UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Liana Davis,	*	
Plaintiff,	*	
	*	
v.	*	Case No. 2:25-cv-220
	*	
Christopher Cooprider, et al.	*	
Defendants.	*	

RESPONSE TO PLAINTIFF'S MOTION TO DISMISS DEFENDANT CHRISTOPHER COOPRIDER'S COUNTERCLAIMS

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COMES NOW Counter-Plaintiff Christopher Cooprider ("COOPRIDER") and files this his Response to Plaintiff's Motion to Dismiss COOPRIDER's Counter Claims (Doc. 22).

I. INTRODUCTION

In response to the Complaint (Doc. 1) filed by Plaintiff Liana Davis ("DAVIS"), COOPRIDER filed an Answer and Counterclaims (Doc. 7), alleging malicious prosecution, *id.,* pp. 89-91, ¶¶2(a-g), 3(a-e), 3 and 4, intentional infliction of emotional distress, *id.*, pp. 91-92, ¶¶5-7, fraud, *id.*, p. 92, ¶¶8-9 (referencing ¶¶11-105 supporting factual allegations supporting a cause of action for fraud, which were first discussed in the affirmative defense section earlier), and malice. *Id.*, p. 92, ¶9 (same cross-reference). DAVIS then filed a Motion to Dismiss ("MTD") these Counterclaims under Rule 12(b)(6). COOPRIDER now responds to the MTD herein.

II. ARGUMENT AND AUTHORITIES

COOPRIDER now provides the Court with cases describing the correct standard of review in evaluating a Rule 12(b)(6) motion, the reasons and legal support as to why the MTD should be denied, and a request for permission to replead, if the Court deems that necessary.

A. STANDARD OF REVIEW

DAVIS has moved to dismiss COOPRIDER's counterclaims (Doc. #22). "A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (reversing a Rule 12(b)(6) dismissal). This is because "[c]ourts are intended as places of redress" and when motions to dismiss are granted, "they tend to undermine the overarching public policy favoring merits-based disposition." *Kafi, Inc. v. Sand Canyon Corp.*, Civil Action No. 3:20-cv-00354, 2022 WL 3084480, at *10 (S.D. Tex. Aug. 3, 2022) (Edison, M.J.) (**Appx. 1**), *Rep. & Rec. Appr. by*, 2022 WL 4454395 (S.D. Tex. Sept. 23, 2022) (Brown, J.) (**Appx. 2**). As such, "[t]o survive a Rule 12(b)(6) motion to dismiss, a complaint "does not need detailed factual allegations," but must provide the "grounds for entitlement to

relief" with facts that when assumed to be true "raise a right to relief above the speculative level." *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir 2007), citing *Twombly*, 550 U.S. at 545. As this Court has told the parties here, Rule 8 says that "[e]ach [pleading] must be simple, concise, and direct." (Doc. 17). Moreover, "[T]hose portions of Rule 9 that require specific or detailed allegations should not be construed in an unduly strict fashion." *Kafi*, at 9, citing 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, Federal Practice and Procedure § 1291 (4th ed.) (**Appx. 3**).

This Court has properly observed that to defeat a motion filed under FRCP 12(b)(6), "'a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Maxim Crude Oil, LLC v. Noil Corp., Inc.*, Civ. No. 2:21-CV-90, 2021 WL 12320541, at *4 (S.D. Tex. Nov. 16, 2021) (Morales, J.) (**Appx. 4**). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*, citing *Iqbal & Twombly*.

B. WHY THE MOTION SHOULD BE DENIED

COOPRIDER now provides specific reasons why each of the five (5) arguments made by DAVIS in her MTD should be rejected, with authorities supporting this response.

1. Malicious Prosecution

DAVIS moves to dismiss the ***malicious prosecution*** claim because "the proceedings that Ms. Davis has initiated against him have not terminated" and because COOPRIDER cannot state a claim "until after he prevails and after all appeals are exhausted." (Doc. 22, p. 1). Yet the exhibits authenticated by Exhibit 1, the Declaration of Mikal Watts, demonstrate termination has occurred.

(A) The Criminal Investigations Have Been Closed

While DAVIS's counsel said on September 2, 2025 that COOPRIDER would be "held to account … in the upcoming criminal proceedings," (Doc. 24, p. 2), it now appears that Plaintiff's

counsel's press announcement concerning "the upcoming criminal proceedings" was just fiction, and that the criminal investigations initiated by his client has already been terminated.

(1) Press Statements by Criminal Investigatory Bodies That the Investigations are Now Closed

In an article published on August 12, 2025, but unknown to COOPRIDER at the time, the CCPD told the *Washington Times*[1] that it and the Nueces County District Attorney's Office had closed the investigation back on May 28, 2025, "as unfounded."

On August, 14, 2025 again, Madeline Vaugh, a spokeswoman for the CCPD told *The New York Times* that "the investigation was subsequently closed as unfounded."[2]

Moreover, after COOPRIDER's Counterclaim was filed on September 3, 2025 (Doc. 7), *NBC News* reported that the CCPD "declined to recommend criminal prosecution after investigating her claims," "told *NBC News* that there are no active investigations involving Cooprider," said that "an investigator with more than a dozen years of experience as a detective 'conducted an extremely thorough investigation' into DAVIS' claim that she was drugged and that the investigation was closed as unfounded," and "stands by the results of this investigation and is confident that any honest and objective third-party review would reach a similar conclusion."[3]

After DAVIS's attorney indicated on September 4, 2025, to the New York Magazine's online publication called *INTELLIGENCER* that COOPRIDER "will be held to account for what

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[1] Exhibit 1-A - Swoyer, Alex, *Texas who was eight weeks pregnant files wrongful death suit after man drugs her with abortion* pills, THE WASHINGTON TIMES, August 12, 2025. https://www.washingtontimes.com/news/2025/aug/12/texan-sues-marine-drugging-abortion-pills-killing-baby/.

[2] Exhibit 1-B - Petri, Alexandra E., *Woman Claims Marine Laced Her Drink With Abortion Pills*, THE NEW WORK TIMES, August 14, 2025. *https://www.nytimes.com/2025/08/14/us/marine-abortion-pills-lawsuit-texas.html*.

[3] Exhibit 1-C - Chan, Melissa, *Marine files countersuit against Texas woman who claims he spiked her drink with abortion pills,* NBC NEWS, Sept. 4, 2025. https://www.nbcnews.com/news/us-news/marine-files-countersuit-texas-woman-claims-spiked-drink-abortion-pill-rcna229088.

he did, both in this civil suit and in the upcoming criminal proceedings,"[4] COOPRIDER's attorney immediately prepared and filed a Motion for Limited Stay (Doc. 11).

Finally, on September 5, 2025, at 8:25 p.m., after DAVIS's attorney's statement concerning "the upcoming criminal proceedings," AUTONOMY NEWS updated its prior story dated September 3, 2025 "*with statements from the Corpus Christi Police Department and the Naval Criminal Investigative Service,"* with the CCPD "confirm[ing that] it has 'no open or active investigations involving these individuals at this time,'" and the Naval Criminal Investigative Service (NCIS), saying: 'I can confirm that the NCIS investigation has been closed.'"[5]

(2) *COOPRIDER's FOIA Request of the CCPD*

After learning of these statements to the press reported, COOPRIDER issued a Freedom of Information Act ("FOIA") request on the CCPD and the Nueces County D.A.'s office. No materials received suggest anything but a closed investigation.

(B) There Can Be No Appeal of the Decision Not to Prosecute

Despite extrajudicial press statements by her lawyer, DAVIS provides no indication in filings before this Court that there is an ongoing criminal investigation (Docs. 22-24). Nonetheless, DAVIS cites *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 208 (Tex. 1996) for the proposition that the Court "should dismiss the malicious-prosecution counterclaim under Rule 12(b)(6)" because COOPRIDER "cannot state a claim for malicious-prosecution until after he prevails and after all appeals are exhausted." (Doc. 22, p. 1).

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[4] Exhibit 1-D - Carmon, Irin, *The Explosive Lawsuit Challenging a Right-Wing Abortion-Pill Story,* INTELLIGENCER, September 5, 2025. https://nymag.com/intelligencer/article/christopher-cooprider-sues-over-abortion-pill-allegation.html.

[5] Exhibit 1-E - Henderson, Garnet & Rinkunas, Susan, *Texas Man Accused of Putting Abortion Pills in Partner's Drink Claims She Made It Up, Countersues for $100 million,* AUTONOMY NEWS, September 3, 2025, 7:10 p.m. https://www.autonomynews.co/texas-man-accused-of-putting-abortion-pills-in-partners-drink-claims-she-made-it-up-countersues-for-100-million/.

The Supreme Court says, "the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). While DAVIS may not like the CCPD's decision not to recommend charges, nor that of prosecutors not file a criminal case, she has no appeal therefrom. *See Clawson v. Wharton County*, 941 S.W.2d 267, 272 (Tex. App. – Corpus Christi-Edinburg Dec. 19, 1996), *reh'g overruled* (Jan. 16, 1997), *writ denied* (Mar. 26, 1998), *reh'g of writ of error overruled* (May 14, 1998) ("The act … complain[ed of] - the decision not to prosecute – is the quintessential function of a prosecutor."). *See also Crotts v. Healey*, 2015 WL 5890103, at ** 2-3 (Tex. App. – Houston [1st Dist.] 2015), *rev. denied* (Feb. 26, 2016), *reh'g of petition for review denied* (April 8, 2016), *cert denied*, 580 U.S. 868 (2016) (**Appx. 5**) (same).

DAVIS has no right to appeal the decision not to prosecute, so *Texas Beef* does not delay COOPRIDER's malicious prosecution claim "until after he prevails on all appeals are exhausted." DAVIS's motion to dismiss COOPRIDER's malicious prosecution claim should be denied now.

2. Intentional Infliction of Emotional Distress

COOPRIDER filed a counterclaim for intentional infliction of emotional distress (IIED). (Doc. 7, § V(B), pp. 91-92), yet DAVIS argues he "has failed to state a claim," citing *Kroger Texas Limited Partnership v. Suberu,* 216 S.W.3d 788, 796 (Tex. 2006). (Doc. 22, § II, p. 2).

But *Kroger* has been held to be distinguishable in the context of a Rule 12(b)(6) motion. *Kroger* involved a plaintiff acquitted of shoplifting suing a store owner for IIED, contending that the store "knowingly provided false information to police so that an innocent person is prosecuted. *Kroger*, 216 S.W.3d at 291, 296. In *Oliveros v. Oliveros*, Case No. 5:23-CV-00402-FB-RBF, 2024 WL 875834 (W.D. Tex. Feb. 13, 2024) (Farrer, M.J.) (**Appx. 7**), *Rep. & Rec. Appr. by*, 2024 WL 874145 (W.D. Tex. Feb. 29, 2024) (Biery, J.) (**Appx. 8**), the Court denied a Rule 12(b)(6)

motion, distinguishing *Kroger* and noting that the *Kroger* court "found that such behavior would be sufficiently extreme and outrageous if the evidence supported it." *Id.* at *11, citing *Kroger*, 216 S.W..3d ay 796. *See also Kroger*, at 796 ("Suberu, however, argues that knowingly providing false information to police so that an innocent person is prosecuted for shoplifting is extreme and outrageous. …[W]e are inclined to agree that Suberu's premise is sound.").

Moreover, *Kroger* reviewed on appeal a jury verdict in favor of the shopper. The standard concerning of that appellate court's post-verdict review is much different than this Court's role in considering a motion to dismiss under Rule 12(b)(6). The *Kroger* court reviewed trial court *evidence*; this Court must review factual *allegations* in a Complaint, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable" to COOPRIDER at this stage of the proceedings. *See Smith v. MTGLQ Investors, L.P.*, 851 Fed. Appx. 514, 514 (Mem) (5th Cir. June 30, 2021) (per curiam) (unpublished) (**Appx. 9**); *Peninsula Marine, Inc. v. Principle Industrial Services, LLC*, Civil Action No. 2:23-CV-00104, 2024 WL 5036616, at **2, 4 & n.6, 8, 10, 12, 14 (S.D. Tex. Sept. 30, 2024) (Morales, J.) (**Appx. 10**) (same).

Here, COOPRIDER has alleged DAVIS knew her allegations to be untrue. Doc. 7, p. 5, ¶13(b-c)); p. 5, ¶13(b-c)); p. 5, ¶¶14-3, 4, 14(g); p. 6, ¶14(h); p. 7, ¶¶21, 22; p. 8, ¶27; p. 11, fn. 6; p. 27, fn. 23; p. 38, ¶104; p. 60, ¶180. As such, this Court should deny a Rule 12(b)(6) dismissal, as Judge Biery did in *Olivares*, and for the additional reasons discussed below.

DAVIS next moves to dismiss COOPRIDER's claim for intentional infliction of emotional distress (IIED) "for four separate and independent reasons". (Doc. 22, § II, p. 2).

(A) Identification of Conduct Qualifying as Extreme and Outrageous

DAVIS first argues that COOPRIDER "has not identified the conduct of Mr. Davis that qualifies as 'extreme and outrageous'." (Doc. 22, § II(A), pp. 2-3).

1. Cases Approving IIED Claims

DAVIS identically quotes four times[6] from *Twyman v. Twyman,* 855 S.W.2d 619, 621 (Tex. 1993) (quoting Restatement (Second) of Torts § 46 cmt. d (1965) (**Appx. 11**)), which is the Supreme Court of Texas case adopting the IIED tort for Texas 32 years ago.

Before *Twyman*, the Fifth Circuit twice affirmed IIED judgments based on conduct similar to that of DAVIS's here involving threats of criminal charges. First, the Fifth Circuit in 1989 denied the appeal of a defendant who "contends that the district court erred in denying its Rule 12(b)(6) motion to dismiss the plaintiff's emotional distress claim." *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 301 (5th Cir. 1989). Second, in 1991, that court affirmed a jury verdict in favor of the plaintiff's IIED claim in *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir.1991).

In *Dean*, the plaintiff presented evidence that her supervisor intentionally placed checks in her purse to put her in fear of criminal charges for theft. *Dean*, 885 F.2d at 304, 306–07. In affirming the jury's verdict in favor of the plaintiff over the defendant's challenge, the Fifth Circuit held that the "check incidents ... [were] precisely what [took] this case beyond the realm of an ordinary employment dispute and into the realm of an outrageous one." *Id.*

In *Wilson*, the plaintiff presented sufficient evidence to support the jury's verdict in his favor by showing that the defendant, as part of a plan to get rid of older employees, tried to force plaintiff, a 60–year–old executive, to resign. *Wilson*, 939 F.2d at 1145. Age discrimination was held to be within the "realm of an ordinary employment dispute." *id.*, at 1144–45, but also assigning janitorial duties to an executive in order to humiliate him into resigning was "outrageous conduct" that took the case "out of the realm of an ordinary employment dispute." *Id.*, at 1145.

[6] Doc. 22, p. 2, p. 3 and p. 5 (twice).

In *Twyman*, the Supreme Court of Texas adopted Section 46 of the Restatement (Second) of Torts. *Id.*, at 621-22 ("Today we become the forty-seventh state to adopt the tort of intentional infliction of emotional distress as set out in § 46(1) of the RESTATEMENT (SECOND) OF TORTS."). The *Twyman* court noted that Section 46 "expressly includes situations in which the actor recklessly inflicts emotional distress," and advised that on retrial, the jury may consider whether [the Defendant] acted recklessly toward [the Plaintiff]." *Id.,* at 624. That mere reckless conduct will suffice for an IIED claim in Texas federal court has been observed by the Fifth Circuit as well. *Kumar v. Panera Bread Co.*, Case No. 23-20178, 2024 WL 1216562, at *4 (5th Cir. Mar. 21, 2024) (per curiam) (unpublished) (**Appx. 12**) ("intentional infliction of emotional distress can be established through merely reckless conduct…," citing *Twyman*).

Since *Twyman*, Texas courts have reiterated the viability of IIED as a tort in Texas. *See Massey v. Massey*, 867 S.W.2d 766 (Tex. 1993) (denying writ of error of IIED judgment); *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605 (Tex. 1999) (affirming IIED judgment for Plaintiff); *Morgan v, Anthony,* 27 S.W.3d 928 (Tex. 2000) (reversing summary judgment on IIED claim).

COOPRIDER's Counterclaim alleges mendacious conduct by DAVIS knowingly designed to lure him in so that she could frame him for murder. Doc. 7, p. 5, ¶13(b-c)); p. 5, ¶13(b-c)); p. 5, ¶¶14-3, 4, 14(g); p. 6, ¶14(h); p. 7, ¶¶21, 22; p. 8, ¶27; p. 11, fn. 6; p. 27, fn. 23; p. 38, ¶104; p. 60, ¶180; p. 91, ¶2(d). This well-pleaded conduct by DAVIS easily qualifies as "extreme and outrageous," *see Bruce,* 998 S.W.2d at 613-14 (reciting evidence of threatening employment status," threatening "he was in a position to get even" as certainly justify an order denying dismissal at the Rule 12(b)(6) pleadings stage). *See 7X Cattle Co. LLC v. Brandstadt*, Case No. 6:22-CV-00396-JDK-KNM, 2024 WL 4183301, at *5 (E.D. Tex. Jul. 22, 2024) (Mitchell, M.J.) (**Appx. 13**), *Rep. & Rec. Appr. by*, 2024 WL 3950677 (E.D. Tex. Aug. 27, 2024) (Kernodle, J.)

(**Appx. 14**) ("A jury could plausibly find this conduct demonstrates the "extreme and outrageous" standard required for an IIED claim.").

(B) Conduct Causing Emotional Distress Upon Him

With no citation to even a single case here other than global references to *Iqbal* and *Twombly* here, DAVIS argues second that COOPRIDER "has not properly alleged that Ms. Davis's actions inflicted 'emotional distress' upon him." (Doc. 22, § II(B), pp. 3-4). But because "the question of causation is a fact question for the jury," at the 12(b)(6) stage, the facts alleged by COOPRIDER, "presumed to be true, raise a fact issue regarding proximate cause and preclude dismissal." *Western Reserve Medtec Services, LLC v. Stryker Corporation*, Civil Action No. 4:18-CV-2604, 2019 WL 13191641 (S.D. Tex. May 13, 2019) (Bryan, M.J.) (**Appx. 15**).

COOPRIDER must allege only a "facially plausible" causal relationship between DAVIS's actions and harm to him, i.e., only "enough facts to give rise to a reasonable hope or expectation that discovery will reveal evidence of the foregoing elements of loss causation." *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 258 (5th Cir. 2009), citing *Twombly*. A court is "not authorized or required to determine whether the plaintiff's plausible inference of loss causation is equally or more plausible than other competing inferences." *Delaware County Employees Retirement System v. Cabot Oil & Gas Corp.*, 620 F.Supp.3d 603, 633 (S.D. Tex. 2022) (Rosenthal, C.J.).

This can be done through temporal proximity alone. In *Garcia v. LCS Corrections Services, Inc.*, Civil Action No. C–09–334, 2010 WL 2163284 (S.D. Tex. May 24, 2010) (Crane, J.) (**Appx. 16), a** court in the Corpus Christi Division of the Southern District of Texas denied a motion to dismiss under Rule 12(b)(6) contending that the "'seven bare-boned allegations of negligence and one-sentence generic allegation of causation' fail to state a facially plausible claim for relief against this Defendant." Sitting in this very courthouse, the Court rejected this argument, reasoning,

> The hospital discharged Mr. Gacia with instructions given to continue his medications. Shortly thereafter, he died. Against the "framework" of Plaintiff's allegations of negligence in the provision of medical treatment to Mr. Garcia, and proximate cause, these factual allegations are enough to state a facially plausible claim for relief against Dr. Pendleton, allegedly the physician at the prison at the time of Mr. Garcia's death.

Id., at *4. "[I]t is enough … to plead adequate facts that allow us to draw a reasonable causation inference: and this can be done by pleading "temporal proximity that is quite tight." *Luebano v. Office Depot, L.L.C.*, Case No. 22-50767, 2023 WL 4249268, at *5 (5th Cir. Jun. 29, 2023) (per curiam) (unpublished) (**Appx. 17**) (reversing dismissal when complaint alleged facts demonstrating separation of only weeks between Defendant's action and Plaintiff's harm); *Outley v. Luke & Assocs., Inc.*, 840 F.3d 212, 219 (5th Cir. 2016) (about two months' difference is close enough to show a *prima facie* causal connection). *See also Briceno-Belmontes v. Coastal Bend College*, Civil Action No. 2:20-CV-00114, 2022 WL 673854, at *7 (S.D. Tex. Mar. 5, 2022) (Tipton, J.) (**Appx. 18**) (denying dismissal when only four months lapsed).

COOPRIDER alleged that on the evening of "April 5, 2025, with her children sleeping upstairs" already, DAVIS put alcohol in her drink," Doc. 7, p. 46, ¶131. Plaintiff's Complaint suggests she drank hot chocolate approximate 30 minutes before she claims to have begun hemorrhaging "shortly before midnight" (Doc. 1, p. 22, ¶50), meaning she would have drank hot chocolate shortly before 11:30 p.m. Less than two hours later, at 1:24 a.m., DAVIS "arrived at the emergency room" "at the hospital," (Doc. 1, p. 27, ¶67) when she says she turned the evidence "over to the Corpus Christi police." (Doc. 1, p. 27-28, ¶¶70-71). Thus, DAVIS's own pleading suggests that less than three hours later, she accused COOPRIDER of murder. This "quite tight" temporal relationship of only a few hours is – by itself – sufficient to draw a reasonable causation inference" under the Fifth Circuit's holding in *Luebano.* This is far tighter than a timeline of "just a few days" that a Judge in this courthouse said supported causation. *See Perez v.*

Brooks County, Texas, Civil Action No. 2:19-CV-391, 2020 WL 4261253 (S.D. Tex. Jul. 24, 2020) (Gonzales Ramos, J.) (**Appx. 19**) ("it is clear from the allegations that the [harm alleged] followed" fewer than "just a few days after the [activity], which is sufficient to support causation").

As such, this is not a discrimination case with a "robust causality requirement, *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 542 (2015), nor a complaint alleges that "a failure to train" fails to "support a plausible causation inference, *see Ratliff v. Aransas County, Texas*, 948 F.3d 281, 285 (5th Cir. 2020), nor where the Counterclaim "fails to plausibly allege that Defendant's actions or omissions proximately caused Plaintiff's harm" and therefore "cannot pass 12(b)(6) muster based on causation." *See Henderson v. Wells Fargo Bank*, 779 F.Supp.3d 910, 918 (S.D. Tex. Mar. 31, 2025) (Morales, J.) (**Appx. 20**).

Here, "the close temporal proximity in this case" between DAVIS's actions and harm to COOPRIDER are alone "enough to satisfy the low 12(b)(6) motion to dismiss standard." *Stewart v. City of Arcola*, Civil Action No. 4:23-cv-04387, 2024 WL 3297361, at *3 (S.D. Tex. Jul. 3, 2024) (Hanen, J.) (**Appx. 21**); *Garcia v. Oceans Healthcare, L.L.C.*, Civil Action No. 2:22-CV-00219, 2023 WL 6393885, at *6 (S.D. Tex. Sept. 30, 2023) (Tipton, J.) (**Appx. 22**) (denying 12(b)(6) motion on causation, citing *Besser v. Tex. Gen. Land Off.*, 834 F. 876, 884 & n. 30 (5th Cir. 2020) (per curiam)) (citing *Clark County School Dist. v. Breedon*, 532 U.S. 268, 273 (2001) ("very close" temporal proximity is "sufficient evidence of causality to establish a prima facie case").

(C) COOPRIDER's Emotional Distress was Severe

DAVIS argues third that COOPRIDER "has not properly alleged that the emotional distress that Ms. Davis inflicted was 'severe'." (Doc. 22, § II(C), p. 4). While Rule 12(b)(6) relates to cause of action," it does not reference damages. Though DAVIS tries to have *Iqbal* and *Twombly* require the pleading of "facts *showing* that his emotional distress was 'severe,'" she does

so by citing to Rule 8(a)(2) which requires only "a short and plain statement of the claim." But COOPRIDER met that under Rule 8(a)(2), Doc. 7, p. 92, ¶ 6(d), and under Rule 8(a)(3) ("monetary damages, mental anguish and reputational damage."). *Id,* p. 92, ¶ 7, even though the rule exempts from the effect of failing to deny matters "relating to the amount of damages." FRCP 8(b)(6).

Damages severity is not an appropriate matter for pleadings practice, as is evidenced by DAVIS's failure to cite any Rule 12(b)(6) case on this issue. A court in this District permitted this claim to proceed past Rule 12(b)(6) practice. *M.D.C.G. v. United States*, Civil Action No. 7:15–CV–552, 2016 WL 6638845, at *12 (S.D. Tex. Sept. 13, 2016) (Crane, J.) (**Appx. 23**) (citing *Twyman* and denying Rule 12(b)(6), observing "the Court will allow Plaintiffs' intentional infliction of emotional distress claim, as limited, to proceed" after reciting allegations of post-traumatic stress disorder (PTSD), that "none of the injuries they sustained were accidental," and that defendant's conduct "will remain mental scars years after physical injuries diminish." Because "damages are *remedies*, not causes of action, a Rule 12(b)(6) motion is an improper vehicle for dismissing these specific requests for relief." *Mott's LLP v. Comercializadora, S.A.*, 507 F.Supp.3d 780, 791 (W.D. Tex. Dec. 14, 2020) (Ezra, J.).

The extent of damages, *see* Rule 26(a)(1)(A)(iii), requiring initial disclosure of a computation of each category of damages claimed, is a matter to be adjudicated after discovery, *see* Rule 55(b)(2)(B) (the court needs to "determine the amount of damages."). The Fifth Circuit case granting dispositive relief in an intentional infliction of emotional distress case concerning "sever[ity]," did so only at the summary judgment phase after discovery was conducted, but not at the Rule 12(b)(6) phase. *See Amin v. United Parcel Service, Inc.*, 66 F.4th 568, 572 (5th Cir. 2023) (noting that three of four causes of action were dismissed under Rule 12(b)(6), but not Count 3 for intentional infliction of emotional distress; and noting that the issue of whether emotional distress

is "severe" has been handled at the Rule 56 stage. *Id.*, n. 1 ("As with any factual issue subject to Rule 56, federal courts can and have found that certain allegations do not constitute severe emotional distress as a matter of law. *See, e.g., Peavy v. Harman*, 37 F.Supp.2d 495, 523 (N.D. Tex. 1999), *aff'd in part and rev'd in part on other grounds*, 221 F.3d 158 (5th Cir. 2000), *cert. denied*, 521 U.S. 1051 (2001)."). This makes sense because the *Peavy* noted that "[i]t is also significant that plaintiffs were not required to seek help from a mental health professional. This further militates against a finding of 'severe emotional distress.'" Cases deciding whether the bar has been reached are those evaluating the evidence developed in discovery, as the Rule 56 summary judgment stage. *See Gaona v. Wells Fargo Bank, N.A.*, SA-23-CV-280-FB (HJB), 2025 WL 699353, at *9 (W.D. Tex. Feb 13, 2025) (Bemporad, M.J.) (**Appx. 24**), *Rep. & Rec. Adopted by*, 2025 WL 696546 (W.D. Tex. Mar. 4, 2025) (Biery, J.) (**Appx. 25**); *Munoz v. H&M Wholesale, Inc.*, 926 F.Supp. 596, 613 (S.D. Tex. 1996). *Cf., Bruce*, 998 S.W.2d at 618-19.

(D) Whether Filing a Groundless Lawsuit is Extreme and Outrageous

DAVIS argues fourth that "the act of filing a lawsuit does not qualify as 'extreme and outrageous' conduct, even if the person filing the lawsuit knows that it is groundless." (Doc. 22, § II(D), pp. 4-6). This argument wrongly suggests that COOPRIDER's IIED claim relies only on the filing of this lawsuit. That is untrue. Furthermore, the single case DAVIS could find in support of this argument - *Beecy v. Pucciarelli,* 387 Mass. 589, 596, 441 N.E.2d 1035, 1040 (1982), cited at p. 5 of Doc. 22 - does not help her for two reasons.

First, *Beecy* is from Massachusetts, not binding on this Court located in the Fifth Circuit. *See, e.g., United States ex rel. Porter v. Magnolia Health Plan, Inc.*, 810 Fed. Appx. 237, 242, n. 7 (5th Cir. Apr. 15, 2020) (unpublished) (**Appx. 26**); *Gutierrez v. Corrections Corp. of America*, 559 Fed. Appx. 406, 408 (mem) (5th Cir. Apr. 3, 2014) (unpublished) (**Appx. 27**); *United States v.*

Basulto-Reina, 421 Fed. Appx. 349 (5th Cir. Apr. 5, 2011) (unpublished) (**Appx. 28**). *See U.S. v. Kim*, Criminal No. H-07-406, 2009 WL 29688, at *1 (S.D. Tex. Jan. 5, 2009) (Rosenthal, J.) (**Appx. 29**). *See also Blair v. Pride Industries, Inc.*, EP-14-CV-00183-DCG, 2015 WL 11251771, at *3, n. 2 (W.D. Tex. Jan. 27, 2015) (Guaderrama, J.) (**Appx. 30**). In *Dean*, by contrast, the Fifth Circuit affirmed the denial of a Rule 12(b)(6) motion when the plaintiff alleged that the defendant took actions "to put her in fear of criminal charges for theft," *Dean*, 885 F.2d at 304, 306–07. Here, DAVIS actually followed through and took steps to pursue criminal charges for murder, which surely qualifies as conduct supporting an IIED claim under the precedent provided in *Dean*.

Second, *Beecy* is distinguishable, as the Massachusetts Supreme Judicial Court in *Ladd v. Polidoro*, 424 Mass. 196, 199, 675 N.E.2d 382, 385 (1997) flat out restricted *Beecy* as only requiring a filing *plus* an ulterior motive under its caselaw, noting that "[a] reasonable argument can be made that the Beecy opinion overstated the consistency with which this court has announced a requirement of proof of an ulterior motive (*see id.*, at 596, 441 N.E.2d 1035), but it cannot be doubted that our Beecy opinion proclaimed that an ulterior motive is an element of the tort of abuse of process in all instances." Courts reviewing *Beecy* have further restricted its application. In *Homesavers Council of Greenfield Gardens, Inc.*, 70 Mass. App. Ct. 453, 874 N.E.2d 497 (2007), the Court noted "[t]he facts underlying *Beecy*... on which the landlord relies, which cases held that the mere filing of a lawsuit is not extreme and outrageous conduct, fell far short of the level to which the behavior of the landlord sank in the present case."). *Id.*, at 503-04. Likewise, in *Medford Co-Operative Bank v. Skerry*, 2004 Mass. App. Div. 120, 2004 WL 1853343, at *4 (2004) (**Appx. 31**), the Court noted *Beecy,* but said that "proof of ill will, bad intentions, or knowledge that a claim is groundless … is relevant in proving ulterior or illegitimate purpose."

3. Fraud

Over 34 pages, COOPRIDER supplied detailed factual allegations constituting fraud. (Doc. 7, pp. 4-38). While conceding that when "Cooprider's 94-page pleading hurls many accusations" at DAVIS, they must "be assumed true when deciding a motion to dismiss" (Doc. 22, p. 2), DAVIS nonetheless offers three arguments in support of her MTD with respect to the fraud claim.

(A) COOPRIDER did comply with Rule 9(b) and Thompson by pleading fraud with particularity

DAVIS initially cites *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.,* 125 F.3d 899, 903 (5th Cir. 1997) as a fraud pleading floor (Doc. 22, p. 6), but "Rule 9(b)'s application is context-specific, however, and "[d]epending on the claim, a plaintiff may sufficiently 'state with particularity the circumstances constituting fraud or mistake' without including all the details of any single court-articulated standard—it depends on the elements of the claim at hand." *ASG Chemical Holdings, LLC v. Bisley Int'l, LLC*, Civil Action No. H-23-4333, 2024 WL 5036568 (S.D. Tex. Nov. 18, 2024 (Bray, M.J.) (**Appx. 32**), *Rep. & Rec. Appr. By*, 2024 WL 5108450 (S.D. Tex. Dec. 13, 2024 (Lake, J.) (**Appx. 33**). "Minimal" factual allegations will do if they provide the "Defendant with notice of the nature and specifics of the fraud claim against it." *Specialties of Mexico, Inc. v. Masterfoods USA*, Civil Action No. L–09–88, 2010 WL 2488031, at *8 (S.D. Tex. Jun. 14, 2010) (Alvarez, J.) (**Appx. 34**).

Nonetheless, COOPRIDER did comply with both Rule 9(b) and *Thompson*, as follows:

- COOPRIDER alleged the "***who***" to be DAVIS. (Doc. 7, p. 5, ¶13(a)); *see Albores v. Dimitri*, Civil Action No. 18-6936, 2025 WL 871601, at *4 (E.D. La. Mar. 20, 2025) (Milazzo, J.) (**Appx. 35**);

- COOPRIDER alleged the "***what***" to be DAVIS's lie on January 31, 2025, Doc. 1, p. 3, ¶33; and February 3, Doc. 7, p. 5, ¶13(a & b); *see Forum Subsea Rentals v. Globaltech Offshore*, Civil Action No. H–13–885, 2014 WL 10751177, at *8 (S.D. Tex. Sept. 17, 2014) (Hittner, J.) (**Appx. 36**); and her representation to him that he was invited over for cocoa as part of a "night of trust" when she intended to frame him for murder. (Doc. 7, pp. 6-7, ¶14(3)–(j)); *see Pierce v. Aircraft Finance Corp. LLC*, 512 F.Supp.3d 753, 767 (S.D. Tex. Jan. 8, 2021) (Eskridge, J.); *see also Pointeast Pharma Consulting, Inc.*

v. Lenzing Aktiengesellschaft, Civil Action No. 4:21-CV-3654, 2024 WL 5048964, at *5 (S.D. Tex. Dec. 9, 2024) (Hanen, J.) (**Appx. 37**);

- COOPRIDER alleged the "***when***" as the February 3, 2025 representation that she was pregnant. Doc. 7, p. 5, ¶13(a) and April 4, 2025, when she lured him to her place for the proverbial "night of trust." *Id.*, pp. 6-7, ¶14(3)–(j)); *see Katz v. Intel Pharma, LLC*, Civil Action No. H-18-1347, 2018 WL 4701566, at *4 (S.D. Tex. Oct. 1, 2018) (Rosenthal, J.) (**Appx. 38**); *see also Borneo Energy Sendirian Berhad v. Sustainable Power Corp.*, 646 F.Supp.2d 860 (S.D. Tex. Aug. 12, 2009) (Rosenthal, J.);

- COOPRIDER alleged the "***where***" to be via text message on February 3, 2025. Doc. 7, p. 5, ¶13(a), and at her home on April 5, 2025. *Id.*, pp. 6-7, ¶14(3)–(j); *see Kafi, Inc. v. Sand Canyon Corp.*, Civil Action No. 3:20-cv-00354, 2022 WL 3084480 (S.D. Tex. Aug. 3, 2022) (Edison, M.J.) (**Appx. 39**), Rep. & Rec. Appr. by, 2022 WL 4454395 (S.D. Tex. Sept. 23, 2022) (Brown, J.) (**Appx. 40**); *see also Louisiana Oilfield Logistics, LLC v. Flotek Chemistry, LLC*, Civil Action No. H-19-1272, 2020 WL 13240060, at *4 (S.D. Tex. Jun. 29, 2020) (Rosenthal, C.J.) (**Appx. 41**);

- COOPRIDER alleged the "***how***" to be her text message representation to him that she was pregnant on February 3, 2025. Doc. 7, p. 5, ¶13(a), and that she orally induced him on April 4, 2025, when she to lured him to her place for the proverbial "night of trust." *Id.*, pp. 6-7, ¶14(3)–(j); *see ClaimHub, Inc. v. Universal Risk Ins. Srvs., Inc.*, Civil Action No. H-10-2841, 2011 WL 13247456, at *4 (S.D. Tex. Jul. 25, 2011) (Rosenthal, J.) (**Appx. 42**); *see also Zytax, Inc. v. Green Plains Renewable Energy, Inc.*, Civil Action No. H–09–2582, 2010 WL 4702303, at *8 (S.D. Tex. Nov. 10, 2010) (Rosenthal, J.) (**Appx. 43**).

In sum, COOPRIDER's detailed pleading meets the requirements of *Thompson.*

(B) DAVIS incorrectly complains that COOPRIDER did not plead an injury with the particularity required by Rule 9(b)

DAVIS writes that COOPRIDER "does not explain any injury that Cooprider might have suffered with the particularity required by Rule 9(b)." (Doc. 22, p. 7). At this pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992); "[W]hen the plaintiff is himself an object of the action (or foregone action) at issue there is ordinarily little question that the action or inaction has caused him injury, and that a judgment

preventing or requiring the action will redress it." *Id.*, at 561-62. Moreover, "[t]he Fifth Circuit has held that the Rule 8(a) and 12(b)(6) plausibility pleading standard, not heightened pleading, is sufficient to plead loss causation." *Cabot Oil & Gas Corp.*, 620 F.Supp.3d 603, 632 (S.D. Tex. 2022) (Rosenthal, C.J.) (quoting *Lormand*). Pleadings as those here alleging a fraudulent statement by one party inducing a response from another are sufficient. *See Diagnostic Affiliates of Northeast Houston, LLC v. United Healthcare Services, Inc.*, Civil Action No. 2:21-CV-00131, 2022 WL 214101, at *12 (S.D. Tex. Jan. 18, 2022) (Gonzales Ramos, J.) (**Appx. 44**) (rejecting argument that Plaintiff company "has not pled sufficient facts to show that acts caused its alleged injury," noting that the complaint alleging that the complained of conduct was "designed to" create a response created a " link between at least some of the conduct complained of and some of the injuries sustained is sufficiently direct to support proximate causation and survive Rule 12(b)(6) review."); *William Marsh Rice University v. Arrowhead Research Corp.*, Civil Action No. 14-03496, 2016 WL 3223313, at *5 (S.D. Tex. Mar. 8, 2016) (Gilmore, J.) (**Appx. 45**) (denying dismissal of fraud claim over causation argument, because in "[v]iewing the pleadings in the light most favorable to Plaintiff, Defendants' alleged actions induced Rice…"). COOPRIDER too alleged specific facts that DAVIS's fraud caused his injury. (Doc. 7, p.5, ¶14(3); p. 5, p. 91, ¶3(d) ("Having already miscarried on April 4, 2025, Counter-Defendant DAVIS set up Counter-Plaintiff COOPRIDER by inviting him to her home – "the scene of the crime that wasn't" – for a daily later on April 5, 2025, the day after she had already likely miscarried her unborn child.").

(C) DAVIS's Alternative Causation Argument Fails at the Rule 12(b)(6) Stage

DAVIS initially argues that her lie to him that she was pregnant causing COOPRIDER to purchase abortion pills on February 6, 2025, could not have inflicted injury on COOPRIDER because he "would have purchased those abortion pills in response to DAVIS's actual pregnancy

because he wanted to kill any unborn child that he conceived with DAVIS." Doc. 22, pp. 6-7, and says that because " he would have wound up purchasing anyway," the consequence of her lie therefore "does not qualify as an injury." This argument fails for three distinct reasons.

First, the causation link is properly pleaded by COOPRIDER. (Doc. 7, pp. 5-6, ¶ 14).

Second, the Court must accept COOPRIDER's allegation concerning causation. *See Lee v. Samsung Electronics America, Inc.*, Case No. 4:21-cv-1321, 2023 WL 4240277, at *16 (S.D. Tex. Jun. 28, 2023) (Palermo, M.J.) (**Appx. 46**), *Rep. & Rec. Adopted in Part & Rejected in Part by*, 717 F.Supp.3d 585, 589-91 (S.D. Tex. Feb. 13, 2024) (Ellison, J.)(because "the Court must accept as true Plaintiffs' allegations…," "[t]he Court finds that Plaintiffs have sufficiently alleged reliance and causation"); *Polanco v. Innovation Ventures, LLC*, Civil Action No. 7:13-CV-568, 2014 WL 12599332, at *2 (S.D. Tex. May 5, 2014) (Crane, J.) (**Appx. 47**) (Complaint "offer[s] a theory of causation that the Court cannot simply assume to be implausible.").

Third, DAVIS's argument that causation doesn't exist because he would have bought the pills anyway is one for a jury, not now when the Court must accept as true COOPRIDER's factual allegations as pled. *Borneo,* 646 F.Supp.2d at 868-69, and "liberally construe the complaint in the light most favorable to the plaintiff, with every doubt resolved in the plaintiff's favor, dismissal is proper only if it "appear[s] beyond doubt that [COOPRIDER] can prove no set of facts in support of his claim which would entitle him to relief." *Kafi, Inc.*, at *3.

(D) DAVIS's Illegitimately Uses Abridged Text Messages to Attempt to Characterize Who Initiated the "Night of Trust"

Knowing that COOPRIDER's pleaded allegation that DAVIS "made a material representation to Defendant COOPRIDER, that he should come over to her home for a 'night of trust' over hot cocoa and alcohol, when she intended to frame him with false allegations that he poisoned her," (Doc. 7, ¶ 14), DAVIS casts doubt on this allegation anyway with use of an

extraneous text message. (Doc. 22, pp. 7-8, citing Exhibit 32 to her complaint) and a footnote citation to *Walch v. Adjutant General's Dept. of Texas*, 533 F.3d 289, 294 (5th Cir. 2008).

(1) Generally, the Court Must Confine its Rule 12(b)(6) Analysis to the Complaint

A Rule 12(b)(6) motion ... only tests whether the claim has been adequately stated in the complaint." 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 1356 at 298 (1990) (**Appx. 48**). The Fifth Circuit long held that a court's Rule 12(b)(6) review is to be confined to the pleadings.[7]

(2) The One Exception Recognized by the Fifth Circuit 25 Years Ago Requires the Extraneous Document to Be Central to the Claim

In 2000, the Fifth Circuit permitted, over no objection, documents attached to be considered in the Rule 12(b)(6) context, *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000), when the court noted approving that "various other circuits have specifically allowed that "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Id.,* at 498-99 (citing three circuit courts). Three years later in *Scanlan v. Texas A& M University*, 343 F.3d 533, 536 (5th Cir. 2003), that Court stated this Court "has recognized one limited exception" in *Collins*, and noted that "[i]n approving the district court's consideration of the documents attached to the motion to dismiss, this Court restricted such consideration to documents that are referred to in the plaintiff's complaint and are central to the plaintiff's claim." While the *Walch*

[7] 35 years ago, "[a] court which considers a motion for a 12(b)(6) or 12(c) dismissal must look only at the pleadings and accept all allegations in them as true," *St. Paul Ins. Co. of Bellaire, Texas v. AFIA Worldwide Ins. Co.*, 937 F.2d 274, 279 (5th Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992); 34 years ago, "We may not look beyond the pleadings," *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992); 32 years ago, "We may not go outside the pleadings," *Colle v. Brazos County, Texas*, 981 F.2d 227, 243 (5th Cir. 1993); 26 years ago, "This court will not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged fact," *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

opinion in 2008 admittedly failed to cite *Collins*, both the Fifth Circuit[8] and district courts within it[9] have continued to insist that such extraneous documents be central to the claims made in the petition to which they are attached. As Judge Barbara Lynn of the Northern District of Texas ably observed in striking exhibits proposed for consideration during a Motion to Dismiss in *Kaye v. Lone Star Fund V (U.S.), L.P.*, 453 B.R. 645, (N.D. Tex. Apr. 26, 2011) (Lynn, J.),

> [T]he case law suggests that documents are central when they are necessary to establish an element of one of the plaintiff's claims. … However, if a document referenced in the plaintiff's complaint is merely evidence of an element of the plaintiff's claim, then the court may not incorporate it into the complaint…. The Court does not read *Walch* as an expansion of the "limited exception" recognized in *Collins* and reinforced in *Scanlan*; rather, the Court reads *Walch* as presenting an entirely different situation that is not applicable….

Id., at 662-663. In *Lopez v. Don Herring Ltd.*, Civil Action No. 3:16-CV-02663-B, 2018 WL 296063 (N.D. Tex. Jan. 4, 2018) (Boyle, J.) (**Appx. 56**), the Court cited *Walch*, but said,

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[8] *See Breton Energy, L.L.C. v. Mariner Energy Resources, Inc.*, 764 F.3d 394 (5th Cir. 2014) (this letter is referenced in the complaint and central to Appellants' claims); *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000)) ("The court's review is limited to the complaint, any documents attached to the complaint, and any documents … that are central to the claim and referenced by the complaint."); *In re Katrina Canal Breachers Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (because the contracts referred to in the complaints were "central to the plaintiffs' claims, we may consider the terms of the contracts in assessing the motions to dismiss.").

[9] *See Kent Distributors, Inc. v. Travelers Casualty and Surety Co. of America*, 693 F.Supp. 726, 730 (W.D. Tex. 2023); *Lin v. Veritex Community Bank, N.A.*, Civil Action No. H-20-1904, 2021 WL 3831986, at *3 (S.D. Tex. Jan. 4, 2021) (Atlas, J.) (**Appx. 49**); *Enventure Global Technology, Inc. v. Weatherford, U.S., L.P.*, Civil Action No. H-19-2397, 2020 WL 6146565, at *1 (S.D. Tex. Oct. 2, 2020) (Atlas, J.) (**Appx. 50**); *IIITec, Ltd. v. Weatherford Technology Holdings, LLC*, Civil Action No. H-19-3386, 2019 WL 7037744, at *2 (S.D. Tex. Dec. 20, 2019) (Atlas, J.) (**Appx. 51**); *Balcerowicz v. Sweetin*, Civil Action No. H-12-0310, 2017 WL 1474093, at *2 (S.D. Tex. Apr. 6, 2017) (Ellison, J.) (**Appx. 52**); *American General Life Ins. Co. v. Mickelson*, Civil Action No. H–11–3421, 2012 WL 1355591, at *2 (S.D. Tex. Apr. 18, 2012) (Ellison, J.) (**Appx. 53**); *Cortez v. Pharia L.L.C.*, Civil Action No. H–10–5068, 2011 WL 2455724 (S.D. Tex. May 18, 2011) (Stacy, M.J.) (**Appx. 54**). *See also* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 376 (3d ed. 2004) (**Appx. 55**).

> Nor can the Court consider the emails on the ground that they are central to Lopez's claim. Here, the emails on which Herring relies are like the report in Scanlan and unlike a contract in a contract case. Like the report the district court improperly considered in *Scanlan*, the emails Herring wants the Court to consider are "merely evidence," *Kaye,* 453 B.R. at 662; they do not give rise to Lopez's claim in the way a contract gives rise to a contract claim. Though the emails may be relevant, probative evidence in Lopez's case, they are not legally necessary for Lopez to prevail…. Thus, the Court declines to incorporate the emails….

Id., at 5. As such, *Walch* is distinguishable because the two documents allowed to be considered in *Walch* were "incident to his military service," *id.,* at 293-94, or "central" to his claim. Exhibit 32 is not central to DAVIS's claim. Even if it were, and therefore considered by this Court, at most it creates a fact issue inappropriate for adjudication at this stage of the proceedings.

(3) Exhibit 32 is Not Central to DAVIS's Claim of Murder, and Therefore, Should Be Stricken from Consideration

Exhibit 32 is admittedly admissible at a later stage, but it is because it is merely evidentiary. Exhibit 32 is not "necessary to demonstrate" murder under *Kaye*, nor "legally necessary" for DAVIS to win under *Lopez*. As such, Exhibit 32 should be stricken from consideration.

(E) DAVIS's Last Argument That COOPRIDER's Claim Fails The Plausibility Requirement of Twombly and Iqbal Does Not Merit Dismissal

DAVIS's last argument is that "[i]t is implausible to believe that DAVIS intended to "frame" Cooprider for murder when she had no way of knowing or controlling whether or when she would begin hemorrhaging." Doc. 22, p. 9. This argument fails for four reasons.

First, this court can examine all the circumstances to determine plausibility and fraudulent intent. As the Supreme Court of Texas observed in *Spoljaric v. Percival Tours, Inc.,* 708 S.W.2d 432 (Tex. 1986), "[s]ince intent to defraud is not susceptible to direct proof, it invariably must be proven by circumstantial evidence. 'Slight circumstantial evidence' of fraud, when considered with the breach of promise to perform, is sufficient to support a finding of fraudulent intent." *Id.,*

at 435; *see also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2007). Consequently, this Court approved language earlier this year saying, a "breach combined with slight circumstantial evidence of fraud is" sufficient to support a finding of fraudulent intent." *Banquete I.S.D. v. Alliance for Community Solutions, Ltd.*, Civil Action No. 2:22-Cv-00094, 2024 WL 4720290, at *4 (S.D. Tex. Sept. 10, 2024) (Libby, M.J.) (**Appx. 57**), *Rep. & Rec. Appr. in part, Denied in part*, 2025 WL 957598 (S.D. Tex. Mar. 31, 2025) (Morales, J.).[10] Consequently, the Court must examine fraudulent intent by assuming as true each of the accusations COOPRIDER "hurls" at DAVIS over his "94-page pleading." (Doc. 7, p. 2).

Second, COOPRIDER alleges that DAVIS miscarried earlier – certainly by the day before the alleged fetal murder – than when she staged the alleged cocoa poisoning. (Doc. 7, p. 41, ¶127(g &h); p. 50, ¶142; pp. 57-61, ¶174-182; pp. 68-69, ¶188; p. 91, ¶2(c & d)). The plausibility that she negligently (or intentionally) induced a spontaneous abortion of her unborn child is set forth in 18 pages and 70 paragraphs of very detailed factual allegations of her contributory negligence. (Doc. 7, pp. 42-70, ¶¶120-190). The detailed, scientifically supported, fact allegations therein demonstrate not merely plausibility, but an epidemiological probability, that DAVIS induced her own miscarriage prior to or on April 4, 2025, when she asked COOPRIDER to come to her home for a night of trust that ended up being recorded inches away from a pre-staged cocoa cup.

Third, the "plausibility requirement" of *Twombly* and *Iqbal* is not intended to circumvent the jury's role to resolve fact disputes in civil cases enshrined in the Seventh Amendment of the United States Constitution ("In Suits at common law, … the right of trial by jury shall be preserved."). *See Premier Holdings of Texas, LP v. Sterling Reit, Inc.*, Case No. A H-04-0916, 2006

[10] This came not from Banquete quoting *Barge v. Wells Fargo Bank, N.A.*, Civil Action No. 1:23-CV-00189, 2024 WL 2520324, at *6 (E.D. Tex. Mar. 28, 2024) (Truncale, J.) (**Appx. 58**), but from *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 775 (Tex. 2009) (per curiam) cited in *Barge*. *Aquaplex*, of course, is the case DAVIS cites to begin her assault on COOPRIDER's fraud claim. (Doc. 22, p. 6).

WL 2796387, at *5 (S.D. Tex. Sep. 26, 2006) (Gilmore, J.) (**Appx. 59**) ("Intent is a fact question uniquely within the realm of the trier of fact.").

Fourth, DAVIS's fraudulent intent in setting up COOPRIDER may be inferred by her conduct subsequent to the invitation for cocoa. *Aquaplex,* 297 S.W.3d at 775 ("intent … may be inferred from the party's subsequent acts after the representation is made.").

- The fact that she recorded the event by pre-placing a recording device right next to the cocoa (Doc. 7, p. 28, fn. 25; ¶79; p. 91, ¶2(e)). *See United States ex rel. BakerRipley v. Kids U US, Inc.*, Civil Action No. 23-cv-1124, 2024 WL 3541499, at **6-7 (S.D. Tex. Jul. 25, 2024) (Rosenthal, J.) (**Appx. 60**) (detailing use of alternative device and means to engineer fraud).

- Her persistent spoliation of the evidence, deleting I-Phone data concerning her pregnancy (Doc. 7, p. 41, ¶118), *see Xiongen Jiao v. Ningbo Xu*, Case No.: 4:19-cv-01848, 2020 WL 6136265, at *2 (S.D. Tex. Jan. 29, 2020) (Ellison, J.) (**Appx. 61**), and after by discarding the poisoning evidence (Doc. 7, pp. 32-38, ¶103)). *See Tony Gullo Motors*, 306 ("spoliation of evidence … provides some circumstantial evidence of fraud in that process.").

4. Malice

Because "malice" is one of Texas's "standards for recovery of exemplary damages," Tex. Civ. Prac. & Rem. Code, § 41.003, COOPRIDER was right to plead "malice." Like malice, "[f]indings of recklessness or gross negligence would allow exemplary, rather than merely compensatory, damages *were the underlying tort of misrepresentation found*". *Collins,* 224 F.3d at 500-01 & n. 6. "Malice" means "a specific intent by the defendant to cause substantial injury or harm to the claimant," *Id*., § 41.001(7), and COOPRIDER will prove it so that "exemplary damages may be awarded*." Id*., § 41.003(a). Consequently, DAVIS's request that "[t]he Court should dismiss the counterclaim for 'malice' under Rule 12(b)(6) is not inappropriate.

5. Plaintiffs' Other Requested Remedies

In his Counterclaim (Doc. 7), COOPRIDER also pleaded for other requested remedies in Sections V(E) (punitive damages), Section V(F) (exceptions to Texas' limitations on exemplary damages), and Section V(G) (amount of damages sought). In her MTD, DAVIS does not suggest dismissal, but rather opines that "none of these qualify as causes of action or claims for relief," but instead are "merely the relief that Cooprider is asking this Court to impose in response to the torts that he has alleged," and then concludes merely that "Cooprider has failed to state a claim with respect to any of those torts, so the court should not consider his requested remedies." (Doc. 33, p. 10). But remedies are not torts, nor appropriate fodder for a Rule 12(b)(6) motion. *Mott's LLP,* at 791 ("Because "damages are *remedies*, not causes of action, a Rule 12(b)(6) motion is an improper vehicle for dismissing these specific requests for relief.").

C. LEAVE SHOULD BE GRANTED TO REPLEAD, IF NECESSARY

COOPRIDER and his attorneys took great care to meet the pleading requirements in Rules 8 and 9(b). However, if anything requires remedial work, COOPRIDER invokes FRCP 15(a)(2), and respectfully asks the Court to "freely give leave" to amend a complaint "when justice so requires." *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270 (5th Cir. 2010). Given that two defendants have either not been served or have not yet appeared, DAVIS will not be "unduly prejudiced" by such an amendment. *Id.*, at 270-71, citing *Griggs v. Hinds Junior Coll.*, 563 F.2d 179, 180 (5th Cir.1977) (per curiam).

This Court's Order for Conference and Disclosure of Interested Parties (Doc. 4) proposes a schedule with an Amendment of Pleadings deadline of February 17, 2026. So, any amendment will not slow down this case at all. Consequently, if deemed necessary by the Court, COOPRIDER

respectfully moves the Court to permit him to replead. Otherwise, this Court should permit a simple repleading of actual termination.

III. CONCLUSION

COOPRIDER respectfully moves the Court to deny DAVIS's Motion to Dismiss and enter the order doing so.

October 28, 2025

Respectfully submitted,

WATTS LAW FIRM LLP

By: */s/ Mikal C. Watts*
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ATTORNEYS FOR
CHRISTOPHER COOPRIDER

CERTIFICATE OF SERVICE

I certify that on October 28, 2025 I electronically filed the foregoing document(s) and that they are available for viewing and downloading from the Court's CM/ECF system, and that the participants in the case that are registered CM/ECF users will be served electronically by the CM/ECF system. I further certify that a copy of the foregoing document(s) was served via email on all counsel of record.

/s/ Mikal C. Watts
Mikal C. Watts

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Liana Davis, Plaintiff,	*	
v.	*	Case No. 2:25-cv-220
Christopher Cooprider, et al. Defendants.	*	

DECLARATION OF MIKAL C. WATTS

I, Mikal C. Watts, declare the following pursuant to 28 U.S.C. 1746:

1. I am an attorney with the law firm of WATTS LAW FIRM L.L.P. I am the attorney-in-charge for Defendant Chris Cooprider ("COOPRIDER") in the above styled case.

2. I am legally competent to make this declaration. I have personal knowledge and am familiar with the matters stated in this declaration, and the facts contained herein are true and correct.

3. Attached as Exhibit A is a true and correct copy of an article written by Alex Swoyer entitled, *Texan who was eight weeks pregnant files wrongful death suit after man drugs her with abortion* pills, THE WASHINGTON TIMES, August 12, 2025, accessed on October 28, 2025, and available at https://www.washingtontimes.com/news/2025/aug/12/texan-sues-marine-drugging-abortion-pills-killing-baby/.

4. Attached as Exhibit B is a true and correct copy of an article written by Alexandra Petri entitled, *Woman Claims Marine Laced Her Drink With Abortion Pills*, THE NEW WORK TIMES, August 14, 2025, accessed on October 28, 2025, and available at. *https://www.nytimes.com/2025/08/14/us/marine-abortion-pills-lawsuit-texas.html*.

5. Attached as Exhibit C is a true and correct copy of an article written by Melissa Chan entitled, *Marine files countersuit against Texas woman who claims he spiked her drink with abortion pills,* NBC NEWS, Sept. 4, 2025, accessed on October 28, 2025, and available at https://www.nbcnews.com/news/us-news/marine-files-countersuit-texas-woman-claims-spiked-drink-abortion-pill-rcna229088.

6. Attached as Exhibit D is a true and correct copy of an article written by Irin Carmon entitled, *The Explosive Lawsuit Challenging a Right-Wing Abortion-Pill Story,* INTELLIGENCER, September 5, 2025, accessed on October 28, 2025, and available at https://nymag.com/intelligencer/article/christopher-cooprider-sues-over-abortion-pill-allegation.html.

7. Attached as Exhibit E is a true and correct copy of an article written by Garnet Henderson and Susan Rinkunas entitled, *Texas Man Accused of Putting Abortion Pills in Partner's Drink Claims She Made It Up, Countersues for $100 million,* AUTONOMY NEWS, September 3, 2025, 7:10 p.m., accessed on October 28, 2025, and available at https://www.autonomynews.co/texas-man-accused-of-putting-abortion-pills-in-partners-drink-claims-she-made-it-up-countersues-for-100-million/

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 28, 2025.

/s/ Mikal C. Watts
Mikal C. Watts, Declarant

EXHIBIT 1-A

This is more than 2 months old.

Texan who was eight weeks pregnant files wrongful death suit after man drug with abortion pills



Mifepristone tablets are seen in a Planned Parenthood clinic, July 18, 2024, in Ames, Iowa. (AP Photo/Charlie Neibergall, File) Mifepristone tablets are seen in a ... more >

By Alex Swoyer
The Washington Times
Tuesday, August 12, 2025

A Texas woman is suing her ex-lover and an abortion pill distributor after secretly being given the drug to abort her daughter after the tablets were dissolved in hot chocolate.

Liana Davis filed a wrongful death lawsuit against U.S. Marine Christopher Cooprider, Aid Access and its founder on Monday, arguing they broke Texas law by assisting in an illegal abortion.

"The wrongful-death statute allows surviving parents to sue those who cause the death of an unborn child by a wrongful act, neglect, carelessness, unskillfulness or default," read the complaint, filed in the Southern District of Texas. "Each of the defendants caused the death of Ms. Davis' unborn child through their wrongful acts, which violated the law."

Jonathan Mitchell, the lawyer for Ms. Davis, didn't immediately respond to a request for comment about the uniqueness of the legal battle.

In the 33-page complaint, Ms. Davis alleges Mr. Cooprider harassed her for months to get an abortion when, at eight weeks pregnant, he ordered mifepristone and misoprostol from Aid Access, an Austrian company, and urged her to take the drug.

When she refused, he suggested the two have a night together to rebuild trust, and at that time he mixed the pills in hot chocolate. According to the legal document, he used 10 doses of one of the drugs and left the packaging behind at her home. The prescription was made out to him.

She began hemorrhaging after 30 minutes, and Mr. Cooprider left her on her own to find a ride to the hospital where doctors were unable to save her unborn daughter, whom she had named Joy.

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According to the legal complaint, Mr. Cooprider and Aid Access broke Section 171 of Texas' health and safety code regulations by allowing someone other than a Texas-licensed provider to administer abortion drugs, which is a state felony. The complaint also asserts that federal law prohibits the mailing of abortion-inducing drugs.

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During the Biden administration, the Justice Department permitted the mailing of the drug. However, four states have outlawed it, according to the pro-choice Guttmacher Institute. Texas is one of them.

Texas law also makes abortion a felony unless the woman's life is at risk. A violation can result in two to five years in prison.

A spokesperson from Aid Access didn't immediately respond to a request for comment.

The Corpus Christi Police Department said it assigned a detective to the case who examined all evidence. The results of the probe were shared with the Nueces County District Attorney's Office and it declined to bring criminal charges.

"After careful review, both agencies concluded that the elements of a crime could not be established, and the investigation was subsequently closed as unfounded," a department spokesperson said. "The CCPD stands by the results of this investigation and is confident that any honest and objective third party review would reach a similar conclusion."

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Mr. Cooprider is a Marine pilot, according to the legal filing. A spokesperson from the U.S. Marine Corps said it knows of the civil lawsuit.

"Training Command is aware of a civil lawsuit involving a student at Marine Aviation Training Support Group 22 at Naval Air Station Corpus Christi, Texas. No further information is available, due to this being a civil matter," the spokesperson told The Washington Times in an email.

Another man in the state was charged for similar conduct and landed behind bars. The Houstonian got 180 days in jail and 10 years' probation after secretly drugging his wife with an abortion pill in an unsuccessful attempt to terminate the pregnancy.

Kelsey Pritchard, communications director for Susan B. Anthony Pro-Life America, said Ms. Davis' boyfriend "poisoned her with 10 doses of the abortion drug."

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"The drugs he mixed in Davis' hot chocolate ended her child's life and caused her to hemorrhage and need emergency medical attention within 30 minutes. As a nation, we should be horrified by this story and the Biden administration's reckless policy of mail-order abortion drugs that is fueling the rise of this new form of domestic violence," Ms. Pritchard said.

• *Alex Swoyer can be reached at aswoyer@washingtontimes.com.*

The Washington Times

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EXHIBIT 1-B

The New York Times https://www.nytimes.com/2025/08/14/us/marine-abortion-pills-lawsuit-texas.html

Woman Claims Marine Laced Her Drink With Abortion Pills

A Texas woman said in a lawsuit that a U.S. Marine got her pregnant and then, after she chose to keep the pregnancy, dissolved abortion pills in her hot chocolate.

Listen to this article · 5:34 min Learn more



By Alexandra E. Petri

Aug. 14, 2025

A Texas woman accused a U.S. Marine in a lawsuit on Monday of lacing her drink with abortion pills, terminating her pregnancy against her wishes.

The woman, Liana Davis, 37, claims that Christopher Cooprider, 34, a U.S. Marine Corps Captain from Arizona who she says impregnated her, secretly dissolved 10 pills of misoprostol, a drug used in medical abortions, in a hot chocolate he made for her on April 5.

She made the accusation in a civil complaint filed in a federal court in Texas.

Shortly after drinking the beverage, the complaint says, Ms. Davis began bleeding and went to the hospital, where she lost her pregnancy.

The lawsuit also names Aid Access, a major seller of abortion pills online, as a defendant. Ms. Davis said in the lawsuit that Mr. Cooprider used Aid Access to obtain the pills. The suit named the founder of Aid Access, the Dutch physician Rebecca Gomperts, as a third defendant.

Mr. Cooprider, a flight student with the U.S. Marines in Corpus Christi, Texas, declined to comment on the lawsuit or say if he had a lawyer.

The U.S. Marine Corps said in a statement that it was aware of a civil lawsuit involving one of its aviation students but that no additional information was available.

In a statement, Dr. Gomperts pointed to Aid Access's role in providing "essential, lifesaving health care" for vulnerable women.



The Dutch physician Rebecca Gomperts, who founded Aid Access, during a demonstration in front of the U.S. Supreme Court in Washington last year. The lawsuit

filed by Liana Davis names Aid Access and Dr. Gomperts as defendants. Tom Brenner/The Washington Post, via Getty

Ms. Davis became pregnant by Mr. Cooprider in early 2025, the lawsuit claims. Text messages included in the lawsuit and said to be from Ms. Davis to Mr. Cooprider describe the pregnancy as “unplanned.” In one message she called herself Mr. Cooprider’s “mistress.”

The lawsuit says that Ms. Davis has three children with her husband, with whom she was in divorce proceedings.

According to the messages, Mr. Cooprider told Ms. Davis that he wanted her to have an abortion, even before she had confirmed her pregnancy with a test.

Ms. Davis texted Mr. Cooprider on Jan. 31, 2025, for his thoughts on her possible pregnancy, and he responded, “Get rid of it,” the lawsuit said.

Mr. Cooprider added that the two were not in love or a couple, and that bringing a child into the world would be “messed up,” according to the lawsuit.

On Feb. 3, Mr. Cooprider sent a text message saying that if the pregnancy test was “positive then we need to schedule a clinic visit and get an abortion pill asap,” according to the complaint.

On Feb. 5, Mr. Cooprider texted Ms. Davis and said he was going to order abortion pills for her, according to the complaint, a step it said Ms. Davis opposed. On Feb. 6, Mr. Cooprider purchased pills from Aid Access, according to the lawsuit.

“I’m not OK with you buying something like that w/o my permission,” Ms. Davis wrote him, according to the complaint.

Mr. Cooprider brought the pills to Ms. Davis’s home and repeatedly asked her to take them, according to the lawsuit. Pictures included in the lawsuit show two containers of abortion drugs labeled “Chris Cooprider.”

The text exchanges grew more heated over several weeks, then took an abrupt turn. In early April, the lawsuit says, Mr. Cooprider texted Ms. Davis to propose a "trust building night" where he would make them "warm relaxing tea."

Mr. Cooprider went to Ms. Davis's home on April 5, where he made her a hot chocolate, according to the lawsuit. Ms. Davis was eight weeks pregnant at the time, the lawsuit said.

According to the lawsuit, she began hemorrhaging and cramping within 30 minutes of drinking the beverage.

Mr. Cooprider said he would drive to get Ms. Davis's mother, who lived nearby, the lawsuit said. The plan was that she would mind Ms. Davis's three children, and Mr. Cooprider could then drive Ms. Davis to the emergency room.

But after leaving to get Ms. Davis's mother around 12:10 a.m., Mr. Cooprider stopped responding to calls and texts, and did not pick her up, according to the lawsuit. Screenshots of text messages included in the lawsuit show Ms. Davis repeatedly texting Mr. Cooprider, including one sent at 12:34 a.m. saying: "I'm gushing blood. Please hurry."

Ms. Davis sent her mother money for an Uber just before 1 a.m., around the same time Mr. Cooprider responded to the text messages, the lawsuit said. He apologized and told her he had a flight in the morning, according to the complaint, and then stopped answering.

Before leaving the house, Ms. Davis found the opened packets of pills, the lawsuit said.

A neighbor drove Ms. Davis to a Bay Area hospital's emergency room, where she lost the pregnancy, according to the complaint.

Ms. Davis brought the pill bottles with her to the emergency room and gave them to the Corpus Christi Police Department, according to the lawsuit.

The Police Department said a detective investigated the allegations and shared the results with the Nueces County District Attorney's Office.

"After careful review, both agencies concluded that the elements of a crime could not be established, and the investigation was subsequently closed as unfounded," Madeline Vaughn, a spokeswoman with the department, said in a statement.

Ms. Davis's suit seeks punitive damages from the defendants. It did not give a figure, but said the amount was greater than $75,000.

Sheelagh McNeill contributed research.

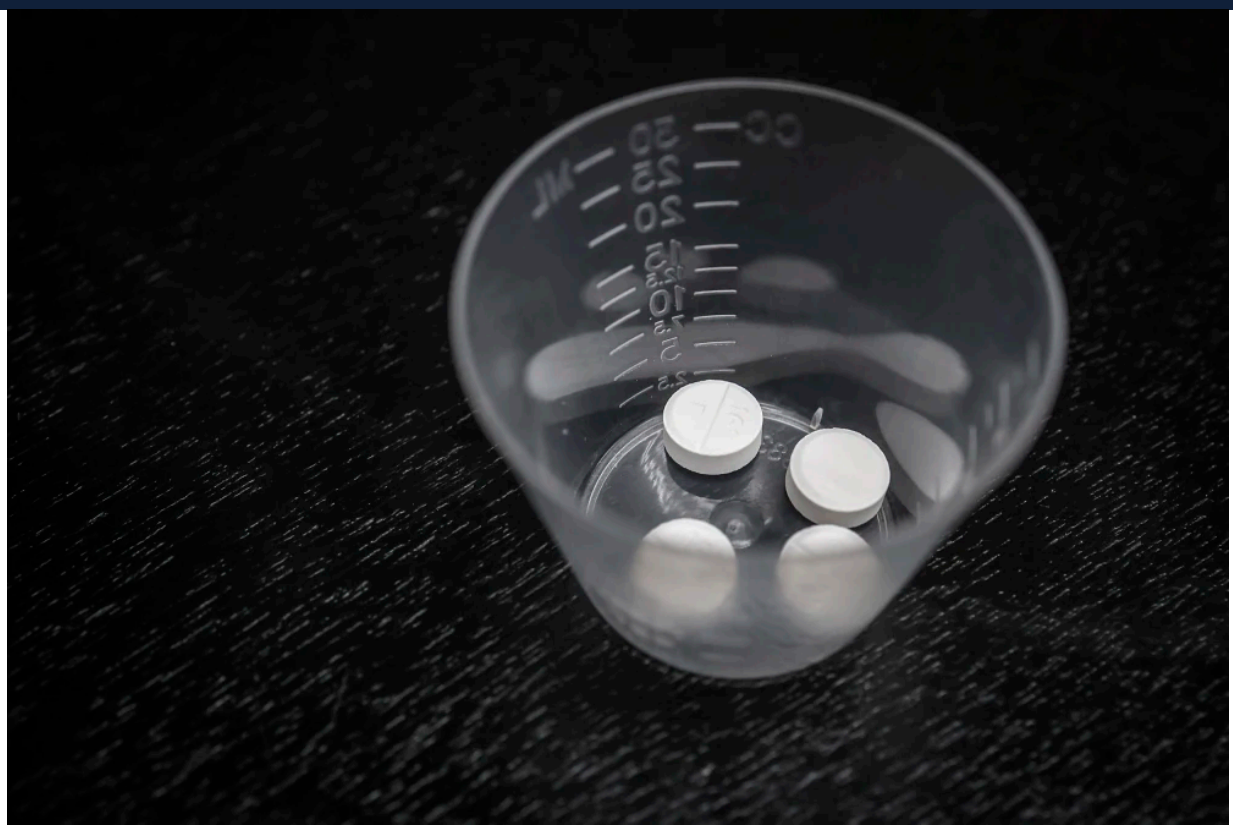
A version of this article appears in print on , Section A, Page 14 of the New York edition with the headline: In Lawsuit, Woman Claims a Marine Spiked Her Drink With Abortion Pills

EXHIBIT 1-C

U.S. NEWS

Marine files countersuit against Texas woman who claims he spiked her drink with abortion pills

Capt. Christopher Cooprider has accused the woman of lying and is seeking $100 million in damages.



Misoprostol tablets at a family planning clinic in Rockville, Md., in 2023.

Anna Moneymaker / Getty Images file

Sept. 4, 2025, 5:17 PM CDT

By Melissa Chan

A U.S. Marine who is being sued for allegedly

spiking a Texas woman's drink with abortion pills has filed a countersuit, accusing the woman of lying and being personally responsible for a series of failures that killed their unborn child.

Capt. Christopher Cooprider, 34, said he did not drug Liana Davis' drink, causing her pregnancy to end in April, as she alleged in a wrongful death lawsuit filed in federal court last month.

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Davis had accused Cooprider of secretly dissolving at least 10 abortion pills into a cup of hot chocolate that he prepared for her on April 5, when she was eight weeks pregnant, after she rebuffed his repeated requests to "get rid of it," her suit said. She said he left her Corpus Christi home that night and stopped responding to her texts when she reached out for help as she profusely bled.

In his countersuit, filed Wednesday in the U.S. District Court for the Southern District of Texas, Cooprider denied the allegations, saying Davis, 37, intended to frame him with false claims that he drugged her that night.

He alleges in his lawsuit that the pregnancy loss could be attributed to a series of factors, including her age, a sexually transmitted disease, a bacterial infection, alcohol consumption and failure to seek medical help when she experienced heavy cramping earlier.

Cooprider said in the suit that he ordered the abortion pills at Davis' request and gave some of them to her in February, two months before she alleges he drugged her drink, and discarded the rest.

Davis' attorney, Jonathan Mitchell, disputed that claim and said Cooprider ordered the drugs without his client's permission and "in defiance of her explicit instructions."

Mitchell said his team would disprove each of Cooprider's "abject lies" in court.

"Cooprider is guilty as sin and will be held to account for what he did," he said.

Cooprider requested that the court dismiss the woman's lawsuit, adding that the Corpus Christi Police Department declined to recommend criminal prosecution after investigating her claims.

The Corpus Christi Police Department told NBC News there are no active investigations involving Cooprider.

In a statement, the police department said an investigator with more than a dozen years of experience as a detective "conducted an extremely thorough investigation" into Davis' claim that she was drugged and that the investigation was closed as unfounded.

The investigator interviewed Davis, Cooprider, witnesses, hospital medical staff, Davis' OBGYN and the Nueces County Medical Examiner, as well as examined existing evidence and medical records, the department said.

"The results of the investigation were then shared with the Nueces County District Attorney's Office. After careful review, both agencies concluded that the elements of a crime could not be established," it said.

Corpus Christi police said it "stands by the results of this investigation and is confident that any honest and objective third-party review would reach a similar conclusion."

It encouraged media outlets to request further information about the case to file an open records request but denied a request by NBC News on Aug. 19, citing confidentiality laws.

Cooprider is seeking $100 million in damages from Davis, which he pledged to give to the

Wounded Warrior Project, a nonprofit that helps ill and injured post-9/11 veterans and service members, according to the suit.

Davis' lawsuit, filed in the same court on Aug. 11, included text messages she alleges the pair exchanged for weeks, beginning Jan. 31, when Davis asked Cooprider for his input in case she is confirmed to be pregnant.

Cooprider said he "would like to get rid of it," the texts show, saying the two were "not in love" or together and that it would be "messed up to bring a child into the world without both parents raising them."

The following text messages cited in Davis' complaint show Cooprider telling Davis, without her approval, that he would order abortion pills online. The pills were purchased from Aid Access, an online service that ships abortion pills from abroad, according to the lawsuit.

Aid Access and Dr. Rebecca Gomperts, a Dutch physician who runs it, are also listed as defendants in the lawsuit. They did not return requests for comment.

On April 2, Cooprider proposed making them "some warm relaxing tea" in what they could call a "trust building night," according to screenshots shared in Davis' lawsuit.

Davis accepted. When the two met up at her home on April 5, Cooprider handed her a cup of hot chocolate shortly before midnight,

according to the lawsuit. Within 30 minutes of drinking it, the suit says, Davis began hemorrhaging and cramping.

Davis knew she had to go to the emergency room, but she knew she could not leave her three children who were sleeping upstairs, the suit said. They came up with a plan for Cooprider to pick up Davis' mother, who lived nearby, so she could watch the children while Cooprider took Davis to the hospital, according to the suit.

But once Cooprider left the house, he became unreachable, the suit said.

"I am gushing blood. Please hurry," Davis texted him around 12:30 a.m.

Davis' mother took an Uber ride to her daughter's house around 1 a.m. Around that time, Cooprider apologized and said he had to catch a flight the next day, the suit said.

A neighbor drove Davis to the hospital, where the fetus did not survive, according to the suit.

Back home, Davis said she found the opened box of abortion pills and a pill bottle, which she turned over to the Corpus Christi police, according to the lawsuit. The suit claims Cooprider mixed 10 misoprostol pills into the hot chocolate.

The Marine Corps confirmed that Cooprider is an active-duty captain and a flight student

EXHIBIT 1-D

THE BODY POLITIC

The Explosive Lawsuit Challenging a Right-Wing Abortion-Pill Story



By Irin Carmon, a features writer at New York Magazine

SEPT. 5, 2025



Photo: Anna Moneymaker/Getty Images

Last month, an anti-abortion activist named Jana Pinson gave explosive testimony before a Texas Senate committee in support of HB7, a law that woul state's bounty-hunter abortion law, allowing lawsuits against anyone who facilitates a Texan getting abortion pills, including manufacturers, for up to $ a lawsuit filed that very day by Liana Davis against Christopher Cooprider, accusing him of smuggling abortion pills he ordered online into Davis's hot her pregnancy.

The case soon made international headlines for both its sordid details and its political valences. Like other red states that outlawed abortion as soon as them, Texas has been unable to stop tens of thousands of abortion pills — as many as 12,000 a month, according to the Society of Family Planning — f providers in blue states, where they enjoy protection under "shield laws." (Davis also sued Aid Access, a prominent provider of abortion pills to places v Attorney General Ken Paxton promptly issued cease-and-desist letters to shield providers, citing the Davis case. Meanwhile, the state senate passed HI governor's signature.

But a countersuit filed Thursday by Cooprider claims the sensationalistic drugging never happened. He says Davis had a spontaneous miscarriage, whi conduct, and that she vengefully framed him for a forced abortion. Cooprider is seeking an eyebrow-raising amount in damages — over $1 billion.

"I'm not here to castigate the pro-life position. I consider myself a pro-life individual, but we don't do political advocacy by criminal allegations that are disgusting," Cooprider's attorney, Mikal Watts, told me Thursday. "They used this situation to pass a law that, if it's based on this case, was passed based

Even as initially presented, the case raised questions. Cooprider wasn't criminally charged, even though Texas prosecutors have brought at least two otl accused of similar crimes — one of them for capital murder, which carries the death penalty. A second man was sentenced to 180 days in jail last year a giving his wife abortion pills, though her pregnancy continued.

Davis did go to the cops in Corpus Christi, where she and Cooprider were neighbors, but they declined to bring charges. When reporters asked why, the statement, saying the case had been assigned to a "highly experienced family violence detective" who had "conducted an extremely thorough investigati including an examination of the existing evidence and medical records, and interviews with the complainant, accused, witnesses, hospital medical staff OBGYN, and the Nueces County Medical Examiner." Along with the district attorney, the department said, they "concluded that the elements of a crim established, and the investigation was subsequently closed as unfounded." Unusually, the department added that it "highly encourages any media outle information regarding this case to file an open records request through the Police Department Open Records Unit," though when I filed one, it was dec the information would be "highly intimate or embarrassing" and "not of legitimate concern to the public."

Even in Davis's filing, there are a few hints of uncertainty about the pregnancy's viability. She includes text messages that show that weeks before the h both Cooprider and Davis expressed doubts as to whether the fetus was still alive.

Cooprider's 99-page lawsuit says that Davis faked a first pregnancy, then tricked Cooprider into having sex with her when she was ovulating, telling hi remains of a miscarriage for a nonexistent pregnancy. It alleges that Davis's own negligence was a "proximate cause of the death of her unborn baby" a "properly" treating a sexually transmitted infection, causing fevers that can trigger miscarriage; of consuming alcohol, Red Bull, and medications contr pregnancy; and of ignoring cramping while staying in extreme heat with her kids, which is associated with greater miscarriage risk.

Cooprider's lawsuit also accuses Davis of erratic behavior, including, a month before the hot-chocolate incident, standing outside his house and "loudly threatening that she would charge Cooprider with sexual assault if he didn't speak to her." Cooprider includes a transcript of a call he says he made to t department in which he says Davis was threatening him and had taken abortion pills for a pregnancy he now says didn't exist.

Watts suggested that Davis's lawyer, Jonathan Mitchell, probably the best-known anti-abortion attorney in America and the father of the original Texa knew that Davis's case had major holes in it and pressed on even after the police concluded the claims were unfounded.

"There's Rule 11 that you have to do a reasonable investigation before you can sign your name to a federal court plea," says Watts, a well-known torts la was acquitted in 2016 of fraud in a case where he represented himself. "I'm not here to suggest that that rule has been violated yet, although I may be s some digging."

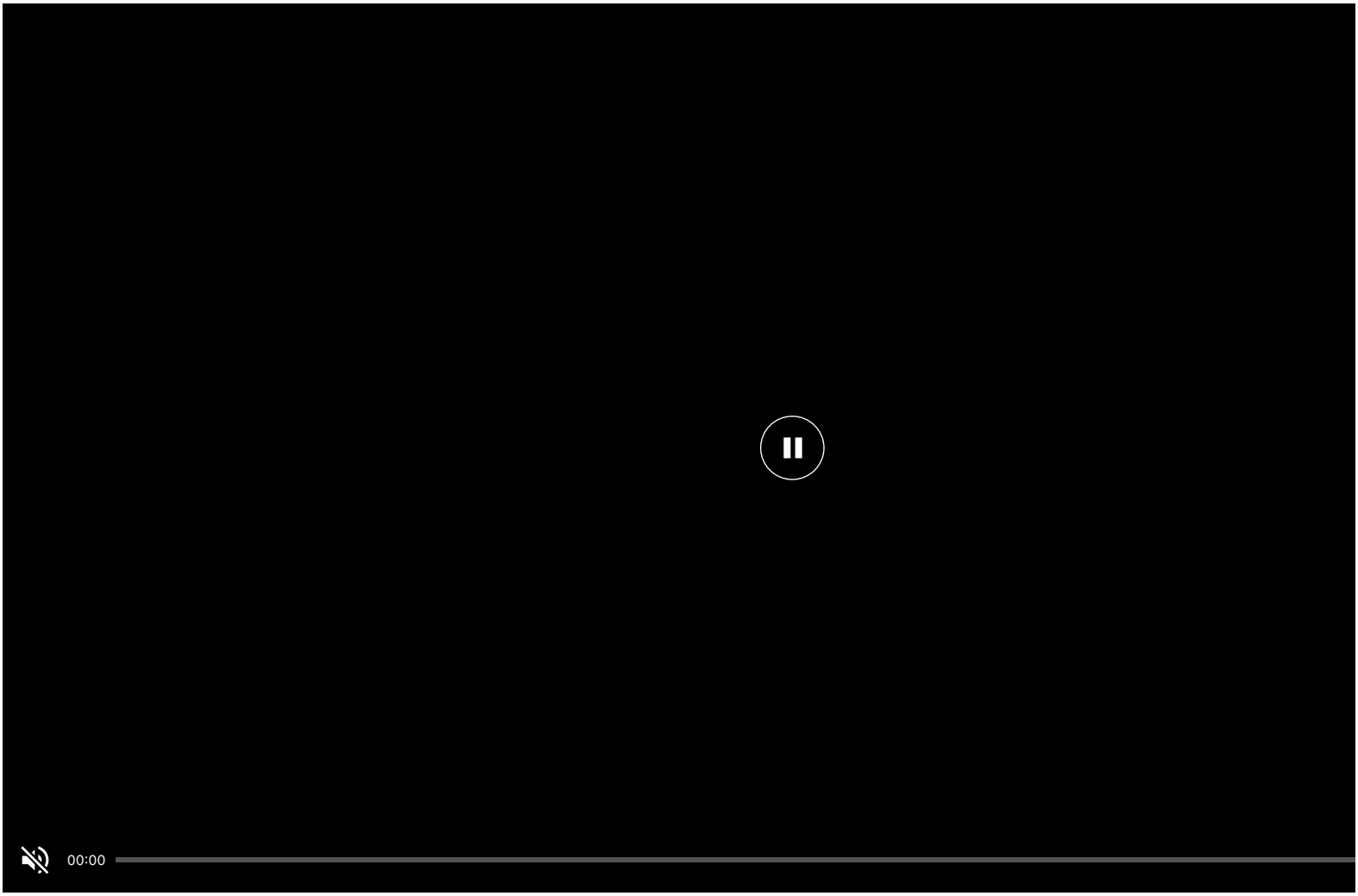
Mitchell didn't respond to a request for comment but told Autonomy News, "These are abject lies and we will disprove every one of them in court. Coo will be held to account for what he did, both in this civil suit and in the upcoming criminal proceedings." It's not clear what criminal proceedings he's r

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By ERROL LOUIS

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ABORTION

Texas Man Accused of Putting Abortion Pills in Partner's Drink Claims She Made It Up, Countersues for $100 Million

The 34-year-old Marine alleges that the woman who sued him for wrongful death lied about a coerced abortion, and that there were political motives behind her lawsuit.

GARNET HENDERSON and SUSAN RINKUNAS

September 3, 2025 . 7:10 PM — 6 min read



Photo by Brett Jordan on Unsplash

Update 9/5/25, 8:25pm: *This story has been updated with statements from the Corpus Christi Police Department and the Naval Criminal Investigative Service. It was previously updated with comment from attorney Jonathan*

Mitchell.

Last month, Autonomy News reported on a lawsuit filed by Liana Davis, a Texas woman who alleged that Christopher Cooprider, her male sex partner, had given her abortion-inducing medication without her knowledge or consent, causing her to lose her pregnancy. The case was filed in federal court in Corpus Christi, Texas. Davis is represented by anti-abortion legal activist and former Texas Solicitor General Jonathan Mitchell, and the case is thought to be the first instance of a woman suing for wrongful death from abortion pills.

On Wednesday, Cooprider countersued Davis in the same federal district, seeking $100 million in damages. When covering the initial complaint, Autonomy News did not name either party, but we are doing so now because Cooprider alleges the suit was fraudulent and initiated for retribution and political purposes. When reached for comment, Mitchell said "these are abject lies and we will disprove every one of them in court. Cooprider is guilty as sin and will be held to account for what he did, both in this civil suit and in the upcoming criminal proceedings."

Mitchell did not immediately respond to our questions about a possible criminal case. Autonomy News has contacted local and federal authorities to inquire about any ongoing investigations. On Friday, Corpus Christi Police Department confirmed it has "no open or active investigations involving these individuals at this time." A spokesperson for the Naval Criminal Investigative Service (NCIS), which covers the U.S. Navy and the Marine Corps, said: "I can confirm that the NCIS investigation has been closed. Out of respect for the investigative process, NCIS will not comment further at this time."

Cooprider, a 34-year-old Marine pilot, alleges that Davis' suit was malicious and intended to cause him emotional distress. He says he had a brief sexual relationship with Davis, a 37-year-old who was going through a divorce, and that her behavior escalated to harassment when he expressed that he didn't want the relationship to continue. After that, Cooprider claims Davis faked multiple pregnancies and miscarriages, and that after she actually became pregnant, she failed to treat medical conditions which themselves could have triggered a miscarriage.

Cooprider alleges that Davis concocted her suit after the Corpus Christi

Police Department declined to recommend charges based on her allegations against him.

He further alleges that Davis' lawsuit was filed early on August 11 "so it could be immediately and widely disseminated to national and Texas media outlets that morning" prior to a Texas Senate committee hearing on legislation that would supercharge the state's existing "bounty hunter" abortion ban, inviting citizens to sue manufacturers and providers of abortion pills and win $100,000 bounties. Davis' suit was cited in the hearing by Jana Pinson, executive director of Pregnancy Center of the Coastal Bend, a small "crisis pregnancy center" chain with locations in and around Corpus Christi.

"Just this morning, a lawsuit was filed for wrongful death where a military guy got a next-door neighbor pregnant, tried to force an abortion," Pinson said during the August 11 hearing. "He ordered in his own name from Aid Access, and then when she wouldn't take them, he … put 10 pills in her chocolate and she doubled over in pain about 30 minutes later. Then he left her to bleed out while she had to get help to get to the ER."

"This is another avenue of men being able to force abuse on women," Pinson continued. She mentioned the case again in a hearing on August 22, this time before a House committee.

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Davis' suit also named online abortion provider Aid Access and its founder, Rebecca Gomperts, as defendants. In addition to alleging that they violated wrongful death laws in Texas, the complaint accused them of violating the Comstock Act, a dormant 1873 law that Mitchell and other anti-abortion leaders argue outlaws the mailing of abortion pills. In 2025, the anti-abortion movement has made it a major priority to attack "shield" laws, which protect abortion providers like Aid Access who prescribe abortion pills via telehealth to patients in states where abortion is illegal.

Mark Lee Dickson, a prominent anti-abortion activist who was first to announce Davis' case on social media, also mentioned her case in the

August 22 hearing. In his initial social media posts about Davis' lawsuit, Dickson connected it directly to anti-abortion legislation: "I hope these stories drive us to see more protections pass." At the time, Dickson said he first heard Davis' story from a CPC director in Corpus Christi. If Pinson was the person who told Dickson about the story, it's unclear how she came in contact with Davis in the first place. According to Dickson, he put Davis in touch with "my attorney"—meaning Mitchell, who has recently filed a spate of wrongful death suits related to the use of abortion pills, usually on behalf of men upset about their partners' abortions.
Versions of the abortion pill bounty bill have passed in both chambers of the Texas legislature in recent days. It appears poised to become law.

In his suit, Cooprider claims he didn't coerce Davis, and that she was the one threatening him. He said Davis asked him to order abortion pills for her in February 2025, which he alleges that she never took, and that she began harassing him after he expressed that he didn't want her to join him at his next military post in North Carolina. One night in early March, he claims, Davis stood outside his house and implied she'd accuse him of sexual assault if he didn't speak to her. He called 911 for police to do a wellness check and told operators that she'd called him 40 times that day, according to a transcript provided in the counterclaim. He told the operators he took video of her outside his home and added: "And she's also threatening… she's saying that I coerced her into taking the abortion pills against her will, and that's illegal in Texas."

Later on the call, he said Davis told him that she was miscarrying and was sitting "in a pile of her blood in the bathtub." Cooprider's filing then notes that "Law enforcement checked on [her] and she was not sitting in blood. She said that she was fine."

However, she was actually pregnant at this time, per an ultrasound on March 21, where a physician said that she had conceived about four weeks earlier. Cooprider claims that Davis invited him over on April 5, at which point she tried to frame him for a coerced abortion by alleging that he slipped abortion pills into her hot chocolate. She claimed she was bleeding profusely, and got a neighbor to drive her to the hospital, where she told staff that Cooprider "drugged" her.

Officers from Corpus Christi Police Department came to the emergency

Officers from Corpus Christi Police Department came to the emergency department and opened an investigation. CCPD told the *New York Times* in August that it shared results with Nueces County District Attorney's Office, but that, "after careful review, both agencies concluded that the elements of a crime could not be established, and the investigation was subsequently closed as unfounded."

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According to Cooprider's admittedly melodramatic suit, Davis' "lethal lies in the malicious allegations now embedded in her made-up complaint read like the screenplay written for Glenn Close in the movie *Fatal Attraction*." Other salacious allegations featured in the complaint include that Davis failed to properly treat a sexually transmitted infection *and* typhoid fever, either of which could have led to natural miscarriage. Cooprider also alleges that Davis failed to take progesterone prescribed in late March due to a low embryonic heart rate, which his complaint presents as evidence that she did not want to continue the pregnancy. (However, while progesterone is commonly prescribed in an attempt to prevent first trimester miscarriage, evidence doesn't support the practice except in people with a history of three or more miscarriages.) He also claims she was a heavy drinker and that she continued to drink when her children were in her home despite being ordered not to by family court.

Cooprider's lead attorney is Mikal Watts, a puzzling figure who frequently donates to Democratic politicians, per Federal Election Commission records, but is also listed as a Federalist Society contributor. Watts faced a federal trial in 2016 on 96 counts of wire fraud, mail fraud, and identity theft after he was accused of inventing 40,000 victims of the 2010 Deepwater Horizon oil spill in order to file a class action suit that would have earned him an estimated $40 million. Watts fired his attorney on the eve of trial and chose to represent himself. A jury acquitted him.

Cooprider is seeking $100 million in damages, but pledges in his counterclaim to donate any proceeds to the Wounded Warrior Project. Watts and two other attorneys said they are working on the case *pro bono*.

This is a developing story and may be updated.

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appointments after September 30 in an apparent attempt to avoid Medicaid "defunding."

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Liana Davis, Plaintiff,	*	
v.	*	Case No. 2:25-cv-220
Christopher Cooprider, et al. Defendants.	*	

ORDER DENYING LIANA DAVIS'S MOTION TO DISMISS CHRISTOPHER COOPRIDER'S COUNTERCLAIMS

Before the Court is Counter-Defendant Liana Davis's Motion to Dismiss Counter-Plaintiff Christopher Cooprider's Counterclaims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Motion"). Having considered the Motion, the applicable law, the arguments of counsel, and all other supporting and opposing papers, the Court is of the opinion that the Motion should be and hereby is DENIED.

SIGNED this ____ day of _____, 2025.

_____
DAVID S. MORALES
UNITED STATES DISTRICT JUDGE

	APPENDIX OF UNPUBLISHED AUTHORITIES (p. 1 of 5) **RESPONSE TO PLAINTIFF'S MOTION TO DISMISS** **DEFENDANT CHRISTOPHER COOPRIDERS COUNTERCLAIMS**
	CASE/AUTHORITY NAME
1	*Kafi, Inc. v. Sand Canyon Corp.*, Civil Action No. 3:20-cv-00354, 2022 WL 3084480 (S.D. Tex. Aug. 3, 2022) (Edison, M.J.)
2	*Kafi, Inc. v. Sand Canyon Corp.*, Civil Action No. 3:20-cv-00354, 2022 WL 4454395 (S.D. Tex. Sept. 23, 2022) (Brown, J.)
3	5A CHARLES A. WRIGHT & ARTHUR R. MILLER, Federal Practice and Procedure § 1291 (4th ed.)
4	*Maxim Crude Oil, LLC v. Noil Corp., Inc.*, Civil Action No. 2:21-CV-90, 2021 WL 12320541 (S.D. Tex. Nov. 16, 2021) (Morales, J.)
5	*Crotts v. Healey*, 2015 WL 5890103 (Tex. App. – Houston [1st Dist.] 2015), *rev. denied* (Feb. 26, 2016), *reh'g of petition for review denied* (April 8, 2016), *cert denied*, 580 U.S. 868 (2016)
6	*Bond v. Nueces County, Texas*, Civil Action No. 2:19-CV-43, 2019 WL 13221680 (S.D. Tex. Sept. 5, 2019) (Morales, J.)
7	*Oliveros v. Oliveros*, Case No. 5:23-CV-00402-FB-RBF, 2024 WL 875834 (W.D. Tex. Feb. 13, 2024) (Farrer, M.J.)
8	*Oliveros v. Oliveros*, Case No. 5:23-CV-00402-FB-RBF, 2024 WL 874145 (W.D. Tex. Feb. 29, 2024) (Biery, J.)
9	*Smith v. MTGLQ Investors, L.P.*, 851 Fed. Appx. 514 (Mem) (5th Cir. June 30, 2021) (per curiam) (unpublished)
10	*Peninsula Marine, Inc. v. Principle Industrial Services, LLC*, Civil Action No. 2:23-CV-00104, 2024 WL 5036616 (S.D. Tex. Sept. 30, 2024)
11	Restatement (Second) of Torts § 46 cmt. d (1965)
12	*Kumar v. Panera Bread Co.*, Case No. 23-20178, 2024 WL 1216562 (5th Cir. Mar. 21, 2024) (per curiam) (unpublished)
13	*7X Cattle Co. LLC v. Brandstadt*, Case No. 6:22-CV-00396-JDK-KNM, 2024 WL 4183301 (E.D. Tex. Jul. 22, 2024) (Mitchell, M.J.)
14	*7X Cattle Co. LLC v. Brandstadt*, Case No. 6:22-CV-00396-JDK-KNM, 2024 WL 3950677 (E.D. Tex. Aug. 27, 2024) (Mitchell, M.J.)

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	CASE/AUTHORITY NAME
15	*Western Reserve Medtec Services, LLC v. Stryker Corporation*, Civil Action No. 4:18-CV-2604, 2019 WL 13191641 (S.D. Tex. May 13, 2019) (Bryan, M.J.)
16	*Garcia v. LCS Corrections Services, Inc.*, Civil Action No. C–09–334 2010 WL 2163284 (S.D. Tex. May 24, 2010) (Crane, J.)
17	*Luebano v. Office Depot, L.L.C.*, Case No. 22-50767, 2023 WL 4249268 (5th Cir. Jun. 29, 2023) (per curiam) (unpublished)
18	*Briceno-Belmontes v. Coastal Bend College*, Civil Action No. 2:20-CV-00114, 2022 WL 673854 (S.D. Tex. Mar. 5, 2022) (Tipton, J.)
19	*Perez v. Brooks County, Texas*, Civil Action No. 2:19-CV-391, 2020 WL 4261253 (S.D. Tex. Jul. 24, 2020) (Gonzales Ramos, J.)
20	*Henderson v. Wells Fargo Bank*, 779 F.Supp.3d 910 (S.D. Tex. Mar. 31, 2025) (Morales, J.)
21	*Stewart v. City of Arcola*, Civil Action No. 4:23-cv-04387, 2024 WL 3297361 (S.D. Tex. Jul. 3, 2024) (Hanen, J.)
22	*Garcia v. Oceans Healthcare, L.L.C.*, Civil Action No. 2:22-CV-00219, 2023 WL 6393885 (S.D. Tex. Sept. 30, 2023) (Tipton, J.)
23	*M.D.C.G. v. United States*, Civil Action No. 7:15–CV–552, 2016 WL 6638845 (S.D. Tex. Sept. 13, 2016) (Crane, J.)
24	*Gaona v. Wells Fargo Bank, N.A.*, SA-23-CV-280-FB (HJB), 2025 WL 699353 (W.D. Tex. Feb 13, 2025) (Bemporad, M.J.)
25	*Gaona v. Wells Fargo Bank, N.A.*, SA-23-CV-280-FB (HJB), 2025 WL 696546 (W.D. Tex. Mar. 4, 2025) (Biery, J.)
26	*United States ex rel. Porter v. Magnolia Health Plan, Inc.*, 810 Fed. Appx. 237 (5th Cir. Apr. 15, 2020) (unpublished)
27	*Gutierrez v. Corrections Corp. of America*, 559 Fed. Appx. 406 (mem) (5th Cir. Apr. 3, 2014) (unpublished)
28	*United States v. Basulto-Reina*, 421 Fed. Appx. 349 (5th Cir. Apr. 5, 2011) (unpublished)
29	*U.S. v. Kim*, Criminal No. H-07-406, 2009 WL 29688 (S.D. Tex. Jan. 5, 2009) (Rosenthal, J.)

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	CASE/AUTHORITY NAME
30	*Blair v. Pride Industries, Inc.*, Case No. EP-14-CV-00183-DCG, 2015 WL 11251771 (W.D. Tex. Jan. 27, 2015) (Guaderrama, J.)
31	*Medford Co-Operative Bank v. Skerry*, 2004 Mass. App. Div. 120, 2004 WL 1853343 (2004)
32	*ASG Chemical Holdings, LLC v. Bisley Int'l, LLC*, Civil Action No. H-23-4333, 2024 WL 5036568 (S.D. Tex. Nov. 18, 2024 (Bray, M.J.)
33	*ASG Chemical Holdings, LLC v. Bisley Int'l, LLC*, Civil Action No. H-23-4333, 2024 WL 5108450 (S.D. Tex. Dec. 13, 2024 (Lake, J.)
34	*Specialties of Mexico, Inc. v. Masterfoods USA*, Civil Action No. L–09–88, 2010 WL 2488031 (S.D. Tex. Jun. 14, 2010) (Alvarez, J.)
35	*Albores v. Dimitri*, Civil Action No. 18-6936, 2025 WL 871601 (E.D. La. Mar. 20, 2025) (Milazzo, J.)
36	*Forum Subsea Rentals v. Globaltech Offshore*, Civil Action No. H–13–885, 2014 WL 10751177 (S.D. Tex. Sept. 17, 2014) (Hittner, J)
37	*Pointeast Pharma Consulting, Inc. v. Lenzing Aktiengesellschaft*, Civil Action No. 4:21-CV-3654, 2024 WL 5048964 (S.D. Tex. Dec. 9, 2024) (Hanen, J.)
38	*Katz v. Intel Pharma, LLC*, Civil Action No. H-18-1347, 2018 WL 4701566 (S.D. Tex. Oct. 1, 2018) (Rosenthal, J.)
39	*Kafi, Inc. v. Sand Canyon Corp.*, Civil Action No. 3:20-cv-00354, 2022 WL 3084480 (S.D. Tex. Aug. 3, 2022) (Edison, M.J.)
40	*Kafi, Inc. v. Sand Canyon Corp.*, Civil Action No. 3:20-cv-00354, 2022 WL 4454395 (S.D. Tex. Sept. 23, 2022) (Brown, J.)
41	*Louisiana Oilfield Logistics, LLC v. Flotek Chemistry, LLC*, Civil Action No. H-19-1272, 2020 WL 13240060 (S.D. Tex. Jun. 29, 2020) (Rosenthal, C.J.)
42	*ClaimHub, Inc. v. Universal Risk Ins. Srvs., Inc.*, Civil Action No. H-10-2841, 2011 WL 13247456 (S.D. Tex. Jul. 25, 2011) (Rosenthal, J.)
43	*Zytax, Inc. v. Green Plains Renewable Energy, Inc.*, Civil Action No. H–09–2582, 2010 WL 4702303 (S.D. Tex. Nov. 10, 2010) (Rosenthal, J.)

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44	*Diagnostic Affiliates of Northeast Houston, LLC v. United Healthcare Services, Inc.*, Civil Action No. 2:21-CV-00131, 2022 WL 214101 (S.D. Tex. Jan. 18, 2022) (Gonzales Ramos, J.)
45	*William Marsh Rice University v. Arrowhead Research Corp.*, Civil Action No. 14-03496, 2016 WL 3223313 (S.D. Tex. Mar. 8, 2016)
46	*Lee v. Samsung Electronics America, Inc.*, Case No. 4:21-cv-1321, 2023 WL 4240277 (S.D. Tex. Jun. 28, 2023) (Palermo, M.J.)
47	*Polanco v. Innovation Ventures, LLC*, Civil Action No. 7:13-CV-568, 2014 WL 12599332 (S.D. Tex. May 5, 2014) (Crane, J.)
48	5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 1356 at 298 (1990)
49	*Lin v. Veritex Community Bank, N.A.*, Civil Action No. H-20-1904, 2021 WL 3831986 (S.D. Tex. Jan. 4, 2021) (Atlas, J.)
50	*Enventure Global Technology, Inc. v. Weatherford, U.S., L.P.*, Civil Action No. H-19-2397, 2020 WL 6146565 (S.D. Tex. Oct. 2, 2020) (Atlas, J.)
51	*IIITec, Ltd. v. Weatherford Technology Holdings, LLC*, Civil Action No. H-19-3386, 2019 WL 7037744 (S.D. Tex. Dec. 20, 2019) (Atlas, J.)
52	*Balcerowicz v. Sweetin*, Civil Action No. H-12-0310, 2017 WL 1474093 (S.D. Tex. Apr. 6, 2017) (Ellison, J.)
53	*American General Life Ins. Co. v. Mickelson*, Civil Action No. H–11–3421, 2012 WL 1355591 (S.D. Tex. Apr. 18, 2012) (Ellison, J.)
54	*Cortez v. Pharia L.L.C.*, Civil Action No. H–10–5068, 2011 WL 2455724 (S.D. Tex. May 18, 2011) (Stacy, M.J.)
55	5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 376 (3d ed. 2004)
56	*Lopez v. Don Herring Ltd.*, Civil Action No. 3:16-CV-02663-B, 2018 WL 296063 (N.D. Tex. Jan. 4, 2018) (Boyle, J.)
57	*Banquete I.S.D. v. Alliance for Community Solutions, Ltd.*, Civil Action No. 2:22-Cv-00094, 2024 WL 4720290 (S.D. Tex. Sept. 10, 2024) (Libby, M.J.)
58	*Barge v. Wells Fargo Bank, N.A.*, Civil Action No. 1:23-CV-00189, 2024 WL 2520324 (E.D. Tex. Mar. 28, 2024) (Truncale, J.)
59	

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59	Case No. A H-04-0916, 2006 WL 2796387 (S.D. Tex. Sep. 26, 2006) (Gilmore, J.)
60	*United States ex rel. BakerRipley v. Kids U US, Inc.*, Civil Action No. 23-cv-1124, 2024 WL 3541499 (S.D. Tex. Jul. 25, 2024) (Rosenthal, J.)
61	*Xiongen Jiao v. Ningbo Xu*, Case No.: 4:19-cv-01848, 2020 WL 6136265 (S.D. Tex. Jan. 29, 2020) (Ellison, J.)

CASE NO. 1

2022 WL 3084480
Only the Westlaw citation
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United States District Court,
S.D. Texas, Galveston Division.

KAFI, INC. Plaintiff.
v.
SAND CANYON CORPORATION
F/k/a Option One Mortgage
Corporation, et al. Defendants.

Civil Action
No.
3
:
20
-
cv
-
00354
|
Signed August 3, **2022**

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MEMORANDUM AND RECOMMENDATION

ANDREW M. EDISON, UNITED STATES MAGISTRATE JUDGE

***1** Pending before me is Defendants' Joint Motion to Dismiss Fourth Amended Complaint. Dkt. 66. Having reviewed the briefing, the record, and the applicable law, and for the reasons explained below, I recommend the Court **GRANT in part** and **DENY in part** the motion.

I. FACTUAL BACKGROUND

In this lawsuit, Kafi, Inc. ("Kafi") seeks to avoid foreclosure of a property it owns at 810 Almond Pointe in League City, Texas (the "Property"). In June 2006, non-parties Joe and Kelly Richardson (the "Richardsons") purchased the Property. The transfer was memorialized by general warranty deed with a vendor's lien. The Richardsons financed their purchase with a loan from Sand Canyon Corporation f/k/a Option One Mortgage Corporation ("Sand Canyon"). The loan was secured by a deed of trust in favor of Sand Canyon. The deed of trust contains an optional acceleration clause, allowing Sand Canyon to "invoke the power of sale and/or any other

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remedies" should the Richardsons default. Dkt. 63-1 at 6.

In January 2012, Sand Canyon purported to assign the deed of trust, along with "all interests secured thereby, all liens, and any rights due or to become due thereon" (the "Assignment"), to Wells Fargo Bank, N.A. ("Wells Fargo"). Dkt. 63-9. The Assignment was prepared by Nationwide Title Clearing, Inc. ("NTC"), notarized by Miranda Avila ("Avila"), and purportedly executed on behalf of Sand Canyon by Derrick White ("White") in his professed capacity as Sand Canyon's Vice President.[1] It is undisputed that, at the time of the Assignment, White and Avila were employees of NTC. *See* Dkt. 66 at 3. As discussed in greater detail in the following sections, the central issue in this case is Kafi's allegation that White's and Avila's signatures are forgeries.

By September 2012, the Richardsons were in default. Although the Property was noticed for sale multiple times, for reasons not explained, it was never sold at foreclosure. Kafi has attached to its pleadings four notices of trustee's sales:

Date of Notice	Date of Sale
September 5, 2012	October 2, 2012
November 6, 2012	December 4, 2012
June 19, 2017[2]	August 1, 2017
February 24, 2020	May 5, 2020

Kafi alleges that two of the notices—dated September 5 and November 6, 2012—were mailed to the Richardsons and filed in the real property records, thereby "unequivocally accelerat[ing]" the loan. Dkt. 63 at 14.

***2** In September 2020, Kafi purchased the Property "as-is" from the Richardsons by general warranty deed, which provides, in relevant part:

> This conveyance is made subject-to any outstanding liens of record. Grantors understand that Grantee is in no way assuming or promising to pay any outstanding liens of record.

Dkt. 63-3 at 1–2. There is no allegation that Defendants have attempted to foreclose on the Property.

II. PROCEDURAL HISTORY

In October 2020, Kafi sued Defendants in Texas state court, seeking, among other things, a declaration that Defendants lack standing to foreclose and a judgment quieting title to the Property. Defendants timely removed the case to this Court on the basis of diversity jurisdiction.

Kafi has since amended its complaint multiple times. In its live pleadings, Kafi requests a bevy of declaratory relief concerning its alleged title to the Property,[3] the most relevant of which are its requests for declaratory judgments that: (1) the Assignment is a forgery and, therefore, void; and (2) the four-year limitations period to foreclose on the Property has expired. Kafi also brings claims to quiet title or, in the alternative, for the equitable right of redemption. *See* Dkt. 63 at 10–11, 16–17. Finally, against Sand Canyon and NTC, Kafi asserts common-law claims for "forgery." *See id.* at 12–13.

In December 2021, I granted Kafi's request to conduct limited, targeted discovery to develop facts supporting its forgery allegation. Specifically, I allowed Kafi to depose Avila and send written discovery to Sand Canyon and NTC. *See* Dkt. 57. In January **2022**, I denied Kafi's request to depose White. *See* Dkt. 60. After completing its court-approved discovery, Kafi amended its complaint for a fourth time in February **2022**. In support of the allegations mentioned above, Kafi's Fourth Amended Complaint includes over a dozen exhibits, most of which pertain to its claim that the Assignment is a forgery. I discuss the relevant exhibits later in the opinion, but it is worth mentioning upfront that one of the exhibits is a "Forensic Document Examination Preliminary Report," prepared by two forensic document examiners who analyzed dozens of White's and Avila's known signatures and compared them to the supposed forgeries. *See* Dkt. 63-14.

Defendants have jointly moved for dismissal under Federal Rule of Civil Procedure 12(b)(6), arguing that Kafi's forgery claim is time-barred, as are Kafi's claims for declaratory relief based on the alleged forgery. *See* Dkt. 66 at 6–11. Even if the statute of limitations does not torpedo Kafi's claims, Defendants aver that Kafi has failed to sufficiently plead a claim for any of the relief sought. Sand Canyon and NTC further argue that they must be dismissed from the case, irrespective of whether Kafi has adequately pleaded a claim for relief, because they claim no interest in the underlying loan or Property. *See id.* at 29–30.

***3** Kafi advances a handful of interrelated arguments in response, the most relevant of which are: (1) the Assignment is a forgery and, therefore, void *ab initio*—meaning Defendants lack standing to enforce the underlying deed of trust; (2) foreclosure is time-barred under Texas' four-year statute of limitations for real-property actions, *see* TEX. CIV. PRAC. & REM. CODE § 16.035(d); and (3) even if the Assignment was valid and foreclosure not time-barred, Kafi is entitled to equitably redeem the Property by paying off the loan's balance to the current mortgagee, Wells Fargo, or the current loan servicer, PHH.

III. LEGAL STANDARD

A. RULE 12(b)(6) MOTION TO DISMISS

Rule 12(b)(6) provides that a district court must dismiss a complaint that fails to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6). This rule is read in conjunction with the pleading standard set forth in Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P.

8(a)(2). To survive dismissal at this early stage, the complaint must state enough facts such that the claim to relief is plausible on its face. *See* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads enough facts to allow the district court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although a complaint "does not need detailed factual allegations" to survive Rule 12(b)(6), a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

In deciding a Rule 12(b)(6) motion, I must accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. *See* *Alexander v. AmeriPro Funding, Inc.*, 848 F.3d 698, 701 (5th Cir. 2017). I also must limit my inquiry "to the facts stated in the complaint and the documents either attached to or incorporated in the complaint." *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996). Here, all documents discussed in this opinion are both attached to and incorporated in Kafi's Fourth Amended Complaint.

The Fifth Circuit has repeatedly held that "[m]otions to dismiss are viewed with disfavor and are rarely granted." *Test Masters Educ. Servs. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005). Given my charge to liberally construe the complaint in the light most favorable to the plaintiff, with every doubt resolved in the plaintiff's favor, dismissal is proper only if it "appear[s] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quotation omitted).

B. RULE 9(b)'S HEIGHTENED PLEADING STANDARD

Rule 9(b) imposes a heightened pleading standard for claims of fraud. Forgery is a type of fraud, and, therefore, Rule 9(b)'s heightened pleading standard applies. *See* *Bynane v. Bank of N.Y. Mellon*, 866 F.3d 351, 360 (5th Cir. 2017) (analyzing forgery allegations under Rule 9(b)'s heightened pleading standard). *See also* *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001) ("Rule 9(b) applies by its plain language to all averments of fraud, whether they are part of a claim of fraud or not.").

Rule 9(b) requires that a party "state with particularity the circumstances constituting fraud." FED. R. CIV. P. 9(b). "What constitutes 'particularity' will necessarily differ with the facts of each case." *Benchmark Elecs. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003) (cleaned up). Generally, Rule 9(b) requires that a complaint detail "the who, what, when, and where before access to the discovery process is granted." *Hart v. Bayer Corp.*, 199 F.3d 239, 247 n.6 (5th Cir. 2000) (cleaned up). However, the Fifth Circuit has acknowledged that there is "no single construction of Rule 9(b) that applies in all contexts," *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 188 (5th Cir. 2009), and that "Rule 9(b)'s ultimate meaning is context-specific." *Williams v. WMX Techs.*, 112 F.3d 175, 178 (5th Cir. 1997).

***4** Relatedly, "[i]f the facts pleaded in a complaint are peculiarly within the opposing party's knowledge, fraud pleadings may be

based on information and belief." *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994). *See* *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1051 (7th Cir. 1998) ("Rule 9(b) must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim."). But the Fifth Circuit has cautioned that "this exception must not be mistaken for license to base claims of fraud on speculation and conclusory allegations." *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) (quotation omitted). That is, "even where allegations are based on information and belief, the complaint must set forth a factual basis for such belief." *Id.*

C. DIVERSITY JURISDICTION

Because jurisdiction is based on diversity of citizenship, Texas substantive law and federal procedural law apply to Kafi's claims. *See* *Ferguson v. Bank of N.Y. Mellon Corp.*, 802 F.3d 777, 780 (5th Cir. 2015).

IV. ANALYSIS

A. BECAUSE A FORGED SIGNATURE IS THE TYPE OF INJURY THAT IS INHERENTLY UNDISCOVERABLE, THE DISCOVERY RULE APPLIES

It is undisputed that the Assignment was filed in the real property records of Galveston County on January 18, 2012. Defendants insist that subsequent purchasers of real property, like Kafi, are charged with constructive notice of any title defects that could have been discovered through a reasonably diligent inspection of the public record. Defendants thus contend that Kafi's forgery claim accrued on January 18, 2012. Because Kafi did not file the underlying lawsuit until October 2020, Defendants argue that Kafi's forgery claim is time-barred under Texas's four-year statute of limitations for real-property actions. *See* TEX. CIV. PRAC. & REM. CODE §§ 16.004(a)(4), 16.051. Kafi counters that any claim based on the purportedly forged Assignment did not accrue until it acquired an interest in the Property or, alternatively, the discovery rule deferred accrual of its claim because its injury is the type of injury that is inherently undiscoverable.

A cause of action generally accrues when a wrongful act causes some legal injury, regardless of when the plaintiff learns of such injury. *See* *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990). "The discovery rule represents an exception to this general rule of accrual." *Id.* It applies when "the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." *Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996). "This legal question is decided on a categorical rather than case-specific basis; the focus is on whether a *type* of injury rather than a *particular* injury was discoverable." *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006). When the discovery rule applies, the cause of action does not accrue, and, consequently, the limitations period does not begin to run until the plaintiff knows or, through the exercise of reasonable diligence, should know of the facts giving rise to the cause of action. *See* *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734 (Tex. 2001).

In Defendants' minds, "had Kafi owned the Property in 2012, *before* the supposedly fraudulent assignment was filed," the discovery rule would save Kafi's claim because property owners do not have a duty to continuously search the public record to ensure that no fraudulent instruments are subsequently recorded against their property. Dkt. 66 at 8. However, because "Kafi purchased the Property from the borrowers nearly nine (9) years *after* the allegedly forged assignment was executed and recorded," Defendants argue that Kafi is charged with "constructive notice [of the allegedly forged Assignment] for limitations purposes." *Id.* (quotation omitted).

***5** Although Texas law may charge a buyer "with constructive notice of the actual knowledge that could have been acquired by examining the public records," *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981), this includes only "knowledge of all facts that reasonable inquiry would have disclosed." *Holmes v. P.K. Pipe & Tubing, Inc.*, 856 S.W.2d 530, 542 (Tex. App.—Houston [1st Dist.] 1993, no writ). At the time of its purchase, Kafi was placed on notice of the Assignment itself. Nothing on the face of the Assignment—nor anything else in the public record—should have alerted Kafi that White's or Avila's signatures are possible forgeries. To hold otherwise would be nothing short of demanding Kafi exercise clairvoyance. This far exceeds the concept of "reasonable diligence" required under Texas law. *See Hooks v. Samson Lone Star, Ltd. P'ship*, 457 S.W.3d 52, 60–61 (Tex. 2015) (holding where fraudulent information "taints the public record," the question of whether a property owner exercised "reasonable diligence remains a fact question" for the jury to decide);[4] *Mooney*, 622 S.W.2d at 85 ("When evidence of fraud may be disclosed by examination of public records ... limitations will begin to run from the time the fraud could have been discovered by the exercise of ordinary diligence.").

At this point in the litigation, one can only speculate on when Kafi learned of the supposed forgery. Under Texas law, where a plaintiff pleads the discovery rule, the defendant bears the burden of conclusively negating its application before dismissal is appropriate. *See KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999) ("the defendant must ... negate the discovery rule, if it applies and has been pleaded or otherwise raised"); *Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex. 1996) ("If the nonmovant asserts that a tolling provision applies, the movant must conclusively negate the tolling provision's application to show his entitlement to summary judgment.").

Right now, any theory that Kafi knew or should have known of the forgery more than four years before filing suit is just that—a theory without factual support. For Rule 12(b)(6) purposes, I conclude that Kafi has sufficiently invoked the discovery rule, permitting it to proceed for the time being. However, at trial, Kafi, as "[t]he party seeking to benefit from the discovery rule must also bear the burden of proving and securing favorable findings thereon." *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988).

B. FORGERY

1. Pleading Requirements for Kafi's Forgery Allegation

Although the parties agree that Rule 9(b)'s heightened pleading standard controls Kafi's forgery claim, they differ over how stringently it must be applied.

Rule 11(b)(3) of the Federal Rules of Civil Procedure allows a party to plead factual allegations that lack evidentiary support if it appears that they are "likely [to] have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(b)(3). Kafi contends that Rule 9(b)'s heightened pleading standard should be relaxed in this case because the facts in question are peculiarly within Defendants' knowledge. Regardless, Kafi insists that its Fourth Amended Complaint demonstrates its belief that White's signature is a forgery is well-grounded. Understandably, Defendants disagree. They argue, "Kafi's forgery allegations are purely speculative and fail to meet [Rule 9(b)'s] stringent pleading requirements." Dkt. 66 at 16.

Rule 9(b) does not require omniscience. As mentioned, the Fifth Circuit has held that "[i]f the facts pleaded in a complaint are peculiarly within the opposing party's knowledge, fraud pleadings may be based on information and belief." *Tuchman*, 14 F.3d at 1068. *Cf.*, *ABC Arbitrage v. Tchuruk*, 291 F.3d 336, 354 (5th Cir. 2002) ("[T]he plaintiffs need not allege all facts that may be related to their claims, since such a requirement is impossible at the pleading stage because, in nearly every securities fraud case, only the defendants know all the facts related to the alleged fraud." (quotations omitted)).

***6** That said, the Fifth Circuit warned that relaxation of Rule 9(b)'s requirements "must not be mistaken for license to base claims of fraud on speculation and conclusory allegations." *Tuchman*, 14 F.3d at 1068. That is, "while Rule 11(b)(3) may relax Rule 9(b)'s particularity requirement, it cannot be construed to eviscerate that requirement in its entirety by permitting rank speculation." *Moon v. Harrison Piping Supply*, 375 F. Supp. 2d 577, 593 (E.D. Mich. 2005), *rev'd in part on other grounds*, 465 F.3d 719 (6th Cir. 2006). So, even under a non-restrictive application of the rule where allegations are based on information and belief, "the complaint must set forth a factual basis for such belief." *U.S. ex rel. Thompson*, 125 F.3d at 903. *See also Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990) ("[A] complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard.").

As one leading authority explains:

> Allegations of the circumstances of a fraud based on information and belief, which are commonplace and often a necessity in many litigation contexts, usually do not satisfy the particularity requirement of Rule 9(b), *unless accompanied by a statement of the facts upon which the pleader's belief is founded or*

> *by allegations that the necessary information lies within the defendant's control.*

5A CHARLES A. WRIGHT & ARTHUR R. MILLER, *Federal Practice and Procedure* § 1298 (4th ed.) (emphasis added).

The prima facie elements of the claim will assist in determining whether the plaintiff has satisfied a relaxed application of Rule 9(b)'s "time, place, contents, and identity" standard. *See* *Wagemann v. Dr.'s Hosp. of Slidell, LLC*, No. CIV.A. 09-3506, 2010 WL 3168087, at *3 (E.D. La. Aug. 6, 2010). Put differently, the degree of particularity required is guided by the nature of the claim. *See* *U.S. ex rel. Foster v. Bristol-Myers Squibb Co.*, 587 F. Supp. 2d 805, 819 (E.D. Tex. 2008) ("Just as the particularity requirements of Rule 9(b) are depend[e]nt on the facts of the case, they are also depend[e]nt on Rule 8.").

In sum, to satisfy Rule 9(b)'s heightened pleading requirement, Kafi must convince me that there is a reasonable basis for its belief that White's and Avila's signatures are forgeries and that evidentiary support will be forthcoming should the case proceed.

2. Kafi's Forgery Allegations

Keeping in mind that a plaintiff must plead specific facts and not mere conclusory allegations, but accepting as true the well-pleaded factual allegations of the complaint and reasonable inferences to be drawn from them, I turn to Kafi's Fourth Amended Complaint.

Below are the allegations that Kafi has "allege[d] upon information [are] reasonably likely to be discovered," *see* Dkt. 63 at 6, 12–13:

- "[T]he signature of Derrick White was not signed or affixed by Derrick White nor was the signature signed or affixed by someone else" with White's knowledge and authority. *Id.* at 6.
- "[T]he signature [of] Miranda Avila was not signed or affixed by Miranda Avila nor was the signature signed or affixed by someone else" with Avila's knowledge or authority. *Id.*
- "Sand Canyon and NTC altered, made, completed, executed, and authenticated the 2012 Assignment so that it purported to be signed by Derrick White and [notarized by] Miranda Avila when in fact Derrick White and Miranda Avila did not sign and did not authorize anyone else to sign for them." *Id.* at 12.
- "Sand Canyon and NTC issued, transferred, [possessed], registered, passed off, and published the 2012 assignment when it purported to be signed by Derrick White and Miranda Avila." *Id.* at 12–13.

3. The Basis for Kafi's Belief That White's Signature Is a Forgery

***7** Kafi's Fourth Amended Complaint includes a handful of exhibits that it claims demonstrate a reasonable basis for its belief that the Assignment is a forgery. I will address the relevant exhibits, in turn.

i. Osceola County, Florida Records Audit

The first is a 2014 property records audit performed in Osceola County, Florida,[5] which identifies four property transactions where White, as an "alleged NTC employee," executed unrelated assignments in which he misrepresented his capacity to do so "as Assistant Secretary of MERS" on behalf of several now-defunct corporations. Dkt. 63-10 at 121–22.

Kafi relies on the Osceola County records audit to cast general aspersions on NTC's business practices. *See* Dkt. 63 at 6–7. Buried within the 332-page document are allegations brought by the Illinois Attorney General that implicate NTC in a "robosigning" scheme. *See* Dkt. 63-10 at 111. Ostensibly relevant here is an allegation that "[d]ocuments generated by NTC were ... signed by NTC employees who had no personal knowledge of the facts they were attesting to." *Id.* The records audit also describes NTC as "a known document manufacturing plant," engaged in a pattern of recording documents that were prepared but not executed by NTC employees. *Id.* at 109–12.

The report itself is replete with conclusory allegations. United States District Judge Gray Miller found the same records audit less than useful when considering a similar forgery allegation. *See* *Reed v. Bank of Am., N.A.*, No. CV H-15-2005, 2016 WL 3058303, at *4 (S.D. Tex. May 31, 2016) ("Even considering the report, it simply makes the conclusory statement that Martha Munoz is a 'known Bank of America robosigner.' The report offers no support for this allegation. Moreover, the report is no evidence that the assignments at issue in this case were forged." (internal citation omitted)).

But even if I were to accept the allegations contained within the records audit as the gospel truth, they are not the silver bullet Kafi believes them to be. That is, the records audit does not lend support to Kafi's theory that White's signature is a forgery. If anything, it tilts the scales in the opposite direction, suggesting that White personally signed the Assignment but misrepresented his capacity to do so as Sand Canyon's Vice President.

Under Texas law, "a contract executed on behalf of a corporation by a person fraudulently purporting to be a corporate officer is, like any other unauthorized contract, not void, but merely voidable." *Reinagel v. Deutsche Bank Nat'l Tr. Co.*, 735 F.3d 220, 226 (5th Cir. 2013). This is significant because, under Texas law, a non-party to a mortgage assignment (i.e., homeowner) may only challenge the assignment on grounds that would render it void, not merely voidable. *See* *EverBank, N.A. v. Seedergy Ventures, Inc.*, 499 S.W.3d 534, 542 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("When the homeowner is just a third party to an assignment, the homeowner lacks standing to challenge the assignment on grounds that would merely render the assignment voidable."). Here, Kafi's standing to challenge the Assignment hinges on the fact that "[a] forged deed is void" under Texas law. *Vazquez v. Deutsche Bank Nat'l Tr. Co., N.A.*, 441 S.W.3d 783, 787 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

***8** Said differently, allegations of White's supposed nefarious conduct found in the

records audit are not comparable to the allegations made by Kafi in this case and do not provide a reasonable basis for its forgery allegations.

ii. AOL.com News Article

The second exhibit is an online news article similarly discussing NTC's "problematic" business practice of robosigning mortgage-related documents. Dkt. 63-11. In its briefing, Kafi specifically references an NTC employee mentioned in the article who, according to the article, testified at deposition that he notarized hundreds of documents at a time and, on occasion, signed documents as a vice president of various financial institutions. *See id.* at 3. That same employee, however, also apparently testified that he was unaware whether other NTC employees did the same. *See id.*

Cutting to the chase, the article makes no mention of White, Avila, or the Assignment at issue. Like the records audit, the article's general allegations regarding NTC's supposed business practices do nothing to demonstrate a reasonable basis for Kafi's forgery allegations in this case.

iii. Forensic Document Examination Preliminary Report

The third exhibit is the aforementioned "Forensic Document Examination Preliminary Report," prepared by forensic document examiners Dale Stobaugh ("Stobaugh") and Kenneth Crawford ("Crawford"), both of whom analyzed dozens of White's and Avila's "known signatures" and compared them to the supposed forgeries. *See* Dkt. 63-14. The report begins with the caveat, "[d]ue to the lack of detail and possible misinterpretation of foreign matter reflected in copies [of signatures], it is usually our policy not to base definite identification or elimination by handwriting comparison on any type of reproduction," and includes a disclaimer that ink originals of the known signatures "could provide a basis for a more definite determination." *Id.* at 1–2. Nonetheless, the report cites "consistent differences" between the known signatures and supposed forgeries before concluding that these inconsistencies "indicat[e]" White and Avila did not author their respective signatures on the Assignment. *Id.* at 2.

iv. Avila's Deposition Testimony

Avila testified her signature on the Assignment is authentic and that White signed the Assignment in front of her. *See* Dkt. 66-1 at 5–6. However, upon cross-examination, Avila conceded that she did not specifically remember White signing "this particular assignment" but could not recall an instance where she notarized a document where the signer was not in her presence. *Id.* at 6–7.

Predictably, the parties' view of Avila's testimony is considerably different. Defendants would have me look at Avila's seemingly unequivocal statement that White "signed [the Assignment] in front of [her]." *Id.* at 6. While Kafi emphasizes that Avila walked back her testimony, admitting she did not recall White signing the Assignment in question. *See id.* at 6–7 (Q: [A]re you saying that you specifically recall that this particular assignment from January 5, 2012, that you have specific recollection that [White] signed this in front of you?" A: "I don't remember specifically that

day, but we sign in front of each other all the time.").

4. Kafi Has Pleaded Forgery with Sufficient Particularity

***9** Defendants' flagship argument is that "the Fifth Circuit has repeatedly held that these types of signature comparison are insufficient to state a [forgery] claim." *Id.* at 14 (citing *Bynane v. Bank of N.Y. Mellon*, 866 F.3d 351, 360 (5th Cir. 2017) and *Kreway v. Countrywide Bank*, 647 F. App'x 437, 437–38 (5th Cir. 2016)).

The short of it is that the Fifth Circuit has never decided a case like this. In both *Bynane* and *Kreway*, the plaintiff's forgery allegations were premised solely on the plaintiff's own deduction that the assignment was a forgery because, according to the plaintiff, the signature on the assignment in question differed from the signer's signature on other unrelated assignments, which the plaintiff had attached to the complaint for the court to compare. *See Bynane*, 866 F.3d at 361; *Kreway*, 647 F. App'x at 438.

This case might have started out as a *Bynane* or *Kreway*-type signature-comparison case, but Kafi amended its pleadings and dropped the signature-comparison argument altogether. Now, Kafi's allegations chiefly rely on the preliminary forensic document examination report. Stobaugh and Crawford —professional forensic document examiners —compared dozens of versions of White's and Avila's "known signatures" that were produced by NTC with the supposed forgeries and found "consistent differences," which they concluded "indicat[e]" that White and Avila "did not write the signature in that name on the [Assignment]." Dkt. 63-14 at 2. While the Fifth Circuit has constructed an admittedly rigorous test for successfully pleading forgery allegations of this type, the preliminary report distinguishes Kafi's allegations from those made in *Bynane* and *Kreway.* Viewed in the light most favorable to Kafi, I find that the preliminary report demonstrates a reasonable basis for its allegation that the Assignment is a forgery. *See* Dkt. 63 at 6 (alleging that "[t]he forgery allegations ... in this complaint have evidentiary support and will likely have even more evidentiary support after a reasonable opportunity for further investigation or discovery").

Moreover, if I were to adopt the position Defendants would have me take, it is difficult to envision how a plaintiff in Kafi's shoes could ever surmount Rule 9(b)'s heightened pleading standard. Admittedly, Kafi does not allege who forged the signatures, when the signatures were forged, where the signatures were forged, or how the signatures were forged. However, there is no question that this information is "peculiarly within the opposing party's knowledge." *Tuchman*, 14 F.3d at 1068. To hold otherwise would essentially require Kafi first figure out who (allegedly) forged the signatures (without the benefit of discovery) and then drag them into court to explain when, where, and how they did so. This would be a draconian application of Rule 9(b) where, as here, Kafi has demonstrated a reasonable basis for its belief that the signatures are forgeries. *See U.S. ex rel. Foster*, 587 F. Supp. 2d at 819 ("the particularity requirements of Rule 9(b) are depend[e]nt on the facts of the case"); 5A CHARLES A. WRIGHT & ARTHUR R.

MILLER, *Federal Practice and Procedure* § 1291 (4th ed.) ("[T]hose portions of Rule 9 that require specific or detailed allegations should not be construed in an unduly strict fashion.").

***10** Courts are intended as places of redress. For this reason, motions to dismiss are generally viewed with disfavor, as they tend to undermine the overarching public policy favoring merits-based disposition. *See Test Masters*, 428 F.3d at 570 ("Motions to dismiss are viewed with disfavor and are rarely granted."); 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *Federal Practice and Procedure* § 1356 (3d ed.) ("[A] motion under Federal Rule 12(b)(6) ... is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case."). Because I find that *Bynane* and *Kreway* are not binding on the facts of this case, I recommend the Court deny Defendants' motion to dismiss Kafi's claims for declaratory relief based on the supposed forgery and decide the merits of Kafi's forgery allegations at summary judgment or at trial. *See Foley v. Wells Fargo Bank, N.A.*, 772 F.3d 63, 72 (1st Cir. 2014) ("[A] primary purpose of a Rule 12(b)(6) motion is to weed out cases that do not warrant reaching the (oftentimes) laborious and expensive discovery process because, based on the factual scenario on which the case rests, *the plaintiff could never win.*" (emphasis added)).

C. TEXAS LAW DOES NOT RECOGNIZE FORGERY AS AN INDEPENDENT CIVIL CAUSE OF ACTION

In addition to seeking a declaratory judgment that the Assignment is a forgery, Kafi has pleaded an independent "forgery" cause of action against Sand Canyon and NTC. Thus, I must address whether "forgery" is a recognized civil claim under Texas law and, if so, whether Kafi has sufficiently pleaded such a claim. *See Breitling v. LNV Corp.*, No. CV 3:15-CV-0703-B, 2015 WL 5896131, at *8 (N.D. Tex. Oct. 5, 2015) (observing that whether forgery qualifies as a tort under Texas "is unclear" and collecting conflicting authority).

Kafi's Fourth Amended Complaint cites a single state-court decision in support of its position that a common-law claim of forgery exists under Texas law, *Saxer v. Nash Phillips-Corpus Co. Real Estate*, 678 S.W.2d 736 (Tex. App.—Tyler 1984, writ ref'd n.r.e.). In that case, the court of appeals wrote as follows: "Forgery is an unlawful and unconscionable act for which a common law court may provide a civil remedy independent of the remedies provided by [the Deceptive Trade Practices Act]." *Id.* at 739 (footnote omitted). Critically, following the phrase "unconscionable act," the court included a footnote citation to Texas Penal Code § 32.21, which codifies forgery as a criminal offense. *See id.* at 739 n.2.

As United States District Judge Sim Lake aptly pointed out, "in order for a private right of action to exist under a criminal statute, there must be a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." *Van Duzer v. U.S. Bank Nat'l Ass'n*, 995 F. Supp. 2d 673, 699 (S.D. Tex.) (cleaned up), *aff'd*, 582 F. App'x 279 (5th Cir. 2014). What's more, *Van Duzer* considered the very question before me now—whether a private cause of action for "forgery" exists under Texas law. *See id.* In deciding that no such civil claim exists, Judge Lake explained: "Plaintiffs have

not provided any statutory basis for inferring that they are entitled to bring a private cause of action on the basis of any criminal statute. Thus, any attempt by Plaintiffs to assert a cause of action under a criminal statute fails as a matter of law." *Id.*

Much like the plaintiff in *Van Duzer*, Kafi's forgery allegations track the language found in the Texas Penal Code—though Kafi does not cite to the Penal Code itself. *Compare* Dkt. 63 at 12–13, *with* Tex. Penal Code § 32.21(a)–(b). Kafi cannot create a civil cause of action simply by parroting the Texas Penal Code. Because there is no statutory basis for me to infer that Texas law recognizes a civil cause of action for violating the criminal forgery statute, I find that forgery is not a cognizable, stand-alone civil claim under Texas law. *See Mathis v. DCR Mortg. III Sub, I, LLC*, 952 F. Supp. 2d 828, 836 (W.D. Tex. 2013) (dismissing a forgery claim "to the extent it was asserted as any kind of freestanding cause of action"). Accordingly, I recommend the Court dismiss Kafi's forgery claims against Sand Canyon and NTC with prejudice.

D. STATUTE OF LIMITATIONS

***11** Defendants label Kafi's claim for declaratory relief based on the expiration of the statute of limitations to foreclose on the Property as "nothing more than speculation," arguing that Kafi has pleaded no facts to support its allegations that the notices of trustee's sale[6] were ever mailed to the Richardsons or that the notices were proceeded by a notice of intent to accelerate. Dkt. 66 at 25–26.

Under Texas law, a suit for the foreclosure of a real property lien must be brought within four years of the maturity date of the last installment of an obligation payable in installments. TEX. CIV. PRAC. & REM. CODE §§ 16.035(a), (e). However, default alone does not automatically start the limitations clock. If a note or deed of trust secured by real property contains an optional acceleration clause—as in this case—"the action accrues only when the holder actually exercises its option to accelerate." *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001).

Effective acceleration requires two acts: (1) notice of intent to accelerate; and (2) notice of acceleration. *See id.* Both notices must be "clear and unequivocal," *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991), and notice of acceleration is ineffective unless preceded by proper notice of intent to accelerate. *See Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 234 (Tex. 1982).

Kafi has sufficiently pleaded facts to assert a plausible claim that the statute of limitations to foreclose on the Property has expired. Kafi alleges that the debt was accelerated—and, therefore, the limitations period to bring a foreclosure action began—on September 5, 2012, when "notice of foreclosure sale was filed in the real property records and mailed to the Richardsons," or, in the alternative, "on November 6, 2012, when another notice of foreclosure sale was filed in the real property records and mailed to the Richardsons." Dkt. 63 at 14. Kafi further alleges the notices were "preceded by an unequivocal notice of intent to accelerate," though Kafi cabins this allegation by pleading it "will likely have evidentiary

support after a reasonable opportunity for further investigation or discovery." *Id.* at 15. Accepting these facts as true for the purposes of the motion to dismiss, I find that Kafi has sufficiently pleaded the expiration of the statute of limitations to foreclose.

Accordingly, I recommend the Court deny Defendants' motion to dismiss Kafi's claim for declaratory relief based on the expiration of the statute of limitations to foreclose on the Property. *See e.g.*, *Kafi, Inc. v. Deutsche Bank Nat'l Tr. Co.*, No. CV H-20-3247, 2021 WL 5143309, at *4 (S.D. Tex. Oct. 5, 2021) (recommending the same result under near-identical circumstances).

E. QUIET TITLE

***12** Under Texas law, an action to quiet title—also known as a suit to remove cloud from title—is one in which a superior title holder seeks to remove a challenge to that title. *See Brumley v. McDuff*, 616 S.W.3d 826, 835 (Tex. 2021). "A cloud on title exists when an outstanding claim or encumbrance is shown, which on its face, if valid, would affect or impair the title of the owner of the property." *Gordon v. W. Houston Trees, Ltd.*, 352 S.W.3d 32, 42 (Tex. App.—Houston [1st Dist.] 2011, no pet.). "An action to remove a cloud from title exists to enable the holder of the feeblest equity to remove from his way to legal title any unlawful hindrance having the appearance of a better right." *Hahn v. Love*, 321 S.W.3d 517, 531 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (quotation omitted). In a suit to remove a cloud from his title, the plaintiff has the burden of supplying the proof necessary to establish his superior equity and right to relief. *See Lance v. Robinson*, 543 S.W.3d 723, 739 (Tex. 2018). "That is, the plaintiff must prove, as a matter of law, right, title, or ownership in himself with sufficient certainty to enable the court to see that he has a right of ownership and that the alleged adverse claim is a cloud on the title that equity will remove." *Hahn*, 321 S.W.3d at 531. "The effect of a suit to quiet title is to declare invalid or ineffective the defendant's claim to title." *Essex Crane Rental Corp. v. Carter*, 371 S.W.3d 366, 388 (Tex. App.–Houston [1st Dist.] 2012, pet. denied).

The elements of a claim for relief to quiet title are: (1) a valid equitable interest in a specific property, (2) title to the property is affected by a claim by the defendant, and (3) although facially valid, the defendant's claim is invalid or unenforceable. *See id.* To prevail, the plaintiff must demonstrate that she has superior title to the property at issue. *See id.*

Here, there is no question that Kafi has an interest in the Property. Moreover, Wells Fargo's claim of a right to foreclose and thereby transfer legal title to the Property constitutes a cloud on Kafi's title. *E.g.*, *Morales v. Wells Fargo Bank, N.A.*, No. SA-13-CV-410-XR, 2013 WL 6057853, at *6 (W.D. Tex. Nov. 14, 2013). *See Lighthouse Church of Cloverleaf v. Tex. Bank*, 889 S.W.2d 595, 603 (Tex. App.—Houston [14th Dist.] 1994, writ denied) ("Foreclosure transfers title ... to another party"). As for the third element, either of Kafi's two principal arguments—forgery[7] or limitations[8]—if proven, would demonstrate Wells Fargo's claimed interest in the Property is invalid or unenforceable, and that Kafi has a superior title.

For these reasons, I find that Kafi has alleged facts that, if true, would permit it to recover on the strength of its own title and has demonstrated the existence of a potentially invalid charge against that title. Accordingly, I recommend the Court deny Defendants' motion to dismiss Kafi's claim to quiet title to the Property without prejudice to re-urging the issue at summary judgment.

F. EQUITABLE RIGHT OF REDEMPTION

***13** In the alternative, Kafi has also pleaded a claim for equitable redemption. A right of redemption is the right to redeem the property subject to foreclosure within a reasonable time of default by paying off the full amount owed on the mortgage. *See* *Scott v. Dorothy B. Schneider Estate Tr.*, 783 S.W.2d 26, 28 (Tex. App.—Austin, 1990 no writ). In order to state a claim for equitable redemption, a plaintiff must allege: (1) it has a legal or equitable interest in the property subject to the mortgage; (2) it is ready, able, or willing to redeem the property in question by paying off the amount of the liens to which the property is subject; and (3) that the equity of redemption was asserted before a foreclosure sale occurred. *See id.*

Kafi's alleged right to equitable redemption is based on its allegations that: (1) it is the "legal owner of the Property"; (2) it "would suffer a loss of ownership and the right to possession and control of the Property if Wells Fargo and PHH are allowed to foreclose"; and (3) it "is ready, able or willing to redeem the Property ... by paying off the amount of any *valid and subsisting* liens to which the Property is subject." Dkt. 63 at 17. Regarding the latter, Kafi pleads that it has a net worth of $7 million, which dwarfs the loan's principal amount ($260,248), and would "pay any *valid and subsisting* liens in cash." *Id.* Finally, Kafi represents that the current amount owed under the loan agreement is unknown and subject to discovery. *See id.*

Defendants maintain that Kafi has failed to sufficiently plead a claim for equitable redemption because it has not tendered all amounts due on the underlying note. *See* *Owens v. Bank of Am., NA*, No. CIV.A. H-11-2552, 2012 WL 912721, at *3 (S.D. Tex. Mar. 16, 2012) ("Thus, within the context of the plaintiffs' equitable redemption claim, the plaintiffs must tender the redemption amount (including the full amount of the defendant's lien) either to the defendant or the Court.").

Simply pleading willingness and the ability to pay the amount owed has been rejected by just about every court to consider the issue. Nonetheless, some courts have decided that alleging facts that adequately explain the plaintiff's ability to pay off the amount owed on the subject property is sufficient to survive a motion to dismiss. *Compare*, *DBDFW 3 LLC v. JPMorgan Chase Bank, N.A.*, No. 3:18-CV-3148-C-BN, 2019 WL 823810, at *8 (N.D. Tex. Feb. 6, 2019) ("Stating that the plaintiff is willing to satisfy the lien is insufficient to state a claim for equitable redemption. The plaintiff must provide additional details such as the value of the lien, how it would pay, its own net worth or assets, or any other information from which the court could infer that plaintiff's right to relief is plausible."), *with* *330 Cedron Tr. v. Citimortgage, Inc.*, No. SA-14-CV-933-XR, 2015 WL 1566058, at *3 (W.D. Tex. Apr. 8, 2015) ("Cedron offers no facts in its complaint

that demonstrate it is [ ] 'ready, willing, and able' to pay off the amount of the existing liens to which the Property is subject .... Cedron offers no facts about the value of such lien, how it would pay, its own net worth or assets, etc. The conclusory statement that merely recites an element of the cause of action is not enough to raise the right to relief above a purely speculative level.").

Here, Kafi has pleaded that it is ready, willing, and able to pay off "any *valid and subsisting* liens to which the Property is subject." Dkt. 63 at 17. Standing alone, this would be insufficient. But Kafi has also pleaded that "it has a net worth of $7 million and would pay any *valid and subsisting* liens in cash." *Id.* Moreover, although Kafi offers no facts about the amount due, it does include the loan's principal amount: $260,248. Given that Kafi claims a net worth of $7 million, Kafi has sufficiently alleged that it has the assets to pay off whatever remains on the loan.

***14** In my mind, these extra allegations nudge Kafi's equitable redemption claim above a purely speculative level. *See* *Green for 2016 Wolf Tr. v. Bank of Am., N.A.*, No. CV H-17-0772, 2017 WL 1424332, at *2 (S.D. Tex. Apr. 20, 2017) ("Plaintiff has plead sufficient facts to state a claim for its equitable right of redemption that is plausible on its face."); *id.* ("Although the cases on which Defendant relies correctly identify tender of the amount owed as a condition precedent to recovery of title, tender is not required in order to state a legally cognizable claim." (quotation omitted)).

G. KAFI CANNOT OBTAIN ANY RELIEF FROM NTC OR SAND CANYON BECAUSE NEITHER PARTY CLAIMS A CURRENT INTEREST IN THE MORTGAGE

It is undisputed that PHH is the current loan servicer, and, since 2012, Wells Fargo has been the assignee of record of the deed of trust. There are no allegations that Sand Canyon has a current interest in the loan or deed of trust, nor are there any allegations that NTC has ever claimed such an interest. Moreover, there are no allegations that Sand Canyon or NTC is attempting to foreclose on the Property. Thus, even if Kafi ultimately succeeds on any of its claims for declaratory relief, it could not obtain any of the requested relief from NTC or Sand Canyon. Accordingly, I recommend the Court dismiss Kafi's claims against Sand Canyon and NTC.

H. KAFI'S CLAIMS FOR EXEMPLARY DAMAGES

Kafi alleges that Defendants' conduct in making, presenting, or using the Assignment and the post-2008 notices of sale constitute fraud, malice, or gross negligence, entitling Kafi to exemplary and punitive damages. *See* Dkt. 63 at 18 (citing TEX. CIV. PRAC. & REM. CODE § 41.003(a)).

An independent tort must be separately pleaded and proved to recover exemplary damages. *See* *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981) (holding that exemplary damages were "not recoverable because the [Appellees] failed to plead and prove a tort allowing recovery of exemplary damages"); *Sharpe v. Kilcoyne*, 962 S.W.2d 697, 703

n.5 (Tex. App.—Fort Worth 1998, no pet.) ("To support an award of exemplary damages, the plaintiff must prove a 'distinct' tortious injury with actual damages arising from that injury."). Because Kafi's forgery allegations live on only through its requests for declaratory relief, it is unable to obtain exemplary damages. Accordingly, I recommend the Court dismiss Kafi's request for exemplary damages.

CONCLUSION

For the above reasons, I recommend that the Court **GRANT in part** and **DENY in part** Defendants' Joint Motion to Dismiss (Dkt. 66). Specifically, I recommend the Court dismiss (1) Kafi's civil forgery claim against all Defendants; (2) Kafi's claim for exemplary damages; and (3) all claims against NTC and Sand Canyon. All other requested relief is denied without prejudice to re-urging at summary judgment.

The Clerk shall provide copies of this Memorandum and Recommendation to the respective parties who have 14 days from receipt to file written objections pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002–13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

All Citations

Not Reported in Fed. Supp., 2022 WL 3084480

Footnotes

1 Kafi's Fourth Amended Complaint alleges that White executed the Assignment as "an 'Assistant Secretary' for" Mortgage Electronic Registration Systems, Inc. Dkt. 63 at 5–6. However, the Assignment identifies White as Sand Canyon's Vice President. *See* Dkt. 63-9. Whatever the case may be, the capacity in which White executed the Assignment has no bearing on my decision.

2 The June 2017 notice of sale identifies Ocwen Loan Servicing, LLC ("Ocwen") as the Richardsons loan servicer. Dkt. 63-7 at 2. Kafi alleges Ocwen merged with PHH Mortgage Corporation in 2019, and that "PHH now claims to be the [loan's] mortgage servicer." Dkt. 63 at 9.

3 Specifically, Kafi seeks the following declarations that: (1) Defendants lack "legal or contractual" standing to conduct a foreclosure sale; (2) the Assignment is void as a forgery; (3) the Assignment is void because Sand Canyon had no right, title, or interest in the mortgage on the date of the Assignment; (4) the Assignment is void because it violates the public policy favoring identification of lienholders and avoidance of "secret liens"; (5) there is no complete and unbroken chain of

assignments and transfers of the deed of trust or mortgage documents from Sand Canyon to any of the other Defendants; (6) not all assignments and transfers of the mortgage were properly recorded in the public record, in violation of TEX. LOC. GOV'T CODE § 192.007; (7) the deed of trust is null and void; and (8) the limitations period to foreclose has expired. Dkt. 63 at 10, 13–15.

4 *Hooks* concerned the fraudulent-concealment doctrine. Although the discovery rule and fraudulent-concealment doctrine are separate tolling doctrines that are "characterized by different substantive and procedural rules," *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996), "cases discussing fraudulent concealment are relevant to the meaning of reasonable diligence" under the discovery rule. *Hooks*, 457 S.W.3d at 58 n.9.

5 The 332-page records audit is part one of a two-part forensic examination of Osceola County, Florida's real property and circuit court records.

6 Defendants cite a decision out of the Houston Division for the proposition that I should dismiss Kafi's limitations claim because nothing in the record indicates the Richardsons actually received the notices of trustee's sale. *See* Dkt. 66 at 25–26 (citing *Ther & Co. v. U.S. Bank, N.A.*, No. CV H-18-2916, 2019 WL 5684226, at *3 n.1 (S.D. Tex. Oct. 31, 2019)). Critically, *Ther* was decided at summary judgment. In contrast, Rule 8's liberal pleading standard does not require that a plaintiff produce evidence supporting the facts alleged; "it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" to support what is alleged. *Twombly*, 550 U.S. at 556.

7 "A void contract of assignment confers no right to foreclose under the deed on the purported assignee[.]" *Puente v. CitiMortgage, Inc.*, No. 3:11-CV-2509-N, 2012 WL 4335997, at *6 n.14 (N.D. Tex. Aug. 29, 2012) (applying Texas law). *See Wright v. Matthews*, 26 S.W.3d 575, 578 (Tex. App.—Beaumont 2000, pet. denied) ("Any deed, contract, judgment or other instrument not void on its face that purports to convey any interest in or make any charge upon the land of a true owner, the invalidity of which would require proof, is a cloud upon the legal title of the owner.").

8 "It is established law in Texas that, when a debt is barred, an action to foreclose a lien or mortgage given as security for it is barred also." *Dupree v. Mansur*, 214 U.S. 161, 166 (1909). *See Wolf*, 44 S.W.3d at 567 ("Under state law, a sale of real property under a power of sale in a mortgage or deed of trust that creates a real-property lien must be made not later than four years after the day the cause of action accrues. When this four-year period expires, the real-property lien and the power of sale to enforce the lien become void." (internal citations omitted)).

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CASE NO. 2

2022 WL 4454395
Only the Westlaw citation
is currently available.
United States District Court,
S.D. Texas, Galveston Division.

KAFI, INC., Plaintiff.
v.
SAND CANYON CORPORATION
f/k/a Option One Mortgage
Corporation, et al., Defendants.

No.
3
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20
-
cv
-
00354
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Signed September 23, **2022**

Attorneys and Law Firms

Jeffrey Craig Jackson, Charles Daniel Brooks, Jeffrey Jackson & Associates, PLLC, Houston, TX, for Plaintiff.

Brett W. Schouest, Dykema Gossett PLLC, San Antonio, TX, Stephen Andrew Walsh, Weinberg Wheeler et al, Birmingham, AL, for Defendant Sand Canyon Corporation.

Kurt Lance Krolikowski, Ryan Benner Burns, Locke Lord LLP, Houston, TX, for Defendant Nationwide Title Clearing, Inc.

Neyma Edelyn Figueroa, Brett W. Schouest, Dykema Gossett PLLC, San Antonio, TX, for Defendants Wells Fargo Bank, N.A. as Trustee for ABFC 2006-OPT3 Trust, Asset Backed Funding Corporation Asset-Backed Certificates, Series 2006-OPT3, PHH Mortgage Corporation.

ORDER ADOPTING MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

JEFFREY VINCENT BROWN, UNITED STATES DISTRICT JUDGE

***1** On February 24, 2021, all dispositive and non-dispositive pretrial matters in this case were referred to United States Magistrate Judge Andrew M. Edison under 28 U.S.C. § 636(b)(1)(A) and (B). *See* Dkt. 38. Judge Edison filed a memorandum and recommendation on August 3, **2022**, recommending that the court grant in part and deny in part the defendants' joint motion to dismiss claims brought against them by Kafi, Inc. ("Kafi") for failure to state a claim. *See* Dkt. 72. Specifically, Judge Edison recommended the court dismiss: (1) Kafi's forgery claim against all defendants; (2) Kafi's claim for exemplary damages; and (3) Kafi's claims against Nationwide Title Clearing ("NTC") and Sand Canyon Corporation f/k/a Option One Mortgage Corporation ("Sand Canyon"). In all other respects, Judge Edison recommended the court deny the relief sought by the defendants in their joint motion to dismiss without prejudice to re-urging at summary judgment.

On August 17, **2022**, the defendants timely filed their objections to the memorandum and recommendation. *See* Dkt. 73. In accordance with 28 U.S.C. § 636(b)(1)(C), this court is

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required to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection [has been] made." 28 U.S.C. § 636(b)(1)(C). After conducting this de novo review, the court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.*; *see also* Fed. R. Civ. P. 72(b)(3).

The court has carefully considered the objections, the memorandum and recommendation, the pleadings, and the record. The court accepts Judge Edison's memorandum and recommendation and adopts it as the opinion of the court. It is therefore ordered that:

(1) Judge Edison's memorandum and recommendation (Dkt. 72) is approved and adopted in its entirety as the holding of the court;

(2) The defendants' joint motion to dismiss (Dkt. 66) is granted in part and denied in part.

(3) Kafi's forgery claim against all defendants is dismissed with prejudice;

(4) Kafi's claim for exemplary damages is dismissed is dismissed with prejudice;

(5) Kafi's claims against NTC and Sand Canyon are dismissed with prejudice, and those parties are dismissed from the case; and

(6) All other relief sought by the defendants in their joint motion to dismiss is denied without prejudice to re-urging at summary judgment.

All Citations

Not Reported in Fed. Supp., 2022 WL 4454395

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CASE NO. 3

5A Fed. Prac. & Proc. Civ. § 1291 (4th ed.)

Federal Practice and Procedure (Wright & Miller) | September 2025 Update

Federal Rules of Civil Procedure

Chapter 4. Pleadings and Motions

Rule 9. Pleading Special Matters
Author: A. Benjamin Spencer

A. Pleading Special Matters—In General

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§ 1291 Pleading Special Matters—In General

Primary Authority

- **Fed. R. Civ. P. 9**

In contrast to the broad general pleading principles in Federal Rule of Civil Procedure 8,[1] Federal Rule of Civil Procedure 9 contains a number of provisions designed to solve or ameliorate several pleading problems that historically have been dealt with in special ways. In some instances, Rule 9 preserves prior practice regarding the detail with which certain matters must be pleaded—for example, with regard to fraud and mistake (Rule 9(b))[2]—but in other respects the rule alleviates the stringency of past pleading practice—for example, in the case of capacity (Rule 9(a))[3] or conditions precedent (Rule 9(c)).[4]

Courts and commentators have traditionally noted that Rule 9 must be read in light of the basic pleading philosophy set forth in Rule 8[5] and in conjunction with the directives as to the form of the pleadings that appear in Federal Rule of Civil Procedure 10.[6] This has traditionally meant that those portions of Rule 9 that require specific or detailed allegations should not be construed in an unduly strict fashion. Although the federal rules in their inception contemplated a de-emphasis of the pleadings and a general simplicity in pleading practice,[6.50] the Supreme Court's decisions in Bell Atlantic Corporation v. Twombly[7] and Ashcroft v. Iqbal[8] have modified this understanding to some extent by requiring the pleading of nonconclusory factual allegations sufficient to state a plausible claim for relief.[9] These modified strictures of Rule 8—not simply the classic liberal

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pleading philosophy of the federal rules—must be kept in mind when interpreting the requisites and allowances of Rule 9.[10] That said, the Court has stood by the notion that "[t]he federal rules effectively abolish the restrictive theory of the pleadings doctrine" and indicated that stating facts that entitle a litigant to relief "simply, concisely, and directly" will suffice to stave off a dismissal.[11] Thus, although Rule 9(b) calls for fraud (and mistake) to be pleaded with particularity, the allegations still may be short, plain, simple, direct, and concise.[12]

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Footnotes

1 **Rule 8**
See §§ 1201 to 1286.

2 **Rule 9(b)**
See §§ 1296 to 1301.1.

"Admittedly, Kafi does not allege who forged the signatures, when the signatures were forged, where the signatures were forged, or how the signatures were forged. However, there is no question that this information is peculiarly within the opposing party's knowledge. To hold otherwise would essentially require Kafi first figure out who (allegedly) forged the signatures (without the benefit of discovery) and then drag them into court to explain when, where, and how they did so. This would be a draconian application of Rule 9(b) where, as here, Kafi has demonstrated a reasonable basis for its belief that the signatures are forgeries." Kafi, Inc. v. Sand Canyon Corporation, 2022 WL 3084480 (S.D. Tex. 2022) (magistrate judge) (citations and internal quotation marks omitted), **citing Wright & Miller**, report and recommendation adopted, 2022 WL 4454395 (S.D. Tex. 2022).

3 **Rule 9(a)**
See §§ 1292 to 1294.

4 **Rule 9(c)**
See §§ 1302 to 1304.

5 **Pleading philosophy**
See §§ 1202, 1215 to 1223, 1281 to 1286.

6 **Form of pleading**
See §§ 1321 to 1327.

6.50 **Simplicity in pleading**
Charles E. Clark, The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure, 23 A.B.A.J. 976 (1937) ("There is certainly no longer reason to force the pleadings to take the place of proof, and to require other ideas than simple concise statements, free from the requirement of technical detail.").

7 **Twombly case**
550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

8 **Iqbal case**
556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

9 **Twombly and Iqbal pleading standard**
See Johnson v. City of Shelby, Miss., 135 S. Ct. 346, 347, 190 L. Ed. 2d 309 (2014) ("A plaintiff, [Twombly and Iqbal] instruct, must plead facts sufficient to show that her claim has substantive plausibility.").

10 **Rule 9 subject to Rule 8**
Iqbal, 556 U.S. at 686–687 ("Rule 9 * * * does not give [a party] license to evade the less rigid—though still operative—strictures of Rule 8."), **citing Wright & Miller**.

11 **Court's pleading philosophy**
Johnson v. City of Shelby, 135 S. Ct. at 347, **quoting Wright & Miller**.

See also
Amalgamated National Health Fund v. Hickey Freeman Tailored Clothing, Inc., 2024 WL 1333569, *8 (S.D. N.Y. 2024) ("[T]hose portions of Rule 9 that require specific or detailed allegations should not be construed in an unduly strict fashion. * * * [T]he Rule itself requires only 'particularity,' and it is the language of the federal rules, not judicial interpretation, that governs. Therefore, in keeping with the purpose of Rule 9(b), courts tolerate certain ambiguities in a pleading, provided that the allegations about the fraud are sufficient to give notice to the defendant and allow it to prepare its defense.") (citations omitted), **quoting Wright & Miller**, report and recommendation adopted, 2024 WL 1330049 (S.D. N.Y. 2024).

Deveraux v. Meadowlark of Billings LLC, 2023 WL 2330311, *2, (D. Mont. 2023) ("Rule 9(b)'s requirement of specificity and detailed allegations 'should not be construed in an unduly strict fashion.' * * * Though Plaintiffs do not plead the exact date of the conversation, their identification of the month and year within the case's timeline * * * is sufficiently particular for notice.") (citations omitted), **quoting Wright & Miller**.

12 **Pleading fraud**

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See §§ 1296 to 1298.

Pleading mistake See § 1299.

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CASE NO. 4

2021 WL 12320541
Only the Westlaw citation
is currently available.
United States District Court, S.D.
Texas, Corpus Christi Division.

MAXIM CRUDE OIL, LLC, Plaintiff,
v.
NOIL CORP., INC., et al., Defendants.

Civil Action
No.
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CV
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90

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Signed November 16, **2021**
|
Entered November 17, **2021**

Attorneys and Law Firms

Antonio Ortiz, Shelby A. Jordan, Jordan & Ortiz, PC, Corpus Christi, TX, for Plaintiff.

Michael Lynn Navarre, Matthew R. Beatty, Beatty Navarre Strama, PC, Austin, TX, Marty J. Schwartz, Three First National Plaza, Chicago, IL, for Defendant.

ORDER

DAVID S. MORALES, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Defendant Morrell Steve Neely's ("Neely") motion to dismiss Plaintiff Maxim Crude Oil, LLC's second amended complaint. (D.E. 8; D.E. 29). Neely seeks dismissal under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction, 12(b)(6) for failure to state a claim, and 9(b) for failure to plead fraud with particularity. (D.E. 8); *see* FED. R. CIV. P. 12(b)(2), 12(b)(6), 9(b). After considering Plaintiffs second amended complaint (D.E. 29), Neely's motion (D.E. 8), Plaintiff's responses (D.E. 18, D.E. 34), and Neely's reply and surreply (D.E. 24, D.E. 31), the Court **DENIES** Neely's motion to dismiss. (D.E. 8).

I. Background

On April 23, **2021**, Plaintiff filed this lawsuit in state court against Defendant Noil Corporation, Inc. ("Noil") and Neely. (D.E. 1). Neely is Noil's CEO and President. (D.E. 8, p. 2). On May 3, **2021**, Defendants removed to this Court based on diversity jurisdiction. (D.E. 1). Plaintiff's second amended complaint sets forth several allegations, including that Noil and Neely fraudulently converted $600,000 from Plaintiff. *See* (D.E. 29). Plaintiff's second amended complaint presents the following factual allegations (D.E. 29), which are taken as true for purpose of the Rule 12(b)(6) motion.[1] *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam) (quoting *Oppenheimer v. Prudential Sec. Inc.*, 94 F.3d 189, 194 (5th Cir. 1996) ("[T]he plaintiff's

complaint is to be construed in a light most favorable to the plaintiff [when deciding a Rule 12(b)(6) motion], and the allegations contained therein are to be taken as true.")).

In early March **2021**, Plaintiff contacted Neely regarding procuring a fuel product, Naptha, in the Nueces County area. (D.E. 29, p. 9). Neely represented that he could, in fact, procure Naptha for Plaintiff. *Id.* Relying on Defendants' representations and promises, Plaintiff and Noil entered into a crude products agreement dated March 15, **2021** (the "Agreement"), whereby Plaintiff would purchase Naptha from Defendants on a monthly basis. *Id.* A material term of the Agreement required that the funds Plaintiff tendered Defendants for Naptha be held in an escrow account until Plaintiff obtained the product. *Id.* at 10. Noil agents represented in several text messages and emails that the funds would be held in an escrow account. *Id.* at 10–15. Relying on these representations, Plaintiff wired $2,000,000 to Noil's bank account. *Id.* at 14.

***2** According to Plaintiff, the representations that the funds would be held in an escrow account were false. *Id.* at 13. Noil did not and never intended to keep the funds in an escrow account. *Id.* Significantly, Plaintiff never received the product nor assurance that his funds were in an escrow account. *Id.* at 14–15. Ultimately, Plaintiff terminated the Agreement and demanded the funds be returned. *Id.* at 15. After Plaintiff threatened to file suit, Defendants returned $1,400,000 of Plaintiff's money, withholding $600,000. *Id.* at 16.

Plaintiff alleges that Noil is a sham company created by Neely to perpetuate fraud, including inducing people into wiring funds to Noil with no intention of performing its contractual obligations. *Id.* at 16–17. Plaintiff contends that Neely used Noil to protect his individual liability, knowing that when his fraud is discovered, he will have already drained the corporation's assets. *Id.* at 17. Stated differently, Plaintiff alleges that Neely—as owner, control person, and alter ego of Noil—converted at least $440,000 in fraudulent transfers out of Maxim's $600,000 for his own benefit and now refuses to return the funds, despite claiming that Noil is a highly successful business. *Id.*

The Court will first consider the Rule 12(b)(2) jurisdictional attack before considering the Rule 12(b)(6) merits challenge. *See Wilson v. Hous. Comm. Coll. Sys.*, 955 F.3d 490, 494 (5th Cir. 2020).

II. Motion to Dismiss for Lack of Personal Jurisdiction

A. Legal Standard – Rule 12(b)(2)

Under Federal Rule of Civil Procedure 12(b)(2), a court must dismiss a claim if the court lacks personal jurisdiction over the defendant. FED. R. CIV. P. 12(b)(2). In a diversity case, a federal court may exercise personal jurisdiction over a non-resident defendant if the forum state's long-arm statute extends to a particular defendant and exercising jurisdiction over that defendant would comport with due process. *Carmona v. Leo Ship Mgmt., Inc.*, 924 F.3d 190, 193 (5th Cir. 2019). Texas's long-arm statute extends to the limits of due process, so the federal due process analysis is used in

determining personal jurisdiction. *Halliburton Energy Servs., Inc. v. Ironshore Specialty Ins. Co.*, 921 F.3d 522, 539 (5th Cir. 2019). Federal due process permits the exercise of specific jurisdiction if:

> (1) the defendant has minimum contacts with the forum state, i.e., it purposely directed its activities toward the forum state or purposefully availed itself of the privileges of conducting activities there; (2) the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) the exercise of personal jurisdiction is fair and reasonable.

Carmona, 924 F.3d at 193 (quoting *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 271 (5th Cir. 2006)).

When a district court rules on a Rule 12(b)(2) motion without a hearing, it is the plaintiff's burden to make a prima facie showing of jurisdiction. *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008). Proof by preponderance of the evidence is not required. *Id.* Moreover, "uncontroverted allegations in the plaintiff's complaint must be taken as true." *Id.* However, a court need not credit a plaintiff's conclusory allegations, even if uncontroverted. *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 869 (5th Cir. 2001).

B. Plaintiff has made a prima facie showing of personal jurisdiction over Neely via Plaintiff's fraudulent transfer claims.

Neely moved to dismiss the suit against him for lack of personal jurisdiction, contending that he does not have minimum contacts with Texas. (D.E. 8, p. 3–5). Plaintiff argues that Neely has established minimum contacts with Texas, including through Neely's activities as alleged in Plaintiff's fraudulent transfer claims. (D.E. 29, p. 4–7). In those claims, Plaintiff alleges that Neely's minimum contacts with Texas are established under the Texas Uniform Fraudulent Transfer Act ("TUFTA"), with Noil as the fraudulent transferor and Neely as the fraudulent transferee. *Id.* at 27–30. Neely disagrees, raising the following counter arguments. *See* (D.E. 31).

***3** First, Neely contends that Plaintiff's allegations are "conclusory." (D.E. 31, p. 2). Second, Neely argues that Plaintiff does not identify a fraudulent transfer and does not and cannot allege that the unidentified transfer was initiated in Texas, occurred in Texas, or involved a Texas bank. *Id.* at 3. Neely relies on his own declaration to controvert Plaintiff's allegations, in which he avers that:

> Since at least January 1, **2021**, Noil has not had a bank account with a bank that is based in Texas or has a branch in Texas. Since at least January 1, **2021**, I have

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> not had a bank account with a bank that is based in Texas or has a branch in Texas. I do not reside in Texas and have never lived in Texas.... Noil is not insolvent and has not been insolvent at any time in **2021**.

(D.E. 31-1, p. 1).

Intentional conduct designed to cause harm in the forum state is a basis for finding minimum contacts. *Sourcing Mgmt., Inc. v. Simclair, Inc.*, 118 F. Supp. 3d 899, 911 (N.D. Tex. 2015) (citing *Calder v. Jones*, 465 U.S. 783, 787–90 (1984) (explaining that defendants "reasonably anticipate[d] being haled into court [in the forum state]" because "their intentional, and allegedly tortious actions were expressly aimed at" the forum state and "they knew the brunt of th[e] injury would be felt" in the forum state). Under this standard, the Fifth Circuit has upheld a district court's finding of personal jurisdiction over a party that had "no contacts with the forum state, Texas, other than its involvement in a fraudulent scheme that affected 'a known, major creditor in Texas whose right to payment arises out of contacts that share a strong connection with Texas.' " *Id.* (quoting *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 402 (5th Cir. 2009)); *see, e.g., Dontos v. Vendomation NZ Ltd.*, 582 F. App'x 338, 345–48 (5th Cir. 2014) (holding that personal jurisdiction existed where plaintiff alleged that out-of-state defendants fraudulently transferred assets to prevent a Texas creditor/plaintiff from collecting a pre-existing Texas judgment).

Taking all Plaintiff's uncontroverted allegations as true, the Court determines that Plaintiff has made a prima facie showing that Noil fraudulently transferred Plaintiff's assets to Neely to prevent Plaintiff from recovering those assets should Plaintiff prevail in this case. *See* (D.E. 15; D.E. 29). Specifically, Plaintiff alleges that "Noil is insolvent" and that the transfers were made "for less than reasonably equivalent value" in exchange for the transfer. (D.E. 15, p. 28; D.E. 29, p. 29). In support, Plaintiff makes several specific factual allegations, including that:

- Another corporation that Neely owned and operated was sued in Texas, the plaintiff in that case was awarded a judgment, and that judgment was never collected.
- Neely created Noil to perpetuate similar fraudulent conduct.
- The address Noil uses as its office space is vacant and has been for over a year.
- Noil only retains possession of $160,000 out of $600,000 of Plaintiff's funds.
- Noil's fraudulent transfers include the transfer of at least $440,000 of Plaintiff's funds that Noil converted from Plaintiff.
- Noil did not receive reasonably equivalent value for the funds because only $160,000 remains in Noil's account.

(D.E. 29, p. 8, 18, 27–29). Through these specific factual allegations, Plaintiff carries its burden of making a prima facie showing of personal jurisdiction.

***4** Respecting Neely's declaration, the Court finds that it does not controvert Plaintiff's specific factual allegations. *See* Johnston v. Multidata Sys. Int'l Corp., 523 F.3d 602, 609 (5th Cir. 2008) ("[O]n a motion to dismiss for lack of jurisdiction, uncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor for purposes of determining whether a prima facie case for personal jurisdiction exists."). Importantly, Neely does not dispute that the $440,000 in transfers were made, that he was the transferee of any of the $440,000, nor that the transfers were made for less than reasonably equivalent value. On each of these points, Plaintiff makes specific factual allegations that support a fraudulent transfer claim on the pleadings and is enough, using a prima facie standard, to establish personal jurisdiction over Neely via the TUFTA. *See, e.g.,* Mullins., 564 F.3d at 402; Sourcing Mgmt., Inc., 118 F. Supp. 3d at 911. Neely's conclusory allegation that Noil is not insolvent does not controvert Plaintiff's allegations.

For these reasons, the Court may exercise personal jurisdiction over Neely and, accordingly, the Court **DENIES** Neely's motion to dismiss for lack of personal jurisdiction.

III. Motion to Dismiss for Failure to State a Claim

A. Legal Standard – Rule 12(b)(6)

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing Twombly, 550 U.S. at 556). The facial plausibility standard is not a probability standard, but it requires the plaintiff's factual allegations "to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. While a court must take all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor, a court is not bound "to accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555).

Here, Neely argues that the Court should dismiss all claims against him because Plaintiff fails to plead specific factual allegations as to Neely, individually. (D.E. 8, p. 7). In response, Plaintiff states that he has pled sufficient facts to recover on all claims against Neely through Plaintiff's alter ego claim, which alleges that Neely was the control person of Noil and created Noil to defraud Plaintiff, and, as such, is jointly liable for Noil's misconduct. *See* (D.E. 18, p. 2–4, 16). The Court first addresses Plaintiff's alter ego theory and then each of Plaintiff's remaining claims.

B. Piercing the Corporate Veil – Noil as the Alter Ego of Neely

Neely argues that Plaintiff's piercing the corporate veil claim does not state a claim for relief against Neely. (D.E. 24, p. 10). Neely states that the claim is merely a recitation of the

elements and lacks specific factual allegations. *Id.*

i. Choice of Law

Where federal court jurisdiction is based on diversity, courts apply the conflict of laws rule of the state in which it sits to determine which state's substantive law should be applied. *Alberto v. Diversified Grp., Inc.*, 55 F.3d 201, 203 (5th Cir. 1995). Under Texas law, "[o]nly the laws of the jurisdiction of incorporation of a foreign corporation shall govern ... the liability, if any, of shareholders of the foreign corporation for the debts, liabilities, and obligations of the foreign corporation for which they are not otherwise liable by statute or agreement." *Id.*

Here, Plaintiff seeks to pierce the corporate veil of Noil, an Illinois corporation, to hold Neely, an officer of Noil, personally liable for debts that Noil allegedly owes Plaintiff. *See* (D.E. 29, p. 26). Applying Texas choice of law rules, Neely's liability is governed by the laws of the jurisdiction of Noil's incorporation, which is Illinois. *See Alberto*, 55 F.3d at 203–04; (D.E. 1, p. 4) (stating that Noil is incorporated and has its principal place of business in Illinois).

ii. Piercing the Corporate Veil

***5** To pierce the corporate veil under Illinois law, a plaintiff must satisfy a two-pronged test. *Laborers' Pension Fund v. Lay-Com, Inc.*, 580 F.3d 602, 610 (7th Cir. 2009) (applying Illinois state law). First, a plaintiff must prove that there is a unity of interest and ownership such "that the separate personalities of the corporation and the individual or other corporation no longer exist." *Id.* at 569–70. Second, a plaintiff must show that circumstances exist "such that adherence to the fiction of [a] separate corporate existence would sanction a fraud or promote injustice." *Id.*

Here, Plaintiff states a plausible claim upon which relief could be granted. Plaintiff alleges that Noil is sham corporation that Neely formed only after dissolving his last corporation because it had judgments against it from another fraud lawsuit. (D.E. 15, p. 2). Plaintiff then alleges that Neely, through Noil and Noil's agents, illegally converted Plaintiff's money, which Defendants had represented was held in an escrow account and which Plaintiff was owed because Plaintiff canceled the contract per the Agreement's terms. *Id.* at 3. After accepting all the factual allegations as true, construing the complaint in the light most favorable to Plaintiff, and drawing reasonable inferences in Plaintiff's favor, Plaintiff's theory is that: (1) Neely used Noil as his alter ego; (2) to protect him from personal liability beyond the corporate veil; (3) and directed his agents to misrepresent the nature of the escrow account; (4) to induce Plaintiff into wiring money; (5) which he illegally converted by refusing to refund $600,000 to which Plaintiff was entitled. Plaintiff does more than restate the claim's elements and sufficiently supports the complaint with enough factual allegations to narrate a plausible theory. Accordingly, Neely's Rule 12(b)(6) motion is denied with respect to Plaintiff's alter ego theory.

C. Breach of Contract

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Neely argues that Plaintiff cannot state a breach of contract claim against Neely because Neely is not a party to the contract. (D.E. 8, p. 2). However, as explained above, Plaintiff has sufficiently alleged that Noil was Neely's alter ego. Accordingly, the only remaining allegation Plaintiff must state is that Noil breached its contract with Plaintiff.[2] Under Texas law, the elements of a breach of contract claim are "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach." *Smith Intern, Inc. v. Egle Grp., LLC*, 490 F.3d 380 (5th Cir. 2007) (citing *Valero Mktg. &Supply Co. v. Kalama Int'l, L.L.C.*, 51 S.W.3d 345, 351 (Tex. App.—Houston [1st Dist.] 2001, pet. denied)).

Here, Plaintiff alleges a breach of contract claim against Noil because Plaintiff alleges that there is a valid and enforceable contract, the contract required an escrow structure, and that Noil breached the agreement by converting the funds for its own use and dispersing the funds from the account prior to Plaintiff receiving any product from Noil. (D.E. 29, p. 23). Noil's failure to deliver Plaintiff the product and to put the funds in an escrow account caused Plaintiff's injury, the $600,000 that Plaintiff wired Noil. *Id.* As such, Plaintiff has stated a breach of contract claim and Neely's Rule 12(b)(6) motion is denied on this claim.

D. Unjust Enrichment

***6** Neely argues that Plaintiff cannot plead an unjust enrichment claim against Neely because Noil, not Neely, received the money from Plaintiff. (D.E. 24, p. 9). Under Texas law, unjust enrichment allows recovery "when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Perales v. Bank of America, N.A.*, 2014 WL 3907793, *3 (S.D. Tex. Aug. 11, 2014) (citing *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)). Unjust enrichment includes a plaintiff's transfer to a defendant, resulting in the defendant's material gain and the plaintiff's material loss. *Id.*

Here, accepting all factual allegations as true and construing them in the light most favorable to Plaintiff, Plaintiff sufficiently alleges an unjust enrichment claim against Neely. As explained above, Plaintiff articulates a theory in which Neely directed his alter ego, Noil, to fraudulently convert $600,000 belonging to Plaintiff. (D.E. 29, p. 16–17). As such, Neely's Rule 12(b)(6) motion is denied regarding Plaintiff's unjust enrichment claim.

E. Money Had & Received

Neely's argument to dismiss this claim fails for the same reason explained for Plaintiff's unjust enrichment claim. The elements of a claim for money had and received are that (1) the defendant holds money and (2) the money in equity and good conscience belongs to plaintiff. *Bank of Saipan v. CNG Fin. Corp.*, 380 F.3d 836, 840 (5th Cir. 2004) (citing *Staats v. Miller*, 243 S.W.2d 686, 687–88 (Tex. 1951)). Accepting all factual allegations as true and construing them in the light most favorable to Plaintiff, Plaintiff plausibly alleges that Plaintiff owned the $600,000 wired to Noil, which Neely converted for his own direct benefit and to perpetuate fraud. (D.E. 29, p. 24).

Neely's Rule 12(b)(6) motion is denied on this claim.

F. Breach of Fiduciary Duty & Conversion

Neely argues that Plaintiff fails to plead any facts that would establish a fiduciary relationship between Plaintiff and Neely. (D.E. 24, p. 9). However, an escrow agent owes a fiduciary duty to escrow contract parties. *Alexander O & G, LLC v. Nomad Land & Energy Resources, LLC*, 313 F. Supp. 794, 801 (S.D. Tex. 2018) (quoting *Bell v. Safeco Title Ins. Co.*, 830 S.W.2d 157, 160 (Tex. App.—Dallas 1992, writ denied)). Here, taking all Plaintiff's factual allegations as true and construing them in the light most favorable to Plaintiff, Plaintiff plausibly alleges a fiduciary relationship between Neely and Plaintiff, asserting that Noil represented that funds would be placed into an escrow account while Noil secured the product. (D.E. 29, p. 12–18). Neely, as Noil's control person, breached his fiduciary duty when he withdrew funds from the account and converted them for his own use. *Id.* at 19. Neely's Rule 12(b)(6) motion is denied on this claim

G. Fraudulent Transfer under Texas Uniform Fraudulent Transfer Act §§ 24.005 & 24.006(a)

Neely argues that Plaintiff fails to state a claim for fraudulent transfer because Plaintiff fails to allege specific factual allegations against Neely. (D.E. 31, p. 5). Under the TUFTA, a fraudulent transfer may be actual or constructive. *Matter of Life Partners Holdings, Inc.*, 926 F.3d 103, 117, 119 (5th Cir. 2019). The elements of an actual fraudulent transfer claim are: (1) a creditor; (2) a debtor; (3) the debtor transferred assets shortly before or after the creditor's claim arose; (4) with actual intent to hinder, delay, or defraud any of the debtor's creditors. *Id.* at 117 (citing *Nwekedi v. Unlimited Restoration Specialists, Inc.*, 428 S.W.3d 191, 204–05 (Tex. App.—Houston [1st Dist.] 2014, pet. denied)). Constructive fraudulent transfer has the same elements, except that instead of actual intent, a plaintiff can show that (1) the debtor did not receive reasonably equivalent value for the transfer and (2) the transferor was financially vulnerable or insolvent at the time of the transaction. *Id.* at 119–120 (citing *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 562, 566 & n.21 (Tex. 2016); TEX. BUS. & COMM. CODE § 24.006(a)).

***7** Here, Plaintiff has sufficiently alleged both actual and constructive fraudulent transfer claims. First, Plaintiff alleges that he is a creditor owed money that Noil converted from Plaintiff at Neely's direction and for Neely's benefit. (D.E. 29, p. 27). This is supported by Plaintiff's allegation that Plaintiff wired $600,000 to Noil, $440,000 of which Noil no longer possesses. *Id.* Second, Neely directed Noil to transfer the funds between March **2021** and May 20, **2021**, shortly after Plaintiff's claims arose so that Noil would have no cash or assets from which Plaintiff could recover. (D.E. 34, p. 6; D.E. 29, p. 18). Plaintiff alleges that Noil was insolvent during the transfer, and received less than fair value for the transfer, since Noil only has $160,000 left of the funds. (D.E. 29, p. 27–28). Neely's Rule 12(b)(6) motion is denied on this claim.

Overall, taking all factual allegations in the complaint as true and drawing all reasonable

inferences in Plaintiff's favor, the Court determines that Plaintiff has plausibly stated claims for relief against Neely. Neely's Rule 12(b)(6) motion is therefore **DENIED.**

IV. Motion to Dismiss for Failure to Plead Fraud with Particularity

A. Legal Standard – Rule 9(b)

To satisfy Rule 9(b)'s heightened pleading standards, a plaintiff must specifically plead the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and articulate a theory that would render the statement fraudulent. *See* *ABC Arbitrage Plaintiffs Grp. v. Tchuruk*, 291 F.3d 336 (5th Cir. 2002); *Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 453 (5th Cir. 2005). Additionally, "[i]n cases concerning fraudulent misrepresentation and omission of facts, Rule 9(b) typically requires the claimant to plead the type of facts omitted, the place in which the omissions should have appeared, and the way in which the omitted facts made the representations misleading." *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1174 (5th Cir. 2006) (citations omitted).

B. Fraudulent Misrepresentations by Neely

Neely argues that Plaintiff fails to allege fraud with particularity because Plaintiff does not plead that Neely made the statement, when he made the statement, where he made the statement, what Neely obtained from the statement, and why the statement was fraudulent. (D.E. 8, p. 8). A plaintiff asserting a fraudulent misrepresentation claim must allege that (1) a material misrepresentation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the plaintiff act upon it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff thereby suffered injury. *SGK Properties, LLC v. U.S. Bank Nat'l Ass'n for Lehman Bros. Small Balance Com. Mortg. Pass-Through Certificates, Series 2007-3*, 881 F.3d 933, 943 (5th Cir. 2018) (citing Texas law)).

Here, Plaintiff's second amended complaint specifically includes the requisite allegations, including the "who, what, when, and how" of the alleged misrepresentations. *See* (D.E. 15); *see also* *Tchuruk*, 291 F.3d 336. First, Plaintiff alleges that Defendants made fraudulent statements misrepresenting Noil's ability to secure Naptha and that the prepaid funds would be held in an escrow account. (D.E. 15, p. 9–10). Second, Plaintiff specifically identifies Neely and his agents as speakers of the fraudulent statements. *Id.* at 9–12. Plaintiff's complaint includes emails and text messages, indicating where the statements were made. *Id.* While Jennifer Watson, not Neely, made these communications, Plaintiff articulates a theory that would render the statement fraudulent by alleging that Neely directed the sham organization as a scheme to perpetuate fraud. *See id.* at 27. As such, the Court finds that Plaintiff has sufficiently stated a fraudulent misrepresentation claim under Rule 9's heightened pleading standards.

C. Fraud by Non-Disclosure and Omission by Neely

***8** Neely argues that Plaintiff fails to identify the omission, that Neely was the speaker, what Neely obtained from the omission, and why the omission was fraudulent. (D.E. 8, p. 8). "Under Texas law, fraud by non-disclosure requires: (1) a deliberate failure to disclose material facts; (2) a duty to disclose; (3) that the plaintiff was ignorant and did not have an equal opportunity to discover; (4) that the defendant intended the plaintiff to act or refrain from acting; and (5) injury." *Savoia-McHugh v. McCrary*, 2021 WL 4066992, *4 (S.D. Tex. Sept. 7, 2021) (citing *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 219–20 (Tex. 2019)).

Here, Plaintiff's second amended complaint sufficiently demonstrates the elements of fraud by non-disclosure and omission. Plaintiff alleges that Neely, in directing Noil, intentionally failed to disclose that the funds Plaintiff wired Noil would not be kept in an escrow account nor be treated as escrow funds. (D.E. 29, p. 13). Plaintiff alleges this failure was material because Plaintiff transferred Noil the funds while relying on the promise that they would be put in an escrow account. *Id.* at 14. But-for Neely's omissions and failure to correct Plaintiff's understanding that the funds would be in an escrow account, Plaintiff would not have transferred Noil the money. *Id.* As a result, Plaintiff was injured in the amount of $600,000. *Id.* at 16. Thus, the Court finds that Plaintiff has sufficiently stated a fraud by omission claim.

For these reasons, the Court determines that Plaintiff has satisfied the heightened pleading standard on its fraudulent misrepresentation and fraudulent omission claims. Accordingly, Neely's Rule 9(b) motion is **DENIED.**

V. Conclusion

For the reasons stated herein, the Court **DENIES** Defendant Neely's motion to dismiss in its entirety. (D.E. 8).

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2021 WL 12320541

Footnotes

1 Neely also moves to dismiss himself under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction, *see* (D.E. 18, p. 13), which holds a different standard of review than Rule 12(b)(6). *See Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008) (providing that when a district court rules on a Rule 12(b)(2) motion without an evidentiary hearing, it is the plaintiff's burden to make a prima facie showing of jurisdiction over a non-resident). Proof by a preponderance of the evidence is not required. *Id.* "Moreover, on a motion to dismiss for lack of jurisdiction,

uncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor for purposes of determining whether a prima facie case for personal jurisdiction exists." *Id.* (quoting *D.J. Invs., Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 546 (5th Cir. 1985)).

2 Illinois law, which would be the choice of law in determining whether Noil is the alter ego of Neely, permits courts to apply alter ego liability to contractual claims. *See UIRC-GSA Holdings Inc. v. William Blair & Co.*, 289 F. Supp. 3d 852 (N.D. Ill. 2018) (citing Illinois law).

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CASE NO. 5

2015 WL 5890103
Only the Westlaw citation
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SEE TX R RAP RULE 47.2
FOR DESIGNATION AND
SIGNING OF OPINIONS.

Court of Appeals of
Texas, Houston (1st Dist.).

Alan Nelson CROTTS, Appellant
v.
John F. HEALEY, Jr. and
Jeff Strange, Appellees

NO. 01–15–00076–CV
|
Opinion issued October 8, 2015

On Appeal from the 268th District Court, Fort Bend County, Texas, Trial Court Case No. 14–DCV–217232

Attorneys and Law Firms

Crotts, Alan Nelson, for Appellant.

Randall W. Morse, for Appellees.

Panel consists of Justices Jennings, Higley, and Brown.

MEMORANDUM OPINION

Harvey Brown, Justice

***1** Alan Nelson Crotts sued his local district attorney and assistant district attorney for refusing to prosecute a theft allegedly committed against him by Jessalyn Cole, the mother of his children, in a dispute over child support payments. The defendants filed a plea to the jurisdiction, which the trial court granted. Crott's case was dismissed. In three issues, Crotts contends that (1) the trial court erred in granting the plea because the district attorney and assistant district attorney are not entitled to prosecutorial immunity, (2) this lawsuit is not an impermissible collateral attack on his child support proceeding, and (3) the trial court should not have dismissed the lawsuit "with prejudice." Because the defendants are entitled to absolute prosecutorial immunity, we affirm.

Background

Jessalyn Cole, the mother of Alan Nelson Crotts's children, claimed Crotts owed child support. The Child Support Division of the Office of the Attorney General garnished nearly $7,000 from Crotts's income tax return for child support payments. Crotts argued that Cole was not entitled to the $7,000.

In a lawsuit for modification of the child support order, the trial court denied Crotts's request for a $7,000 credit for the alleged overpayment resulting from the garnishment. About a year after that order, Crotts reported Cole to the Sugar Land Police for theft of the $7,000 in child support Crotts claimed he did not owe. Jeff Strange, the Assistant District Attorney for Fort Bend County, informed the police he would not prosecute Cole for theft.

Crotts filed this lawsuit against John F. Healey, Jr., the Fort Bend District Attorney, and Strange for failure to prosecute Cole, alleging civil

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rights violations, breach of contract, and abuse of process. Healey and Strange filed a plea to the jurisdiction, which the trial court granted. Crotts appeals.

Standard of Review

A plea to the jurisdiction challenges the trial court's subject-matter jurisdiction over a case. *Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 554 (Tex.2000); *Pineda v. City of Houston,* 175 S.W.3d 276, 279 (Tex.App.—Houston [1st Dist.] 2004, no pet.). Subject-matter jurisdiction is required for a court to have authority to decide a case and is never presumed. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 443–45 (Tex.1993). The plaintiff has the burden to allege facts affirmatively demonstrating that the trial court has subject-matter jurisdiction. *Id.* at 446; *Richardson v. First Nat'l Life Ins. Co.,* 419 S.W.2d 836, 839 (Tex.1967).

The existence of subject-matter jurisdiction is a question of law. *State Dep't of Highways & Pub. Transp. v. Gonzalez,* 82 S.W.3d 322, 327 (Tex.2002); *Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 928 (Tex.1998). Therefore, we review de novo the trial court's ruling on a plea to the jurisdiction. *Mayhew,* 964 S.W.2d at 928.

Prosecutorial Immunity

Healey and Strange argue they are entitled to "the defense of absolute prosecutorial immunity from any suit for damages," for their conduct performing discretionary duties.

***2** Crotts disagrees, arguing that "prosecutors enjoy absolute immunity only when initiating a prosecution and in presenting the State's case." Crotts argues Healey and Strange never initiated a case, instead they "advised the Sugar Land Police Department that they would not prosecute a case.... In essence, [Healey and Strange] performed no duties related to their office."

A. Healey and Strange are entitled to absolute prosecutorial immunity

A prosecutor, in certain circumstances, is entitled to absolute immunity from a lawsuit for damages. *Imbler v. Pachtman,* 424 U.S. 409, 411, 96 S.Ct. 984, 986 (1976); *Bradt v. West,* 892 S.W.2d 56, 71 (Tex.App.—Houston [1st Dist.] 1994, writ denied). Absolute immunity extends to both a prosecutor and to the prosecutor's deputies. *See Imbler,* 424 U.S. at 411, 96 S.Ct. at 986 (applying absolute prosecutorial immunity to deputy district attorney). To determine when a prosecutor is entitled to immunity, Texas applies a "functional approach." *Bradt,* 892 S.W.2d.at 69. This approach "focuses on the nature of the official acts of which the plaintiff complains" and shields a prosecutor for acts "intimately associated with the judicial phase of the criminal process." *Id.* at 69–70. In applying the functional approach, "Texas courts follow federal jurisprudence." *Clawson v. Wharton Cnty.,* 941 S.W.2d 267, 271 (Tex.App.—Corpus Christi 1996, writ denied); *see Bradt,* 892 S.W.2d at 69; *Brown v. Lubbock Cnty. Comm'rs Court,* 185 S.W.3d 499, 505 (Tex.App.—Amarillo 2005, no pet.); *Oden v. Reader,* 935 S.W.2d 470, 474 (Tex.App.—Tyler 1996, no writ).

The decision on whether to initiate a prosecution is a "quintessential function" of a prosecutor "intimately associated with the judicial phase of the criminal process." *Bradt,* 892 S.W.2d at 70. Thus, "in initiating a prosecution ... the prosecutor is immune from a civil suit for damages." *Imbler,* 424 U.S. at 430, 96 S.Ct. at 995. A prosecutor receives absolute immunity because civil liability "for his decision to initiate and pursue a prosecution could skew his decisionmaking, tempting him to consider the personal ramifications of his decision rather than rest that decision purely on appropriate concerns." *Bradt,* 892 S.W.2d at 70 (quoting *Schloss v. Bouse,* 876 F.2d 287, 289–90 (2d Cir.1989)).

Texas law does not support Crotts's distinction between initiating and declining to initiate a prosecution. "[T]he decision not to prosecute ... is the quintessential function of a prosecutor." *Clawson,* 941 S.W.2d at 272; *see Font v. Carr,* 867 S.W.2d 873, 876 (Tex.App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.) (*citing Miller v. Curry,* 625 S.W.2d 84, 87 (Tex.App.—Fort Worth 1981, writ ref'd n.r.e.)) (recognizing "absolute prosecutorial immunity for decisions to prosecute or not prosecute criminal complaints"). Public policy supports applying prosecutorial immunity when a prosecutor chooses not to initiate a prosecution because, "if the prosecutor were not immune ... suits for civil damages could be expected with considerable frequency from disgruntled, frustrated citizens whose complaints and grievances the prosecutor, in exercising his best judgment, chose not to file and prosecute. His time, energies and resources would be seriously affected." *Miller,* 625 S.W.2d at 87. Eleven federal circuits have reached the same conclusion. *Pugh v. Balish,* 564 Fed.Appx. 1010, 1013 (11th Cir.2014); *Smith v. McCarthy,* 349 Fed.Appx. 851, 859 (4th Cir.2009); *Nedab v. Litten,* 184 Fed.Appx. 261, 262 (3d Cir.2006); *Botello v. Gammick,* 413 F.3d 971, 976 (9th Cir.2005); *Steele v. City of Bemidji,* 257 F.3d 902, 906 (8th Cir.2001); *Ireland v. Tunis,* 113 F.3d 1435, 1446 (6th Cir.1997); *Mendenhall v. Goldsmith,* 59 F.3d 685, 691 n.10 (7th Cir.1995); *Guzman–Rivera v. Rivera–Cruz,* 55 F.3d 26, 31 (1st Cir.1995); *Schloss,* 876 F.2d at 290; *Morrison v. City of Baton Rouge,* 761 F.2d 242, 248 (5th Cir.1985); *Dohaish v. Tooley,* 670 F.2d 934, 938 (10th Cir.1982).

***3** Under Texas law, Healey and Strange are entitled to absolute prosecutorial immunity for their decision not to prosecute Cole. Crotts attempts to circumvent prosecutorial immunity by alleging that he in only complaining of "legal advice" Strange gave the police to not file a police report. A prosecutor is not protected by absolute immunity when giving legal advice to law enforcement. *Burns v. Reed,* 500 U.S. 478, 496, 111 S.Ct. 1934, 1944–45 (1991); *Font,* 867 S.W.2d at 875. In *Font v. Carr,* a bondsman sued a prosecutor for advising the sheriff to require the bondsman to show additional proof of sufficiency of security for bonds he posted. *Font,* 867 S.W.2d at 875. This Court held that this advice was not "bound up with the judicial process" and, thus, the prosecutor was not entitled to absolute prosecutorial immunity. *Id.* at 874, 876. In contrast, the advice here was intertwined with the decision not to prosecute. Crotts's petition makes clear that Healey and Strange's decision not to prosecute Cole underlies all of his asserted causes of action. [1]

This "advice" Strange gave the police was connected with the district attorney's office's decision not to prosecute. *See Koubriti v. Convertino,* 593 F.3d 459, 469–70 (6th Cir.2010) (holding prosecutor's recommendation to police officer that he need not disclose certain evidence to defendant was not "legal advice" but rather part of decisions for which the prosecutor was entitled to prosecutorial immunity). Because Healey and Strange did not give the police any legal advice and Crotts only complains of their decision not to prosecute Cole, Healey and Strange are entitled to absolute prosecutorial immunity.

To the extent absolute prosecutorial immunity may not shield Healey and Strange from liability for breach of contract, Crotts cannot successfully assert a breach-of-contract claim against them. To successfully assert a claim for breach of contract, a contract must exist between the parties. *Graves v. Logan,* 404 S.W.3d 582, 584 (Tex.App.—Houston [1st Dist.] 2010, no pet.). Crotts claims that Healey and Strange's oaths of office constitute a contract between them and the public. No contract, however, has been entered into between Crotts and Healey and Strange; thus, Crotts cannot sue them for breach of contract. *See Price v. Schnaufer,* 81 S.W.2d 160, 160–61 (Tex.Civ.App.—Fort Worth 1935, no writ) (holding that member of public cannot assert breach-of-contract claim against police officer based on contract formed by police officer's oath of office).

Because Healey and Strange are entitled to absolute immunity, we overrule his first issue. We do not reach the issues of qualified immunity, state sovereign immunity, or Eleventh amendment immunity. Nor do we reach Crotts's second issue of whether this lawsuit constituted an improper collateral attack on the child support proceedings.

B. Dismissal with prejudice

In his third issue, Crotts argues that the trial court should have dismissed his lawsuit without prejudice. Ordinarily, if the trial court grants a plea to the jurisdiction, it should not dismiss the lawsuit with prejudice until it first affords the plaintiff a reasonable opportunity to amend the jurisdictionally defective pleading. *Univ. of Tex. M.D. Anderson Cancer Ctr. v. Eltonsy,* 451 S.W.3d 478, 482 (Tex.App.—Houston [14th Dist.] 2014, no pet.). "Incurably defective claims, however, must be dismissed with prejudice." *Tex. A & M Univ. Sys. v. Koseoglu,* 233 S.W.3d 835, 846 (Tex.2007). A dismissal of a lawsuit by granting a plea to the jurisdiction on the grounds of immunity "is with prejudice because a plaintiff should not be permitted to relitigate jurisdiction once that issue has been finally determined." *Harris Cnty. v. Sykes,* 136 S.W.3d 635, 639 (Tex.2004). Here, the jurisdictional defects are incurable: no amount of repleading will overcome absolute immunity. Accordingly, we conclude that the trial court did not err in dismissing Crotts's lawsuit with prejudice. We overrule his third and final issue.

Conclusion

***4** We affirm the judgment of the trial court.

All Citations

Not Reported in S.W. Rptr., 2015 WL 5890103

Footnotes

1 In his cause of action for violation of his civil rights, Crotts complains that Healey and Strange "have refused to prosecute crimes committed against the Plaintiff in the same manner as crimes committed against others." In his cause of action for breach of contract, Crotts complains that "the Defendants substantially breached [their employment] contract, failing in whole or in part, to faithfully perform their duties, which include, but are not limited to, the diligent prosecution of crimes committed within their jurisdiction, refusing to prosecute crimes not supported by probable cause, and to see that justice is done, not merely seek convictions." In his cause of action for abuse of process, Crotts complains that "[t]he Defendant's perverted the proper use of legal process by refusing to prosecute crimes committed against the Plaintiff, thereby violating the Plaintiff's civil rights."

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CASE NO. 6

2019 WL 13221680
Only the Westlaw citation
is currently available.
United States District Court, S.D.
Texas, Corpus Christi Division.

Diana BOND, Plaintiff,
v.
NUECES COUNTY,
TEXAS, et al., Defendants.

Civil
Action
No.
2
:
19
-
CV
-
43
|

Signed September 5, **2019**

Attorneys and Law Firms

Christopher J. Gale, Amie Augenstein, Gale Law Group PLLC, Corpus Christi, TX, for Plaintiff.

Calvin Trey Scott, Kennedy Attorneys and Counselors at Law, Dallas, TX, for Defendant Jackie Blevins.

Nichol L. Bunn, Lewis Brisbois Bisgaard & Smith, Calvin Trey Scott, Kennedy Attorneys and Counselors at Law, Dallas, TX, for Defendant Wellpath LLC.

ORDER GRANTING
MOTION TO DISMISS

DAVID S. MORALES, UNITED STATES DISTRICT JUDGE

***1** In this civil rights action brought under 42 U.S.C. § 1983, Plaintiff Diana Bond claims that Nueces County employees denied adequate medical attention to Plaintiffs daughter, Tami Bond ("Bond"), who died while detained at the Nueces County Jail. (D.E. 29). Before the Court is Defendants' Supplemental Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (D.E. 33). The Motion to Dismiss was filed by Nueces County, Texas ("Nueces County"), Elizabeth Alvarado, Jasmine Drake, Michael Alvarez, Anthony Munoz, Jose Rodriguez, Luis Rivera, Jose Aguayo, and Chris Gomez (together "Individual County Defendants"). For the reasons stated below, Defendants' Motion to Dismiss is **GRANTED.** Plaintiff may file for leave to amend **on or before September 19, 2019.**

I. Procedural Background

On February 5, **2019**, Plaintiff filed her Original Complaint alleging that Defendants did not provide adequate medical care to treat Plaintiff's serious medical needs in violation of her constitutional rights.[1] (D.E. 1). She named as Defendants: (1) Nueces County, Texas; (2) two John Doe defendants; and (3) two Jane Doe defendants. (D.E. 1). On February 11, **2019**,

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Plaintiff filed her First Amended Complaint naming the same defendants. (D.E. 3).

On April 22, **2019**, Nueces County filed a 12(b)(6) Motion to Dismiss. (D.E. 10). The Plaintiff responded on May 28, **2019**, (D.E. 17), and Nueces County replied on June 4, **2019**. (D.E. 21). In Plaintiff's response, she requested leave to amend, which the Court granted on June 12, **2019**. (D.E. 22).

On July 1, **2019**, Plaintiff filed her Second Amended Complaint ("the Complaint"), naming as defendants: (1) Nueces County, Texas; (2) Elizabeth Alvarado; (3) Jasmine Drake; (4) Michael Alvarez; (5) Anthony Munoz; (6) Jose Rodriguez; (7) Luis Rivera; (8) Jose Aguayo; (9) Chris Gomez; (10) Wellpath, LLC; and (11) Jackie Blevins. (D.E. 29). On July 12, **2019**, Defendants filed a Supplemental 12(b)(6) Motion to Dismiss. (D.E. 33). Plaintiff filed her Response to the Supplemental Motion to Dismiss on August 7, **2019**. (D.E. 39).

II. Standard of Review

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint for failure to state a claim upon which relief may be granted. The district court, however, must construe the complaint in a light most favorable to the plaintiff, and the allegations contained therein must be taken as true. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (citation omitted). To survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face" and must plead those facts with enough specificity "to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Moreover, a complaint will not be dismissed merely because it contains an "imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby*, 574 U.S. 10, 10 (2014) (per curiam) (citations omitted).

III. Plaintiff's Allegations

***2** The following allegations were made in Plaintiffs Second Amended Complaint and are taken as true for the purposes of a 12(b)(6) motion to dismiss. *Katrina Canal Breaches*, 495 F.3d at 205.

On February 6, 2017, Tami Bond was arrested, charged with possession of a controlled substance and tampering with evidence, and placed in the Nueces County Jail. (D.E. 29, ¶ 15). During intake, Bond was calm, focused, and oriented. (D.E. 29, ¶ 15). Soon thereafter, however, Bond became uncooperative because she had swallowed two lethal-sized baggies of methamphetamine or amphetamines. (D.E. 29, ¶ 15). When the medical personnel provided by Nueces County Sheriff's Department asked about any medical concerns, Bond answered "no" to all questions. (D.E. 29, ¶ 16). However, Bond was unable to follow verbal commands, and she was placed in a holding cell until

she could sufficiently cooperate and finish the booking process. (D.E. 29, ¶ 16).

During Bond's time in holding, she required help from other inmates to use the bathroom and get up from the floor, and she was seen grabbing unseen objects from the air. (D.E. 29, ¶ 17). Because of Bond's behavior, guards were sent into the cell to search for narcotics. (D.E. 29, ¶ 17). After the search, Bond was seen acting as if she was in pain and continued to require assistance from other inmates. (D.E. 29, ¶ 18). Defendants saw she was stumbling, had slurred speech, and needed assistance, and when Defendants again tried to complete Bond's booking, they were unable to because of her behavior. (D.E. 29, ¶ 18). Both Bond and other inmates sought further medical attention for her. (D.E. 29,¶ 20). Despite Bond's behavior and requests for help, Defendants took no action to have Bond medically reassessed. (D.E. 29, ¶ 18).

Defendants eventually moved Bond to another cell—and then to an isolation cell—because of erratic behavior, such as sitting on a pregnant woman and hallucinating. (D.E. 29, ¶ 19). Though she was placed in isolation and was supposed to be checked on every fifteen minutes, jail personnel neither monitored Bond nor provided medical treatment. (D.E. 29, ¶ 19). Bond died from an overdose the following morning. (D.E. 29, ¶ 20). Plaintiff alleges that Defendants' failure to provide adequate medical attention to Bond's serious medical condition resulted in Bond's death. (D.E. 29, ¶ 20).

Based on these factual allegations, Plaintiff brings suit under 42 U.S.C. § 1983 against Nueces County, eight individual county employees, Wellpath, LLC (the jail medical provider), and Wellpath's employee, Blevins. (D.E. 29). Plaintiff alleges that Defendants violated Bond's Fourth Amendment rights "by acting with deliberate indifference to a substantial and known risk of harm" to Bond, "failing to intervene, where such intervention would have prevented further injury, including [Bond]'s death," ignoring Bond's "serious medical needs," and "failing to impose proper and sufficient policies and/or procedures as to the screening of inmates/detainees/arrestees in regard to their medical needs and/or training concerning same." (D.E. 29, ¶ 25). Plaintiff advances her theory of municipal liability by asserting ten customs or persistent practices that Plaintiff alleges have become Nueces County policy. (D.E. 29, ¶ 27). The allegations include that Nueces County does not properly supervise detainees and ignores their serious medical needs, does not provide adequate staff or discipline employees who violate procedures, does not comply with standards concerning proper cell checks, and does not have proper policies and procedures for screening or reassessing the medical needs of detainees. (D.E. 29, ¶ 27).

***3** Nueces County moves to dismiss Plaintiff's claims asserting Plaintiff has failed to state any plausible claim for governmental liability. (D.E. 33). The Individual County Defendants move to dismiss claiming the suit against them is barred by the statute of limitations. (D.E. 33).

IV. Section 1983 & Municipal Liability

"To state a claim under [42 U.S.C.] § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988) (citations omitted). A municipality will be liable for the constitutional violations of its employees only if the alleged constitutional deprivations resulted from municipal policy. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). To establish municipal liability, a plaintiff must identify three elements: (1) an official policy or custom (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right. *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) (citation omitted). Together, these three elements "distinguish individual violations perpetrated by local government employees from those that can be fairly identified as actions of the government itself." *Piotrowski v. City of Hous.*, 237 F.3d 567, 578 (5th Cir. 2001). A "facially innocuous policy will support liability if it was promulgated with deliberate indifference to the 'known or obvious consequences' that constitutional violations would result." *Id.* at 579 (quoting *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 407 (1997)).

Plaintiff does not allege that Nueces County is liable because of an official policy but alleges ten customary practices that Plaintiff claims have become policy. Defendants argue that Plaintiff did not plead sufficient factual content to show a custom or practice of failing to protect or provide adequate medical care. In response, Plaintiff challenges the pleading standard, stating that the Fifth Circuit "blatantly ignore[s]" the proper pleading standard for a section 1983 municipal claim. (D.E. 39, p. 7). Specifically, Plaintiff pleads that "generic and boilerplate" assertions are sufficient at this stage.[2] (D.E. 39, p. 11).

A. *Leatherman* Does Not Eliminate *Twombly* & *Iqbal* in Section 1983 Cases

The Supreme Court in *Leatherman* made it clear that the pleading of a section 1983 claim is not governed by Rule 9 the Federal Rules of Civil Procedure, but by Rule 8, which at the time was treated as a notice pleading standard. *Leatherman v. Tarrant Cty. Narcotics Intelligence Coordination Unit*, 507 U.S. 163, 164, 168 (1993). The Court agrees with Plaintiff that the main point of *Leatherman* survived *Twombly* in that section 1983 pleadings are evaluated under Rule 8(a). But *Twombly* announced new law that altered the interpretation of Rule 8(a), and that new interpretation applies to every case going forward that would have previously permitted formulaic pleadings. *Twombly*, 550 U.S. 544; *see, e.g., Evans v. City of Meridian*, 630 F. App'x 312, 315 (5th Cir. 2015) (per curiam) (applying *Twombly* & *Iqbal* to a municipal section 1983 claim without mentioning *Leatherman*); *Hatcher ex rel. T.H. v. Nueces Cty.*, No. 2:17-CV-155, 2017 WL 2985639, at *2 (S.D. Tex. July 13, 2017) (applying *Twombly* & *Iqbal* to municipal section 1983 claims); *Gonzales v. Nueces Cty.*, 227 F. Supp. 3d 698, 701 (S.D. Tex. 2017) (same); *Flanagan v. City of Dall*, 48 F. Supp. 3d 941, 950-51 (N.D. Tex. 2014) (same); *White v. City of Dall*, No. 3:12-cv-2145-0(BH), 2013 WL 821992, at *4 (N.D. Tex. Feb. 8, 2013)

(same); *Wright v. City of Dall*, No. 3:09-cv-1923-B, 2010 WL 3290995, at *2–4 (N.D. Tex. July 19, 2010) (same). This Court does not hold Plaintiff to a Rule 9(b) or a summary judgment standard. Rather, this Court holds Plaintiff to the pleading standards set forth under Rule 8, *Twombly, Iqbal*, and *Leatherman.*

B. Official Policy or Custom

***4** The first element of a municipal liability claim under section 1983 requires Plaintiff to adequately plead an official policy or custom. *Peterson*, 588 F.3d at 847. "[A] policy can be shown through evidence of an actual policy, regulation, or decision that is officially adopted and promulgated by lawmakers or others with policymaking authority." *Valle v. City of Hous.*, 613 F.3d 536, 542 (5th Cir. 2010) (citing *Burge v. St. Tammany Parish*, 336 F.3d 363, 369 (5th Cir. 2003)). A custom is "a persistent, widespread practice of [municipal] officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Piotrowski*, 237 F.3d at 579 (citing *Webster v. City of Hous.*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc) (per curiam)). To establish a custom, a plaintiff must demonstrate "a pattern of abuses that transcends the error made in a single case." *Id.* at 582 (citing *Brown*, 520 U.S. at 410–11). Prior incidents "cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question. That is, notice of a pattern of *similar* violations is required." *McCully v. City of N. Richland Hills (In re Estate of Davis)*, 406 F.3d 375, 383 (5th Cir. 2005) (footnote omitted); *see also Oporto v. City of El Paso*, No. EP-10-CV-110-KC, 2010 WL 3503457, at *6 (W.D. Tex. Sept. 2, 2010) (holding that to survive a motion to dismiss on an unconstitutional unwritten policy or customary-practice claim, a plaintiff must plead sufficient facts to "allow the court to draw the reasonable inference that [the municipality has] engaged in a pattern of misconduct").

Plaintiff alleges that the following customary policies caused the violations of constitutional rights and form the basis of the Defendants' liability under section 1983:

> (1) ignoring the serious medical needs of those entrusted to its care based either on expedience or ignorance to the consequences, (2) failing to discipline those persons [who] are found to have ignored the medical needs of such individuals, (3) failing to adequately supervise and/or observe its inmates/detainees/arrestees, (4) failing to provide adequate manpower to supervise and/or observe inmates/detainees/arrestees, (5) failing to provide adequate staff to handle situations stemming from the medical needs of inmates/detainees/arrestees, (6) failing to impose proper and sufficient policies and/or procedures as to the screening of inmates/detainees/arrestees in regard to their medical needs,

> (7) failing to act in compliance with and failing to enforce the policy (of Texas Jail Standards or otherwise) concerning proper cell checks and/or the importance of same, and (8) failing to act in compliance with and failing to enforce the policy (of Texas Jail Standards or otherwise) requiring visual "checks" every 15 minutes for persons in isolation and/or under medical review, (9) failing to train and/or discipline those employees whom are found to have violated any of the above-noted policies, and (10) failing to train and/or supervise concerning medical reassessments for inmates/detainees/arrestees who – even while initially may not have signs of obvious medical problems – begin to exhibit obvious signs of medical problems, including but not limited to, those stemming from the use of illicit drugs.

(D.E. 29, ¶ 27).

Plaintiffs allegations one through five, seven, and eight are those of customary policies, while allegations six, nine, and ten pertain to failure to train and are addressed separately.[3] Defendants move to dismiss asserting that Plaintiff did not establish the existence of an unconstitutional policy or custom by Nueces County. The Court addresses each customary policy allegation below, focusing solely on the issue of governmental liability.

i. Alleged Customs One, Three, Seven and Eight

***5** Plaintiff alleges that Nueces County ignores the serious medical needs of those entrusted to its care based either on expedience or ignorance of the consequences and that the County does not adequately supervise and observe its inmates, detainees, or arrestees. (D.E. 29, ¶ 27). Plaintiff also alleges that Defendants do not comply with or enforce policies (of the Texas Jail Standards,[4] or otherwise) concerning proper cell checks, specifically for persons in isolation or under medical review. (D.E. 29, ¶ 27).

All of Plaintiff's alleged facts on these allegations deal exclusively with Bond. No other instances involving other inmates, detainees, or arrestees are alleged. But a pattern "requires 'sufficiently numerous prior incidents,' as opposed to 'isolated instances.' " *Peterson*, 588 F.3d at 850.

> If actions of [municipal] employees are to be used to prove a custom for which the municipality is liable, those actions must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing

> body of knowledge that the objectionable conduct is the expected, accepted practice of [municipal] employees.

Webster, 735 F.2d at 842; *see* *Rivera v. Hous. Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003) ("[I]solated unconstitutional actions by municipal employees will almost never trigger liability" (citing *Piotrowski*, 237 F.3d at 578)). [5]

Persuasive here are rulings from other federal district courts where claims of an unconstitutional policy or custom against a municipality were dismissed. *See* *Hatcher*, 2017 **WL** 2985639, at *3–4 (finding insufficient facts to infer a policy or custom for failure to provide adequate medical treatment in part because plaintiff did not plead a pattern of denial of medical care); *Gonzales*, 227 F. Supp. 3d at 705 (dismissing claims against a county because lists of internal investigations were devoid of facts showing any similarity); *Carter v. Diamond URS Huntsville, LLC*, 175 F. Supp. 3d 711, 753 (S.D. Tex. 2016) (dismissing claims against a city because alleging only three isolated incidents was insufficient to plead a custom or practice); *Moreno v. City of Dall*, No. 3:13-cv-4106-B, 2015 **WL** 3890467, at *9 (N.D. Tex. June 18, 2015) (dismissing claims against a city because eight prior incidents over five years did not establish a pattern).

Holdings where the plaintiff was found to have met the pleading standard are also instructive. *See, e.g.*, *Sanchez v. Gomez*, 283 F. Supp. 3d 524, 536-37 (W.D. Tex. 2017) (finding a sufficient pattern of excessive force against persons with mental illness when nine similar incidents were alleged and statistics suggested that the city's proportion of individuals killed by police who had visible mental health issues were double and quadruple the national average); *Flanagan*, 48 F. Supp. 3d at 952-54 (finding a "close call" that plaintiffs had pled sufficient facts in alleging that a police department had a policy to shoot first and ask questions later after the city acknowledged training issues existed and numerous statistics showed high levels of a variety of misconduct compared to the national averages); *Oporto*, 2010 **WL** 3503457, at *6 (finding allegations of thirty-two prior incidents of deadly force spanning fifteen years sufficient to infer a custom or practice).

***6** In the case at hand, Plaintiff does not even allege a bare list of prior incidents. Though she must allege a pattern with "similarity and specificity," *Peterson*, 588 F.3d at 851, Plaintiff fails to allege any other instances where Nueces County allegedly ignored the serious medical needs of someone entrusted to its care, let alone similar or specific instances. The Complaint is devoid of any facts suggesting a persistent practice existed as to these four alleged policies.

Plaintiff alleges:

> The actions and/or inactions taken in this case were taken pursuant to the customary practices and/or policies or procedures that were sanctioned by

> Defendants. Liability for Defendants is established under § 1983 because its "ignore all policies" attitude is a persistent, widespread practice of the county employees —namely deputies/officers/ agents—that, although not authorized by officially adopted policy, is so common and well settled as to constitute a custom that fairly represents official policy. Defendants had actual or constructive knowledge of each practice, custom, and/or policy or procedure and numerous prior incidents of such conduct and/or inaction as to establish accession to that custom by the policy makers. Defendants' unspoken policies above is a decision that reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision.

(D.E. 29, ¶ 28).

These allegations are almost verbatim quotes from the elements of municipal liability and are too conclusory and general to assert an actionable claim. *See Spiller v. City of Tex. City, Police Dept.*, 130 F.3d 162, 167 (5th Cir. 1997) ("[The] assertion that [the municipality] is liable because '[defendant] was acting in compliance with the municipality's customs, practices or procedures' is insufficient because it is conclusory."). "It is the conclusory nature of respondent's allegations ... that disentitles them to the presumption of truth." *Iqbal*, 556 U.S. at 681.

Plaintiff points to *Balle v. Nueces County*, where the Fifth Circuit found a pattern was sufficiently pled. 690 F. App'x 847, 850-53 (5th Cir. 2017) (finding the complaint asserted a pattern when jail personnel did not provide Balle with "even minimally adequate medical care for his acute and emergency needs and made little effort to transfer him to a hospital, despite his numerous complaints that he was experiencing a medical emergency."). *Balle* is distinguishable from this. The plaintiff in *Balle* was detained for six days and subject to mistreatment on several days across several shifts of employees. *See id.* at 848. By contrast, Bond was detained for one night in Nueces County Jail. As such, this Court relies on the numerous published Fifth Circuit precedents requiring plaintiffs to allege a pattern of mistreatment to sufficiently show a policy. *See Peterson*, 588 F.3d at 850; *Rivera*, 349 F.3d at 247; *Webster*, 735 F.2d at 842. Accordingly, Plaintiff's amended pleadings are insufficient to allege a pattern of similar abuses.

ii. Alleged Customs Two, Four and Five

Plaintiff alleges that Nueces County does not discipline employees who ignore the medical needs of individuals entrusted to its care, but Plaintiff offers no facts to support this allegation. Plaintiff also alleges Nueces County is liable for failing to provide adequate

manpower to supervise and observe inmates, detainees, and arrestees and failing to provide adequate staff to handle situations stemming from the medical needs of those individuals. Again, the Complaint is entirely devoid of facts to support these conclusory allegations for either Bond's case or to establish a pattern. *See Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.") (citation omitted). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations to be entitled to the assumption of truth." *Id.* at 679. As such, these customs are likewise insufficiently pled.

iii. Alleged Customs Six, Nine, and Ten: Failure to Train

***7** The failure to train municipal employees may also constitute a "policy," but only when it "reflects a 'deliberate' or 'conscious' choice by a municipality." *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). Plaintiffs allegations six, nine, and ten assert that Nueces County is liable for failure to train. Defendants move to dismiss, arguing that Plaintiff pled insufficient factual content to show a failure to train. (D.E. 33, p. 9–10). Plaintiff's response did not address the argument. However, the Court has reviewed the merits of this claim.

"A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (citation omitted). To establish liability for failure to train, a plaintiff must show that: "(1) the municipality's training policy or procedure was inadequate, (2) the inadequate training policy was a 'moving force' in causing violation of the plaintiff's rights; and (3) the municipality was deliberately indifferent in adopting its training policy." *Valle*, 613 F.3d at 544 (citation omitted). "Moreover, 'for liability to attach based on an inadequate training" claim, a plaintiff must allege with specificity how a particular training program is defective.' " *Goodman v. Harris Cty.*, 571 F.3d 388, 395 (5th Cir. 2009) (quoting *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005)). To show a municipality's deliberate indifference, the plaintiff is required to demonstrate a municipality had "notice of a pattern of similar violations." *McCully*, 406 F.3d at 383.

Plaintiff alleges that Nueces County failed "to train and/or discipline those employees [who] are found to have violated any of the above-noted policies." (D.E. 29, ¶ 27). The Complaint contains no other information related to this alleged custom and is therefore insufficient and shall be dismissed.

Plaintiff also pled two customary policies of:

> failing to impose proper and sufficient policies and/or procedures as to the screening of inmates/detainees/arrestees in regard to their medical needs .. and [ ] failing to train and/or supervise concerning medical reassessments for inmates/detainees/arrestees who—even while initially may not have signs of

> obvious medical problems —begin to exhibit obvious signs of medical problems, including but not limited to, those stemming from the use of illicit drugs.

(D.E. 29, ¶ 27). The alleged facts supporting these policies are those surrounding Bond's time in jail, which would be sufficient if analyzing the Individual County Defendants' liability. For governmental liability, more facts are needed to establish a persistent, widespread practice of failing to protect or provide adequate medical care. *See* *Piotrowski*, 237 F.3d at 579. To that point, Plaintiff alleges:

> Defendants are aware that during each and every shift of every single day, that the possibility that someone (especially someone that is accused of tampering with evidence by ingestion) could very well have complications associated with the use/ ingestion of same. The possibility that overdoses (leading to death or otherwise) will occur is without question and any jail should be training their employees/agents to observe signs of same, how to react to same and actually utilize medical technology at hand. Based on information and belief, Plaintiff would proffer that such "overdoses" are a regular event and that very often, medical (either internal or outside ambulance services) is called for persons suffering same. Even in the last few months, such occurrence has been repetitive and resulted in multiple persons being treated and/or hospitalized.

***8** (D.E. 29, ¶ 21).

Taken as true, Defendants knew of regular overdoses that very often required medical services by their detainees. Plaintiff fails to allege anything further that could meet the elements for failure to train. Plaintiff does not allege that Nueces County had notice "of a pattern of similar violations" to show Bond's death was a "plainly obvious consequence" of the decision not to provide her medical care. *See* *Brown v. Bryan Cty.*, 219 F.3d 450, 457 (5th Cir. 2000). Plaintiff alleged that overdoses requiring medical attention are a pattern, but she did not allege a pattern of Nueces County failing to provide medical care during those overdoses. In fact, Plaintiff seems to allege the opposite—that medical care *is* being provided—in that such occurrences have "been repetitive and resulted in multiple persons being treated and/or hospitalized." (D.E. 29, ¶ 21).

Plaintiff did not plead any prior incidents allowing the Court to draw the reasonable inference that Nueces County was deliberately indifferent to constitutional violations like

those Bond suffered. *See Iqbal*, 556 U.S. at 678. Accordingly, Plaintiff did not plead sufficient facts to hurdle the deliberate indifference element. Because Plaintiff fails to factually plead deliberate indifference, she has not met the pleading standard as to any of the failure to train elements.

After considering all ten "policies" Plaintiff put forth, the Court concludes that none are sufficient to establish that Nueces County maintained a wide-spread custom or policy that caused Bond's death. Because the Court finds Plaintiff's claim fails on element one of municipal liability—an official policy or custom—there is no need to consider the other two elements: policy maker and moving force. Without an official policy or custom, Plaintiff's section 1983 claim against Nueces County must be dismissed. The. Court notes that Plaintiff made compelling and detailed allegations against at least some of the individual officers. But alleging liability against Nueces County is beyond the inferences afforded this Complaint.

V. Statute of Limitations & the Individual Defendants

Defendants argue that Rule 15 does not allow Plaintiff to add named defendants in for the Doe defendants after the limitations period. (D.E. 33, p. 11–12). The statute of limitations for a section 1983 claim "is determined by the general statute of limitations governing personal injuries in the forum state." *Piotrowski*, 237 F.3d at 576 (citing *Pete v. Metcalfe*, 8 F.3d 214, 217 (5th Cir. 1993)). Texas's statute of limitations for personal injury actions is two years after the day the cause of action accrues. TEX. CIV. PRAC. & REM. CODE § 16.003; *Piotrowski*, 237 F.3d at 576. The cause of action for injury resulting in death accrues on the death of the injured person, in this case February 7, 2017. TEX. CIV. PRAC. &REM. CODE § 16.003(b). As such, limitations ran on February 7, **2019**.

Plaintiff's Original Complaint was filed on February 5, **2019**. (D.E. 1). Her Second Amended Complaint, which substituted names of individual defendants for John and Jane Doe, was filed on July 1, **2019**. (D.E. 29). However, changing the parties' names from "Doe" to named individuals does not relate back to the date of the Original Complaint filed within the limitations period. Accordingly, as discussed below, these claims must be dismissed as barred by limitations.

A. Applicable Law

***9** Federal Rule of Civil Procedure 15(c)(1) allows for an amendment to a complaint to relate back to the date of the original complaint if certain conditions are met.

> An amendment to a pleading relates back to the date of the original pleading when:
>
> (A) the law that provides the applicable statute of limitations allows relation back;
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction or occurrence set out—or attempted to be set out—in the original pleading; or

> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> i. received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> ii. knew or should have known that the action would have been brought against it, *but for a mistake concerning the proper party's identity.*

FED. R. CIV. P. 15(c)(1) (emphasis added).

In *Jacobsen v. Osborne*, the Fifth Circuit held that an attempted substitution for a "John Doe" defendant does not relate back to the date of the original complaint for limitations purposes. 133 F.3d 315, 320-21 (5th Cir. 1998). Rule 15(c) requires a " 'mistake concerning the identity of the proper party' and our Circuit held that "use of a John Doe moniker does not constitute a 'mistake.' " *Whitt v. Stephens Cty.*, 529 F.3d 278, 282-83 (5th Cir. 2008) (denying leave to amend after the limitations period because naming Doe defendants is not a mistake and did not relate back (quoting *Jacobsen*, 133 F.3d at 321–22)).

In some circumstances, a court may preserve a claim that is otherwise untimely under the doctrine of equitable tolling. "The doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable." *Lambert v. United States*, 44 F.3d 296, 298 (5th Cir. 1995) (citation omitted). "Traditional equitable principles preclude a court from invoking equitable tolling, however, when the party seeking relief has an adequate legal or statutory remedy to avoid the consequences of the statute of limitations." *Id.* at 299 (citations omitted).

B. Analysis

Plaintiff does not dispute that both *Balle*, 690 F. App'x 847, and *Jacobsen*, 133 F.3d 315, hold that substituting for "John Doe" defendants does not relate back for limitations periods. Instead, Plaintiff argues that the Fifth Circuit's caselaw is incorrect on this matter and ostensibly urges the Court to follow other circuit courts. (D.E. 39, p. 3–4). To be sure, Fifth Circuit caselaw is binding upon this Court. Plaintiff substituted named individuals for "John Doe" and "Jane Doe" in her Second Amended Complaint—over six months after the limitations period expired. (D.E. 29). That substitution does not relate back to the date of her original complaint. *See Jacobsen*, 133 F.3d at 321-322. Therefore, the claims against the substituted individual defendants are time-barred.

Additionally, equitable tolling does not apply. Because the Texas statute of limitations is borrowed in section 1983 cases, "Texas's equitable tolling principles control this litigation." *Myers v. Nash*, 464 F. App'x 348, 349 (5th Cir.2012) (per curiam) (citing *Rotella v. Pederson*, 144 F.3d 892, 897 (5th Cir.1998)). "Texas courts sparingly apply equitable tolling and look, *inter alia*, to whether a plaintiff diligently pursued his rights; litigants may not use the doctrine to avoid the consequences of their own negligence. Federal courts also apply

the doctrine sparingly." *Id.* at 349 (citations and internal quotation marks omitted).

***10** The Fifth Circuit has spoken on this issue. In *Balle*, the court found that the delay in determining identities of "Doe" defendants did not warrant equitable tolling. 690 F. App'x at 851. In contrast, in *Green v. Doe*, the Fifth Circuit instructed that equitable tolling was appropriate "because the delay in determining the identity of 'John Doe' [was] not attributable to" the plaintiff's actions. 260 F. App'x 717, 719 (5th Cir. 2007) (per curiam) (emphasizing that the plaintiff had filed motions for discovery twice before limitations expired, which the district court denied). The Fifth Circuit in *Green* was careful to distinguish the case from *Jacobsen*, noting that Green had filed his lawsuit "almost eleven months before the running of the statute." *Green*, 260 F. App'x at 719. In contrast, the *Jacobsen* and *Balle* plaintiffs filed the suit just a few days before the limitations period had run, and the Fifth Circuit instructs that "there was no justification for equitable tolling" in those cases. *Id.* (citing *Jacobsen*, 133 F.3d at 321); *Balle*, 690 F. App'x at 851.

The Court finds equitable tolling is not applicable here. Plaintiff's inability to timely determine the identities of the "Doe" defendants was attributable to her own decision to file this suit two days before the end of the limitations period. By choosing to file that close to the deadline, Plaintiff failed to utilize the discovery mechanisms of the Federal Rules of Civil Procedure. Plaintiff states she "attempted—prior to hiring counsel—to determine the identity of the employees at issue to no avail." (D.E. 39, p. 6). No further facts were alleged about this attempt. Because the court's discovery mechanisms are a legal remedy available to Plaintiff and she did not utilize them by filing so close to the end of the limitations period, the Court cannot conclude that Plaintiff "diligently pursued [her] rights" and does not find that equitable tolling is appropriate. *Myers*, 464 F. App'x at 349; *see also Lambert*, 44 F.3d at 299.

As such, all claims against Individual County Defendants Elizabeth Alvarado, Jasmine Drake, Michael Alvarez, Anthony Munoz, Jose Rodriguez, Luis Rivera, Jose Aguayo, and Chris Gomez are untimely and are dismissed.

VI. Leave to Amend

Plaintiff included in her response a request for leave to amend should the Court find her pleading deficient. The Court notes that this Order is not dispositive of the entire case because claims against Wellpath, LLC and Jackie Blevins remain. The Court will permit Plaintiff to file a renewed motion for leave to amend with the proposed amended pleading attached as an exhibit. The motion shall include any necessary briefing to show that the amended pleading complies with Federal Rule of Civil Procedure 8(a) and *Twombly*, 550 U.S. 544, & *Iqbal*, 556 U.S. 662. The motion for leave to amend may be filed on or before September 19, **2019**. No extensions shall be granted.

VII. Conclusion

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Defendants' Motion to Dismiss, (D.E. 33), is **GRANTED.** All claims against Elizabeth Alvarado, Jasmine Drake, Michael Alvarez, Anthony Munoz, Jose Rodriguez, Luis Rivera, Jose Aguayo, and Chris Gomez are time-barred and **DISMISSED.** The claims against Nueces County, Texas are **DISMISSED** for failure to state a claim. Defendant's first Motion to Dismiss, (D.E. 10), is **DENIED** as moot. Plaintiff may request leave to amend **on or before September 19, 2019.**

SIGNED and ORDERED this 5th day of September **2019**.

All Citations

Not Reported in Fed. Supp., 2019 WL 13221680

Footnotes

1 Plaintiff also initially brought a claim under the Americans with Disabilities Act, but she did not include an ADA claim in her Second Amended Complaint.

2 Plaintiff relies on *Gearin v. Rabbett*, No. 10-CV-2227 (PJS/AJB), 2011 **WL** 317728, at *9 (D. Minn. Jan. 28, 2011); *Charles v. Galliano*, No. 10-811, 2010 **WL** 3430519, at *6 (E.D. La. Aug. 26, 2010); *Abdulkhalik v. City of San Diego*, No. 08CV1515-MMA(NLS), 2009 **WL** 4282004, at *10 (S.D. Cal. Nov. 25, 2009); and *Dwyer v. City of Corinth*, No. 4:09-CV-198, 2009 **WL** 3856989, at *9 (E.D. Tex. Nov. 17, 2009).

3 Plaintiff also alleges that "[a]t all pertinent times, Defendant Nueces County, Texas (by and through the Nueces County Sheriff's Department) authorized and ratified the wrongful and tortuous acts and/or omissions of its officers/deputies/agents." (D.E. 29, ¶ 22). Neither side briefed the issue of ratification, but "[Fifth Circuit] precedent has limited the theory of ratification to 'extreme factual situations.' " *Peterson*, 588 F.3d at 848 (citing *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1998)). Plaintiff alleges no facts to support a ratification claim beyond this conclusory statement.

4 Plaintiff does not state which chapter of the Texas Jail Standards she is referring to, but the Texas Jail Standards are found in Title 37, Part 9, of the Texas Administrative Code.

5 The Court notes that the posture of this case is distinguishable from much of the Fifth Circuit case law on establishing a pattern. Discovery has not usually begun at the motion to dismiss stage, unlike in *Peterson, Rivera*, and *Webster*, which were at the summary judgment or jury stage. Those cases discussed the need for evidence beyond a bare list of prior incidents. *See* *Peterson*, 588 F.3d at 850; *Rivera*, 349 F.3d at 247; *Webster*, 735 F.2d at 842. In contrast, here at the motion to dismiss stage,

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the Court "must only evaluate whether Plaintiff has pled sufficient facts that would allow it to draw the reasonable inference that Defendants are liable for the alleged misconduct." *Ramirez v. Jim Wells* Cry., No. CC-09-CV209, 2010 WL 2598304, at *2 (S.D. Tex. June 25, 2010).

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CASE NO. 7

2024 WL 875834
Only the Westlaw citation
is currently available.
United States District Court, W.D.
Texas, San Antonio Division.

Christine OLIVEROS, Plaintiff,
v.
David Rene OLIVEROS, Ross Molina Oliveros PC, James Michael Oliveros, Defendants.

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Signed February 13, **2024**

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REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

RICHARD B. FARRER, UNITED STATES MAGISTRATE JUDGE

To the Honorable United States District Judge Fred Biery:

***1** This Report and Recommendation concerns Defendants' Motions for Summary Judgment (originally filed as Motions to Dismiss). *See* Dkt. Nos. 33, 34, & 35; *see also* Dkt. No. 47 (Order converting Motions to Dismiss to Motions for Summary Judgment). Also before the Court is Plaintiff's Motion to Set Aside Mutual Release. *See* Dkt. No. 58. All pretrial matters in this action have been referred for resolution, pursuant to Rules CV-72 and 1 of Appendix C to the Local Rules for the United States District Court for the Western District of Texas. *See* Dkt. No. 14. Authority to enter this recommendation stems from 28 U.S.C. § 636(b)(1)(B).

For the reasons set forth below, the Motions for Summary Judgment, Dkt. Nos. 33, 34, & 35, are converted back to Motions to Dismiss, and those motions to dismiss should be **GRANTED IN PART** and **DENIED IN PART**, as discussed below. The Court will take up Plaintiff's Motion to Set Aside Mutual Release by a separate order.

Factual and Procedural Background

This **case** centers around a divorce between Plaintiff Christine Oliveros and Defendant

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David Rene Oliveros. Defendant James Oliveros is David's brother. James is a partner at Defendant law firm Ross Molina Oliveros PC, and David is a non-partner attorney working at the firm.

Plaintiff Christine filed for divorce from David on March 3, 2020, in Bexar County, Texas. Dkt. No. 32, Second Amended Complaint, at 3-4 ("2d Am. Compl.") According to Christine, she decided to end the 22-year marriage "after learning that Defendant David Oliveros had sexually assaulted her while she was 'not cognizant' due to taking prescribed sleeping medication." *Id.*

Three documents and one alleged incident are pertinent to the present motions. On March 18, 2021, while the then year-long divorce proceedings were pending, Christine, David, and James all signed and entered into a Mediated Settlement Agreement. It includes a release provision that states:

> Mutual Release by all parties and Jim Oliveros as to all claims that are known or reasonably could have been known.

Dkt. No. 33, Exhibit I, Mediated Settlement Agreement at 7.

But then in April of 2021, an incident occurred at the Ross Molina Oliveros PC law firm. 2d Am. Compl. at 11. According to Christine's recounting of events, she was the victim of a physical assault by David. *Id.*

In November of 2021, Christine, David, and James all signed and executed an Agreement Incident to Divorce. The Agreement Incident to Divorce styles itself, "a merger of [the] mediated settlement agreement dated March 18, 2021, between the parties." Dkt. No. 33, Exhibit N ("Agreement Incident to Divorce") at 18. The Agreement Incident to Divorce, like the preceding Mediated Settlement Agreement, includes a release provision. *See* Dkt. No. 33, Exhibit I ("Mediated Settlement Agreement"). The release in the Agreement Incident to Divorce provides in pertinent part the following:

> Save and except the obligations contained in this Agreement or in the Final Decree of Divorce, each party to this Agreement releases each other party to this Agreement for all claims, liabilities, debts, obligations, and causes of action of any and every character, whether asserted or unasserted, at law or equity, whether sounding in contract, tort, or arising under any federal or state statute, that each party may have against the other and that are known or reasonably could have been known.

Agreement Incident to Divorce at 15. As an aside, Christine now takes issue with the

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validity of this release, claiming the "release was obtained under both emotional and financial duress, duress of property, through fraudulent means, and should be deemed invalid." 2d Am. Compl. at 8; Dkt. No. 38 at 14; Dkt. No. 39 at 6.

***2** In January of 2022, the state court entered a final decree of divorce. Dkt. No. 33, Exhibit O ("Final Divorce Decree"). The decree incorporates by reference the Agreement Incident to Divorce, using the following language:

> The Court finds that the Parties have entered into an Agreement Incident to Divorce, in a document separate from the Final Decree of Divorce. The Court approves the agreement and incorporates it by reference as part of this decree as if it were recited herein verbatim and orders the parties to do all things necessary to effectuate the agreement.

Final Divorce Decree at 2. The divorce decree also includes a mutual release, which states:

> Save and except the obligations contained in this Final Decree of Divorce and the obligations contained in the parties' Agreement Incident to Divorce, CHRISTINE OLIVEROS and DAVID OLIVEROS have fully and forever released each other from all claims and causes of action of any and every character, whether asserted or unasserted, at law or in equity, whether sounding in contract, tort, or arising under any federal or state statute, that each party may have against the other and that are known or reasonably could have been known. *This release does not apply to any claims or causes of action that may arise after March 18, 2021.*

Final Divorce Decree at 28 (emphasis added).

Plaintiff Christine filed her complaint against Defendants David Oliveros, James Oliveros, and the Ross Molina Oliveros PC law firm on April 1, 2023. Dkt. No. 1. Against her former husband, Defendant David, Christine raises claims of sexual assault, physical assault, and civil conspiracy to defraud. 2d Am. Compl. at 6-8, 11-12, & 22-35. Against David's brother, Defendant James, Christine raises claims for sexual assault (as an accessory after the fact), fraud, civil conspiracy to defraud, knowing participation in breach of fiduciary duty, tortious interference with a contract or business relationship, and intentional infliction of emotional distress. *Id.* at 8-10 & 15-35. Against Ross Molina Oliveros PC, Christine

alleges vicarious liability for physical assault, negligent retention, fraud, and civil conspiracy to defraud. *Id.* at 12-15 & 22-35. In the present Motions to Dismiss, filed on August 8, 2023, Defendants ask the Court to dismiss Plaintiff's various claims on the basis of *res judicata* and due to pleading deficiencies. *See generally* Dkt. Nos. 33, 34 & 35.

In their Original Answer, Defendants David, James, and Ross Molina Oliveros PC raise counterclaims against Christine for breach of contract and trespass. Dkt. No. 11 at 15-16. These claims, however, are not at issue in the present motions and, indeed, are not presently the subject of any dispositive motion.

Upon its initial review of the present motions to dismiss, the Court observed that Defendants attached to those motions a significant amount of evidentiary material that had not been attached to or referenced in the live complaint. *See id.*; *see also* 2d Am. Compl. Accordingly, the Court ordered the motions converted to motions for summary judgment and ordered the parties to submit any additional summary judgment evidence they believed the Court should consider when resolving the motions in a summary judgment posture. *See* Dkt. No. 47.

***3** But having spoken with the parties at a December 1, 2023, hearing on a motion to quash depositions, the Court will now—at the parties' request—convert the motions back to motions to dismiss and exclude from consideration when addressing those motions any evidence not properly before the Court under Rule 12(b)(6). *See* Dkt. No. 52.

Analysis

The Court will first explain why the motions are being converted back to motions to dismiss and, second, what the scope of the record is in connection with the Court's consideration of those motions. The Court then will address the motions' merits. As discussed further below, some of Plaintiff's claims warrant dismissal under the doctrine of *res judicata*, some warrant dismissal due to pleading deficiencies, and some survive Defendants' dismissal arguments. The surviving claims are Christine's claims against James Oliveros and Ross Molina Oliveros PC law firm for fraud and civil conspiracy to defraud, as well as Christine's claim against James for intentional infliction of emotional distress and her direct negligence claim against Ross Molina Oliveros PC law firm. Also still alive are all of Defendants' counterclaims, as none are the subject of a dispositive motion.

A. Defendants' Present Motions Should Be Converted Back to Motions to Dismiss.

Although the Court initially converted Defendants' motions to dismiss into motions for summary judgment, the parties both requested at the December 1 hearing that the motions be treated as motions to dismiss and that the Court exclude from consideration any evidence not properly before the Court in a Rule 12(b)(6) posture. Dkt. Nos. 52 & 53. In light of this request, the Court converts the motions to motions to dismiss.

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Accordingly, **IT IS ORDERED** that Defendants' Motions for Summary Judgment, Dkt. Nos. 33, 34, & 35, are converted back to Motions to Dismiss.

B. The Court Considers Only Such Evidence as Is Properly Before It on a Rule 12(b)(6) Motion.

In reviewing the present motions to dismiss under Rule 12(b)(6), the Court will "accept[ ] all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Martin K. Eby Const. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004) (quotation marks omitted). The Court, however, need not credit conclusory allegations or allegations that merely restate the legal elements of a claim. *Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 469 (5th Cir. 2016) (citing *Iqbal*, 556 U.S. at 678). In resolving the motions to dismiss, the Court does not consider any evidence outside the pleadings, except for documents that are attached or referred to in the live complaint or are central to the complaint. *See Villarreal v. Wells Fargo Bank, N.A.*, 814 F.3d 763, 766 (5th Cir. 2016).

At the motion hearing on December 1, Defendants agreed to file a brief explaining which of the documents attached to their Motions to Dismiss could properly be considered under a 12(b)(6) standard. Dkt. No. 52. Christine agreed that she would respond with her position on the issue. *Id.* Both sides filed their respective briefs outlining which materials should be considered at this juncture. Dkt. Nos. 55 & 56. While the parties disagree on whether some documents can be considered, they agree that certain documents filed as part of the record in the state court divorce **case** may be considered. *See id.* Those documents—specifically, the Final Divorce Decree, Agreement Incident to Divorce, and Mediated Settlement Agreement—will be considered by the Court. The three documents are referred to in Christine's complaint, and the Final Divorce Decree and Mediated Settlement Agreement are attached to her complaint. *See generally* 2d Am. Compl. The Court will also take judicial notice of matters of public record, including all documents publicly filed as part of the divorce **case**. *See* Dkt. No. 56 at 4; *see also Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) ("A court [ruling on a motion to dismiss] is permitted ... to rely on documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.") (internal quotations omitted).

***4** The parties also agree that a Correction Instrument may be considered. *See* Dkt. Nos. 55 & 56; *see also* Dkt. No. 33, Exhibit K ("Correction Instrument.") Christine's complaint refers to the Correction Instrument, which is central to her fraud claims. *See* 2d Am. Compl. at 15-17, 31. Accordingly, it is also properly considered by the Court at this stage.

No argument seeking the Court to consider any other evidence in connection with the Rule 12(b)(6) motions convinces the Court. To consider the motions, the well-pleaded allegations in Christine's live complaint will be taken as true and modified only by conclusive or uncontested evidence in the Final Divorce Decree, the Agreement Incident to Divorce, the Mediated Settlement Agreement, or the Correction Instrument. All other evidence is excluded from the Court's consideration at this Rule 12(b)(6) stage of the **case**.

C. Plaintiff's Claims Against David Should Be Dismissed.

Defendant David's argument that Christine's claims are barred under the principles of *res judicata* is well taken. Res judicata "prevents relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit." *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). When federal courts determine the preclusive effect of Texas judgments, Texas law applies. *Basic Capital Mgmt., Inc. v. Dynex Capital, Inc.*, 976 F.3d 585, 591 (5th Cir. 2020). Under Texas law, "*res judicata* bars assertion of a claim in a subsequent **case** when: (1) there is a prior final judgment on the merits by a court of competent jurisdiction; (2) the parties in the second action are the same or in privity with those in the first action; and (3) the second action is based on the claims as were raised or could have been raised in the first action." *Id.* (citing *Weaver v. Tex. Capital Bank, N.A.*, 660 F.3d 900, 906 (5th Cir. 2011) (internal quotes omitted)). "To determine what claims could have been raised in the first action, Texas follows a transactional approach, under which a final judgment on an action extinguishes the right to bring suit on the transaction, or series of connected transactions, out of which the action arose." *Id.* (citing *Barr*, 837 S.W. at 631 (internal quotes omitted)).

The three requirements for *res judicata* under Texas law are met here with respect to Christine's claims against David. The Final Divorce Decree is a final judgment. Under Texas law, *res judicata* "applies to a final divorce decree to the same extent that it applies to any other final judgment." *Baxter v. Ruddle*, 794 S.W.2d 761, 762 (Tex. 1990). The divorce decree itself bars relitigation of any claims by Christine against David that could have been raised in the divorce **case**. *See Barr*, 837 S.W.2d at 628. Further, the decree includes a release that, on its face, bars any claims against David predating March 18, 2021. Christine, therefore, cannot assert any claims against David that relate to the divorce as a matter of law. The parties in the present **case** and in the divorce —Christine and David—are the same. Finally, Christine could have raised her claims against David in the state divorce proceedings but did not. The claims all relate to the same transaction, the divorce. In sum, Christine is seeking to relitigate her divorce and raise claims against David—for assault, for fraud, for sexual assault—that she could have raised in her divorce **case** that wasn't final until January of 2022. Texas's transactional approach to *res judicata* bars these claims regardless of the various releases that were executed, although those releases do nothing to assist Christine's efforts.

***5** Christine's argument that her claims against David are not barred do not convince the Court, including her argument that although she could have sued David in the divorce she didn't. Through this argument she urges, "Texas is a state in which joinder of such actions in tort in divorce proceedings in [sic] permissive, not mandatory ... [so that] Christine ... *could* have sued David for his rape during the marriage in the divorce proceedings, and may have even threatened to, but did not do so, and she did not recover damages for, nor was she compensated for the rape or physical assault in any way." Dkt. No. 38 at 2. Christine further

emphasizes that none of her claims against David were actually adjudicated in the divorce case. *Id.* at 8-10. This argument cannot be reconciled with Texas's transaction approach to *res judicata*, and Christine does not dispute that Texas follows that transactional approach.

The principal case Christine cites in support of her argument, *Brinkman*, actually undercuts her argument. *Id.* at 12 (citing *Brinkman v. Brinkman*, 966 S.W.2d 780, 782 (Tex. App.—San Antonio 1998, pet. denied). In *Brinkman*, the Court of Appeals cited *Twyman*, noting that "the Texas Supreme Court adopted the less extreme permissive approach, whereby the joinder of tort causes of action with divorce proceedings is permitted but not required." *Brinkman*, 966 S.W.2d at 782 (citing *Twyman v. Twyman*, 855 S.W.2d 619, 624 (Tex. 1993)). However, the court noted immediately thereafter that in *Twyman*, "the court cautioned that while joinder of the two actions is permissive, *the principles of res judicata remain applicable.*" *Id.* (citing *Twyman*, 855 S.W.2d at 625) (emphasis added). Accordingly, the transactional approach to *res judicata*, as set out in *Barr*, still applies. 837 S.W.2d at 631.

Christine's claims all arise out of the same transaction (or at the very least, a "series of connected transactions, out of which the action arose")—the divorce. *See id.* Indeed, Christine pleads that the alleged sexual assault was the instigating cause of the divorce. 2d Am. Compl. at 3-4. Because she could have brought all her connected claims against David relating to the divorce in the divorce case, those claims are now barred by *res judicata.*

As Christine's claims against David are barred by *res judicata*, the Court need not address David's fairly conclusory argument that the claims are also barred by the narrow *Rooker-Feldman* doctrine.

D. Plaintiff's Claims Against Defendant James Oliveros Are Not Barred.

Plaintiff Christine alleges claims against Defendant James for the following: sexual assault as an accessory after the fact, fraud, knowing participation in breach of fiduciary duty, tortious interference with a contract or business relationship, intentional infliction of emotional distress, and civil conspiracy to defraud. *See generally* 2d Am. Compl. James responds that Christine's claims against him are barred by *res judicata* and the *Rooker-Feldman* doctrine. Dkt. No. 34 at 2-5 & 13.

1. *Christine's claims against James are not barred by res judicata. Res judicata* applies when "the *parties* in the action are the *same* or in privity with those in the first action." *Basic Capital*, 976 F.3d at 591 (emphasis added). Christine's claims against James are not barred by *res judicata* because James was not a party to the divorce case or the divorce decree.

Moreover, James's argument that he was in privity with David in the divorce case does not convince the Court under a 12(b)(6) standard. Under Texas law, there are "three ways" someone can be in privity with a judgment they are not a party to: "(1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action." *E.E.O.C. v. Jefferson Dental*

Clinics, PA, 478 F.3d 690, 694 (5th Cir. 2007), quoting *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 653 (internal quotations omitted). James invokes the first two of these, arguing that he was in privity with the divorce **case** because he controlled it and because David represented his interest in the **case**. He fails to convince on both.

***6** Privity through control exists when "an individual actively and openly participated in the prior proceedings to such an extent that it was clear that the individual had the right to direct them." *E.E.O.C.*, 478 F.3d at 695, quoting *Maxson v. Travis Cty. Rent Account*, 21 S.W.3d 311, 316 (Tex. App.—Austin 1999). James argues that Christine's complaint itself establishes privity through control because she alleges James "maliciously inserted himself into the divorce **case**" and wrongfully took control. Dkt. No. 34 at 4. James also argues that he was in privity because David represented non-party James's interest in Christine's home that was involved in the divorce **case**. *Id.*

Privity is a fact-bound inquiry. Reading Christine's complaint fairly, the Court would be required to draw several inferences to conclude on the basis of the complaint's allegations that James "actively and openly participated" in the divorce **case** "to *such an extent* that it was clear that [he] had the *right* to direct" it. *See* *E.E.O.C.*, 478 F.3d at 695 (emphasis added). Keep in mind, Christine alleges that James's participation in the divorce **case** was malicious and wrongful. *See* 2d Am. Compl. at 16-17. It is undisputed that James participated in the divorce **case** to some degree, but "mere participation" does not suffice to establish privity for *res judicata*. *E.E.O.C.*, 478 F.3d at 695, quoting *Brown v. Zimmerman*, 160 S.W.3d 695, 703 (Tex. App.—Dallas 2005). While Christine's complaint and the documents properly before the Court suggest James had an interest in the marital home, it is not clear that part of David's role in the divorce was to represent that interest. *See* Correction Instrument, Mediated Settlement Agreement at 4, Agreement Incident to Divorce at 3, 2d Am. Compl. at 16. Conversely, James's involvement in signing and acting as a party to several of the agreements involved in the divorce proceedings indicates that perhaps David *did not* fully or significantly represent James's interest. Drawing all inferences in favor of Christine under Rule 12(b)(6)'s standard, the facts she alleges do not affirmatively establish that James was in privity.

James was, however, a signatory to two of the releases in the divorce **case** but this does little to assist him at this stage. *See* Mediated Settlement Agreement & Agreement Incident to Divorce. Christine's claims against James based on facts predating March 18, 2021, are arguably brought in violation of the Mediated Settlement Agreement's release. *See* Mediated Settlement Agreement at 7. And claims against him that arose prior to the November 12, 2021, date of the Agreement Incident to Divorce arguably violate that agreement's release. *See* Agreement Incident to Divorce at 15. But invoking these releases to bar Christine's claims is James' burden under Texas law, *see* Tex. R. Civ. P. 94, and thus the Court can only grant dismissal if the releases are valid on the face of the live complaint. *See, e.g.*, *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir. 1986). Christine, however, takes issue with the validity of these releases in her complaint, claiming

inter alia that they were procured by fraud. 2d Am. Compl. at 7-8.

2. *Christine's claims against James are not barred by the Rooker-Feldman doctrine.* James argues, in conclusory fashion, that the narrow *Rooker-Feldman* doctrine bars Christine's claims against him. Dkt. No. 34 at 13. James' argument is devoid of analysis; indeed, he does not even provide the applicable four-part test adopted by the Supreme Court. *See* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S 280, 284 (2005). On that basis alone, the Court rejects James's argument for failure to carry his burden under a 12(b)(6) standard. Regardless, Christine's claims against James are not *Rooker-Feldman* barred.

***7** *Rooker-Feldman* is a complex, incredibly narrow doctrine that only applies in **cases** "[1] brought by state-court losers [2] complaining of injuries *caused* by state-court judgments [3] rendered before the district court proceedings commenced and [4] inviting district court review and rejection of those judgments." *Land & Bay Gauging, L.L.C. v. Shor*, 623 Fed. Appx. 674, 678 (5th Cir. 2015) (emphasis added); citing *Exxon Mobil*, 544 U.S. at 284. Here, James does not explain how Christine's alleged injuries were *caused* by the divorce decree.

To the extent that any fraud claim Christine brings against James seeks to *change* the divorce decree, that relief would likely be barred. But resolving all ambiguities in Christine's favor, she alleges injuries distinct from the decree and asks for money damages, not to re-open or change the decree. Accordingly, the "second hallmark of the *Rooker-Feldman* inquiry" is not met. *See* *Truong v. Bank of America, N.A.*, 717 F.3d 377, 382 (5th Cir. 2013). In *Truong*, the Fifth Circuit gave several examples of **cases** not barred by *Rooker-Feldman* because the plaintiffs' alleged injuries were not *caused* by the state-court judgment, and James has not done enough to explain why such **cases** don't control the issue here. [1]

Furthermore, to determine whether a plaintiff is complaining of injuries caused by state-court judgments, courts have looked at the *timing* of the alleged injuries. *See* *Land & Bay Gauging*, 623 Fed. Appx. at 679; citing *Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 172 (observing that a "useful guidepost is the timing of the injury"). Here, the timing indicates that the divorce decree itself was not the source of Christine's alleged injuries—all the facts she alleges giving rise to her claims occurred prior to the Final Divorce Decree judgment on January 11, 2022. *See generally* 2d Am. Compl.; *see also* Final Divorce Decree. James has not carried his burden to demonstrate that Christine's claims against him are barred by *res judicata* or *Rooker-Feldman*.

Whether James could benefit from any preclusion principles as to the validity of the releases based on the divorce decree—as opposed to only *res judicata*—is an issue the parties do not raise or brief. In sum, James has not demonstrated that Chirstine's claims against him are barred pursuant to either of the two arguments raised in his motion.

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E. Some of Plaintiff's Claims Should Be Dismissed for Pleading Deficiencies or Failure to State a Viable Claim.

Christine also brings claims against Defendants James and the Ross Molina Oliveros PC law firm that fail for pleading deficiencies. Again, under a Rule 12(b)(6) standard, the Court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Martin*, 369 F.3d at 467 (5th Cir. 2004). But the Court will not accept conclusory allegations or allegations that merely restate the legal elements of a claim. *Chhim*, 836 F.3d at 469.

***8 1.** *Christine's claim against James for sexual assault as an accessory after the fact should be dismissed.* In her apparently criminal claim against James, Christine relies on § 38.05 of the Texas Penal Code and 18 U.S.C. §§ 3, 1512, & 1513. There is no private cause of action under the Texas Penal Code or under the federal criminal statutes Christine cites. *See Hanna v. Home Ins. Co.*, 281 F.2d 298, 303 (5th Cir. 1960); *Jones v. Chevron Phillips Chem. Co.*, No. A-14-CV-761-DAE at *4 (W.D. Tex. 2014); *Spurlock v. Johnson*, 94 S.W.3d 655, 658 (Tex. App.—San Antonio 2002, no pet.). Christine does not plead any facts or make any arguments explaining how she could recover via criminal charges raised in a civil **case**. This claim against James should be dismissed.

2. *Christine's claim against James for knowing participation in breach of fiduciary duty should be dismissed.* Knowing participation in breach of fiduciary duty is a derivative claim that depends on a claim for breach of fiduciary duty. *See Matter of Estate of Poe*, 648 S.W.3d 277, 286 (Tex. 2002). Under Texas law, "where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a *joint* tortfeasor with the fiduciary and is liable as such." *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 574 (Tex. 1942) (emphasis added). Christine alleges that James "maliciously inserted himself into the dealings and participated in Charles Hardy [Christine's divorce attorney]'s breach of fiduciary duty to Christine." 2d Am. Compl. at 17. But a defendant's liability for a derivative tort "depends on participation in some underlying tort for which the plaintiff *seeks to hold at least one of the named defendants liable.*" *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996) (emphasis added). Christine has not sued her divorce attorney, Charles Hardy, for breach of fiduciary duty. Therefore, the derivative claim against James fails. This claim should be dismissed.

3. *Christine's claim against James for tortious interference with a contract should be dismissed.* In Texas, a person "must be a stranger to a contract to tortiously interfere with it." *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 761 (Tex. 2006) (quoting *Morgan Stanley & Co., Inc. v. Texas Oil Co.*, 958 S.W.2d 178, 179 (Tex. 1997)). Christine's complaint alleges that James was a party to the Mediated Settlement Agreement and Agreement Incident to Divorce, and the documents properly considered by the Court confirm her allegations in that regard. *See* 2d Am. Compl. at 19; *see also* Mediated Settlement Agreement & Agreement Incident to Divorce. Taking Christine's complaint as true, she has failed to successfully plead a claim against James for tortious interference. Since James was a party to the contracts mentioned

by Christine in her complaint, he was not a "stranger" to the contracts and cannot be liable for tortious interference with them. *See id.*; *see also* *In re Vesta*, 192 S.W.3d at 761. Therefore, this claim should be dismissed.

4. *Christine's claim against Ross Molina Oliveros PC law firm for vicarious liability for physical assault should be dismissed.* In Texas, claims for vicarious liability are considered "liability-spreading theories [that] depend upon liability for an underlying tort, and they survive or fail alongside that tort." *Nettles v. GTECH Corporation*, 606 S.W.3d 726, 738 (Tex. 2020). Christine's claim for vicarious liability against the law firm for physical assault is based on her underlying claim against David for physical assault. 2d Am. Compl. at 12-14. Christine's claims against David are barred, as explained above. Without direct liability against David for the alleged assault, there can be no vicarious liability against his employer for the same alleged incident. *See* *Nettles*, 606 S.W.3d at 738. This claim should be dismissed.

F. Some of Plaintiff's Claims Survive Defendants' Motions to Dismiss.

***9** Some of Christine's claims survive at this stage.

1. *Christine's complaint against James for fraud should not be dismissed under a 12(b)(6) standard.* In her complaint, Christine alleges various facts supporting her claim against James for fraud, and at this stage the Court takes those facts as true. *See* *Martin*, 369 F.3d at 467 (5th Cir. 2004). In his motion to dismiss, James argues that Christine's fraud claim is "nonsensical" because she cannot establish a critical element of fraud: reliance. *See* Dkt. No. 34 at 6; *see also* *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015) ("A common-law fraud claim requires a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of its truth, which was intended to be acted upon, which was relied upon, and which caused injury."). James also argues "it is obvious" that Christine's pleadings affirmatively *disprove* her reliance on James' alleged misrepresentations because she "immediately disputed" them. Dkt. No. 34 at 6. James also argues that Christine failed to establish that James *intended* to induce her reliance and that she suffered damages. *Id.* at 7-8. These arguments fall short because they all implicate disputed fact issues.

The question before this Court is not whether Christine has *established* each element of fraud, but whether she has sufficiently pleaded a plausible claim for relief that can survive a motion to dismiss. Christine alleges that James fraudulently added his name to the title of her house, that she "was deceived and acted upon that deception," and that she "suffered great damages emotionally, mentally and financially ... and she had to hire a property attorney." 2d Am. Compl. at 16. These allegations, taken as true, plead not only reliance but also James's intent and Christine's damages.

2. *For the same reason that Christine's claims for fraud against James don't fail, her fraud claim against Ross Molina Oliveros PC law firm doesn't fail.* Christine alleged that James, a partner at the law firm, used the law firm's mailing envelope to send the allegedly fraudulent document adding James to the title

of her house. *See* 2d Am. Compl. at 16. She also alleges that another employee of Ross Molina Oliveros PC law firm was involved in the fraud by notarizing the allegedly fraudulent document. *Id.* Under a Rule 12(b)(6) standard that resolves all inferences in favor of Christine, her claim survives the law firm's motion to dismiss.

In its response and reply, the law firm argues only that Christine's fraud claim against James is barred, which then also bars her fraud claim against the firm. Dkt. Nos. 35 & 46. The firm, like James, also argues that Christine failed to show the essential element of reliance. However, as explained above, Christine pleads various allegations supporting reliance or a reasonable inference to that effect, and the Court takes her pleading as true at this stage and draws such inferences in her favor. *See* 2d Am. Compl. at 16. Accordingly, for the same reasons that Christine's fraud claim against Jame survives, so does her fraud claim against Ross Molina Oliveros PC law firm.

***10 3.** *Christine's claims for civil conspiracy to defraud against James and Ross Molina Oliveros PC law firm survive.* In Texas, a civil conspiracy is defined as "a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). It is a derivative tort, meaning that "a defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable." *Id.* Here, Christine has alleged that two or more persons, namely, James and the law firm,[2] conspired to defraud her. 2d Am. Compl. at 22-35. She has also alleged various facts supporting her underlying fraud claim; for example, she alleges that James sent her a fraudulent document which she detrimentally relied on, and that the document was sent via a law firm envelope and notarized by a law firm employee. *See id.* at 16. Therefore, this claim, as to James and the law firm, survives.

4. *Christine's claim for intentional infliction of emotional distress against James should not be dismissed at this stage.* In Texas, the elements of intentional infliction of emotional distress are: "(1) the defendant acted intentionally or recklessly; (2) its conduct was extreme and outrageous; (3) its actions caused the plaintiff emotional distress; and (4) the emotional distress was severe." *Hersh v. Tatum*, 526 S.W.3d 462, 468 (Tex. 2017). In support of this claim Christine alleges, *inter alia*, that James "interrogated [her] ... about being raped," "mocked ... her pain and trauma and tried to tell her that it did not count as rape," "mocked [her] fragile mental state," "yelled at [her] children," and "instructed David ... to use physical force to throw Christine out of [the Defendant law firm] with aggression and cruelty." 2d Am. Compl. at 20-21. Christine further alleges that this conduct was extreme and outrageous, and that it caused her severe emotional distress. *Id.* at 22. ("James [sic] maliciousness and cruelty towards Christine nearly caused her to commit suicide and it ended up causing her to move away from Texas and her children suffered daily... [t]his is very disruptive and traumatizing to Christine as a mother to see her children so traumatized.").

James argues that Christine's claim should be dismissed as a matter of law because it is

"nothing more than a regurgitated summary of her other claims against James." Dkt. No. 34 at 13-14. But Christine alleges various facts to support her intentional-infliction-of-emotional-distress claim that are not stated anywhere else in her complaint. *See* 2d Am. Compl. at 20-22 ("James interrogated Christine via text and ... phone call about her being raped," "James mocked Christine and ...tried to tell her that it did not count as rape," "James had called and yelled at [Christine's children]."). It is not, as James argues, based on the exact same conduct she alleges in her other claims against James. And although the Court need not credit her legal conclusions or conclusory allegations, there are sufficient specific facts alleged to describe a plausible claim.

James' argument that Christine's claim should be dismissed because his alleged conduct is not sufficiently extreme and outrageous fails under the Rule 12(b)(6) standard. Dkt. No. 34 at 15-16. In Texas, "[w]hether a defendant's conduct is extreme and outrageous is a matter of law." *Bradford v. Vento*, 48 S.W.3d 749, 758 (Tex. 2001). James argues that the conduct Christine alleges against him, as a matter of law, cannot satisfy this element of her tort claim. Dkt. No. 24 at 15-16. James cites several Texas Supreme Court **cases** to support his contention that Christine's claims fail as a matter of law. *See Bradford*, 48 S.W.3d at 758; *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003); *Kroger Texas Ltd. Partnership v. Suberu*, 216 S.W.3d 788, 798 (Tex. 2006); *Twyman*, 855 S.W.2d at 622. One of the **cases** is inapplicable: in *Twyman*, the Texas Supreme Court held that the plaintiff could not recover because the trial court did not make findings of outrageousness or extreme emotional distress —but this was because, at the trial court, the plaintiff's claim was *negligent* infliction of emotional distress. *See* 855 S.W.2d at 625-26. The Court in *Twyman* remanded the **case** for a new trial. *Id.* at 626.

***11** The other **cases** are distinguishable. In *Bradford*, the defendant was the landlord of a store at a mall. 48 S.W.3d at 752-53. After an altercation between the plaintiff and a third party, the defendant told the police that the third party owned the store and that "he did not want [the plaintiff] in the mall since he was causing a scene." *Id.* at 753. The plaintiff believed that he was the store's proper tenant and brought an intentional infliction of emotional distress claim against the defendant. *Id.* The facts Christine alleges in her complaint, taken as true, are more egregious than the facts in *Bradford*.

Kroger is also distinguishable. In *Kroger*, the plaintiff was acquitted of a misdemeanor theft charge for alleged shoplifting. 216 S.W.3d at 791. Then, the plaintiff sued the grocery store where the alleged incident occurred, claiming intentional infliction of emotional distress and urging that the grocery store "knowingly provid[ed] false information to police so that an innocent person is prosecuted." *Id.* at 791, 796. The Court found that such behavior would be sufficiently extreme and outrageous if the evidence supported it. *Id.* at 796. But the Court found that the evidence was insufficient to show that "Kroger did not honestly and reasonably believe [the plaintiff] was guilty." *Id.* The facts Christine alleges in her complaint are also more egregious than the facts in *Kroger*. And whether Christine has provided sufficient *evidence* to support her factual allegations is

not appropriately considered by the Court on a motion to dismiss.

Tiller presents a factual scenario most comparable to that before the Court, but it is still distinguishable. The plaintiff in *Tiller* owned a construction company with her husband. 121 S.W.3d at 711. Their company contracted with the defendant to complete a construction project. *Id.* The plaintiff's husband became ill and died during the project, and the plaintiff increasingly took over more management duties of the company. *Id.* The plaintiff sent a letter to the defendant letting him know that the project would nevertheless be completed, but that it was a hard time for her. *Id.* at 711-12. Throughout the project, the defendant called the plaintiff and her children at home many times at odd hours, including late at night, on Sunday mornings, and over holidays. *Id.* at 712. He "raised hell" with her, and was "rude, demanding and curt." *Id.* At one point, when the construction site was shut down for one day, the day of the plaintiff's husband's funeral, the defendant threatened to terminate the contract. *Id.* The Court held that this threat was the most egregious of the defendant's actions, but even so, it was not sufficiently extreme and outrageous as a matter of law. *Id.* at 713-14. The Court highlighted that "to determine whether certain conduct is extreme and outrageous, [courts] consider the context and the relationship between the parties." *Id.* at 714 (citing *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 612 (Tex. 1999)). The Court determined that in the context of a business relationship, where the plaintiff was designated as a contact person for complaints relating to the project, and especially because the defendant only complained about the project and did not insult the plaintiff personally or threaten to harm her, the defendant's conduct was not sufficiently extreme and outrageous. *Id.* at 714.

Like in *Tiller*, the conduct Christine complains of involves phone calls by James and alleged cruel comments made to her and her children. However, Christine also alleges that James incited David to "use physical force to throw Christine out" of the law firm. 2d Am. Compl. at 20-21. Taking this allegation as true, it distinguishes Christine's allegations from the facts in *Tiller*. Additionally, the context in the two **cases** is different: *Tiller* involved a business relationship with a plaintiff who opted to receive customer complaints by phone, while this **case** involves a family relationship and allegations of highly personal statements about an alleged sexual assault. Based on the facts at hand, the Court cannot apply the same reasoning as the court in *Tiller*.

***12** Here, the question before the Court is whether Christine has pleaded sufficient factual allegations to state a "plausible" claim to relief and survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Taking Christine's allegations as true, she has described extreme and outrageous conduct. She alleges intentional cruelty and incitement to violence in the aftermath of an intentional sexual assault. Nothing in Defendants' arguments convince the Court that Christine has failed to plead sufficient facts to raise a plausible claim for relief.

5. *Christine's claim against Ross Molina Oliveros PC law firm for negligent retention should not be dismissed.* The claim against

Ross Molina Oliveros PC law firm for negligent retention should not be dismissed because Christine has pleaded facts plausibly demonstrating a claim for relief. The Texas Supreme Court has not ruled definitively on the existence or elements of a negligent-retention cause of action. *Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499, 505 (Tex. 2017) (citing *Waffle House, Inc. v. Williams*, 313 S.W.3 796, 804 n.27 (Tex. 2010)). Various Texas Courts of Appeals have recognized a claim for negligent retention and "have often held employers to very general duties, but they have not weighed the factors that determine whether a duty exists, and what it is." *Id.* at 505-06. Common law negligence, however, is recognized under Texas law, and has three elements: "1) a legal duty owed by one person to another; 2) a breach of that duty; and 3) damages proximately resulting from the breach. *Greater Hous. Transp. Co. v. Phillips*, 801 S.W.3d 523, 525 (Tex. 1990).

The five relevant factors in determining whether a defendant owed a duty to a third party are "risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden guarding against the injury, and the consequences of placing the burden on the defendant." *Id.* at 525; *see also Pagayon*, 536 S.W.3d at 507-08. In *Pagayon*, the Texas Supreme Court assessed a negligent retention claim by analyzing various factors that determine whether an employer in certain situation owes a duty to third parties to supervise its employees. *See id.* at 507-508. There, the Court considered various facts relevant to the legal question of whether the employer owed a duty to a third party. *Id.* In applying the facts to the *Phillips* factors mentioned above, the Court found that the employer owed no duty as a matter of law and reversed the jury verdict. *Id.*

In her complaint, Christine alleges various facts surrounding the circumstances under which David allegedly physically assaulted her on the premises of the law firm. *See* 2d Am. Compl. at 11-12. She also alleges that Ross Molina Oliveros PC had a "legal duty to hire, supervise, train, and retain competent employees" and to "protect the public ... from ... abuse." 2d Am. Compl. at 14. Christine also alleges that the law firm "was made aware of the events alleged herein and that [David] had a history of domestic violence and sexual assault" and that the firm "breached its duty ... due to the fact that it retained [David] as an employee without any limitations or supervision or remedies to ensure the safety of anyone in the general public on company property or the environment after becoming aware of his history of domestic violence and sexual assault." *Id.* at 14-15.

Defendant Ross Molina Oliveros PC law firm admits that Christine's claim is "a claim for direct liability against [the law firm], not vicarious liability." Dkt. No. 35 at 3. Therefore, it does not necessarily fail because the claim against David fails. *Cf. Nettles*, 606 S.W.3d at 738. In arguing why this claim *should* be dismissed, however, the law firm claims that "the existence of a legal duty is a threshold question of law for the court to decide *based on the facts surrounding the occurrence in question.*" Dkt. No. 35 at 3-4 (citing *Greater Hous. Transp. Co.*, 801 S.W.3d at 525) (emphasis added). But the law firm does not provide further analysis under a Rule 12(b)

(6) standard, which requires the Court to accept as true facts alleged in the complaint. *Twombly*, 550 U.S. 544 at 556; *see also Martin*, 369 F.3d at 467 (5th Cir. 2004). This claim, and the law firm's response to it, raise a fact issue which the Court cannot properly resolve at this stage of the litigation.

***13** The law firm contends that Christine's negligent retention claim must be dismissed because she is required to allege facts showing that her injury relates to "David's competence or fitness to perform his job [at the law firm]"—specifically, his legal work as an attorney, though the Court finds this unpersuasive. Dkt. No. 35 at 4. The law firm cites *Houser v. Smith* for this proposition. 968 S.W.2d 542, 544 (Tex. App—Austin 1998, no pet.) (noting, "the theory of negligent hiring and supervision does require that a plaintiff's harm be the *result of the employment.*" (emphasis added)). But *Houser* doesn't appear to support the law firm's reading of it, and the firm has provided no Texas Supreme Court **case** or other binding authority to support its contention. Considering *Pagayon*'s hesitance to clearly recognize or set out elements for negligent retention, Christine's claim is more fairly read as a simple negligence claim. *Pagayon*, in fact, also involved a claim that an employer owed a duty to a third party, and the Court there declined to find that the negligence claim must relate to the nature of the employee's job. *See generally Pagayon*, 968 S.W.2d 542.

Considering the facts that Christine alleged and applying those to the five factors Texas courts use in determining the existence of a legal duty, her claim survives the law firm's motion to dismiss. Christine's allegations that prior to the incident in question the law firm was "aware ... that [David] had a history of domestic violence and sexual assault," and that the firm had no "limitations or supervision or remedies to ensure the safety of anyone in the general public on company property" inform the Court's weighing of the risk, foreseeability, likelihood, and consequence factors. *See* 2d Am. Compl. at 14; *see also Pagayon*, 536 S.W.3d at 507-08. These allegations support Christine's claim that the firm owed her a legal duty. At this stage, considering all facts Christine alleges as true, the law firm has failed to carry its burden to show that Christine's direct negligence claim warrants dismissal.

Conclusion and Recommendation

For the reasons discussed above, it is recommended that Defendants' Motions to Dismiss, Dkt. Nos. 33, 34, & 35, be **GRANTED IN PART** and **DENIED IN PART.** Plaintiff's Motion to Set Aside Mutual Release, Dkt. No. 58, will be taken up by the Court in due time by a separate order.

The surviving claims are Christine's claims against James Oliveros and Ross Molina Oliveros PC law firm for fraud and civil conspiracy to defraud, as well as Christine's claim against James for intentional infliction of emotional distress and her direct negligence claim against Ross Molina Oliveros PC law firm.

Also surviving are the three defendants' two counterclaims against Christine for trespass and breach of contract, as neither counterclaim

has been the subject of a dispositive motion. *See* Dkt. No. 11.

The Court anticipates motions for summary judgment will be filed. Accordingly, the Court will by separate order extend the deadlines for discovery and to file motions for summary judgment. The parties need not wait until the completion of those deadlines to file motions.

Instructions for Service and Notice of Right to Object/Appeal

The United States District Clerk shall serve a copy of this report and recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy by certified mail, return receipt requested, to those not registered. Written objections to this report and recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Objections, responses, and replies must comply with the same page limits as other filings, unless otherwise excused by the district court's standing orders. *See* Rule CV-7. The objecting party shall file the objections with the clerk of the court, and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions, or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusory, or general objections. A party's failure to file written objections to the proposed findings, conclusions, and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149-52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to timely file written objections to the proposed findings, conclusions, and recommendations contained in this report and recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

***14 IT IS SO ORDERED.**

All Citations

Not Reported in Fed. Supp., 2024 WL 875834

Footnotes

1 *See id.* at 382-83 (citing *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003) (noting that if a plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, rather than an allegedly erroneous decision by a state court, *Rooker-Feldman* does not bar the **case**), *Scott v. Fortenberry*, 278 Fed. Appx. 440, 441

(5th Cir. 2008) ("*Rooker-Feldman* does not bar a 1983 plaintiff's claim for damages arising from court reporter's failure to prepare a trial transcript and consequent delay of his criminal appeal because the suit did not challenge his conviction."); and *Mosley v. Bowie Cnty. Tex.*, 275 Fed. Appx. 327, 328-29 (5th Cir. 2008) ("*Rooker-Feldman* bars a claim that a state child support order is void, but not a claim that state government defendants violated the federal plaintiffs' constitutional rights in the course of enforcing the order.")).

2 No party discusses whether and to what extent a law firm can conspire with its own employee in circumstances such as those alleged here, and so the Court declines to address that topic.

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CASE NO. 8

2024 WL 874145
Only the Westlaw citation
is currently available.
United States District Court, W.D.
Texas, San Antonio Division.

Christine OLIVEROS, Plaintiff,
v.
David Rene OLIVEROS; Ross Molina Oliveros, P.C.; and James Michael Oliveros, Defendants.

CIVIL ACTION NO. SA-23-CA-402-FB
|
Signed February 29, **2024**

Attorneys and Law Firms

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Mark J. Barrera, The Barrera Firm, San Antonio, TX, Ana Luisa Zabalgoitia, Matthiesen, Wickert, Lehrer, S.C., Austin, TX, for Defendants.

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

FRED BIERY, UNITED STATES DISTRICT JUDGE

***1** Before the Court is the Report and Recommendation of United States Magistrate Judge (docket no. 62), filed in the above-captioned cause on February 13, **2024**, concerning Defendants' Motions for Summary Judgment (originally filed as Motions to Dismiss). *See* (docket nos. 33, 34, & 35); *see also* (docket no. 47) (Order converting Motions to Dismiss to Motions for Summary Judgment). Also before the Court is Plaintiff's Motion to Set Aside Mutual Release. (Docket no. 58). To date, no objections to the Report and Recommendation have been received. [1]

Because no party has objected to the Magistrate Judge's Report and Recommendation, the Court need not conduct a de novo review. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). The Court has reviewed the Report and Recommendation and finds its reasoning to be neither clearly erroneous nor contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918 (1989).

IT IS THEREFORE ORDERED that the Report and Recommendation of United States Magistrate Judge (docket no. 62) is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) such that Defendants' Motions to Dismiss (docket nos. 33, 34 & 35) are GRANTED IN PART and DENIED IN PART. Plaintiff's Motion to Set Aside Mutual Release (docket no. 58) will be taken up by the Court in due time by a separate order.

The surviving claims are Plaintiff's claims against Defendants James Oliveros and Ross Molina Oliveros PC law firm for fraud and civil conspiracy to defraud, as well as Plaintiff's claim against Defendant James Oliveros for intentional infliction of emotional distress and her direct negligence claim against Defendant Ross Molina Oliveros PC law firm. This **case**

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continues to be referred to the Magistrate Judge for further pretrial proceedings.

It is so ORDERED.

All Citations

Not Reported in Fed. Supp., 2024 WL 874145

Footnotes

1 Any party who desires to object to a Magistrate's findings and recommendations must serve and file his, her or its written objections within fourteen days after being served with a copy of the findings and recommendation. 28 U.S.C. § 635(b)(1). If service upon a party is made by mailing a copy to the party's last known address, "service is complete upon mailing." FED. R. CIV. P. 5(b)(2)(C). If service is by electronic means, "service is complete upon transmission." *Id.* at (E).

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CASE NO. 9

851 Fed.Appx. 514 (Mem)
This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

Wayne SMITH, Plaintiff-Appellant,
v.
MTGLQ INVESTORS, L.P., Defendant-Appellee.

No. 19-20665
|
Summary Calendar
|
FILED June 30, 2021

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:19-CV-1888

Attorneys and Law Firms

Wayne Smith, Pro Se

Robert Brandon Hakari, McCarthy & Holthus, L.L.P., Plano, TX, for Defendant-Appellee

Before Higginbotham, Jones, and Costa, Circuit Judges.

Opinion

Per Curiam: [*]

Wayne Smith appeals the district court's dismissal of his case under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Smith asserted claims of violation of the Fair Debt Collection Practices Act, negligence, fraudulent concealment, fraudulent inducement, slander of title, and rescission under the Truth in Lending Act. The relief he sought included a declaratory judgment, injunctive relief, and monetary damages.

We review "a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) de novo, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *Harris Cty. Texas v. MERSCORP Inc.*, 791 F.3d 545, 551 (5th Cir. 2015) (internal quotation marks and citation omitted). Smith argues that the district court erred by dismissing the case without first requiring the defendant, MTGLQ Investors, L.P. (MTGLQ), to provide documents proving that it had the authority to foreclose on his property.

The Deed of Trust and assignment records relating to Smith's property were public records, and the district court was permitted to take judicial notice of those unrebutted records in granting MTGLQ's motion to dismiss. *See Norris v. Hearst Tr.*, 500 F.3d 454, 461 n.9 (5th Cir. 2007). Smith's argument fails to show that his allegations stated a claim upon which relief could be granted. *See MERSCORP*, 791 F.3d at 551; Fed. R. Civ. P. 12(b)(6). Smith does not brief any other argument challenging the district court's reasons for dismissing his claims, and he has thus waived any such arguments. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (recognizing that even

pro se litigants must brief arguments in order to maintain them).

Accordingly, the district court's judgment is AFFIRMED. Smith's motion seeking an order to prevent the collection of payment from him is DENIED.

All Citations

851 Fed.Appx. 514 (Mem)

Footnotes

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

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CASE NO. 10

2024 WL 5036616
Only the Westlaw citation
is currently available.
United States District Court, S.D.
Texas, Corpus Christi Division.

PENINSULA MARINE, INC., Plaintiff,
v.
PRINCIPLE INDUSTRIAL
SERVICES, LLC, et al., Defendants.

Civil Action
No.
2
:
23
-
CV
-
00104

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Signed September 30, **2024**

Attorneys and Law Firms

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Joshua L. Hedrick, Spencer Fane LLP, Dallas, TX, Kevin Gerard Corcoran, Rebecca Lynne Gibson, Spencer Fane LLP, Houston, TX, for Defendants Principle Industrial Services, LLC.

Stephen Eric Irving, Peckar & Abramson PC, Houston, TX, for Defendants TTL, Inc.

MEMORANDUM OPINION GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

DAVID S. MORALES, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Defendant Principle Industrial Services, LLC's ("Principle") Motion to Dismiss Plaintiff's First Amended Original Complaint. (D.E. 20). Plaintiff Peninsula Marine ("Peninsula") brings myriad claims against Principle—including breach of contract, promissory estoppel, quantum meruit, sworn account, and fraud—arising out of two agreements.[1] Peninsula states a valid claim for breach of contract under the first, express agreement. Therefore, Peninsula's quasi-contract claims under the first contract fail because of the express contract doctrine. With respect to the second agreement, because Principle disputes the existence of a contract, Peninsula can proceed under alternative theories at the motion to dismiss stage, and it has sufficiently alleged both breach of contract and quasi-contract claims under the second agreement. Finally, Peninsula states a valid claim for fraud because it sufficiently pled that Principle made false statements that Peninsula detrimentally relied on. As such, the **Court GRANTS in part and DENIES in part** the motion to dismiss. (D.E. 20).

I. Background

In May of 2022, Defendant Principle and TTL, Inc., ("TTL") contracted for Principle to

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remove pipelines in the Corpus Christi Ship Channel. (D.E. 17, p. 3–4). Lucas Pappas, an officer of Principle (and now-dismissed Defendant in this matter, *see* (D.E. 28)), signed this contract.. (D.E. 17, p. 3). Later that month, Pappas approached Peninsula "to supply labor, equipment, and services" regarding the pipeline removal. *Id.* at 4. Peninsula gave Principle a bid for the work and negotiated payment, ("the first contract"), which included a clause requiring Peninsula's work invoices to be paid when TTL paid Principle. *Id.* Later that year, Peninsula started work under the first contract and submitted monthly invoices to Principle. *Id.* Principle paid some, but not all, of the amounts owed. *Id.* In November 2022, Principle told Peninsula to stop working under the first contract because there was a "lack of an approved permit." *Id.* at 5. Peninsula obliged. *Id.* Pappas then proposed to Peninsula that it remain on site "at a reduced standby and holiday rate" and any work performed from that day "until the permit issue was resolved would be" Defendants' responsibility ("the second agreement"). *Id.* Peninsula agreed, accepted those terms, and began complying with the terms of this second agreement by working. *Id.* at 5–6. In January 2023, Principle and the now-dismissed Defendants told Peninsula to stop working, and Peninsula left the worksite on January 16, 2023. *Id.* at 6. Peninsula submitted invoices for the standby time and work performed. *Id.* Peninsula calculates the outstanding principal amount under the second agreement (i.e., work from November 2022–January 2023) as approximately $740,000. *Id.* In total, Peninsula alleges Principle owes them $1,085,150.65. *Id.* [2]

***2** Peninsula then sued, alleging breach of contract and promissory estoppel as to the first contract, *id.* at 8–9, breach of contract and promissory estoppel as to the second agreement, *id.* at 9–11, quantum meruit, *id.* at 11, sworn account as to the second agreement, *id.* at 11–12, and fraud, *id.* at 12–13.

Principle and two now-dismissed Defendants move to dismiss the amended complaint. (D.E. 20). [3] Principle first argues that Peninsula cannot state a breach-of-contract claim for the first contract because the condition precedent —that TTL pay Principle—was not satisfied. *Id.* at 15. For the second agreement, Principle argues that Peninsula's breach-of-contract claim fails because the second agreement lacked all the essential requirements to form a contract: offer, acceptance, mutual assent, delivery, and execution. *Id.* at 16–17. Principle argues that Peninsula's promissory estoppel claims fail (1) for similar reasons as the first contract claim—namely, that Peninsula's alleged reliance was neither foreseeable nor justifiable because Peninsula knew (via the first contract) that TTL *had* to pay Principle *before* Principle would pay Peninsula—and (2) because the express contract doctrine bars any estoppel claims. *Id.* at 17–18. Principle argues Peninsula's quantum meruit claim is barred by the express contracts doctrine, *id.* at 18, and that the sworn account claim fails because Peninsula has no outstanding claim for payment (because, as above, the condition precedent that TTL pay Principle has not occurred) and because Peninsula never alleges the prices charged, *id.* at 19–20. Finally, with respect to fraud, Principle argues that Peninsula's claims fail because: (1) the allegations are not particular enough under the

heightened pleading standard; and (2) because the alleged fraudulent statement about TTL not paying is not false, *id.* at 21–22. Alternatively, Principle argues the fraud claims are barred because they arise solely from duties within the contract and are barred by the economic loss rule. *Id.* at 23–24.

II. Legal Standard

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint is facially plausible when it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). To permit a reasonable inference, the complaint must demonstrate "more than a sheer possibility" of unlawful behavior but not a particular probability. *Id.*

At the motion to dismiss stage, the Court examines only "the pleadings and 'any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint.' " *Perry v. Minn. Life Ins. Co.*, No. 6:23-CV-00018, 2023 WL 11802193, at *2 (S.D. Tex. July 14, 2023) (Morales, J.) (quoting *PHI Grp., Inc. v. Zurich Am. Ins. Co.*, 58 F.4th 838, 841 (5th Cir. 2023) (citations and internal quotations omitted)). Although the Court accepts the allegations of the complaint as true and views them "in the light most favorable to the plaintiff[,]" *Allen v. Vertafore, Inc.*, 28 F.4th 613, 616 (5th Cir. 2022) (citation and internal quotations omitted), the Court does not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions[,]" *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010) (quoting *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005)) (citing *Iqbal*, 556 U.S. at 679). [4]

***3** Rule 8 of the Federal Rules of Civil Procedure requires all pleadings that state a claim for relief to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Rule 9(b) lays out a heightened pleading standard for fraud claims. FED. R. CIV. P. 9(b) ("[A] party must state with particularity the circumstances constituting fraud or mistake."). The applicable pleading standard for Peninsula's fraud claims is Rule 9(b), but all claims are subject to Rule 8. *See* (D.E. 17, p. 8–14).

III. Analysis

A. First Contract

i. Breach of Contract

In its complaint, Peninsula alleges Principle "has materially breached the [f]irst [c]ontract by failing to make payment to [Peninsula] in the principal amount of $346,643.69, despite having received payment for such [w]ork from TTL." (D.E. 17, p. 9). Principle moved to dismiss, arguing that because the

condition precedent—that TTL pay Principle—has not been met, Peninsula has failed to state a claim for breach of contract. (D.E. 20, p. 15). To support this argument, Principle points to language in the contract which states "[f]inal payment will not become due to [Peninsula] until final payment is received in full by Principle." (D.E. 20-4, p. 4). In response, Peninsula first argues that Principle's assertion that TTL had not paid Principle is "demonstrably untrue." (D.E. 29, p. 4). In other words, the condition precedent that Principle identifies has been met. *Id.* But Peninsula also goes further, arguing no such condition precedent exists. (D.E. 29, p. 8). Rather, according to Peninsula, "the plain unambiguous language of the [f]irst [c]ontract" provides that once Peninsula submitted invoices to Principle for Peninsula's work, Principle would pay Peninsula within thirty days of receiving the invoice. *Id.* And Peninsula contends that condition precedent was met: it performed work for Principle under the first contract and then "invoiced Principle in accordance with those contractual terms." *Id.*

Under Texas law, a breach of contract claim consists of "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach." *Villarreal v. Wells Fargo Bank, N.A.*, 814 F.3d 763, 767 (5th Cir. 2016) (quoting *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1997, no writ)). "A condition precedent is 'an event that must happen or be performed before a right can accrue to enforce an obligation.' " *Conn Credit I, L.P. v. TF LoanCo III, L.L.C.*, 903 F.3d 493, 500 (5th Cir. 2018) (citing *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 283 (Tex. 1998)). To make performance conditional, courts typically require the contract to contain conditional language like " 'if', 'provided that', 'on condition that', or some similar phrase of conditional language." *Id.* (quoting *Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 109 (Tex. 2010)).

Both parties do not appear to dispute the validity of the first, written contract, nor do they dispute that Peninsula tendered performance. (D.E. 20; D.E. 29). Principle's motion to dismiss only raises argument that there was no *breach* of the contract—Principle does not make argument regarding the contract's essential elements, like offer or consent. *See* (D.E. 20, p. 15–16)). And neither party appears to dispute that Peninsula suffered damages. *See* (D.E. 29; D.E. 20, p. 15–16). As such, the Court need only determine whether Peninsula's complaint alleges facts sufficient to support an inference that the contract was breached. [5]

***4** Peninsula's first breach of contract claim passes Rule 12(b)(6) muster. Principle hangs its hat on its assertion that the contract does not require any payment to Peninsula until " 'final payment is received in full' by Principle from TTL." (D.E. 31, p. 3) (citation and emphasis omitted). Even assuming Principle's interpretation is correct, Peninsula has stated a claim for breach of contract. [6] The complaint notes that Peninsula received word from Principle's agent "that TTL has in fact paid [Principle] for all" of Peninsula's work. (D.E. 17, p. 4). Peninsula reasserts this point in its response, arguing that Principle has in fact been "paid in full by TTL." (D.E. 29, p. 8). In sum,

Peninsula alleges that: (1) it had a contract with Principle providing that once TTL fully paid Principle, Principle would pay Peninsula; and (2) TTL did pay Principle and Principle did not pay Peninsula. (D.E. 17, p. 4; D.E. 29, p. 8). Viewing these allegations "in the light most favorable to" Peninsula, Peninsula has sufficiently alleged that Principle breached the first contract. *See* *Allen*, 28 F.4th at 616. Accordingly, the Court **DENIES** Principle's motion as to this claim. (D.E. 20, p. 15-16).

ii. Promissory Estoppel as to the First Contract

Principle argues that Peninsula fails to state a claim for promissory estoppel as to the first contract because the written contract covers the conduct at issue. (D.E. 20, p. 17–18). Peninsula's complaint alleges, "in the alternative," that Principle promised to pay Peninsula for its work, that Peninsula substantially relied on those promises, and finally, that Principle owes Peninsula $346,643.69. (D.E. 17, p. 9).

"The elements of a promissory-estoppel claim are (1) a promise; (2) foreseeability of reliance by the promisor; (3) actual, substantial, and reasonable reliance by the promisee to its detriment; and (4) injustice that can be avoided only by enforcement of the promise." *Alvarado v. PNC Bank Nat'l Ass'n*, 660 F. Supp. 3d 612, 619 (S.D. Tex. 2023) (Alvarez, J.) (quoting *George-Baunchand v. Wells Fargo Home Mortg., Inc.*, No. H-10-3828, 2011 WL 6250785, at *8 (S.D. Tex. Dec. 14, 2011) (Rosenthal, J.)). "But promissory estoppel 'is not applicable to a promise covered by a valid contract between the parties.' " *OPF Enters., LLC v. Evanston Ins. Co.*, No. 4:21-CV-01835, 2021 WL 4710948, at *6 (S.D. Tex. Oct. 7, 2021) (Ellison, J.) (quoting *Trevino & Assocs. Mech., L.P. v. Frost Nat'l Bank*, 400 S.W.3d 139, 146 (Tex. App.—Dallas 2013, no pet.)). "In other words, the doctrine of promissory estoppel may be invoked only where no contract on the subject matter exists." *Id.* (quoting *Elite Ctr. for Minimally Invasive Surgery, LLC v. Health Care Serv. Corp.*, 221 F. Supp. 3d 853, 863 (S.D. Tex. 2016) (Smith, Mag. J.), *adopted*, 221 F. Supp. 3d 853, 855 (S.D. Tex. 2016) (Hughes, J.)); *see also* *Jhaver v. Zapata Off-Shore Co.*, 903 F.2d 381, 385 (5th Cir. 1990) (citations omitted) ("Under Texas law, a contract comprising the disputed promise precludes recovery under promissory estoppel.").The express contract doctrine "is an affirmative defense" to equitable claims under Texas law. *Shanghai Hailian Elec. Tools Co., Ltd. v. Home Depot Int'l, Inc.*, No. 3:16-CV-1451-D, 2016 WL 5815896, at *2 (N.D. Tex. Oct. 5, 2016) (Fitzwater, J.) (citations omitted). "Although dismissal under Rule 12(b)(6) is ordinarily determined by whether the facts alleged in the complaint, if true, give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings." *Id.* (collecting cases) (internal citations omitted).

Here, Peninsula first argues that Principle both misrepresents the contract terms and contradicts its own performance under the contract—arguing that the contract provides for regular progress payments that both parties abided by. (D.E. 29, p. 10–11). Further, Peninsula notes that its "pleading identifies that it agreed to perform the Work for Principle

in exchange for payment, and that [Peninsula] did so." *Id.* at 11. Finally, Peninsula concedes that the express contract doctrine normally bars promissory estoppel claims when there is an express contract. *Id.* Peninsula attempts to distinguish the instant case by summarily arguing that "there is no agreement between the parties as to the existence of the express contract upon which the suit is brought," meaning a cause of action for promissory estoppel is permitted, *id.* at 11–12.

***5** The Court disagrees with Peninsula as to its last point. Peninsula alleges that it performed work for Principle under the first contract's terms and that it "invoiced Principle in accordance with those contractual terms." (D.E. 29, p. 8). Accordingly, Peninsula's promissory estoppel claim as to work performed under the first contract "is founded upon precisely the same promise as that which undergirds its breach of contract claim." *Elite Ctr. for Minimally Invasive Surgery*, 221 F. Supp. 3d at 863.

Peninsula summarily states that the parties disagree as to whether an express contract exists. (D.E. 29, p. 11). Peninsula fails to cite to anywhere in the record where it disputes the existence of the first, express contract.[7] Indeed, Peninsula's complaint suggests the opposite—as Principle's reply points out. *See* (D.E. 31, p. 6) ("The parties do dispute the existence of a contract as to [the second agreement], but not as to [the first contract]; both parties agree to the validity and existence of the Agreement."). Put another way, Peninsula's allegations demonstrate that an express, written contract covering the work that underlies Peninsula's promissory estoppel claim "clearly appears on the face of the complaint." *See Shanghai Hailian Elec. Tools Co.*, 2016 WL 5815896, at *2–3 (finding express contract did not bar quasi-contract claim because the allegations did not clearly demonstrate that the contract covered the work at issue); *see also* (D.E. 17, p. 4) (defining "the Work" as work conducted under the first contract); (D.E. 17, p. 9) (premising promissory estoppel claim on work conducted under the first contract)). Finally, at the most recent status conference in this matter, Peninsula proceeded with argument that the first contract exists and governs the work at issue. *See* March 6, 2024 Minute Entry.

In sum, the Court must look at Peninsula's complaint. Peninsula's complaint states that the parties agreed to an express contract—the first contract, according to Peninsula—and that Peninsula worked in accordance with that contract. (D.E. 17, p. 3–5). The complaint facially contains an express contract covering the work at issue in Peninsula's promissory estoppel claim. *See* (D.E. 17, p. 3–5, 8).[8] While Peninsula may plead claims in the alternative, FED. R. CIV. P. 8(d)(2), Peninsula cannot do so when "there is a contract that governs" the work at issue. *See Optiv Sec. Inc. v. Iheartmedia Mgmt. Servs., Inc.*, No. SA-20-CV-01273-ESC, 2021 WL 2156410, at *8 (W.D. Tex. May 27, 2021) (Chestney, Mag. J.). "That is because parties should be bound by their express agreements." *Id.* (quoting *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000)) (dismissing promissory estoppel and unjust enrichment claims at the 12(b)(6) stage).

***6** This means that Peninsula cannot state a claim for promissory estoppel for the first contract. *See* Ears & Hearing, P.A. v. Blue Cross & Blue Shield of Tex., No. 1:18-CV-00726, 2019 WL 3557349, at *4 (W.D. Tex. Aug. 5, 2019) (Austin, Mag. J.) (dismissing promissory estoppel claim at the 12(b)(6) stage when the plaintiff failed to allege a promise distinct from the contract's promise), *adopted*, No. A-18-CV-00726, 2019 WL 6037271 (W.D. Tex. Sept. 17, 2019) (Yeakel, J.).; *Cotton v. Tex. Express Pipeline, LLC*, No. 6:16-CV-00453-RP-JCM, 2017 WL 3709093, at *9 (W.D. Tex. July 19, 2017) (Manske, Mag. J.) (citing*Christus Health v. Quality Infusion Care, Inc.*, 359 S.W.3d 719, 722–23 (Tex. App.—Houston [1st Dist.] 2011, no pet.))(dismissing promissory estoppel claim at the 12(b)(6) stage because a valid express contract governed the dispute), *adopted*, No. 6:16-CV-453-RP-JCM, 2018 WL 1419346 (W.D. Tex. Mar. 22, 2018) (Pitman, J.). As such, the Court **GRANTS** Principle's motion to dismiss as to this claim. (D.E. 20, p. 17–18).

B. Second Agreement

i. Breach of Contract

Principle next argues that Peninsula cannot state a claim under the second agreement, because the second agreement did not give rise to a second contract. (D.E. 20, p. 16). According to Principle, none of the essential contract requirements arose: no offer, acceptance, mutual assent, delivery, or execution. *Id.* at 16–17. Principle frames the second agreement as "mere discussion of rates for [Peninsula]'s work" rather than a promise to do anything. *Id.* at 16. In response, Peninsula argues that "[w]hat is relevant is [Peninsula]'s pleading and the facts alleged" there. (D.E. 29, p. 9). And those facts include that Principle proposed "an agreement and terms" to Peninsula; Peninsula accepted those terms; Peninsula performed according to those terms; and Peninsula incurred damages because of Principle's nonpayment. *Id.*[9] Given the necessary inferences that the Court must make at the motion to dismiss stage, *see* Allen, 28 F.4th at 616, Peninsula argues that its complaint "contains sufficient allegations to state a claim." (D.E. 29, p. 9). The Court agrees.

The Court first considers whether the second agreement gave rise to a contract. "The following elements are required for the formation of a valid and binding contract: (1) an offer, (2) acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding." *Gallier v. Woodbury Fin. Servs., Inc.*, 171 F. Supp. 3d 552, 567 (S.D. Tex. 2016) (Ronsenthal, J.) (quoting *Thornton v. Dobbs*, 355 S.W.3d 312, 316 (Tex.App.—Dallas 2011, no pet.)). Under Texas law, the Court determines the existence of these elements using an "objective standard." *See* Fernandes v. Dillard's Inc., 997 F. Supp. 2d 607, 609 (S.D. Tex. 2014) (Atlas, J.) (citations omitted). The Court considers each element in turn.

a. Offer

Peninsula has sufficiently alleged that Principle made an offer. "To prove a valid offer, a party

must show that (1) the offeror intended to make an offer, (2) the terms of the offer were clear and definite, and (3) the offeror communicated the essential terms of the offer to the offeree." *Cano v. State Farm Mut. Auto. Ins. Co.*, 425 F. Supp. 3d 779, 790 (W.D. Tex. 2019) (Rodriguez, J.) (citing *Domingo v. Mitchell*, 257 S.W.3d 34, 39 (Tex. App.—Amarillo 2008, pet. denied)).

***7** Principle challenges whether its proposal was an offer. *See* (D.E. 20, p. 16).[10] Principle frames the second agreement as "a mere discussion of rates[,]" and argues that this discussion "[did] not reflect that [Principle] agreed or promised to do anything." (D.E. 20, p. 16).

However, Peninsula's complaint alleges that Lucas Pappas, an officer of Principle, "made a separate and new proposal for" Peninsula to do work at a specific rate. (D.E. 17, p. 5). Viewing this allegation through an "objective standard of what the parties said and did and not [based on] their subjective state of mind[,]" *DeClaire v. G & B Mcintosh Fam. Ltd. P'ship*, 260 S.W.3d 34, 44 (Tex. App.—Houston [1st Dist.] 2008, no pet.), an officer of Principle (the offeror), intending to come to an agreement, communicated terms for Peninsula to work at definite rates (the terms of the offer), and Peninsula (the offeree) understood that agreement as an offer for specific terms. *See Cano*, 425 F. Supp. at 790. As such, the Court finds that Peninsula sufficiently alleged that Principle made an offer.

b. Acceptance

Principle argues that the new agreement "does not reflect that any Defendant agreed ... to do anything." (D.E. 20, p. 16). But Peninsula alleges that it accepted the new terms. (D.E. 17, p. 5–6) (indicating that Peninsula "agreed to the reduced standby and holiday rates and accepted [the] proposal"). Again, the Court determines the presence of acceptance using an objective standard. *Jordan v. Bank of Am., N.A.*, No. 4:23-CV-01092, **2024** **WL** 420903, at *4 (S.D. Tex. Feb. 5, **2024**) (Ellison, J.). Under Texas law, a party may accept a contract through "acts, conduct, or acquiescence in the terms of the contract." *DeClaire*, 260 S.W.3d at 44 (collecting cases). Here, after Peninsula received the offer of the new rates, it "accepted" and began working. (D.E. 17, p. 5–6).

***8** Accepting the complaint's allegations as true and making all reasonable inferences for Peninsula, *see Allen*, 28 F.4th at 616, Peninsula sufficiently alleges that it accepted Principle's offer for a second agreement, either by accepting the terms or by commencing performance in accordance with the terms. As such, this element is satisfied.

c. Meeting of the Minds

Principle argues that the second agreement contains no "mutual assent." (D.E. 20, p. 16–17). But as Peninsula points out, its complaint alleges that Principle and Peninsula mutually agreed to specific terms for "agreed upon rates." (D.E. 29, p. 9) Under Texas law, "[f]or an agreement to be enforceable, there must be a meeting of the minds with respect to its subject matter and essential terms." *Tyco Valves & Controls, L.P. v. Colorado*, 365 S.W.3d 750,

771 (Tex. App.—Houston [1st Dist.] 2012), *aff'd*, 432 S.W.3d 885, 894 (Tex. 2014) (citation omitted).

Here, taking Peninsula's allegations as true, Peninsula and Principle discussed a new agreement to perform work for compensation —this reflects a meeting of the minds as to the subject matter (Peninsula performing work for Principle, *see* (D.E. 29, p. 9)) and the essential terms (billing at the holiday and standby rates, *see id.*). *See* *Tyco Valves*, 365 S.W.3d at 771. As such, this element is satisfied.

d. Consent

Each party must consent to the contract terms. *Gallier*, 171 F. Supp. 3d at 567. Neither party appears to dispute the element of consent. *See* (D.E. 20; D.E. 29; D.E. 31). As such, the Court finds this element satisfied for purposes of resolving the instant motion to dismiss.

e. Execution

Principle asserts that the second agreement "d[id] not show ... execution[.]" (D.E. 20, p. 16). Peninsula responds by arguing that once it accepted and began performing (i.e., by working and "remaining on standby, billing at the agreed upon rates, [and] invoicing Principle"), the contract became enforceable. *See* (D.E. 29, p. 9).

"The execution of a contract includes the performance of all acts necessary to render it complete as an instrument." *Tyco Valves*, 365 S.W.3d at 771 (citation omitted). Here, the acts necessary to complete the contract as an instrument include (1) that the parties reached an agreement as to the terms of the contract and (2) at least one party began to perform under those terms. *See* *Saum v. City of Coll. Station*, No. 10-17-00408-CV, 2020 **WL** 7688033, at *6 (Tex. App.—Waco Dec. 22, 2020, pet. denied) (mem. op.) (noting that Texas law does not require a contract to be signed to be executed); *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 418 (5th Cir. 2009) (noting performance is an essential element). The Court has already determined that Peninsula has alleged that the parties reached an agreement as to the contractual terms. *Supra* section III.B.i.c. Peninsula alleges that it performed the work "as instructed by" Principle (and the now-dismissed Defendants). (D.E. 17, p. 10). Given the inferences the Court must make at this stage in the proceedings, *see* *Allen*, 28 F.4th at 616, Peninsula sufficiently alleges that the second agreement shows execution of a contract.

In sum, the Court finds that Peninsula has sufficiently alleged that the second agreement gave rise to a contract. *See* (D.E. 17, p. 5–6). Because Peninsula has alleged a valid contract, the Court must now turn to the other breach of contract elements.

f. Breach of Contract Elements

***9** "Under Texas law, the elements of a breach of contract claim are: 1) the existence of a valid contract; 2) performance or tendered performance by the plaintiff; 3) breach of the contract by the defendant; and 4) damages to the plaintiff resulting from the breach." *Jordan*, **2024** **WL** 420903, at *4 (cleaned up). Peninsula

sufficiently alleges all four elements. *See* (D.E. 17, p. 5–6). The Court has already determined that Peninsula has sufficiently alleged the existence of a valid contract, satisfying the first element. *See supra* sections III.C.i–vii.

As to the second element, Peninsula alleges that it "commenced performance under" this new agreement, satisfying the second element. *See* (D.E. 17, p. 6); (D.E. 29, p. 9) (arguing Peninsula performed work under the agreed terms). As to the third and fourth elements, Peninsula alleges that Principle breached their second agreement by refusing to pay the balance for Peninsula's work, (D.E. 17, p. 6), and that Peninsula has suffered damages of at least "the value of the invoices and work" under this second agreement, *id.* at 10. In sum, Peninsula alleges that the second agreement constitutes a valid contract and that Principle breached that contract by refusing to pay in accordance with the parties' agreement. Accordingly, the Court **DENIES** Principle's motion to dismiss as to this claim. (D.E. 20, p. 16–17).

ii. Promissory Estoppel

Principle argues that Peninsula fails to adequately plead "any" of the promissory estoppel elements as to the second agreement. (D.E. 20, p. 18) (emphasis omitted). Peninsula responds that its complaint alleges all elements of a promissory estoppel claim. (D.E. 29, p. 12).

The Court has already determined that Peninsula states a breach of contract claim as to the second agreement. *Supra* Section III.C. However, "[g]enerally, promissory estoppel is a viable alternative to a claim for breach of contract." *Mann v. Robles*, No. 13-14-00190-CV, 2016 WL 1274690, at *4 (Tex. App.—Corpus Christi-Edinburg Mar. 31, 2016, pet denied) (mem. op.) (citation omitted). In other words, "[a] party can plead legal and equitable claims in the alternative," when—as is the case here—a "party disputes the existence of a contract governing the dispute." *Johnson v. Wells Fargo Bank, N.A.*, 999 F. Supp. 2d 919, 929 (N.D. Tex. 2014) (Lynn, J.). Here, Principle disputes the existence of a contract governing the work at issue under the second agreement. *See* (D.E. 20, p. 18) (arguing that Peninsula fails to state a claim for breach of contract because the second agreement never gave rise to a legally binding contract). And Peninsula pled its promissory estoppel claim "in the alternative" to its breach of contract claim. (D.E. 17, p. 10). Further, while Peninsula could not *recover* at trial on both a breach of contract claim and a promissory estoppel claim, at this stage, Peninsula may proceed on alterative theories of liability. FED. R. CIV. P. 8(d)(2).

As the Court stated above, *supra* section III.B, the promissory estoppel elements are "(1) a promise; (2) foreseeability of reliance by the promisor; (3) actual, substantial, and reasonable reliance by the promisee to its detriment; and (4) injustice that can be avoided only by enforcement of the promise." *Alvarado*, 660 F. Supp. 3d at 619 (citation omitted). Peninsula's complaint alleges that Principle promised to pay if Peninsula worked from November 2022 to January 2023; that Peninsula then foreseeably and "reasonably and substantially relied on" this promise by continuing to work; and that it would be unjust

to not enforce such promise. (D.E. 17, p. 10–11).

***10** In sum, Peninsula alleges that Principle's agent proposed a new arrangement and promised a specific rate for Peninsula to work. (D.E. 17, p. 5). Peninsula had been working for Principle for the previous several months and anticipated that it would continue working under this new arrangement. *See id.* at 5–6. Peninsula then allegedly relied on Principle's promise to pay a "reduced standby and holiday rate" to continue working. *See id.* at 5. Accepting the allegations as true and viewing them "in the light most favorable to" Peninsula, *see Allen*, 28 F.4th at 616, the Court finds that Peninsula sufficiently alleges a promissory estoppel claim as to the second agreement. Accordingly, the Court **DENIES** Principle's motion to dismiss as to this claim. (D.E. 20, p. 17). [11]

C. Quantum Meruit

Principle argues that Peninsula's quantum meruit claim fails because (1) it is barred by the express, valid contract that already covers the work at issue and (2) Principle "did not have 'reasonable notice that' " Peninsula expected to be paid for its work. (D.E. 20, p. 18) (citations omitted). In response, Peninsula points out that (1) its quantum meruit theory is presented in the alternative, and no magic words are required to establish that fact; and (2) it would not have given "over $700,000.00 worth of equipment, labor, and manpower to Principle" without expecting to be paid for it. (D.E. 29, p. 13).

Texas law recognizes the "principle of recovery on quantum meruit [that] is founded on the rule that it is inequitable for a party to refuse to pay for benefits received or for work performed for him with his knowledge and consent by someone who is authorized to expect remuneration therefor." *Channel Source Inc. v. CTI Indus. Corp.*, No. 3:15-CV-0271-P, 2015 WL 13118198, at *3 (N.D. Tex. Oct. 26, 2015) (Solis, J.) (quoting *Camacho v. Sullivan Transfer Co.*, 577 S.W.2d 793, 794 (Tex. App.—Waco 1979, no writ)). "While a plaintiff may seek recovery under quantum meruit and breach of contract, a plaintiff may only recover under *one* claim." *Port Elevator-Brownsville, L.C. v. Ivonne Soto Vega*, No. B-98-23, 2008 WL 5435563, at *3 (S.D. Tex. Dec. 30, 2008) (Tagle, J.) (emphasis added) (citation omitted). And "quantum meruit applies where no express contract exists." *Id.* (citations omitted). In other words, "[i]f the parties reached an express agreement allocating payments, services, and risks—that is, a contract—then a court should not step in and impose its view of what would constitute an equitable arrangement." *D2 Excavating, Inc. v. Thompson Thrift Constr., Inc.*, 973 F.3d 430, 436 (5th Cir. 2020).

***11** However, "it is well-established [that] the Federal Rules of Civil Procedure allow a party to assert separate claims under alternative theories of liability." *Fulcrum Credit Partners LLC v. ChipMOS Techs. Inc.*, No. A-10-CA-060-SS, 2010 WL 11444280, at *8 (Sparks, J.) (citing FED. R. CIV. P. 8(d)(2)). And a plaintiff does not need to "include the magic words 'in the alternative' " to successfully plead an alternative theory. *Id.* (citation omitted).

To the extent Peninsula brings a quantum meruit claim as to actions arising under

the first, express contract, these claims are barred because "quantum meruit applies where no express contract exists." *Port Elevator-Brownsville, L.C.*, 2008 WL 5435563, at *3; *Cotton*, 2017 WL 3709093, at *9 (noting that when an "express contract governs" the parties' disagreement, plaintiff fails to state a quantum meruit claim under the 12(b)(6) standard); *Shanghai Hailian Elec. Tools Co.*, 2016 WL 5815896, at *2 (noting that if a defendant asserts the express contract doctrine as an affirmative defense to quantum meruit claim, and the express contract covers the dispute at issue, the quantum meruit claim is subject to 12(b)(6) dismissal). As such, the Court **GRANTS** Principle's motion to dismiss to the extent that it seeks to dismiss Peninsula's quantum meruit claim as to actions arising under the first, express contract. (D.E. 20, p. 18).

But to the extent Peninsula brings a quantum meruit claim as to actions arising under the second agreement—in the alternative to breach of contract—these claims pass Rule 12(b)(6) muster. *See* (D.E. 17, p. 11). As previously stated, plaintiffs can assert claims under alterative theories of liability. FED. R. CIV. P. 8(d)(2). And Peninsula alleges that Principle is refusing "to pay for benefits received [and] for work performed for [Principle] with [Principle's] knowledge and consent." *See Camacho*, 577 S.W.2d at 794; (D.E. 17, p. 5–6, 11) (alleging Peninsula worked for Principle for months under its agreement where Principle's agent proposed a specific rate at which Peninsula would work). While Principle argues that it "did not have 'reasonable notice that' " Peninsula expected to be paid for its work under the second agreement, (D.E. 20, p. 18) (citation omitted), Peninsula's allegation that it agreed to work for Principle at a specified rate (the "reduced standby and holiday rate") is sufficient to state that Principle had reasonable notice that Peninsula expected payment for its work. *See* (D.E. 17, p. 6). As such, the Court **DENIES** Principle's motion to dismiss to the extent that it seeks to dismiss Peninsula's quantum meruit claim as to actions arising under the second agreement. *See* (D.E. 20, p. 18–19). [12]

D. Sworn Account as to the Second Agreement

***12** Principle argues that Peninsula's claim under sworn account fails because Peninsula does not adequately plead whether the prices were in accordance with an agreement or were "reasonable and customary." (D.E. 20, p. 19) (citation omitted). In response, Peninsula first argues that it can plead this claim in the alternative to a breach of contract claim, and that it rendered work for Principle and that the agreed price for the work was usual and customary. *See* (D.E. 29, p. 14). [13]

In Texas, the elements of a sworn account claim are "(1) ... the rendering of personal services; (2) the prices charged are in accordance with the parties' agreement or, in the absence of an agreement, the prices are usual, customary and reasonable; and (3) the amount remains unpaid." *Nat'l Oilwell Varco, L.P. v. Elite Coil Tubing Sols., LLC*, No. H-13-0374, 2014 WL 12619323, at *3 (S.D. Tex. Oct. 17, 2014) (Atlas, J.) (citations omitted).

Here, only the second element appears to be at issue. *See* (D.E. 20, p. 19) (arguing

Peninsula fails to allege second element); *see also* (D.E. 17, p. 5–6) (alleging Peninsula rendered services for Principle and Principle has not paid Peninsula for that work). Principle appears to argue that the prices for the second agreement were not made in accordance with an agreement, which means that the prices would not be assessed under the "reasonable and customary" standard. *See* (D.E. 20, p. 19–20).

Principle is correct that Peninsula's complaint states that the prices for the second agreement "were reasonable and customary." *See* (D.E. 17, p. 11). But Peninsula's sworn account section also incorporates by reference every previous allegation "as though fully restated verbatim[,]" *id.*, and Peninsula's complaint previously states that the parties agreed to "a reduced standby and holiday rate" at which Peninsula would work, *see* (D.E. 17, p. 5). Accepting these allegations as true and construing them in the light most favorable to Peninsula, *see* *Allen*, 28 F.4th at 616, Peninsula has sufficiently alleged there was an agreement regarding prices and those prices were in accordance with that agreement—satisfying the second element for sworn account. As such, the Court **DENIES** Principle's motion to dismiss as to this claim. (D.E. 20, p. 19).

E. Fraud

Peninsula's fraud claim is subject to a heightened pleading standard. *See* FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). Principle argues that Peninsula fails to state a claim under this heightened standard. (D.E. 20, p. 20–23). In the alternative, Principle argues that the economic loss doctrine bars any fraud claims because the claims are based on a duty that arises out of the contract and because the loss is the subject of the contract. *Id.* at 23–24. In response, Peninsula argues that despite the heightened pleading standard, fraud claims do "not require absolute particularity" and that the heightened fraud pleading "standard is not a straightjacket." (D.E. 29, p. 15–16) (citation omitted). Peninsula also argues that the economic loss doctrine does not bar fraud and fraudulent inducement claims and does not apply when a party to a contract has an independent legal duty (here, the duty to avoid fraud). (D.E. 29, p. 21) (citations omitted). [14]

***13** Under Texas law, fraud "requires (1) a material misrepresentation; (2) that was false; (3) that the employer knew to be false when made or asserted without knowledge of its truth; (4) intended to be acted upon; (5) detrimentally relied upon; and [(6)] resulting in injury." *Gilbert v. Driven Brands Shared Servs., LLC*, No. 4:23-CV-01747, 2023 **WL** 9316919, at *6 (S.D. Tex. Dec. 11, 2023) (Ho, Mag. J.) (citing *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998)), *adopted*, No. 4:23-CV-01747, **2024** **WL** 407497 (S.D. Tex. Feb. 2, **2024**) (Bennett, J.). However, the "mere failure to perform contractual obligations as promised does not constitute fraud but is instead breach of contract.... To be actionable as fraudulent inducement, a breach must be coupled with a showing that the promisor never intended to perform under the contract." *Kevin M. Ehringer Enters., Inc. v McData Servs. Corp.*, 646 F3d 321, 325 (5th Cir. 2011) (citations omitted). Such a representation "must be a representation

of a material fact." *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983) (citation omitted).

In the Fifth Cirucit, "[p]leading fraud with particularity ... requires 'time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby.' " *Ascend Performance Materials Operations LLC, v. Mastec Power Corp.*, No. 4:22-CV-03932, **2024 WL** 3497931, at *2 (S.D. Tex. July 22, **2024**) (Eskridge, J.) (quoting *Williams v. WMX Tech., Inc.*, 112 F3d 175, 177 (5th Cir. 1997)).

Before turning to the elements of fraud, the Court considers whether the economic loss doctrine bars this claim. Principle cites *Hurd v. BAC Home Loans Servicing, LP*, 880 F. Supp. 2d 747, 763 (N.D. Tex. 2012) (Lynn, J.) (adopting magistrate judge's recommendation, 880 F. Supp. 2d 747, 753–769 (N.D. Tex. 2012) (Ramirez, Mag. J.)), in support of its argument that a claim is barred by the economic loss doctrine if the claim arises from a breach of the contract or from "the subject of the contract itself." (D.E. 20, p. 23) (citing *Hurd*, 880 F. Supp. 2d at 763). But *Hurd* also notes "that the economic loss rule does not bar fraud and fraudulent inducement claims." *Hurd*, 880 F. Supp. 2d at 763 (collecting cases). Further, Peninsula's fraud claim does not arise solely from Peninsula and Principle's first contract—as Peninsula's complaint states, *see* (D.E. 17, p. 13), Peninsula alleges Principle committed fraud in order to convince Peninsula to begin and to keep working under the second agreement, *see id.* (stating that Principle made its representation "with the intent that" Peninsula would later perform the work for Principle). As such, Principle's argument that the economic loss doctrine bars Peninsula's fraud claims is inapposite, and the Court **declines** to dismiss Peninsula's fraud claims on those grounds. *See* (D.E. 20, p. 23–24).

Now, the Court turns to the fraud claim itself, considering each element in turn, viewing the allegations in the light most favorable to Peninsula, and making all reasonable inferences in Peninsula's favor. *See Allen*, 28 F.4th at 616.

i. Principle made a material misrepresentation.

To be actionable, Peninsula must allege Principle made "a representation of a material fact" and not merely an opinion. *See Trenholm*, 646 S.W.2d at 930. To start, Peninsula's allegations state that Principle represented to Peninsula "that [Principle] had not received payment from TTL for all the [w]ork completed by [Peninsula] under the [f]irst [c]ontract." (D.E. 17, p. 12). Peninsula contends this is a *misrepresentation* because it alleges that Principle "had no intention of compensating" Peninsula for its work, even though TTL had paid Principle. *Id*; *see also id.* at 4 (alleging that "TTL has in fact paid ... Principle") This representation is more than a mere opinion—Peninsula alleges that Principle stated as a fact that TTL had not submitted final payment. Further, this representation was not ancillary; it was material enough that it induced Peninsula to continue working for at least two months. *See* (D.E. 17, p. 5–6) (alleging that Peninsula worked for approximately two and a half months after Principle's representation); (D.E.

29) (arguing that Principle's representation to Peninsula was material).

ii. The representation was false.

***14** Principle argues that its statement to Peninsula was "not materially false" because "Principle never was paid in full by TTL[.]" (D.E. 20, p. 22). Nevertheless, the Court accepts Peninsula's allegations as true. *See* Allen, 28 F.4th at 616. And those allegations say that TTL paid Principle. In support of the allegation that TTL paid Principle, Peninsula notes that Principle's agent Pappas "affirmed receipt of the payments from TTL by executing sworn Conditional Waiver of Release of Liens attesting to receipt of the payments and that subcontractors, such as [Peninsula], would be paid in full for their work." (D.E. 17, p. 13). It appears that Principle made this alleged representation sometime in the fall of 2022. *See id.* at 4–5. As such, this element is satisfied.

iii. Principle knew the representation was false.

Peninsula alleges that Principle knew its representation was untrue because TTL had paid Principle; Peninsula notes that Principle's agent Pappas "affirmed receipt of the payments from TTL by executing sworn conditional waiver of release of liens attesting to receipt of the payments" and that those receipts meant "that subcontractors, such as [Peninsula], would be paid in full for their [w]ork." (D.E. 17, p. 13) (cleaned up); *see e.g.* (D.E. 29-4, p. 23) (signature of Lucas Pappas as agent of Principle swearing that Principle received payment from TTL). At the same time, Peninsula alleges that Principle said that TTL had not paid Principle. *Id.* at 4. Because Peninsula alleges that Principle made this representation at a time during or after it allegedly received payment from TTL, Peninsula sufficiently alleges that Principle knew its representation that TTL had not paid was false. As such, this element is satisfied.

iv. Principle made a representation with the intent that Peninsula would rely on it, and Peninsula reasonably and detrimentally relied on this representation.

Peninsula alleges that it detrimentally relied on Principle's representation: Principle allegedly misrepresented that TTL had not paid Principle to induce Peninsula to work under the second agreement. *See* (D.E. 17, p. 13) (stating that Principle made its representation "with the intent that [Peninsula] would rely upon [it] and act thereon and perform the [w]ork" and that Peninsula did rely on such statement). Peninsula must have reasonably relied on this representation to be actionable under Texas law. *See* LeTourneau Techs. Drilling Sys., Inc. v. Nomac Drilling, LLC, 676 F. Supp. 2d 534, 546 (S.D. Tex. 2009) (Lake, J.) (stating that reliance on an oral representation must be reasonable for fraud claim to be proper under Texas law).

Here, viewing the allegations in the light most favorable to Peninsula, *see* Allen, 28 F.4th at 616, the Court finds Peninsula has sufficiently alleged that its reliance was both reasonable and detrimental. Peninsula alleges that it "relied on [Principle]'s representation because

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it believed ... Principle would compensate" Peninsula for Peninsula's work—which is why it came to an agreement with Principle—the second agreement, *see* Section III.B—to continue to work. (D.E. 17, p. 5–6, 13). Because Peninsula alleges that Principle gave Peninsula a reason it needed to enter into a new contract (that TTL had not yet paid Principle) and that Principle had previously paid Peninsula in the parties' course of dealing, *see* (D.E. 17, p. 4), the Court finds Peninsula has sufficiently alleged reasonable reliance. Additionally, because Peninsula alleges damages resulting from this reliance, *see* (D.E. 17, p. 6, 13), the Court finds Peninsula has sufficiently alleged detrimental reliance. As such, this element is satisfied.

v. Peninsula was injured as a result.

Finally, Peninsula alleges that it spent significant resources and incurred expenses for its labor, equipment, and services and forewent other work opportunities as a result of entering into the second agreement. (D.E. 17, p. 13). The amount Principle allegedly owes Peninsula includes $738,506.96 worth of damages. *Id.* at 6. These injuries were a direct result of Peninsula's continuing to work for Principle (and forgoing other work opportunities). *See id.* at 4–6, 13. Accordingly, Plaintiff has sufficiently alleged it was injured.

vi. In total, Peninsula sufficiently alleges fraud.

***15** In short, Peninsula alleges that Principle, through its agent, made a false representation with the intent that Peninsula would rely upon it, and Peninsula ultimately relied upon the representation, resulting in Peninsula's injury. *See* (D.E. 17, p. 4, 5–6, 12–13). Indeed, Peninsula's chronology of alleged events supports the inference of fraud: Principle told Peninsula that TTL had not paid Principle at around the same time that TTL had in fact paid Principle, assuming the allegation's truth and holding all inferences in favor of Peninsula, *see* *Allen*, 28 F.4th at 616. *Cf.* *Gilbert*, 2023 WL 9316919, at *6 (finding fraud claim failed when plaintiff's pleadings were conclusory and "the chronology of events undermine[d]" plaintiff's theory of fraud). While Peninsula could have alleged in more detail how Principle was fraudulent, the Court finds that each of the fraud elements under Texas law are met.

Finally, in addition to alleging the elements of fraud, Peninsula also meets the Fifth Circuit's test: Peninsula alleges the time-frame (fall 2022), the place (occurring in the Corpus Christi, Texas area)[15], the contents (that TTL had not paid Principle), and the identity of the person making the alleged false statement (Pappas, an agent of Principle). *See* *Williams*, 112 F3d at 177. This is sufficient at this early stage in the proceedings. *Allen*, 28 F.4th at 616. As such, the Court **DENIES** Principle's motion to dismiss as to this claim. (D.E. 20, p. 20–21).

F. Fraud Claims against now-dismissed Defendants

Peninsula's complaint includes claims of fraud against the now-dismissed Pappas and Southern. (D.E. 17, p. 13–14). Principle moves to dismiss these claims. (D.E. 20, p. 20–24). Given that Southern and Pappas are no longer

defendants in this action, (D.E. 28), the Court **DENIES as moot** Principle's motion to dismiss as to these claims. (D.E. 20, p. 20–24).

IV. Conclusion

For the reasons above, the Court **GRANTS in part** and **DENIES in part** the motion to dismiss. (D.E. 20). Accordingly, the Court **ORDERS** the following:

- Peninsula has plausibly alleged a breach of contract claim as to the first contract. As such, Principle's motion to dismiss as to this claim is **DENIED.**
- Peninsula has not plausibly alleged a promissory estoppel claim as to the first contract. As such, Principle's motion to dismiss as to this claim is **GRANTED.**
- Peninsula has plausibly alleged a breach of contract claim as to the second agreement. As such, Principle's motion to dismiss as to this claim is **DENIED.**
- Peninsula has plausibly alleged a promissory estoppel claim as to the second agreement. As such, Principle's motion to dismiss as to this claim is **DENIED.**
- Peninsula has failed to plausibly allege a quantum meruit claim as to the first, express contract, but Peninsula has plausibly alleged a claim as to quantum meruit claim as to the second agreement. As such, Principle's motion to dismiss as to this claim is **GRANTED in part and DENIED in part**.
- Peninsula has plausibly alleged a claim as to sworn account as to the second agreement. As such, Principle's motion to dismiss as to this claim is **DENIED.**
- Peninsula has plausibly alleged a claim of fraud, which the Court construes as a fraudulent inducement claim. As such, Principle's motion to dismiss as to this claim is **DENIED.** Further, the Court **DENIES as moot** Principle's motion to dismiss Peninsula's fraud claims against Pappas and Southern.
- Principle's motion to dismiss with respect to personal jurisdiction and failure to state a claim as to Southern and Pappas, *see* (D.E. 20, p. 5–14), is **DENIED as moot.**

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2024 WL 5036616

Footnotes

1 For clarity, in this Order, the Court refers to the first, written agreement between the parties as the “first contract” and the second agreement (that Peninsula alleges is a

contract) as the "second agreement." Since Principle has not moved to dismiss the first breach of contract claim on the grounds that it was not a contract, both parties appear to agree that the first agreement is a contract. However, given that Principle disputes whether the second agreement is a contract, the Court refers to it as the "second agreement."

2 Peninsula submitted four invoices (totaling $738,506.96) for this time (from November 2022–January 2023) for standby time and work performed payable on "Net 30 days" with a past due penalty of 1.5% interest each month until the invoice is paid in full. *Id.* at 6. Peninsula submitted these invoices under the parties' previous course of dealing and "arrangement." *Id.*

3 The motion to dismiss includes a Rule 12(b)(2) argument for lack of personal jurisdiction and Rule 12(b)(6) argument for failure to state a claim as to the now-dismissed Defendants Southern Road & Bridge, LLC ("Southern") and Pappas. (D.E. 20, p. 5–14). Given that Southern and Pappas are no longer defendants in this action, (D.E. 28), the Court finds those arguments moot and declines to address them. (D.E. 20, p. 5–14).

4 The Court applies Texas law in this diversity case. (D.E. 17, p. 1–2); *Am. Gen. Life Ins. Co. v. Vega*, No. H-11-1720, 2012 **WL** 13042660, at *4 (S.D. Tex. Dec. 12, 2012) (Gilmore, J.).

5 Principle attaches the first contract to its motion to dismiss. (D.E. 20-4). At the motion to dismiss stage, the Court examines "the pleadings and ... 'any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint.' " *PHI Grp., Inc.*, 58 F.4th at 841 (quoting *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010)). Given that this contract gives rise to Peninsula's first breach of contract claim and that Peninsula refers to the contract in its complaint, (D.E. 17, p. 3–5, 8–9), the Court considers the contract in ruling on the motion to dismiss. *See* *Wellness Walk In Tubs, LLC v. Scripps Media, Inc.*, 607 F. Supp. 3d 1167, 1171 n.2 (D. Colo. 2022) (Blackburn, J.) (citations omitted) ("This [contract] document, although not attached to the [a]mended [c]omplaint, is referenced therein and central to plaintiff's claims. It therefore is properly considered in resolving the motion to dismiss.").

6 At the most recent status conference in this matter, Peninsula noted the final payment issue is a fact dispute on which Peninsula needs to conduct discovery. *See* March 6, **2024** Minute Entry. The Court agrees that whether TTL did in fact issue a final payment is a dispute better reserved for the summary judgment stage. At the motion to dismiss stage, the Court must take Peninsula's allegations as true. *Allen*, 28 F.4th at 616.

7 In the alternative, the Court could also decline to consider this one-sentence argument for inadequate briefing, because "[c]ourts have consistently held that inadequate briefing results in a waiver of a party's arguments." *Ronaldo Designer Jewelry, Inc. v. Cox*, No. 1:17-CV-2, 2018 WL 1370610, at *2 (N.D. Miss. Mar. 16, 2018) (Brown, J.) (quoting *TGIP, Inc. v. AT&T Corp.*, 512 F.Supp.2d 696, 712 (E.D. Tex. 2007) (Clark, J.)).

8 Indeed, Peninsula's complaint states that the parties "entered into a contract" that each party signed. (D.E. 17, p. 3). The parties agreed that Texas law would control the contract and that the parties would work in accordance with this contract. *See id.* at 3–4. This contract is an express contract, as "the contractual terms are stated by the parties[.]" *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex. 1972) (citation omitted). This is in contrast to an implied contract, where a contract arises from the parties' conduct. *Id.* (citation omitted).

9 Peninsula confirmed at the most recent status conference in this matter that the second agreement was comprised of both verbal assertions (with Principle requesting that Peninsula remain on site at the standby rate) and later written confirmation via email. *See* March 6, 2024 Minute Entry.

10 In support of its argument, Principle cites to an email exchange between Lucas Pappas and Peninsula Marine that occurred on December 29, 2022. *See* (D.E. 20, p. 16) (citing (D.E. 20-5, p. 1)). In ruling on a motion to dismiss, the Court may consider documents attached to the motion to dismiss, if those document "are 'referred to in the plaintiff's complaint and are central to [the] claim.' " *Stoller Enterprises*, 2022 WL 1238547, at *1 (citations omitted). In reviewing the live complaint, the Court fails to find a December 29, 2022 conversation—indeed, the Court fails to find a conversation from December 2022. *See* (D.E. 17). To be sure, the complaint implicitly references that the parties may have communicated during this time, *see* (D.E. 17, p. 6 (indicating that from November 14, 2022 to January 16, 2023, the parties had a course of dealing)), but the Court declines to determine whether this specific conversation is both referred to in the complaint and central to Plaintiff's claims. *See* (D.E. 20-5, p. 1); *Stoller Enterprises*, 2022 WL 1238547, at *1. As such, the Court declines to consider this conversation in ruling on the motion to dismiss and focuses instead on the allegations in Plaintiff's live complaint. *See* (D.E. 17). Determining whether a fact issue about the formation of a second contract exists based on the possible December 29, 2022 conversation is a determination better suited for the summary judgment stage.

11 Whereas the Court has determined that Peninsula's complaint alleges that an express contract governs the conduct at issue for claims arising under the first contract, *supra* Section III.A.ii, the second agreement does not clearly give rise

to an express contract. The second agreement may ultimately turn out to be an implied, rather than express, contract. *See* Balfour Beatty Rail, Inc. v. Kan. City S. Ry. Co., 173 F. Supp. 3d 363, 400 (N.D. Tex. 2016) (Lindsay, J.) (noting that an implied contract arises "[w]hen the evidence consists of the conduct of the parties and their course of dealing with one another"), *aff'd as modified and remanded*, 725 F. App'x 256 (5th Cir. 2018); *see also* (D.E. 17, p. 5–6) (alleging that Peninsula commenced performance by working under the second agreement's terms and the parties' "course of dealing"). At this juncture, the Court need not decide the unbriefed issue of whether the second agreement was an express or implied contract. Further, Principle disputes the existence of a contract arising from the second agreement, *see* (D.E. 20, p. 18), so Peninsula can properly plead its "equitable claim[ ] in the alternative[,]" *see* Johnson, 999 F. Supp. 2d at 929. Accordingly, although the express contract doctrine bars Peninsula's promissory estoppel claims on the first contract, the express contract doctrine does not bar Peninsula's promissory estoppel claims on the second agreement—at least, at the motion to dismiss stage.

12 Again, while Peninsula cannot recover at trial on both a breach of contract claim and a quantum meruit claim as to damages under the second agreement, at this stage, Peninsula may proceed on alterative theories of liability. *See* FED. R. CIV. P. 8(d)(2); *supra* Section III.D. n.6; *see also* SCP Distribs., L.L.C. v. Tex. Pool Grp., L.L.C., No. H-22-4522, **2024** **WL** 534617, at *6 n.40 (S.D. Tex. Feb. 9, **2024**) (Lake, J.) (holding that plaintiff was "entitled to summary judgment on the breach of contract claim" which precluded plaintiff's "recovery in quantum meruit"). The difference between Peninsula's quantum meruit claim under the first contract and its claim under the second agreement is that Peninsula's complaint clearly alleges that an express contract covers work under the first contract, whereas the parties disagree whether the second agreement ultimately formed a legally binding contract. As such, the first contract bars Peninsula's quasi-contract claims (like quantum meruit) as a matter of law, whereas Peninsula may proceed to summary judgment to prove either breach of contract or quasi-contract claims as to the second agreement.

13 Principle appears to argue that Peninsula cannot bring a claim for sworn account under the first contract. *See* (D.E. 20, p. 20). But Peninsula has clarified that it brings a claim for sworn account only under services provided under the second agreement —not the first. *See* (D.E. 29, p. 14). As such, Peninsula's complaint only brings a claim for sworn account under actions arising under the second agreement, so the Court declines to address any argument that Peninsula cannot bring a claim for sworn account under the first contract. *See* (D.E. 20, p. 20).

14 While Peninsula styles this claim as a 'fraud' claim, the Court construes this claim as a fraudulent inducement claim. *See* W. Afr. Ventures Ltd. v. Fleming, 634 F. Supp. 3d 391, 398 (S.D. Tex. 2022) (Rosenthal, C.J.) (quoting Bohnsack v. Varco,

L.P., 668 F.3d 262, 277 (5th Cir. 2012) ("Fraud claims that depend on the existence of an enforceable contract are properly styled as fraudulent inducement claims, not common law fraud claims."). Fraudulent inducement claims are "a 'species of common-law fraud' that" arise when a defendant makes a "false promise [that] 'induces' the plaintiff to agree to a contract the plaintiff would not have agreed to if the defendant had not made the false promise." *Id.* (quoting *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018)). Given that the alleged fraud at issue arises in the context of Principle inducing Peninsula into a second agreement, *see* (D.E. 29 p. 15) (arguing the fraud arose out of Principle's misrepresentation that TTL had not paid Principle to avoid paying Peninsula under the first contract); (D.E. 17, p. 13) (alleging Principle made representations to Peninsula so that Peninsula would begin work under the "standby and holiday rate[,]" i.e. the second agreement), the Court thus construes Peninsula's claim as a fraudulent inducement claim. Regardless, that does not alter the analysis because the essential elements remain the same: a material misrepresentation that was false, that the defendant intended the plaintiff to rely on; that the plaintiff did rely on; and that caused the plaintiff injury. *W. Afr. Ventures Ltd.*, 634 F. Supp. 3d at 398.

15 Peninsula's complaint notes that TTL employees (as well as Peninsula and Principle) worked out of Corpus Christi, Texas during the time when the allegations occurred. *See* (D.E. 17, p. 5).

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CASE NO. 11

Restatement (Second) of Torts § 46 (1965)

Restatement of the Law - Torts | September 2025 Update

Restatement (Second) of Torts

Division One. Intentional Harms to Persons, Land, and Chattels

Chapter 2. Intentional Invasions of Interests in Personality

Topic 5. The Interest in Freedom from Emotional Distress

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§ 46 Outrageous Conduct Causing Severe Emotional Distress

Comment:
Reporter's Notes
Case Citations - by Jurisdiction

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
(b) to any other person who is present at the time, if such distress results in bodily harm.

See Reporter's Notes.

Caveat:

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The Institute expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress.

Comment:

a. This Section is concerned only with emotional distress which is inflicted intentionally or recklessly. As to the negligent infliction of emotional distress, see §§ 312, 313, 436, and 436A.

b. As indicated in Chapter 47, emotional distress may be an element of damages in many cases where other interests have been invaded, and tort liability has arisen apart from the emotional distress. Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection to the interest in freedom from emotional distress standing alone. It is only within recent years that the rule stated in this Section has been fully recognized as a separate and distinct basis of tort liability, without the presence of the elements necessary to any other tort, such as assault, battery, false imprisonment, trespass to land, or the like. This Section may be regarded as an extension of the principle involved in the rules stated in §§ 21- 34 as to the tort of assault.

c. The law is still in a stage of development, and the ultimate limits of this tort are not yet determined. This Section states the extent of the liability thus far accepted generally by the courts. The Caveat is intended to leave fully open the possibility of further development of the law, and the recognition of other situations in which liability may be imposed.

d. *Extreme and outrageous conduct.* The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. See Magruder, Mental and Emotional Disturbance in the Law of Torts, 47 Harvard Law Review

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1033, 1053 (1936). It is only where there is a special relation between the parties, as stated in § 48, that there may be recovery for insults not amounting to extreme outrage.

Illustrations:

1. As a practical joke, A falsely tells B that her husband has been badly injured in an accident, and is in the hospital with both legs broken. B suffers severe emotional distress. A is subject to liability to B for her emotional distress. If it causes nervous shock and resulting illness, A is subject to liability to B for her illness.

2. A, the president of an association of rubbish collectors, summons B to a meeting of the association, and in the presence of an intimidating group of associates tells B that B has been collecting rubbish in territory which the association regards as exclusively allocated to one of its members. A demands that B pay over the proceeds of his rubbish collection, and tells B that if he does not do so the association will beat him up, destroy his truck, and put him out of business. B is badly frightened, and suffers severe emotional distress. A is subject to liability to B for his emotional distress, and if it results in illness, A is also subject to liability to B for his illness.

3. A is invited to a swimming party at an exclusive resort. B gives her a bathing suit which he knows will dissolve in water. It does dissolve while she is swimming, leaving her naked in the presence of men and women whom she has just met. A suffers extreme embarrassment, shame, and humiliation. B is subject to liability to A for her emotional distress.

4. A makes a telephone call but is unable to get his number. In the course of an altercation with the telephone operator, A calls her a God damned woman, a God damned liar, and says that if he were there he would break her God damned neck. B suffers severe emotional distress, broods over the incident, is unable to sleep, and is made ill. A's conduct, although insulting, is not so outrageous or extreme as to make A liable to B.

e. The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests. Thus an attempt to extort money by a threat of arrest may make the actor liable even where the arrest, or the threat alone, would not do so. In particular police officers, school authorities, landlords, and collecting creditors have been held liable for extreme

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abuse of their position. Even in such cases, however, the actor has not been held liable for mere insults, indignities, or annoyances that are not extreme or outrageous.

Illustrations:

5. A, a private detective, calls on B and represents himself to be a police officer. He threatens to arrest B on a charge of espionage unless B surrenders letters of a third person which are in her possession. B suffers severe emotional distress and resulting illness. A is subject to liability to B for both.

6. A, the principal of a high school, summons B, a schoolgirl, to his office, and abruptly accuses her of immoral conduct with various men. A bullies B for an hour, and threatens her with prison and with public disgrace for herself and her parents unless she confesses. B suffers severe emotional distress, and resulting illness. A is subject to liability to B for both.

7. A, a creditor, seeking to collect a debt from B, sends B a series of letters in lurid envelopes bearing a picture of lightning about to strike, in which A repeatedly threatens suit without bringing it, reviles B as a deadbeat, a dishonest man, and a criminal, and threatens to garnish his wages, to bother his employer so much that B will be discharged, and to "tie B up tight as a drum" if he does not pay. B suffers severe emotional distress. A is subject to liability to B.

8. A, a creditor, seeking to collect a debt, calls on B and demands payment in a rude and insolent manner. When B says that he cannot pay, A calls B a deadbeat, and says that he will never trust B again. A's conduct, although insulting, is not so extreme or outrageous as to make A liable to B.

f. The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know. It must be emphasized again, however, that major outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough.

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Illustrations:

9. A, an eccentric and mentally deficient old maid, has the delusion that a pot of gold is buried in her back yard, and is always digging for it. Knowing this, B buries a pot with other contents in her yard, and when A digs it up causes her to be escorted in triumph to the city hall, where the pot is opened under circumstances of public humiliation to A. A suffers severe emotional disturbance and resulting illness. B is subject to liability to A for both.

10. A knows that B, a Pennsylvania Dutch farmer, is extremely superstitious, and believes in witchcraft. In order to force B to sell A his farm, A goes through the ritual of putting a "hex" on the farm, causing B to believe that it is bewitched so that crops will not grow on it. B suffers severe emotional distress and resulting illness. A is subject to liability to B for both.

11. A, who knows that B is pregnant, intentionally shoots before the eyes of B a pet dog, to which A knows that B is greatly attached. B suffers severe emotional distress, which results in a miscarriage. A is subject to liability to B for the distress and for the miscarriage.

12. A is in a hospital suffering from a heart illness and under medical orders that he shall have complete rest and quiet. B enters A's sick room for the purpose of trying to settle an insurance claim. B's insistence and boisterous conduct cause severe emotional distress, and A suffers a heart attack. B is subject to liability to A if he knows of A's condition, but is not liable if he does not have such knowledge.

13. A is an otherwise normal girl who is a little overweight, and is quite sensitive about it. Knowing this, B tells A that she looks like a hippopotamus. This causes A to become embarrassed and angry. She broods over the incident, and is made ill. B is not liable to A.

g. The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress. Apart from this, there may perhaps be situations in which the actor is privileged to resort to extreme and outrageous words, or even acts, in self-defense against the other, or under circumstances of extreme provocation which minimize or remove the element of outrage. Such cases have not arisen; but an analogy may be found in decisions under the actionable words statutes of Mississippi, Virginia, and West Virginia.

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Illustration:

14. A and her children are destitute, ill, and unable to pay their rent. B, their landlord, calls on A and threatens to evict her if the rent is not paid. Although B's conduct is heartless, he has done no more than the law permits him to do, and he is not liable to A for her emotional distress.

h. Court and jury. It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

i. Intention and recklessness. The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts recklessly, as that term is defined in § 500, in deliberate disregard of a high degree of probability that the emotional distress will follow.

Illustrations:

15. During A's absence from her home, B attempts to commit suicide in A's kitchen by cutting his throat. B knows that A is substantially certain to return and find his body, and to suffer emotional distress. A finds B lying in her kitchen in a pool of gore, and suffers severe emotional distress. B is subject to liability to A.

16. The same facts as in Illustration 15, except that B does not know that A is substantially certain to find him, but does know that there is a high degree of probability that she will do so. B is subject to liability to A.

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j. Severe emotional distress. The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquillity is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed. For example, the mere recital of the facts in Illustration 1 above goes far to prove that the claim is not fictitious.

The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge. See Comment *f*.

It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.

Illustrations:

17. The same facts as Illustration 1, except that B does not believe A's statement, and is only sufficiently disturbed to telephone to the hospital to find out whether it could possibly be true. A is not liable to B.

18. As a practical joke, A dresses himself in woman's clothing in order to surprise and startle B. B, who has a pathological fear of men in women's clothing, is badly frightened, becomes hysterical, and suffers a shock which results in illness. A is not liable to B unless A knows of B's peculiar susceptibility.

k. Bodily harm. Normally, severe emotional distress is accompanied or followed by shock, illness, or other bodily harm, which in itself affords evidence that the distress is genuine and severe. The rule stated is not, however, limited to cases where there has been bodily harm; and if the conduct is sufficiently extreme and outrageous there may be liability for the emotional distress alone, without such harm. In such cases the courts may perhaps tend to look for more in the way of outrage as a

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guarantee that the claim is genuine; but if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required.

Illustrations:

19. A, a police officer, arrests B on a criminal charge. In order to extort a confession, A falsely tells B that her child has been injured in an accident and is dying in a hospital, and that she cannot be released to go to the hospital until she confesses. B suffers severe emotional distress but no physical consequences. A is subject to liability to B.

20. A organizes a mob, and brings it to B's door at night. A tells B that unless he leaves town within ten days the mob will return and lynch him. B suffers severe emotional distress, but no physical consequences. A is subject to liability to B.

l. Conduct directed at a third person. Where the extreme and outrageous conduct is directed at a third person, as where, for example, a husband is murdered in the presence of his wife, the actor may know that it is substantially certain, or at least highly probable, that it will cause severe emotional distress to the plaintiff. In such cases the rule of this Section applies. The cases thus far decided, however, have limited such liability to plaintiffs who were present at the time, as distinguished from those who discover later what has occurred. The limitation may be justified by the practical necessity of drawing the line somewhere, since the number of persons who may suffer emotional distress at the news of an assassination of the President is virtually unlimited, and the distress of a woman who is informed of her husband's murder ten years afterward may lack the guarantee of genuineness which her presence on the spot would afford. The Caveat is intended, however, to leave open the possibility of situations in which presence at the time may not be required.

Furthermore, the decided cases in which recovery has been allowed have been those in which the plaintiffs have been near relatives, or at least close associates, of the person attacked. The language of the cases is not, however, limited to such plaintiffs, and there appears to be no essential reason why a stranger who is asked for a match on the street should not recover when the man who asks for it is shot down before his eyes, at least where his emotional distress results in bodily harm.

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Illustrations:

21. In the presence of A, a bystander, B quarrels violently with C, draws a pistol, and threatens to kill C. B knows that A is pregnant, and that it is highly probable that his conduct will cause severe emotional distress to A. A suffers severe emotional distress, which results in a miscarriage. B is subject to liability to A.

22. The same facts as in Illustration 21, except that A is concealed in an adjoining room, and B does not know of her presence. B is not liable to A.

Reporter's Notes

This Section was revised, and the Comments rewritten, in the 1948 Supplement to the Restatements. It has again been revised, and the Comments rewritten, to keep pace with the continued development of the law. As to this development, see Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv.L.Rev. 1033 (1936); Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich.L.Rev. 874 (1939); Eldredge, Modern Tort Problems, 71-102 (1941); Smith, Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli, 30 Va.L.Rev. 194 (1944); Wade, Tort Liability for Abusive and Insulting Language, 4 Vand.L.Rev. 63 (1950); Prosser, Insult and Outrage, 44 Cal.L.Rev. 40 (1956).

Extreme and outrageous conduct: Illustration 1 is based on Wilkinson v. Downton, 2 Q.B.D. 57 [1897]. See also Bielitski v. Obadisk, 15 Sask.L.R. 155, 61 Dom.L.Rep. 494, 23 A.L.R. 351 (1921); Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954). Cf. Great Atlantic & Pacific Tea Co. v. Roch, 160 Md. 189, 153 A. 22 (1931).

Illustration 2 is taken from State Rubbish Collectors Association v. Siliznoff, 38 Cal.2d 330, 240 P.2d 282 (1952).

Illustration 3: Compare Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961); Mitran v. Williamson, 21 Misc.2d 106, 197 N.Y.S.2d 689 (1960); Halio v. Lurie, 15 App.Div.2d 62, 222 N.Y.S.2d 759 (1961).

Illustration 4 is taken from Brooker v. Silverthorne, 111 S.C. 553, 99 S.E. 350, 5 A.L.R. 1283 (1919). Cf. Martin v. Lincoln Park West Corp., 219 F.2d 622 (7 Cir.1955); Ex parte Hammett, 259

Ala. 240, 66 So.2d 600 (1953); Halliday v. Cienkowski, 333 Pa. 123, 3 A.2d 372 (1939); Flowers v. Price, 190 S.C. 392, 3 S.E.2d 38 (1939); Atkinson v. Bibb Mfg. Co., 50 Ga.App. 434, 178 S.E. 537 (1935); Kramer v. Ricksmeier, 159 Iowa 48, 139 N.W. 1091, 45 L.R.A.N.S. 928 (1913); Galvin v. Starin, 132 App.Div. 577, 116 N.Y.Supp. 919 (1909); Stavnezer v. Sage-Allen & Co., 146 Conn. 460, 152 A.2d 312 (1959); Slocum v. Food Fair Stores of Florida, 100 So.2d 396 (Fla.1958).

Illustration 5 is taken from Janvier v. Sweeney [1919] 2 K.B. 316 (C.A.).

Illustration 6 is taken from Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814, 46 A.L.R. 772 (1926).

Illustration 7 is taken from La Salle Extension University v. Fogarty, 126 Neb. 457, 253 N.W. 424, 91 A.L.R. 1491 (1934) and Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932). See also Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936); Clark v. Associated Retail Credit Men, 70 App.D.C. 183, 105 F.2d 62 (1939); Bowden v. Spiegel, Inc., 96 Cal.App.2d 793, 216 P.2d 571 (1950); Duty v. General Finance Co., 154 Tex. 16, 273 S.W.2d 64 (1954); Christensen v. Swedish Hospital, 59 Wash.2d 545, 368 P.2d 897 (1962); Moore v. Savage, 359 S.W.2d 95 (Tex.Civ.App.), affirmed per curiam, 362 S.W.2d 298 (Tex.1962); Quina v. Robert's, 16 So.2d 558 (La.App.1944); and cf. House v. Peth, 165 Ohio St. 35, 59 Ohio Ops. 60, 133 N.E.2d 340 (1956), privacy; Wiggins v. Moskins Credit Clothing Store, 137 F.Supp. 764 (E.D.S.C.1956), nuisance.

As to the similar bullying tactics of insurance adjusters, see Interstate Life & Accident Ins. Co. v. Brewer, 56 Ga.App. 599, 193 S.E. 458 (1937); National Life & Accident Insurance Co. v. Anderson, 187 Okl. 180, 102 P.2d 141 (1940); Pacific Mutual Life Insurance Co. v. Tetirick, 185 Okl. 37, 89 P.2d 774, 5 N.C.C.A.N.S. 544 (1938); Continental Casualty Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935). Compare, as to forcing settlement of a claim, Curnutt v. Wolf, 244 Iowa 683, 57 N.W.2d 915 (1953).

For cases of a landlord's liability, see Wood v. Young, 20 Ky.L.Rep. 1931, 50 S.W. 541 (1899); Preiser v. Wielandt, 48 App.Div. 569, 62 N.Y.Supp. 890 (1900); Nordgren v. Lawrence, 74 Wash. 305, 133 P. 436 (1913); Duncan v. Donnell, 12 S.W.2d 811 (Tex.Civ.App.1929); Emden v. Vitz, 88 Cal.App.2d 313, 198 P.2d 696 (1948); Richardson v. Pridmore, 97 Cal.App.2d 124, 217 P.2d 113, 17 A.L.R.2d 929 (1950); Louisville & N.R. Co. v. Roberts, 207 Ky. 310, 269 S.W. 333 (1925); Stockwell v. Gee, 121 Okl. 207, 249 P. 389 (1926); Levine v. Tramwell, 41 S.W.2d 334 (Tex.Civ.App.1928), error refused.

Illustration 8 is based on Maze v. Employees' Loan Society, 217 Ala. 44, 114 So. 574 (1927). See also People's Finance & Thrift Co. v. Harwell, 183 Okl. 413, 82 P.2d 994, 4 N.C.C.A.N.S. 242 (1938).

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Illustration 9 is taken from Nickerson v. Hodges (Raley v. Hodges), 146 La. 735, 84 So. 37, 9 A.L.R. 361 (1920). Compare, as to bullying a child, Delta Finance Co. v. Ganakas, 93 Ga.App. 297, 91 S.E.2d 383 (1956).

Illustration 11 is taken from Alabama Fuel & Iron Co. v. Baladoni, 15 Ala.App. 316, 73 So. 205 (1916). See also Richardson v. Pridmore, 97 Cal.App.2d 124, 217 P.2d 113, 17 A.L.R.2d 929 (1950); Vargas v. Ruggiero, 197 Cal.App.2d 709, 17 Cal.Rptr. 568 (1961). Compare Allen v. Camp, 14 Ala.App. 341, 70 So. 290 (1916), where there were no such circumstances of aggravation.

Illustration 12 is taken from Pacific Mutual Life Insurance Co. v. Tetirick, 185 Okl. 37, 89 P.2d 774, 5 N.C.C.A.N.S. 544 (1939). See also Clark v. Associated Retail Credit Men, 70 App.D.C. 183, 105 F.2d 62 (1939); Interstate Life & Accident Co. v. Brewer, 56 Ga.App. 599, 193 S.E. 458 (1937); Patapsco Loan Co. v. Hobbs, 129 Md. 9, 98 A. 239 (1916); Continental Casualty Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935); National Life & Accident Ins. Co. v. Anderson, 187 Okl. 180, 102 P.2d 141 (1940).

Where the defendant is ignorant of the plaintiff's peculiar susceptibility, and the conduct is not otherwise extreme and outrageous, there is no liability. Braun v. Craven, 175 Ill. 401, 51 N.E. 657, 42 L.R.A. 199 (1898); Carrigan v. Henderson, 192 Okl. 254, 135 P.2d 330 (1943); Haas v. Metz, 78 Ill.App. 46 (1898); Kramer v. Ricksmeier, 159 Iowa 48, 139 N.W. 1091, 45 L.R.A.N.S. 928 (1913).

Illustration 14 is taken from Smith v. Gowdy, 196 Ky. 281, 244 S.W. 678, 29 A.L.R. 1353 (1922). See also Stratton v. Posse Normal School of Gymnastics, 265 Mass. 223, 163 N.E. 905 (1928); People's Finance & Thrift Co. v. Harwell, 183 Okl. 413, 82 P.2d 994, 4 N.C.C.A.N.S. 242 (1938); Bechtel v. Combs, 70 Pa.Super. 503 (1918).

Intention and recklessness: Illustrations 15 and 16 are based on Blakeley v. Shortal's Estate, 236 Iowa 787, 20 N.W.2d 28 (1945). Compare Bielitski v. Obadisk, 15 Sask.L.R. 155, 61 Dom.L.Rep. 494, 23 A.L.R. 351 (1921); Price v. Yellow Pine Paper Mill Co., 240 S.W. 588 (Tex.Civ.App.1922); Boyle v. Chandler, 33 Del. 323, 138 A. 273 (1927); Lindh v. Great Northern R. Co., 99 Minn. 408, 109 N.W. 823, 7 L.R.A.N.S. 1018 (1906); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923, 29 N.C.C.A.N.S. 237 (1951); Anderson v. Knox, 297 F.2d 702 (9 Cir.1961), certiorari denied, 370 U.S. 915, 8 L.Ed.2d 498, 82 S.Ct. 1555.

Severe emotional distress: As to Illustration 17, compare Taft v. Taft, 40 Vt. 229, 94 Am.Dec. 389 (1867).

Illustration 18 is taken from Nelson v. Crawford, 122 Mich. 466, 81 N.W. 335, 80 Am.St.Rep. 577 (1899). Cf. Oehler v. L. Bamberger & Co., 103 N.J.L. 703, 137 A. 425 (1927), affirming by an equal division, 4 N.J.Misc. 1003, 135 A. 71 (1926); March v. Cacioppo, 37 Ill.App.2d 235, 185 N.E.2d 397 (1962).

Bodily harm: Illustration 19 is based upon Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954).

Illustration 20 is taken from Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930). Cf. Ruiz v. Bertolotti, 37 Misc.2d 1067, 236 N.Y.S.2d 854 (1962).

Other cases in which recovery has been allowed for emotional distress without physical consequences are Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932); La Salle Extension University v. Fogarty, 126 Neb. 457, 253 N.W.2d 424, 91 A.L.R. 1491 (1934); Quina v. Roberts, 16 So.2d 558 (La.App.1944); State Rubbish Collectors Association v. Siliznoff, 38 Cal.2d 330, 240 P.2d 282 (1952); Curnett v. Wolf, 244 Iowa 683, 57 N.W.2d 915 (1953); Herman Saks & Sons v. Ivey, 26 Ala.App. 240, 157 So. 265 (1934); Delta Finance Co. v. Ganakas, 93 Ga.App. 297, 91 S.E.2d 383 (1956); Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961); Mitran v. Williamson, 21 Misc.2d 106, 197 N.Y.S.2d 689 (1960). Contra, Duty v. General Finance Co., 154 Tex. 16, 273 S.W.2d 64 (1954).

Conduct directed at a third person: Illustration 21 is taken from Rogers v. Williard, 144 Ark. 587, 223 S.W. 15, 11 A.L.R. 1115 (1920). See also Young v. Western & Atlantic Railroad, 39 Ga.App. 761, 148 S.E. 414 (1929); Lambert v. Brewster, 97 W.Va. 124, 125 S.E. 244 (1924); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59, 7 L.R.A. 618 (1890); Duncan v. Donnell, 12 S.W.2d 811 (Tex.Civ.App.1928); Jeppsen v. Jensen, 47 Utah 536, 155 P. 429, L.R.A. 1916D 614 (1916); Purdy v. Woznesensky, 2 West. Week. Rep. (Sask.) 116 [1937]. A clear case of intent is Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157 (1961).

Illustration 22 is taken from Reed v. Ford, 129 Ky. 471, 112 S.W. 600, 19 L.R.A.N.S. 225 (1908). See also Goddard v. Watters, 14 Ga.App. 722, 82 S.E. 304, 7 N.C.C.A. 1 (1914); Phillips v. Dickerson, 85 Ill. 11, 28 Am.Rep. 607 (1877); McGee v. Vanover, 148 Ky. 737, 147 S.W. 742, Ann.Cas. 1913E 500 (1912); Ellsworth v. Massacar, 215 Mich. 511, 184 N.W. 408 (1921); Hutchinson v. Stern, 115 App.Div. 791, 101 N.Y.Supp. 145, appeal dismissed, 189 N.Y. 577, 82 N.E. 1128 (1906); Koontz v. Keller, 52 Ohio App. 265, 6 Ohio Ops. 334, 21 Ohio L.Abs. 544, 3 N.E.2d 694 (1936); Taylor v. Vallelunga, 171 Cal.App.2d 107, 339 P.2d 910 (1959).

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D.Idaho
D.Idaho Bkrtcy.Ct.
C.D.Ill.
N.D.Ill.
S.D.Ill.
N.D.Ind.
S.D.Ind.
N.D.Iowa,
N.D.Iowa
S.D.Iowa
S.D.Iowa
D.Kan.
E.D.Ky.
W.D.Ky.
E.D.La.
M.D.La.
W.D.La.
D.Me.
D.Md.
D.Mass.
E.D.Mich.
W.D.Mich.
W.D.Mich.Bkrtcy.Ct.
D.Minn.
N.D.Miss.
S.D.Miss.
E.D.Mo.
W.D.Mo.
D.Mont.
D.Neb.
D.Nev.
D.N.H.
D.N.J.

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D.N.M.
D.N.M.Bkrtcy.Ct.
E.D.N.Y.
E.D.N.Y.Bkrtcy.Ct.
N.D.N.Y.
S.D.N.Y.
S.D.N.Y.Bkrtcy.Ct.
W.D.N.Y.
W.D.N.Y.Bkrtcy.Ct.
E.D.N.C.
M.D.N.C.
W.D.N.C.
D.N.D.
N.D.Ohio,
N.D.Ohio
N.D.Ohio.
N.D.Ohio
N.D.Ohio,
N.D.Ohio
N.D.Ohio.Bkrtcy.Ct.
N.D.Ohio Bkrtcy.Ct.
S.D.Ohio,
S.D.Ohio
S.D.Ohio,
S.D.Ohio
N.D.Okl.
W.D.Okl.
D.Or.
E.D.Pa.
E.D.Pa.Bkrtcy.Ct.
M.D.Pa.
M.D.Pa.Bkrtcy.Ct.
W.D.Pa.
D.P.R.
D.R.I.
D.R.I.Bkrtcy.Ct.
D.S.C.
D.S.D.
E.D.Tenn.
E.D.Tenn.Bkrtcy.Ct.

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M.D.Tenn.
W.D.Tenn.
E.D.Tex.
N.D.Tex.
S.D.Tex.
W.D.Tex.
D.Utah
D.Vt.
E.D.Va.
E.D.Va.Bkrtcy.Ct.
W.D.Va.
D.V.I.
E.D.Wash.
W.D.Wash.
N.D.W.Va.
S.D.W.Va.
W.D.Wis.
D.Wyo.
Ala.
Ala.App.
Ala.Civ.App.
Alaska
Ariz.
Ariz.App.
Ark.
Ark.App.
Cal.
Cal.App.
Colo.
Colo.App.
Conn.
Conn.App.
Conn.Super.
Del.
Del.Super.
D.C.App.
Fla.
Fla.App.
Ga.
Ga.App.

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Hawaii
Hawaii App.
Idaho,
Idaho
Idaho App.
Ill.
Ill.App.
Ind.
Ind.App.
Iowa,
Iowa
Iowa App.
Kan.
Kan.App.
Ky.
Ky.App.
La.
La.App.
Me.
Md.
Md.Spec.App.
Mass.
Mass.App.
Mich.
Mich.App.
Minn.
Minn.App.
Miss.
Miss.App.
Mo.
Mo.App.
Mont.
Neb.
Neb.App.
Nev.
N.H.
N.J.
N.J.Super.App.Div.
N.J.Super.
N.M.

N.M.App.
N.Y.
N.Y.Sup.Ct.App.Div.
N.Y.Sup.Ct.
N.Y.Ct.Cl.
N.Y.Dist.Ct.
N.Y.City Civ.Ct.
N.C.
N.C.App.
N.D.
Ohio
Ohio App.
OhioApp.
Ohio App.
Ohio Com.Pl.
Ohio Ct.Cl.
Okl.
Okl.App.
Or.
Or.App.
Pa.
Pa.Super.
Pa.Cmwlth.
R.I.
S.C.
S.C.App.
S.D.
Tenn.
Tenn.App.
Tex.
Tex.App.
Utah,
Utah
Utah App.
Utah.App.
Vt.
Va.
Va.App.
Wash.
Wash.App.

W.Va.
W.Va.App.
Wis.
Wis.App.
Wyo.

U.S.

U.S.2011. Coms. (d) and (j) quot. in case quot. in diss. op., illus. 1 cit. in diss. op. Father of marine killed in Iraq in the line of duty sued members of church who picketed near decedent's funeral with signs declaring their church's view that God hated the United States for its tolerance of homosexuality, particularly in its military, and that decedent had died in shame as a curse from God. The district court entered judgment on a multimillion-dollar jury verdict for plaintiff on his claims for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. The court of appeals reversed. This court affirmed, holding, as to the IIED claim, that defendants' speech was entitled to "special protection" under the First Amendment, and that protection could not be overcome by a finding that the picketing was outrageous. The dissent argued that when grave injury was intentionally inflicted by means of a malevolent and vicious verbal attack such as the one at issue in this case, the First Amendment should not be a bar to recovery. Snyder v. Phelps, 562 U.S. 443, 464, 465, 131 S.Ct. 1207, 1223, 179 L.Ed.2d 172.

U.S.2002. Subsec. (2)(a) quot. in ftn. Widow of a murdered Guatemalan citizen sued the former Secretary of State and other government officials, alleging that defendants intentionally concealed that her husband was being detained and tortured in Guatemala by Guatemalan military officers who were paid by the Central Intelligence Agency (CIA) and that this deception denied her access to a lawsuit that might have saved husband's life. District court dismissed plaintiff's claims, and court of appeals reversed in part. The Supreme Court reversed and remanded, holding, inter alia, that plaintiff failed to state a claim for denial of judicial access. The court noted that it was unclear whether plaintiff's allegations met either the "intent" or the "presence" requirements of the emotional-distress cause of action where CIA defendants did not intend husband's situation to become known to the public, but sought to conceal it. Christopher v. Harbury, 536 U.S. 403, 419, 122 S.Ct. 2179, 2189, 153 L.Ed.2d 413, on remand 44 Fed.Appx. 522 (Fed.Cir.2002).

U.S.1987. Cit. in ftn., subsec. (1) cit. in ftn., coms. (d) and (k) cit. in ftn. A railroad employee sued a railroad under the Federal Employer's Liability Act (FELA) for emotional distress caused by his fellow employees. The federal district court granted summary judgment for the railroad and the court of appeals reversed. Vacating and remanding in part, this court held that the Railway Labor Act did not deprive the railroad employee of his right to bring a FELA action for damages. The court recognized the doctrinal divergence in the area of recovering for intentional infliction of emotional distress, such as the different degrees of intent required to establish liability and the abandonment in most jurisdictions of the "impact rule," and concluded that the record had insufficient facts for this Court or the court of appeals to decide whether the employee's emotional injury claim would permit recovery under the FELA. Atchison, Topeka and Santa Fe Ry. Co. v.

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Buell, 480 U.S. 557, 568-571, 107 S.Ct. 1410, 1416-1418, 94 L.Ed.2d 563, on remand 818 F.2d 868 (9th Cir.1987).

C.A.1,

C.A.1, 2023. Com. (d) quot. in case quot. in sup. Pregnant resident of an apartment that was the subject of a search warrant filed claims for, among other things, intentional infliction of emotional distress (IIED) against police officers who executed the warrant, alleging that defendants caused her to go into labor prematurely and to suffer from post-traumatic stress disorder by entering unannounced and pointing their firearms at plaintiff during the search. The district court granted defendants' motion for summary judgment. This court affirmed, holding that plaintiff's IIED claim failed as a matter of law. The court explained that defendants' entry into plaintiff's home, even if conducted without knocking and with weapons raised, could not be classified as going beyond all possible bounds of decency, as required to sustain a claim for IIED under Restatement Second of Torts § 46, Comment *d*. Penate v. Sullivan, 73 F.4th 10, 23.

C.A.1,

C.A.1, 2022. Com. (d) quot. in case quot. in sup.; coms. (e) and (f) quot. in sup. Male student sued university for intentional infliction of emotional distress and other claims in connection with its handling of a sexual-assault complaint filed against him by a female classmate. The district court granted summary judgment for university. This court reversed in part and remanded, holding that there were questions of fact as to whether university's actions were extreme and outrageous, as required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court pointed out that university's dean and vice president knew that student had been hospitalized for a recent suicide attempt but insisted on meeting with him hours after he was discharged to discuss new, facially dubious, and seemingly trivial allegations that the classmate had raised against him. Doe v. Brown University, 43 F.4th 195, 210, 211.

C.A.1

C.A.1, 2010. Com. (j) quot. in case quot. in sup. As part of a § 1983 action filed by several residents against town and various police officers employed by town, two minor plaintiffs brought, inter alia, pendent state-law claims for intentional infliction of emotional distress (IIED) against police officer and police chief. The district court entered judgment on jury verdicts for plaintiffs on their IIED claims. This court vacated the judgments as to those claims and directed entry of judgment for defendants, holding that the minors' fear of going to court, fear of the police, nightmares, and loss of sleep, after one minor's arrest and after the filing of an application for a complaint against the other minor, did not constitute severe emotional distress for purposes of this claim under Massachusetts law, i.e., the kind of distress that no reasonable man could be expected to endure. Kennedy v. Town of Billerica, 617 F.3d 520, 530, 531.

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C.A.1, 2009. Com. (i) cit. in sup. Former prisoners and estates of two deceased prisoners sued the United States under the Federal Tort Claims Act after their state-court murder convictions were vacated based on the discovery that the FBI had suppressed reliable intelligence undercutting a witness's account of the murder. After a bench trial, the district court found for plaintiffs. Affirming as to plaintiffs' claim for intention infliction of emotional distress, this court held, inter alia, that, while a finding of extreme and outrageous conduct under Massachusetts law could be grounded either on actual knowledge or on a defendant's deliberate disregard of a substantial probability that his actions would produce severe emotional distress, the district court's finding that the FBI had actual knowledge that plaintiffs were not involved in the murder was, in any event, unassailable. Limone v. U.S., 579 F.3d 79, 95.

C.A.1, 2008. Cit. in sup., cit. in case cit. in sup., com. (d) quot. in sup. Former employee who was terminated for violating company rules sued former employer for intentional infliction of emotional distress (IIED), inter alia, alleging that defendant had wrongfully accused him of using company facilities to ship drugs, subjected him to a security interview, and had conducted an inadequate investigation of the charges against him. After the jury returned a verdict awarding plaintiff damages, the district court ordered a remittitur of the IIED award. This court vacated the jury verdict on the IIED claim, holding that the claim failed because defendant's actions upon which plaintiff based his IIED claim were insufficient to support a finding of extreme and outrageous conduct. Soto-Lebron v. Federal Express Corp., 538 F.3d 45, 57, 58.

C.A.1, 2005. Cit. in case quot. in disc., com. (d) quot. in sup., com. (g) quot. in case quot. in sup. Woman whose 23-year adulterous relationship broke up sued former male lover for, in part, intentional infliction of emotional distress. Trial court granted defendant's motion for summary judgment. Affirming, this court held, inter alia, that plaintiff failed to establish a claim for intentional infliction of emotional distress; merely breaking up an extramarital affair did not constitute outrageous conduct as required for such claim. Norton v. McOsker, 407 F.3d 501, 509-511.

C.A.1, 2002. Cit. in sup., com. (d) quot. in sup. Former archery counselor at a summer camp sued camp director for intentional infliction of emotional distress, inter alia, alleging that defendant falsely stated to an assistant counselor that he had received a complaint regarding plaintiff through state of New Hampshire concerning inappropriate contact with boys, as well as two complaints from camp parents. District court dismissed plaintiff's complaint. This court affirmed in part, holding, inter alia, that plaintiff did not state a claim for intentional infliction of emotional distress; while defendant's statement could be considered offensive, it was not so outrageous or extreme as to go beyond all bounds of decency. Moss v. Camp Pemigewassett, Inc., 312 F.3d 503, 510-511.

C.A.1, 2002. Quot. in case quot. in disc., com. (d) quot. in case quot. in disc. Objecting to his portrayal in a book that focused on toxic-tort litigation over contaminated well water, a tannery owner and his wife sued the author and his publisher for, inter alia, defamation and intentional infliction of emotional distress. District court granted defendants partial summary judgment,

holding that New Hampshire law did not recognize emotional-distress claim where the factual predicate sounded in defamation. This court affirmed, holding, inter alia, that the book's statements that plaintiff did not give truthful testimony during the litigation and that plaintiff experienced episodes of depression were not extreme and outrageous. Riley v. Harr, 292 F.3d 282, 299.

C.A.1, 1997. Com. (g) quot. in sup. A truck driver sued his employer after he was fired for refusing to participate in a drug-testing procedure, alleging negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. The jury returned a verdict for plaintiff, but the federal district court granted defendant's motion for judgment as a matter of law. This court affirmed, holding that the resolution of each of plaintiff's state law claims required an examination of the terms of the parties' collective-bargaining agreement, and, as a result, the claims were preempted under § 301 of the Labor Management Relations Act. If defendant was within its rights to require plaintiff to take a drug test at the designated site and to terminate him when he refused to do so, a claim for intentional infliction of emotional distress could not lie. Resolution of this issue necessitated examination of the collective-bargaining agreement. Flibotte v. Pennsylvania Truck Lines, Inc., 131 F.3d 21, 27, certiorari denied 523 U.S. 1123, 118 S.Ct. 1806, 140 L.Ed.2d 945 (1998).

C.A.1, 1996. Adopted in case cit. in sup., com. (d) quot. in case quot. in sup. City worker who refused to continue a work assignment on a boat at a city pond due to his fear of capsizing and who was subsequently terminated sued the city for negligent or intentional infliction of emotional distress, inter alia. Affirming in part the district court's grant of directed verdicts for defendant, this court held, in part, that, despite the fact that plaintiff was discharged only several days prior to the expiration of his probationary period, the evidence presented was insufficient to warrant a finding that defendant's actions in terminating plaintiff rose to the level of extreme and outrageous conduct necessary to support plaintiff's claim. Marques v. Fitzgerald, 99 F.3d 1, 7.

C.A.1, 1995. Cit. in headnote, cit. and quot. in sup. Cashier at an Army Post Exchange Store was questioned for violating the store's policy prohibiting employees from transporting merchandise through the front door and was later terminated; she brought an action under the Federal Tort Claims Act for intentional infliction of emotional distress. On remand, the district court granted defendant's motion to dismiss. Affirming, this court held that plaintiff, who alleged that she was questioned for 45 minutes, was shown a videotape supposedly taken at the store where she worked, was told that if she did not cooperate "all of this could be taken to the F.B.I.," and signed a statement after the interview, failed to state a claim for intentional infliction of emotional distress, since there was no allegation that the questioning was abusive, extreme, or outrageously intimidating and the questioning was a necessary incident of employment. Therefore, the action was barred by the exclusivity provision of Puerto Rico's workers' compensation act. Santiago-Ramirez v. Secretary of Defense, 62 F.3d 445, 446, 448.

C.A.1, 1993. Cit. in disc., com. (d) cit. in ftn. Oil tanker engineer whose employment was terminated when employer adopted a new policy barring employees who had ever participated in an alcohol rehabilitation program from holding certain designated jobs sued employer in contract

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and in tort. The district court entered judgment for plaintiff on his breach of contract claim but refused to submit plaintiff's punitive damages claim to the jury, inter alia. Affirming in part, this court stated that even if maritime law permitted a limited role for punitive damages in a contract setting when the breaching party acted with the state of mind that accompanied an intentional tort and even if the court accepted plaintiff's argument that the standard for punitive damages under maritime tort law was less demanding than the standard for intentional infliction of emotional distress, the court nevertheless declined to hold that punitive damages could be awarded for breach of contract under the circumstances of this case in which the jury specifically rejected plaintiff's accompanying intentional tort claims. Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1283, 1284, cert. denied ___ U.S. ___, 113 S.Ct. 2987, 125 L.Ed.2d 682 (1993).

C.A.1, 1993. Com. (h) cit. in ftn. Former police officer who was placed under surveillance by insurer in connection with his receipt of disability benefits under an insurance policy sued insurer for intentional infliction of emotional distress, inter alia. Affirming the district court's entry of a directed judgment as a matter of law for defendant, this court held that since defendant's behavior amounted to not much more than an insurance company's efforts to determine the activities of a claimant whose receipt of benefits was conditioned on his total disability and since investigations of this sort were commonplace and to be expected where disability claims were involved, defendant's surveillance of plaintiff was not extreme or outrageous or utterly intolerable in a civilized society and thus did not violate the tort standard for plaintiff's claim. Thorpe v. Mutual of Omaha Ins. Co., 984 F.2d 541, 545.

C.A.1, 1991. Cit. in disc. com. (d) cit. in sup. An insured misrepresented material facts regarding his medical history and employment when he applied for a health insurance policy. After learning that the insured had misrepresented his employment, the insurer switched the insured's policy with a downgraded policy, and delayed benefit payments to induce the insured to sign a new contract agreeing to the switch. The insured sued the insurer, claiming intentional infliction of emotional distress, inter alia. The district court entered judgment for plaintiff, awarding compensatory and punitive damages. Defendant argued that its conduct, although intentional, was not sufficiently extreme or outrageous, and that plaintiff's emotional distress was not accompanied by significant physical ills that a rational juror could have found satisfied the elements of the tort. Affirming, this court held that defendant's conduct was sufficiently extreme and outrageous, and that two migraine headaches suffered by the insured demonstrated physical injury sufficient to prevent a directed verdict. Borden v. Paul Revere Life Ins. Co., 935 F.2d 370, 380, 381.

C.A.1, 1991. Cit. in ftn., quot. in case cit. in sup., coms. (h) and (j) quot. in disc. and cit. in case cit. in disc. A worker who claimed to have been exposed to excessive radiation in his job as foreman for an independent contractor at a nuclear power plant sued the power plant in state court for intentional infliction of emotional distress, inter alia. The case was removed to federal district court, which granted the defendant's motion for summary judgment. Affirming, this court held that there was no evidence of willful and wanton misconduct by the defendant, the defendant's delay in determining the problem with the plaintiff's contradictory dosimeter readings was not extreme

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and outrageous behavior, and there was no causal link between the defendant's conduct and the plaintiff's depression. Caputo v. Boston Edison Co., 924 F.2d 11, 13-15.

C.A.1, 1991. Com. (d) quot. in case quot. in disc. The plaintiff was mistakenly identified and arrested as an escaped felon, suffering minor physical injuries during the arrest. He was released after a 30-minute detention when the police officers discovered their mistake. Two years later, he sued the arresting police officers and the city for intentional infliction of emotional distress, inter alia. The district court entered summary judgment for the defendants. Affirming, this court held that, since the officers' conduct in effecting the intended arrest was objectively reasonable in the circumstances, the claim must fail. Dean v. City of Worcester, 924 F.2d 364, 369.

C.A.1, 1989. Coms. (d) and (j) quot. in case quot. in disc., com. (i) cit. in case quot. in disc. After hitchhikers falsely accused a driver who picked them up of armed robbery, the driver was arrested in a neighboring town by the police, who verbally and physically abused him and returned him to the city where the incident occurred. The driver sued, among others, the city police lieutenant who charged him, alleging intentional infliction of emotional distress, inter alia. At the close of the evidence, the district court directed a verdict for the defendant on this claim. Affirming, this court held that the plaintiff's testimony that the defendant failed to advise him of the charges against him, failed to give him the Miranda warnings, refused the plaintiff's request for hospital care, and ordered him to remove all his clothing did not provide evidence of the extreme and outrageous conduct necessary to sustain the plaintiff's claim. Kinan v. City of Brockton, 876 F.2d 1029, 1036, 1037.

C.A.1, 1989. Quot. and cit. in sup., com. (d) quot. in case quot. in disc., com. (g) and illus. 14 cit. in ftn., illus. 13 quot. in ftn. An overweight nursing student who was harassed about her weight and was pressured by school administrators to sign a contract to attend Weight Watchers and lose two pounds a week voluntarily left the school and sued it for intentional infliction of emotional distress, inter alia. The district court entered a directed verdict for the defendant on that claim. Affirming, this court held that the defendant's conduct was unprofessional but was not so far removed from the bounds of civilization as to meet the necessary standards of extreme and outrageous behavior necessary for the tort of intentional infliction of emotional distress. Russell v. Salve Regina College, 890 F.2d 484, 487, 488, judgment reversed 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190, on remand 938 F.2d 315 (1st Cir.1991).

C.A.1, 1988. Cit. in sup., coms. cit. in sup., coms. (d) and (h) quot. in sup. A newspaper story included a picture of four elementary school girls who protested the principal's decision to segregate the sexes during recess periods. When a sexually explicit magazine republished the photograph and referred to them as “amazons,” the girls and their parents sued it for false light portrayal and intentional infliction of emotional distress. The trial court dismissed the complaint. Affirming, this court stated that defamation and false light claims had much in common and that the threshold determination of whether the story implied that the girls had consented to the publication was for the court. It was also for the court to determine whether the defendant's conduct might be regarded as so extreme and outrageous as to permit recovery. The court reasoned that even if the

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publication had caused severe emotional distress, there was no liability because the defendant's conduct could not be regarded as atrocious and utterly intolerable in a civilized community. Fudge v. Penthouse Intern., Ltd., 840 F.2d 1012, 1021, cert. denied 488 U.S. 821, 109 S.Ct. 65, 102 L.Ed.2d 42 (1988).

C.A.1, 1987. Com. (d) quot. in case quot. in disc. An employee sued his former employer for intentional infliction of mental distress after he was fired from his job. The trial court found for the employee. Reversing, this court held that the employer's conduct was not sufficiently extreme and outrageous to support a claim for intentional infliction of mental distress where a report the employer sent to the Division of Employment Security, stating that the employee had been fired for willful misconduct, delayed but did not prevent an award of unemployment benefits to the plaintiff. Brown v. Freedman Baking Co., Inc., 810 F.2d 6, 10.

C.A.1, 1987. Com. (d) cit. in disc. An arrestee sued the arresting officers and a private individual, asserting various civil rights and pendent tort claims, including intentional infliction of emotional distress as a result of his unlawful commitment to a mental institution. The trial court entered judgment for the plaintiff and awarded compensatory and exemplary damages. This court affirmed, holding, inter alia, that the arrestee could recover damages for intentional infliction of emotional distress, reasoning that the defendants had every reason to know that wrenching psychic harm was a likely result of arresting and imprisoning an innocent man on the eve of his daughter's wedding, and committing him, though sane, to a mental institution; the defendants' conduct was clearly outrageous and it was the direct cause of the plaintiff's acute emotional distress. Wagenmann v. Adams, 829 F.2d 196, 214.

C.A.1, 1978. Cit. in disc. A former pantryman on a vessel brought an action in negligence against the vessel owner. The jury awarded the pantryman a $300,000 judgment on his claim. The district court entered judgment n.o.v. in favor of the vessel owner, and the pantryman appealed. The appellate court vacated the judgment and remanded the case to the district court for reconsideration of defendant's motion for a new trial. The court held that evidence of negligence of the captain who directed his anger at the pantryman, threatened and insulted him, and threw a spoon at him, which incident allegedly resulted in the pantryman's mental breakdown, was for the jury, and the case should not have been taken from it. In ruling on the motion for a judgment n.o.v., the court could not substitute its views for those of the jury. The court stated that a defendant is liable not only for the emotional consequences flowing from the injury itself, but also for those flowing from the conduct that causes the injury, and that the relevant conduct in this case included not only the throwing of the spoon, but also the captain's manner and manifestations at the time he threw it. The expert testimony of plaintiff's examining physician could be understood as stating a causal connection between plaintiff's mental collapse and the fear and shock resulting from having an angry captain throw a spoon at him. Viewing the evidence in plaintiff's favor, the court found sufficient evidence of some connection between the relevant conduct and the purported psychosis to support the verdict. The court held further that under the circumstances of this case, it could not say that either granting or denying a new trial on the ground that the verdict was contrary to the

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weight of the evidence would be an abuse of discretion, and that the district court should have a further opportunity to pass on the matter. Borras v. Sea-Land Service, Inc., 586 F.2d 881, 885.

C.A.2,

C.A.2, 2019. Subsec. (1) quot. in sup., adopted in case cit. in sup.; com. (f) cit. and quot. in sup., cit. in cases cit. in ftn.; com. (*j*) quot. in disc., cit. in cases cit. in ftn.; coms. (g) and (h) quot. in sup. Parents brought, among other things, a claim for intentional infliction of emotional distress (IIED) against news network and journalists, alleging that defendants engaged in a deliberate and malicious campaign of harassment during their journalistic investigation into the murder of plaintiffs' son. The district court granted defendants' motion to dismiss. This court vacated and remanded, holding that plaintiffs stated a claim for IIED. The court explained that defendants knowingly published a false article about the son's death, exploited plaintiffs' trust by falsely representing to them that their investigator was independent and using the investigator to fabricate false information, and knew plaintiffs' emotional vulnerability to such conduct, which constituted extreme and outrageous behavior sufficient for an IIED claim under Restatement Second of Torts § 46. The court noted that, under § 46, Comment *g*, defendants' conduct was not privileged, because they did not insist on their legal rights in a permissible way. Rich v. Fox News Network, LLC, 939 F.3d 112, 122-126.

C.A.2

C.A.2, 2014. Subsec. (1) adopted in case cit. in ftn., com. (d) quot. in sup. and in ftn. Employee brought an action for intentional infliction of emotional distress (IIED), inter alia, against employer, among others, alleging that he suffered from a hostile and abusive work environment where he was subjected to racial insults, intimidation, and degradation over a period of more than three years. The district court entered judgment on a jury verdict for plaintiff. The court of appeals affirmed as to liability for IIED. Affirming that part of the judgment, this court held that the jury did not err in finding defendant vicariously liable for IIED committed by plaintiff's supervisor. The court remarked that, unlike other intentional torts—such as those of battery and false imprisonment as described in Restatement Second of Torts §§ 18 and 35—IIED did not proscribe specific conduct, but instead imposed liability based on after-the-fact judgments about the actor's behavior. Here, supervisor was liable for IIED as set out in Restatement Second of Torts § 46, because his behavior—which included being a personal witness to the torment to which plaintiff was subjected, blocking others' efforts to investigate serious threats, and, at times, seeming to encourage further harassment—was extreme and outrageous conduct that so transcended the bounds of decency as to be regarded as atrocious and intolerable in a civilized society. Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 157, 158.

C.A.2, 2011. Cit. and quot. in disc., subsec. (1) quot. in disc. Former employee of railroad brought, inter alia, a claim for intentional infliction of emotional distress (IIED) under the Federal Employers' Liability Act (FELA) against railroad and two co-employees, alleging that, while

employed by railroad, he suffered severe emotional distress after defendant co-employee posted plaintiff's sick-leave form on a bulletin board at railroad's facility disclosing that plaintiff was HIV positive. The district court dismissed plaintiff's complaint. Affirming, this court held that, while the common law no longer imposed a zone-of-danger test on IIED claims, that test still applied to such claims brought under FELA; thus, in this case, plaintiff's claim failed because he did not assert that he sustained a physical impact as a result of defendants' alleged conduct or was placed in immediate risk of physical harm by that conduct, as required by the zone-of-danger test. Goodrich v. Long Island Rail Road Co., 654 F.3d 190, 196, 198.

C.A.2, 2003. Subsec. (1) cit. in disc. After enduring physical and verbal harassment from her supervisor, railroad employee sued employer for liability under Federal Employers' Liability Act, negligent failure to provide safe workplace, negligent supervision, and intentional infliction of emotional distress. District court granted railroad summary judgment. This court affirmed, holding, inter alia, that the four alleged incidents of work-related yelling and cursing that could be imputed to railroad under doctrine of respondeat superior were insufficient to make out a case for intentional infliction of emotional distress, because the incidents did not involve extreme and outrageous conduct. Higgins v. Metro-North R. Co., 318 F.3d 422, 426.

C.A.2, 1999. Com. (b) cit. in conc. and diss. op. Wife of former Ghanaian trade representative to the United States brought a claim for intentional infliction of emotional distress against Ghana, after defendant summoned plaintiff's husband home, where he allegedly was detained and tortured. The district court dismissed for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA), and this court affirmed in part. The concurring and dissenting opinion argued that plaintiff's emotional-distress claim could not be characterized as a claim for misrepresentation or any other noncommercial tort with respect to which a foreign state could still claim immunity under the FSIA. Cabiri v. Government of Republic of Ghana, 165 F.3d 193, 203, cert. denied 527 U.S. 1022, 119 S.Ct. 2368, 144 L.Ed.2d 772 (1999).

C.A.2, 1999. Cit. in headnote, com. (d) quot. and cit. in disc., com. (h) cit. in disc. Postal worker whose disability benefits were terminated sued local branch of the Office of Workers' Compensation Programs for violations of the Federal Tort Claims Act, alleging, inter alia, intentional infliction of emotional distress. The district court dismissed the complaint. Affirming, this court held, in part, that the conduct complained of, which included ignoring dispositive medical evidence and pressuring plaintiff to return to work, did not rise to the level of outrageousness necessary to support a claim for intentional infliction of emotional distress. Stuto v. Fleishman, 164 F.3d 820, 822, 827.

C.A.2, 1996. Com. (d) quot. in case quot. in disc. Arrestee brought § 1983 and pendent state-law claims for false arrest, malicious prosecution, battery, and intentional infliction of emotional distress against city and police officers. The district court entered judgment on a jury verdict awarding plaintiff $300,700. Reversing and remanding unless plaintiff accepted remittitur of $150,000, this court held, inter alia, that police officer's actions, as determined by the jury, in striking plaintiff in the mouth and wrongfully initiating an assault charge based on the false claim

that plaintiff bit officer could be regarded as sufficiently outrageous to satisfy the conduct element of the emotional-distress tort; the aggregate award, however, was excessive and was highly likely to have been artificially inflated by duplication of awards among causes of action and among defendants. Bender v. City of New York, 78 F.3d 787, 791.

C.A.2, 1996. Cit. in disc. Pipe fitter who was exposed to asbestos while working in steam tunnels for railroad sued railroad for negligent infliction of emotional distress under the Federal Employers' Liability Act. Vacating the district court's grant of defendant's motion for judgment as a matter of law and remanding, this court held, inter alia, that plaintiff's testimony about his anger and fear of dying satisfied his burden of introducing evidence of his particular fears with some specificity, including, as a threshold matter, evidence of his particular fear of developing cancerous conditions. The court said that emotional distress must be severe only when a plaintiff had not suffered a physical impact, in which case the severity of the emotional distress served to guarantee the genuineness of the claim; here, however, a reasonable jury could find that plaintiff had suffered a physical impact with asbestos and thus was entitled to damages flowing from the impact, including his reasonable emotional distress. Buckley v. Metro-North Commuter R.R., 79 F.3d 1337, 1346, reversed 521 U.S. 424, 117 S.Ct. 2113, 138 L.Ed.2d 560 (1997).

C.A.2, 1988. Subsec. (1) cit. in disc. A sergeant with the police department's absence control unit allegedly was transferred as a result of a conspiracy by the police union, the department, and other officers to blame him for the suicide of a police officer. The sergeant sued the union and the union president, alleging federal civil rights violations and state tort law claims for intentional infliction of emotional distress. The district court entered judgment on a jury verdict awarding the plaintiff substantial damages for intentional infliction of emotional distress and prima facie tort. Affirming in part and reversing in part, this court held that the jury charge as to intentional infliction of emotional distress, requiring extreme and outrageous conduct, conformed in all respects to New York's strict requirements for that tort and that reasonable jurors could have determined that the plaintiff prevailed on each required element to establish the commission of the tort. Hughes v. Patrolmen's Benev. Ass'n of City of N.Y., 850 F.2d 876, 883, cert. denied 488 U.S. 967, 109 S.Ct. 495, 102 L.Ed.2d 532 (1988).

C.A.2, 1986. Cit. in sup. A retired laborer was denied a pension when his union misinformed him that he was not eligible. In a suit against the union, the jury awarded the laborer lost pension benefits and a large verdict for emotional distress because of the union's fraudulent concealment of his pension rights. However, the trial court set aside the award for emotional distress. Affirming in part, vacating, and remanding in part, this court upheld the award of pension benefits on the ground that, regardless of its relationship to the plaintiff, the defendant had a duty to properly inform the plaintiff about his rights. The court also upheld the setting aside of the large emotional distress award, but it stated that the plaintiff should have received a new trial on that issue based on the principle of allowing only compensatory damages for extreme and outrageous conduct. Baskin v. Hawley, 807 F.2d 1120, 1133.

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C.A.2, 1986. Cit. in sup. An attorney, who was a landlord, sued a tenant's father on a prima facie tort theory after a heated phone conversation between the parties regarding the plaintiff's refusal to return a security deposit. The trial court dismissed the action on the grounds that it was frivolous and brought in bad faith to harass the defendant. Affirming, this court stated that the facts revealed a total absence of intent or purpose to do harm to the plaintiff or evidence that making the telephone call to the plaintiff was without any purpose of legitimate communication or with an intent to cause injury. The court reasoned that trivial intrusions were an inevitable product of modern existence and only when the conduct complained of was malicious or so outrageous in character as to exceed the bounds of decency would the law recognize it as an actionable tort. Fox v. Boucher, 794 F.2d 34, 38.

C.A.2, 1985. Subsec. (1) cit. in disc. A bank employee sued her employer for employment discrimination, intentional infliction of emotional distress, and constructive discharge as a result of an incident in which the employee underwent a polygraph test as part of an investigation of an in-bank theft. The trial court dismissed the constructive discharge claim but awarded damages on the discrimination and emotional distress claims. This court affirmed the denial of the constructive discharge claim but reversed the rest of the judgment, holding that there was no discrimination because the evidence presented at trial plainly established that there was good cause for investigating the employee. The court held that there was no intentional infliction of emotional distress since the employer's conduct was not "outrageous in character" or "extreme in degree." The court also noted that the conduct must be intentionally directed at the plaintiff and lack any reasonable justification. Martin v. Citibank, N.A., 762 F.2d 212, 220.

C.A.2, 1983. Cit. but not fol. and subsec. (1) quot. but not fol. Parents sued under a New York wrongful death statute to recover pecuniary loss, property damage, and compensation for emotional distress suffered due to the murder of their daughter. Although the parents did not witness the attack by the defendant, they found their daughter barely alive the next day. The trial court granted damages based on the theory of reckless infliction of emotional distress. On appeal, the court discussed the Restatement formulation allowing recovery for emotional distress inflicted recklessly as well as intentionally, but found no authority for this formulation in the state's highest court. Even if New York adopted the Restatement formulation, plaintiff's recovery would be limited to pecuniary loss prescribed by the relevant wrongful death statute. Reversed, remanded with instructions to dismiss the action to recover for emotional distress. Garland v. Herrin, 724 F.2d 16, 18.

C.A.3

C.A.3, 2010. Subsec. (1) quot. in case quot. in ftn. Student brought a § 1983 suit against public university and others, alleging that university's student code of conduct violated the First Amendment. After a bench trial, the district court entered judgment in favor of defendants. Reversing in part, this court held, among other things, that a provision in the code prohibiting conduct that caused emotional distress was an unconstitutional infringement on students' First

Amendment right to free speech. The court reasoned that "emotional distress" was driven by the subjective experience of the individual, and that the extreme and outrageous conduct necessary to assert a claim for intentional infliction of emotional distress did not bear any clear relationship to free speech; not all extreme and outrageous conduct involving speech was necessarily unprotected by the First Amendment. McCauley v. University of the Virgin Islands, 618 F.3d 232, 251.

C.A.3, 2005. Com. (d) quot. in disc. School nurse filed civil-rights action against school officials, claiming that they violated her rights by harassing her and giving her an unsatisfactory rating in retaliation for her advocacy on behalf of disabled students and her reports to state authorities regarding school's failure to follow various state requirements. The district court granted defendants' motions for summary judgment. This court affirmed in part, holding, inter alia, that, although plaintiff's work environment was unpleasant and stressful, defendants' actions toward her were not outrageous enough to satisfy Pennsylvania's definition of intentional infliction of emotional distress, particularly since plaintiff was never given degrading work and she consistently received pay raises. McGreevy v. Stroup, 413 F.3d 359, 371.

C.A.3, 2004. Quot. in sup., coms. (i) and (j) quot. in case cit. in sup. After being severely injured and psychologically traumatized from an accident at a jobsite, lineman collected workers' compensation, and sued employer for intentional infliction of emotional distress. District court entered judgment for lineman. Reversing with instructions, this court held, inter alia, that lineman failed to prove that, as a result of employer's intentional, extreme, and outrageous conduct, he suffered from emotional distress, excluded by the Workers' Compensation Act, that was so severe that no reasonable man could be expected to endure it. Eddy v. Virgin Islands Water and Power Authority, 369 F.3d 227, 231-232, 235.

C.A.3, 2001. Cit. in case cit. in disc., cit. in case cit. but dist., subsec. (1) and com. (d) quot. in sup., subsec. (2) quot. in ftn., com. (i) quot. in ftn. in sup. Dog owner brought suit for, in part, intentional infliction of emotional distress against police officer who shot her pet dog. The district court granted defendant summary judgment. Reversing in part and remanding, this court held, inter alia, that plaintiff's allegations that defendant, without any justification whatsoever, shot her dog five times in front of her, deliberately ignoring the fact that she was screaming in protest and pleading with him not to shoot, were sufficient to state a claim for intentional infliction of emotional distress. The court said that a reasonable trier of fact could conclude that defendant acted intentionally to cause plaintiff severe emotional distress. Brown v. Muhlenberg Tp., 269 F.3d 205, 217-219, rehearing and rehearing en banc denied 273 F.3d 390 (3d Cir.2001).

C.A.3, 2000. Quot. in case quot. in disc., cit. in ftn. Employee with multiple sclerosis sued former employer for violations of the Americans with Disabilities Act and intentional infliction of emotional distress. The district court entered summary judgment for defendant. Affirming, this court held, in part, that plaintiff had failed to establish that any of the challenged conduct was motivated by a discriminatory or retaliatory intent, and that allegations that plaintiff's co-workers had behaved in an extreme and outrageous manner by acting to worsen his condition were not supported by the evidence. Shaner v. Synthes, 204 F.3d 494, 507, 508.

C.A.3, 1998. Cit. in disc., cit. in case quot. in disc., com. (d) quot. in disc. Administrator of estate of individual who died as a result of inhaling fumes from a butane canister brought strict liability failure-to-warn action against distributor of butane can found next to decedent's body. Plaintiff also asserted a claim for intentional infliction of emotional distress. Defendant filed third-party complaint against manufacturer of butane, and defendants moved for summary judgment. The district court granted the motion. Affirming in part, reversing in part, and remanding, this court held that material factual issues existed as to the adequacy of the warnings printed on the butane can; that plaintiff was entitled to raise the rebuttable presumption that decedent would have heeded adequate warnings of the dangers of inhaling butane; and that a jury could determine whether the heeding presumption was rebutted by the fact that decedent's mother had warned him that butane was dangerous; however, defendants' conduct was not so extreme and outrageous as to support a claim for intentional infliction of emotional distress. Pavlik v. Lane Limited/Tobacco Exporters Intern., 135 F.3d 876, 890.

C.A.3, 1996. Cit. in disc. HIV-positive employee who claimed he was discharged because of his medical condition sued former employer for, inter alia, violations of the Americans With Disabilities Act, invasion of privacy, and intentional infliction of emotional distress. The district court granted employer's motion for summary judgment. Affirming, this court held that employee was judicially estopped from asserting that he was qualified to perform his essential job functions where he had already secured state and Social Security benefits based on his representation that he was permanently and completely disabled; employer's inquiry as to employee's HIV status did not constitute an intrusion upon his seclusion; employer did not publicize that employee was HIV-positive when it told one person of that fact; and the discharge was not so outrageous as to be considered utterly intolerable in a civilized society. McNemar v. Disney Store, Inc., 91 F.3d 610, 623, cert. denied 519 U.S. 1115, 117 S.Ct. 958, 136 L.Ed.2d 845 (1997).

C.A.3, 1996. Cit. in case cit. in sup. and cit. generally in headnote, coms. (d) and (f) quot. in sup. An insurance salesperson sued her former employer and former supervisor for intentional infliction of emotional distress, alleging that the supervisor instructed his sales managers to verbally attack plaintiff so as to intimidate plaintiff and force her to resign. New Jersey federal district court granted defendants summary judgment. This court reversed and remanded, holding that defendants' conduct was sufficiently outrageous, because the supervisor essentially set out to put plaintiff under unnecessary stress to force her out of the company, all the while knowing that her physician had stated specifically that her condition required her to avoid such stress. Subbe-Hirt v. Baccigalupi, 94 F.3d 111, 112, 114, 115.

C.A.3, 1995. Cit. in headnote and disc., quot. in ftn., com. (d) quot. in case quot. in disc. Former employees sued employer in Pennsylvania state court for breach of contract, fraud, RICO violations, and intentional infliction of emotional distress. After removal to federal court, employees moved to withdraw the RICO claims and remand to state court. District court granted employees' motion. This court denied employer's petition for a writ of mandamus to direct the federal district court judge to rescind his order. The court held that the contract, fraud, and

emotional-distress claims asserted substantive rights independent of the collective-bargaining agreement. Employees' allegations that they suffered severe mental distress did not implicate any analysis of terms or rights created by the collective-bargaining agreement, since the state law analysis would only focus on employer's conduct while inducing employees to enter into a guarantee agreement and on the employees' response. Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 219, 232.

C.A.3, 1994. Cit. in case quot. in disc. Former employee brought a § 1983 claim against former employer for violation of his civil rights, arising from his discharge for suspected drug use. On remand, the district court entered judgment awarding plaintiff emotional-distress damages. Affirming, this court held, inter alia, that expert medical evidence was not required to prove emotional distress in § 1983 cases. The court rejected defendant's argument that a § 1983 case in which damages for emotional distress were claimed must be analogized to a common-law action for intentional infliction of emotional distress, which, under Pennsylvania law, required expert medical confirmation that plaintiff actually suffered the claimed distress, noting that this case more closely resembled a defamation case. Bolden v. SEPTA, 21 F.3d 29, 35.

C.A.3, 1993. Cit. in ftn., com. (j) cit. in disc. Railroad employee whose friend and co-worker died of a heart attack brought on by extreme heat and humidity while they repaired a stretch of track sued the railroad under the Federal Employers' Liability Act for negligent infliction of emotional distress. Reversing the district court's granting of summary judgment for defendant and remanding, this court held that the totality of the circumstances, including plaintiff's 40-pound weight loss and institutionalization for medical care, provided sufficient indicia of the genuineness of plaintiff's emotional injury to survive threshold requirements for a trial on the merits and plaintiff presented genuine issues of material fact as to whether there was a breach of duty, injury, and causation. Gottshall v. Consolidated Rail Corp., 988 F.2d 355, 363, 370, cert. granted ___ U.S. ___, 114 S.Ct. 299, 126 L.Ed.2d 247 (1993), judgment reversed ___ U.S. ___, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994).

C.A.3, 1990. Subsec. (1) and com. (d) cit. in disc. Four railroad employees sued their employer, alleging that its policies and practices in eliminating manpower and increasing their responsibilities required them to work in an environment that was unreasonably stressful, as a result of which they suffered various illnesses, injuries, and disabilities. The district court granted the defendant's motion for summary judgment on the grounds that the plaintiffs did not make a case for intentional infliction of emotional distress, because the conduct alleged did not meet the test of outrageous behavior, and that their claim for negligent infliction of emotional distress failed to meet the requirements of such a claim. This court granted the defendant's motion to dismiss the plaintiffs' appeal because it was untimely filed. The court said that it was not an appropriate case for it to exercise its authorization to accept an untimely appeal under the unique-circumstances doctrine. Kraus v. Consolidated Rail Corp., 899 F.2d 1360, 1361.

C.A.3, 1990. Cit. in disc. and in ftn., com. (d) and illus. 2 quot. in ftn. The principal of a construction company sued a subcontractor for intentional interference with existing and

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prospective contractual relations and intentional infliction of emotional distress, inter alia, arguing that the defendant filed, without probable cause, a petition for involuntary bankruptcy against the plaintiff's construction company because of a dispute between the parties over payments allegedly due to the defendant, as a result of which the plaintiff suffered financial injuries. The district court dismissed the complaint and entered judgment for the defendant. Reversing and remanding in part, this court held that the plaintiff stated a claim for intentional infliction of emotional distress, even though it was speculative whether Pennsylvania law recognized the tort. The court said that the extortionate threats made by the defendant constituted outrageous behavior. Silver v. Mendel, 894 F.2d 598, 606, certiorari denied 496 U.S. 926, 110 S.Ct. 2620, 110 L.Ed.2d 641 (1990).

C.A.3, 1989. Cit. in case quot. in disc., subsec. (1) quot. in disc. and cit. generally in disc. A female university student brought, inter alia, a civil rights action against a university and one of its professors, alleging sexual harassment by the professor. Her complaint also asserted a state claim against the professor for intentional infliction of emotional distress. The district court granted the university and professor summary judgment on the ground that the plaintiff's right to be free of unwanted sexual advances did not rise to the level of a constitutional right or federal substantive due process right. The circuit court affirmed on different grounds, holding that the student had no cause of action, because neither defendant committed any actionable wrong within the two-year statute of limitations period preceding the filing of the complaint. The emotional distress claim was dismissed on the same procedural ground. The court also noted that the professor's alleged acts of staring at the plaintiff in a menacing manner on two occasions at a public restaurant were not so outrageous as to constitute intentional infliction of emotional distress. Bougher v. University of Pittsburgh, 882 F.2d 74, 80.

C.A.3, 1989. Cit. in disc., cit. in case quot. in disc., quot. in ftn., com. (d) quot. in case quot. in disc. and cit. in case cit. in disc. A police lieutenant sued a township, police chief, and township supervisor for intentional infliction of emotional distress, inter alia, alleging that the police chief and township supervisor took numerous steps to harass the plaintiff and make his job difficult. The district court entered judgment on a jury verdict for the plaintiff. Reversing and remanding, this court held that the defendants' conduct of forwarding charges against the plaintiff to the district attorney, showing disparaging reports about the plaintiff in public, and changing his duties and depriving him of privileges did not constitute the extreme and outrageous conduct necessary for the tort of intentional infliction of emotional distress. Clark v. Township of Falls, 890 F.2d 611, 622, 623.

C.A.3, 1989. Quot. in ftn., cit. in case quot. in disc., cit. in disc., cit. in case cit. in disc., cit. in case quot. in ftn., cit. in case cit. in ftn. A former tenant sued his former landlord and its employee, alleging intentional infliction of emotional distress, inter alia, stemming from his eviction from an apartment complex. The jury awarded the tenant $25,000 on his emotional distress claim. This court affirmed the district court's entry of judgment on the jury's verdict, concluding that absent a clear statement from the Pennsylvania Supreme Court, it would continue to predict that Pennsylvania would impose liability for intentional infliction of emotional distress. It also opined that Pennsylvania would limit the scope of liability by requiring competent medical evidence of

causation and severity. The court held that the landlord's conduct was sufficiently outrageous to present the case to the jury, in that he had the door removed from the tenant's apartment, told a police officer that the tenant was a trespasser, publicly announced that the tenant was a pimp, and threw his belongings into the street. The plaintiff also put forward medical testimony that these events contributed to a severe set of depressive symptoms. Williams v. Guzzardi, 875 F.2d 46, 50, 51.

C.A.3, 1988. Com. (d) quot. in case quot. in ftn. in sup., com. (h) cit. in case cit. in sup. and quot. in ftn. Upon returning to work after triple bypass surgery, an employee was dismissed, allegedly because the employer wished to avoid medical benefit payments. He sued the employer for interference with the attainment of employee benefits and intentional infliction of emotional distress. The district court directed a verdict for the employer on the emotional distress claim and entered judgment on a verdict for the plaintiff on the interference with the attainment of employee benefits claim and ruled that the employee was not entitled to a jury trial. This court affirmed the emotional distress ruling, holding that the conduct was insufficiently outrageous, but remanded the interference with the attainment of employment benefits ruling, holding that a jury trial may be available under the Employee Retirement Income Security Act. The court said that an improper motive for dismissal, without more, could not provide a basis of recovery for emotional distress. Cox v. Keystone Carbon Co., 861 F.2d 390, 395, appeal after remand 894 F.2d 647 (3d Cir.1990), cert. denied 498 U.S. 811, 111 S.Ct. 47, 112 L.Ed.2d 23 (1990).

C.A.3, 1988. Subsec. (1) quot. in disc., com. (d) cit. in case quot. in sup. A county detective sued the county prosecutor for violation of his First Amendment rights, wrongful retaliation, and intentional infliction of emotional distress, alleging that various disciplinary actions were taken against him because he criticized the prosecutor's reorganization plan for the department. The district court granted the prosecutor's motion for summary judgment on the ground that the detective's expressions were not on a matter of public concern and hence were outside the ambit of First Amendment protection. This court reversed as to the First Amendment and wrongful retaliation claims but affirmed as to the intentional infliction of emotional distress claim, holding that the detective had not alleged behavior that rose to the level of outrageousness necessary for the tort. Zamboni v. Stamler, 847 F.2d 73, 80, cert. denied 488 U.S. 899, 109 S.Ct. 245, 102 L.Ed.2d 233 (1988).

C.A.3, 1987. Cit. in case quot. in ftn., quot. in part in disc.; subsec. (2)(a) quot. but dist.; com. (d) quot. in case quot. in disc., cit. in ftn.; com. (e) cit. in disc.; com. (l) cit. but dist. Relatives of deceased workers sued an asbestos manufacturer for damages, alleging that the manufacturer had exposed the relatives to asbestos dust through the workers' clothing or tools, and that they suffered severe emotional distress as a result of their fears of contracting asbestos-related diseases. The district court granted judgment for the manufacturer. This court affirmed, stating that the manufacturer's conduct was not sufficiently outrageous or reckless to sustain a claim for intentional infliction of emotional distress in the absence of evidence that the manufacturer knew that its products posed a danger to those indirectly exposed through contact with a worker who handled asbestos products. In addition, plaintiffs could not recover for emotional harm from observing the

worker's illnesses and deaths where the injuries were gradual and nontraumatic. Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 85-89.

C.A.3, 1986. Cit. but not fol., com. (d) quot. in case cit. in disc. The estate of a deceased former employee sued the employer for intentional infliction of emotional distress arising out of the employer's firing and potential rehiring of the employee. The trial court held that the plaintiff failed to state a claim for intentional infliction of emotional distress. Affirming, this court held that the state law which governed the claim placed substantial restrictions on the cause of action beyond just extreme and outrageous conduct that was intentional and/or reckless which caused severe distress. The court stated that the conduct must be beyond the bounds of decency to recover for intentional infliction of emotional distress in the state. Bradshaw v. General Motors Corp., Fisher Body Div., 805 F.2d 110, 114.

C.A.3, 1986. Quot. and cit. but dist., coms. (d), (j), and (k) quot. and cit. in sup. A car buyer in the Virgin Islands sued the seller for intentional infliction of emotional distress for failing to be reasonable in honoring the terms of a warranty and for failing to treat her in a professional manner. The territorial court dismissed the claim, and the district court affirmed the dismissal on the ground that the plaintiff had failed to state a cause of action. Affirming, this court reasoned that the alleged facts, showing an absence of bodily harm, were insufficient to meet the standard of extreme and outrageous conduct required to state a cause of action for intentional infliction of emotional distress. Heywood v. Cruzan Motors, Inc., 792 F.2d 367, 371, 372.

C.A.3, 1985. Cit. in disc., quot. in ftn., cit. in diss. op., com. (d) quot. in part in diss. op. The wives and children of a number of men who had died from exposure to asbestos sued the manufacturers and vendors of the asbestos on theories that included products liability and negligent and intentional infliction of emotional distress. Applying Pennsylvania law, the district court dismissed the claims for emotional distress for failure to state a claim on which relief could be granted. This court affirmed as to the claim for negligent infliction of emotional distress, but ruled that the appellants had stated a claim for intentional infliction of emotional distress based upon their fear they would suffer future illness because of exposure in their homes to asbestos occasioned by the conditions of their decedents' employment. A dissent argued that Pennsylvania courts would allow recovery under such a claim only when the plaintiff's injuries resulted directly and immediately from conduct directed at those plaintiffs. Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 275, 276, 278, 279, on remand 1986 WL 3858 (E.D.Pa.1986).

C.A.3, 1982. Cit. in disc. and com. (k) cit. in disc. The plaintiff brought suit against his employer, seeking damages on a variety of tort and contract theories because his employer terminated his employment and failed to offer him permanent employment. The district court dismissed the plaintiff's complaint. On appeal, the plaintiff contended that the district court erred in holding that the plaintiff's intentional infliction of emotional distress claim was time-barred. The plaintiff argued that he was entitled to the benefit of the state's discovery rule because his physical symptoms did not fully manifest themselves until over two years after his alleged injury. This court stated that bodily harm was not an essential element of the tort of intentional infliction of emotional

distress. Therefore, the plaintiff's cause of action was complete before he experienced any physical symptoms. This court further found that since the plaintiff was aware of all the operative facts of his injury prior to the filing of his complaint, the plaintiff could not use the discovery rule to toll the statute of limitations. The judgment was affirmed. Bruffett v. Warner Communications, Inc., 692 F.2d 910, 914.

C.A.3, 1982. Com. (d) cit. in case quot. in disc. In a suit by insureds against a fire insurer, the plaintiffs appealed from the final judgment of the district court. On appeal the plaintiffs contended, inter alia, that the trial court erred in refusing to submit to the jury their claim for intentional infliction of emotional distress. In response, this court stated that New Jersey recognized an independent cause of action for intentional infliction of emotional distress. Recovery was conditioned on a showing that the conduct causing the emotional distress was so extreme and outrageous as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. Since the jury found no breach of the insurer's duty of good faith, the plaintiffs could hardly have prevailed on a cause of action for intentional infliction of emotional distress under the standard above. Thus the court held that error, if any, in the district court's refusal to submit the plaintiffs' separate tort claim to the jury was harmless. The verdict in favor of the insurer precluded an award of damages for emotional distress. Judgment was affirmed as to this issue, but the court reversed and remanded for a new trial on the plaintiffs' breach of contract claim and counsel fees. Polito v. Continental Cas. Co., 689 F.2d 457, 464.

C.A.3, 1980. Cit. in sup. and coms. (h) and (j) cit. in sup. Plaintiff brought an action against an innkeeper for false arrest and intentional infliction of emotional harm after being subjected to citizen's arrest for refusing to leave the hotel for violating its dress code. A jury awarded plaintiff compensatory and punitive damages, and defendant appealed. The court reversed on the emotional harm issue, holding that the District Court erred in not determining whether plaintiff had established that defendant's conduct could be reasonably regarded as so extreme and outrageous as to permit recovery before submitting the case to the jury, and it found that defendant's conduct was not extreme or outrageous, and that plaintiff's embarrassment and humiliation did not constitute severe emotional distress. Moolenaar v. Atlas Motor Inns, Inc., 616 F.2d 87, 89.

C.A.3, 1979. Quot. and fol., illus. (1) quot. in ftn. in sup., com. (d) quot. in sup., com. (j) cit. in sup., coms. (h) and (i) quot. Plaintiff former professional football player sued former employer to recover salary, allegedly due, and damages for defamation and intentional infliction of emotional distress, allegedly resulting from statements made to the press by the team doctor. In the trial court, the jury returned a verdict for the plaintiff on the breach of contract and intentional infliction of emotional distress claims, and against plaintiff on the defamation claim. After judgment was entered, both parties appealed denials of their motions for a judgment notwithstanding the verdict. This court affirmed and held, in regard to the breach of contract claim, that the evidence warranted a finding that the parties had intended to compensate the plaintiff for a three-year period, not a one-year period as contended by defendant. In regard to the claim for intentional infliction of emotional distress, the court held that a jury could reasonably have concluded that defendant's statements were extreme and outrageous, and that they had been made with the requisite intent; it

was viewed as irrelevant as to whether defendant was aware of the consequences of his words. In addition, the court held that punitive damages can be awarded for the tort of intentional infliction of emotional distress, and that under Pennsylvania law the team could be held vicariously liable for its physician's statements. In regard to the claim for defamation, this court held that the remarks in question were not defamatory, as a matter of law, and that the issue should not have gone to the jury. In doing so, the court rejected the contentions of plaintiff that the remarks imputed a loathsome disease or affected his business, trade, profession, or office. Accordingly, the judgment of the district court was affirmed. The dissent objected to the finding of the court that the evidence did not support the defamation count as a matter of law. It was suggested by the dissent that the allegedly defamatory remarks could be construed as affecting plaintiff's business, trade, profession, or office and, therefore, could have formed the basis for his claim. Thus, the dissent concluded that this error necessitated a new trial limited to the defamation claim. Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273-1275, 1277.

C.A.4,

C.A.4, 2016. Cit. in case quot. in sup., com. (d) quot. in case quot. in sup. Former university graduate student brought claims for, among other things, intentional infliction of emotional distress against university and others in connection with allegations that defendants caused false and misleading statements to be included in her permanent academic record, and denied or conspired to deny her academic credit. The district court granted defendants' motions to dismiss. Affirming, this court held that defendants' conduct did not rise to the exacting standard for intentional infliction of emotional distress imposed by West Virginia law. The court noted that West Virginia courts followed Restatement Second of Torts § 46, which provided that, in order for the "outrageous" standard to be met, the conduct had to be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Kerr v. Marshall University Board of Governors, 824 F.3d 62, 78.

C.A.4

C.A.4, 2004. Com. (i) cit. in case quot. in disc. Female security guard sued employer for, in part, intentional infliction of emotional distress, after supervisor permitted plaintiff's boyfriend, against whom plaintiff had obtained a restraining order, access to her, and the boyfriend kidnapped plaintiff at gunpoint and raped her. The district court granted summary judgment for defendant on the emotional-distress claim. Reversing in part and remanding, this court held, inter alia, that summary judgment was precluded on the portion of the claim growing out of supervisor's intentional assignment of plaintiff to an unsecured post. The court said that a jury could infer that supervisor, despite her awareness of boyfriend's abuse of plaintiff, believed it all-important that plaintiff and her boyfriend talk, and so deliberately determined to inflict on plaintiff any emotional distress she might suffer from talking to him. Gantt v. Security, USA, 356 F.3d 547, 552, cert. denied ___ U.S. ___, 125 S.Ct. 51, 160 L.Ed.2d 20 (2004).

C.A.4, 1999. Com. (d) quot. in case quot. in sup. and cit. in headnote, coms. (e) and (f) quot. in sup. and cit. in headnote. A middle school student and her mother sued the student's former teacher, the school principal, and the school board for, in part, intentional infliction of emotional distress, alleging that student was excluded from participating in show choir because of her depression. District court granted defendants' motion to dismiss. This court reversed in part, holding, inter alia, that the district court improperly dismissed plaintiffs' emotional-distress claim, because plaintiffs' assertion that the teacher intentionally attempted to humiliate a child knowing that she was suffering from clinical depression was sufficient to allege outrageous conduct. Baird v. Rose, 192 F.3d 462, 472.

C.A.4, 1998. Cit. in headnote, cit. in disc., com. (d) quot. in disc. Airline passenger who was denied permission to board a connecting flight from Cincinnati to Minneapolis because airline personnel in Roanoke, his point of origin, failed to ask for photo identification sued airline for breach of contract, false imprisonment, and intentional infliction of emotional distress. The district court granted defendant's motion for summary judgment. Affirming, this court held that the contract claim was preempted by the Airline Deregulation Act; that, to the extent the tort claims were based on defendant's refusal to allow plaintiff to board, they too were preempted; and that, to the extent the tort actions were based on other conduct, they failed to state a claim. Smith v. Comair, Inc., 134 F.3d 254, 255, 260.

C.A.4, 1994. Cit. in headnotes, cit. in sup. Employee who was dismissed for allegedly stealing some painting equipment sued former employer in state court for intentional infliction of emotional distress, inter alia. On removal to federal district court, the district court entered judgment on a jury verdict awarding plaintiff damages. Reversing in part, this court held, inter alia, that although defendant's human resources manager's verbal abuse of plaintiff during a 40-minute meeting during which plaintiff became very upset was despicable, it did not rise to the level of being atrocious and utterly intolerable in a civilized community; thus, plaintiff failed to establish the element of outrageous conduct necessary for a claim of intentional infliction of emotional distress. Barber v. Whirlpool Corp., 34 F.3d 1268, 1269, 1277.

C.A.4, 1994. Coms. (d), (i), and (j) quot. in case quot. in sup. Motorist arrested for failing to appear in court as required by a parking ticket sued the issuing county and its maintenance man, who had filed an affidavit to obtain the arrest warrant, alleging civil rights violations and intentional infliction of emotional distress, among other claims. The trial court entered judgment on a jury verdict awarding plaintiff damages. Reversing, this court held, inter alia, that, under South Carolina law, plaintiff could not recover emotional-distress damages, even though her brief detention caused her some distress and even if a jury could have found that the maintenance man's submission of an allegedly false affidavit caused that distress, as there was no evidence that the maintenance man intentionally or recklessly inflicted any harm, the conduct was not extreme and outrageous, and the distress suffered was not so severe that no reasonable man could be expected to endure it. Wilkes v. Young, 28 F.3d 1362, 1366, certiorari denied 513 U.S. 1151, 115 S.Ct. 1103, 130 L.Ed.2d 1069 (1995).

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C.A.4, 1991. Com. (g) quot. generally in disc. An employee who had sued his former employer in a Virginia state court for intentional infliction of emotional distress, negligent infliction of emotional distress, conversion, and negligence in the care of a bailment moved to remand the action to state court following the employer's successful motion to remove the action to federal court. The district court denied the motion to remand and granted summary judgment in favor of the employer, holding that the employee's state law claims were preempted by § 301 of the Labor Management Relations Act (LMRA). Affirming, this court held that because resolution of the state law claims would require interpretation of the collective bargaining agreement, the state law claims were preempted. The court stated that if the collective bargaining agreement authorized the employer to clean out the terminated employee's locker and throw away the employee's personal belongings, those actions could not simultaneously be considered outrageous and intolerable, and therefore punishable as intentional infliction of emotional distress, under Virginia law. McCormick v. AT & T Technologies, Inc., 934 F.2d 531, 537, certiorari denied 502 U.S. 1048, 112 S.Ct. 912, 116 L.Ed.2d 813 (1992).

C.A.4, 1989. Com. (d) cit. in case quot. in disc. An employee sued her employer for wrongful discharge and intentional infliction of emotional distress after she was terminated after being denied disability benefits and then refusing to work. After the employee injured her finger while installing a telephone for the employer, she was awarded temporary total disability benefits, but she was denied permanent disability benefits based on her work-related psychiatric and physical disabilities. The district court granted summary judgment to the defendants, holding that the plaintiff's state law claims were preempted and that her federal claims were barred for failure to file a timely action. Affirming, this court held that a federal court has discretion to dismiss state claims on the merits before resolving the preemption inquiry if the underlying state claims are patently without merit. The court denied relief for emotional distress since the plaintiff's allegations did not rise to the requisite level of "outrageous" conduct. It reasoned that the defendant merely exercised its legal rights in a permissible way in contesting the plaintiff's workers' compensation claims, insisting that the plaintiff be examined by a psychiatrist of the defendant's choosing, and ordering her to return to work. Childers v. Chesapeake & Potomac Telephone Co., 881 F.2d 1259, 1266.

C.A.4, 1989. Com. (d) quot. in sup. An employee sued her employer and her supervisor, in part, for sexual harassment, constructive discharge, and intentional infliction of emotional distress, asserting that the supervisor made unwelcome sexual advances toward her both on and off the job. The district court granted the defendants summary judgment. Reversing in part while affirming the grant of summary judgment on the intentional infliction of emotional distress claim, this court held, inter alia, that summary judgment on that claim was proper, not because the plaintiff could not pursue simultaneous claims for intentional infliction of emotional distress and assault and battery, as the district court reasoned, but because the harassment the plaintiff alleged did not rise to the level of outrageousness required by state law to support such a claim. Paroline v. Unisys Corp., 879 F.2d 100, 112, opinion vacated in part on rehearing 900 F.2d 27 (4th Cir.1990).

C.A.4, 1987. Com. (d) cit. in sup. A country and western singer singled out and made allegedly racially disparaging comments about a black security guard during one of her concerts. The

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security guard sued the singer for intentional infliction of emotional distress. Affirming the trial court's grant of the defendant's motion to dismiss for failure to state a claim, this court held that the singer's behavior did not meet the stringent requirement of outrageousness, central to the tort of intentional infliction of emotional distress. The court concluded that the singer's conduct fell among those intended or unintended hurts that persons in our still "rough-edged" society must simply abide without judicial remedy. Gaiters v. Lynn, 831 F.2d 51, 53, 54.

C.A.4, 1976. Com. (b) quot. in part. in disc. (erron. cit. as com. (a)), cit. in sup. Plaintiffs, customers of defendant carrier, brought an action for breach of duty of nondiscrimination imposed by the Interstate Commerce Act. Defendant delivered plaintiffs' furniture after the date designated in the contract, apparently giving preference to other shippers. Plaintiffs appealed from the district court's order striking all allegations from their complaint supporting recovery of punitive damages and damages for mental distress. The court, in reversing, held that a private right of action existed for violation of the nondiscrimination provision of the Interstate Commerce Act. The court relied in part on aeronautics cases. The court held that plaintiffs' allegations that defendant acted recklessly in callous disregard of plaintiffs' rights was sufficient to allow plaintiffs to introduce further evidence and, if proven, to entitle them to punitive damages. Plaintiffs and defendant occupy a special relationship, that of shipper and common carrier, which creates a strong duty to safeguard plaintiffs' interests. Although the court noted that delay in shipment is generally not such grossly outrageous conduct as to be offensive to a person of normal sensibilities, the court ruled that plaintiffs may introduce proof on the issue of mental distress. Hubbard v. Allied Van Lines, Inc., 540 F.2d 1224, 1229, 1230.

C.A.5,

C.A.5, 2018. Com. (d) quot. in case quot. in sup. Former high-school nurse brought claims for, among other things, intentional infliction of emotional distress (IIED) against school district and others, alleging that she was shunned, subjected to unfounded reprimands, involuntarily transferred to another school, and threatened after she expressed concerns regarding the school's handling of the health needs of a diabetic student who had committed suicide because of her classmates' bullying. The district court granted summary judgment for defendants. Affirming, this court held that plaintiff failed to state an IIED claim, because she failed to show that any of defendants' conduct was extreme and outrageous, or more than a reasonable person could be expected to endure, as required to state such a claim under Restatement Second of Torts § 46. Rayborn v. Bossier Parish School Board, 881 F.3d 409, 420.

C.A.5

C.A.5, 2002. Com. (j) quot. in sup. Employee sued former employer and former supervisors for Title VII violations and intentional infliction of emotional distress, inter alia, arising from defendants' sexual advances and their racial and sexist comments. District court granted defendants summary judgment. This court affirmed, holding, inter alia, that employee's emotional-distress

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claim failed, because although defendants' conduct involved persistent verbal and physical sexual harassment and employee suffered emotional distress and lost her job due to the harassment, evidence did not show that distress was unendurable. While employee testified that she felt angry, embarrassed, disgusted, humiliated, horrified, and repulsed by defendants' actions and that she suffered from depression, headaches, and loss of appetite, employee's emotional distress did not satisfy requisite severity prong. Smith v. Amedisys Inc., 298 F.3d 434, 450.

C.A.5, 2001. Quot. in sup., cit. in ftn. Insurer sought declaratory judgment that the liability policies it sold to insured company afforded no coverage or defense for 21 Mississippi lawsuits alleging that insured's male employee had surreptitiously videotaped female customers in dressing room at insured's photography studio. District court granted insurer summary judgment. This court reversed and remanded, concluding that insurer was obligated to defend and indemnify insured in underlying state suits. The court determined, inter alia, that Mississippi Supreme Court would decide that employee committed the torts of invasion of privacy and extreme and outrageous conduct upon plaintiffs in underlying suits. American Guarantee and Liability Ins. Co. v. 1906 Co., 273 F.3d 605, 614, 615.

C.A.5, 2001. Com. (f) quot. in case quot. in disc. Employee sued former employer for intentional infliction of emotional distress that caused her to leave her employment. District court vacated arbitration award for employee, holding that employer's decision to immediately continue employee's time-sensitive evaluation on her return from medical leave due to stroke-like symptoms was not extreme and outrageous conduct. This court affirmed, holding, inter alia, that, although employer's conduct was insensitive to employee's peculiar physical susceptibility to stress, its instructions that employee resume the evaluation were not extreme and outrageous conduct. Hughes Training Inc. v. Cook, 254 F.3d 588, 595, cert. denied 534 U.S. 1172, 122 S.Ct. 1196, 152 L.Ed.2d 135 (2002).

C.A.5, 2001. Com. (d) cit. in case cit. in sup. African-American store customer sued store, store's insurer, and security guard for unlawful search and seizure, discrimination, false arrest, and intentional infliction of emotional distress, among other claims. Suspecting plaintiff of shoplifting based on eyewitness report, security guard had followed plaintiff through the store and to the parking lot, copied down her car's license plate number, handcuffed her, and transported her to the police station. District court granted defendants summary judgment. This court affirmed, holding, inter alia, that plaintiff's emotional-distress claim failed, because defendants' conduct did not rise to the requisite level of extreme and outrageous conduct. Morris v. Dillard Dept. Stores, Inc., 277 F.3d 743, 757.

C.A.5, 2001. Cit. in disc., com. (f) cit. in case cit. in disc. Doctor fired from university medical school's residency program sued the school, the director of school's residency program, and psychiatrist who examined her, alleging state and federal claims including intentional infliction of emotional distress. District court denied director's motion for summary judgment. This court reversed in part, holding, inter alia, that plaintiff did not prove emotional distress, because director's alleged statements to plaintiff about plaintiff's childhood sexual abuse were not extreme and

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outrageous, as plaintiff was not exposed to those remarks over a protracted period of time or physically threatened. Furthermore, director's effort to obtain information about plaintiff's mental illness and to seclude plaintiff, while ill-motivated, was not actionable infliction of emotional distress. Shaboon v. Duncan, 252 F.3d 722, 734.

C.A.5, 2000. Com. (d) cit. in case cit. in disc. Two African-American former employees sued employer and its vice president and office manager for, in part, racial discrimination and intentional infliction of emotional distress. Affirming in part the district court's grant of summary judgment for defendants, this court held, inter alia, that defendants' racial harassment of plaintiffs in the form of racist remarks did not rise to the level of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress under Texas law. Walker v. Thompson, 214 F.3d 615, 628.

C.A.5, 1999. Cit. in case cit. in disc. A Louisiana cigarette smoker and his wife sued several tobacco manufacturers' trade associations for misrepresentation and fraud, among other claims. Louisiana federal district court dismissed plaintiffs' claims. This court reversed and remanded, holding, inter alia, that plaintiffs made an adequate prima facie case for intentional and nonintentional torts. Each defendant intentionally and negligently communicated to the plaintiffs and other Louisiana residents false representations of material facts as to the addictive and cancer-causing effects of their tobacco products. Guidry v. United States Tobacco Company, Inc., 188 F.3d 619, 627.

C.A.5, 1999. Com. (d) cit. generally in headnote and quot. in case quot. in disc. Former employee sued employer, the employer's parent company, and a coemployee for intentional infliction of emotional distress and Title VII violations arising from sexual harassment by the coemployee. District court entered judgment on a jury verdict for plaintiff. This court vacated in part, reversed in part, and remanded, holding, inter alia, that there was sufficient evidence to support the jury verdict against the coemployee on plaintiff's emotional-distress claim, because the coemployee's behavior went well beyond unwanted sexual advances in the workplace where he subjected plaintiff to sexually suggestive touching, made constant sexual remarks, and asked plaintiff to leave her husband for him. Skidmore v. Precision Printing and Packaging, Incorporated, 188 F.3d 606, 613.

C.A.5, 1997. Com. (d) quot. in sup. and cit. generally in headnote. An employee who suffered from temporomandibular joint disease and underwent jaw surgery was fired. The employee sued her employer for intentional infliction of emotional distress and violations of the Americans with Disabilities Act. Plaintiff alleged that her supervisor became angry when she requested time off for additional surgery, that he told her he would no longer tolerate her health problems, that he pressured her to return to work, and that he excluded her from business meetings and transferred assignments away from her. The district court granted defendant summary judgment. This court affirmed, holding, inter alia, that plaintiff's emotional-distress claim failed because she did not prove that defendant acted in a manner that was extreme or outrageous. Even if the supervisor was in fact generally cruel and unfair and threatened to fire plaintiff, this did not pass muster as the type of utterly indecent, intolerable, and atrocious behavior necessary to prevail on a claim of

intentional infliction of emotional distress. McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 560, 564.

C.A.5, 1997. Cit. in headnotes, cit. in case cit. in disc. An African-American engineer sued her former employer, alleging workplace discrimination based on her sex, race, and national origin, as well as several state law claims, including intentional infliction of emotional distress. Plaintiff had supervised an employee who resented being supervised by an African-American woman and who physically threatened her after being reassigned to a different engineering project. District court granted defendant summary judgment. This court affirmed, holding, inter alia, that plaintiff failed to raise a fact question as to whether defendant's conduct was extreme and outrageous. The employee's harassment of plaintiff was not ratified, in light of defendant's decisive actions to remove the employee from plaintiff's work site and to prevent him from harassing her. Ward v. Bechtel Corp., 102 F.3d 199, 201, 203.

C.A.5, 1996. Com. (d) cit. in case quot. in sup. University student who claimed at a meeting attended by several professors and students that she had been sexually assaulted by another student at a party brought, in part, a state-law claim for intentional infliction of emotional distress against one of the professors who, after the meeting, allegedly engaged in a course of conduct intended to intimidate her. Reversing the district court's denial of defendant's motion for summary judgment and rendering, this court held, inter alia, that defendant's alleged acts of following plaintiff in the hallways, obstructing her passage from a water fountain, showing up in a class and positioning himself where plaintiff usually sat so that she could not avoid encountering him, and repeatedly going in and out of a room where she was taking a make-up exam did not rise to the level of outrageous conduct necessary for a claim of intentional infliction of emotional distress, and thus defendant was entitled to state official immunity from plaintiff's claim. Cantu v. Rocha, 77 F.3d 795, 810.

C.A.5, 1996. Com. (d) quot. in case quot. in disc. Fifty-one-year-old salesman who was fired after 22 years on the job sued his former employer for violations of the Age Discrimination in Employment Act (ADEA) and for intentional infliction of emotional distress. The district court granted employer's motion for judgment as a matter of law on the emotional-distress claim but entered judgment on a jury verdict for salesman on his ADEA claim. Affirming, this court held that the evidence was sufficient to support a finding that salesman's age was the reason for his dismissal, but that a supervisor's failure to remove language from salesman's personnel files indicating that salesman had been placed on probation was not so outrageous as to give rise to an action for intentional infliction of emotional distress. Haun v. Ideal Industries, Inc., 81 F.3d 541, 548.

C.A.5, 1996. Com. (d) quot. in case quot. in disc. An Amtrak ticket and baggage clerk sued Amtrak, alleging a violation of Title VII and a claim for intentional infliction of emotional distress. After plaintiff and her co-workers had received a series of obscene and threatening anonymous phone calls and notes, defendant had called upon four law enforcement agencies to investigate. District court granted defendant summary judgment. This court affirmed, holding, inter alia, that defendant's response to her complaints was not extreme and outrageous conduct, as the evidence

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demonstrated that defendant took plaintiff's complaints seriously and conducted a prompt and thorough investigation. Hirras v. National R.R. Passenger Corp., 95 F.3d 396, 400.

C.A.5, 1996. Com. (d) quot. in case quot. in sup. Discharged employees sued former employer and supervisor, asserting claims for age discrimination and intentional infliction of emotional distress. Affirming the district court's grant of summary judgment for defendants, this court held, inter alia, that plaintiffs failed to show that defendants' actions in terminating plaintiffs' employment rose to the level of extreme and outrageous conduct or caused plaintiffs severe emotional distress, as required to state a claim for intentional infliction of emotional distress under Texas law, where plaintiffs alleged only that one plaintiff's discharge interview occurred in an office so that he and a manager could speak privately, after which defendant supervisor did nothing to cause plaintiff emotional distress, and that defendant supervisor had a smile or smirk on his face when he met with the other plaintiff to discuss plaintiff's work record following his discharge and failed to call plaintiff after promising to do so. Stults v. Conoco, Inc., 76 F.3d 651, 658.

C.A.5, 1995. Subsec. (1) cit. in case cit. in ftn. in sup., com. (d) quot. in sup., quot. in case cit. in ftns. in sup. Texas employee brought state court action for intentional infliction of emotional distress against his Virginia-based corporate employer and two of his Texas supervisors. Plaintiff was reclassified as a staff employee after serving as a manager and, although his responsibilities decreased, his salary remained the same. Defendants successfully removed the case to federal court, but plaintiff moved to remand it, arguing that complete diversity was absent. The district court retained jurisdiction, explaining that supervisors were fraudulently joined, then dismissed the claim against them. Affirming, this court held that supervisors' conduct was not extreme and outrageous and, since plaintiff could not possibly win his case against them, their joinder, for the purpose of defeating removal to federal court, was clearly fraudulent. Burden v. General Dynamics Corp., 60 F.3d 213, 218, 220.

C.A.5, 1995. Cit. in case cit. in disc., subsec. (1) cit. in headnote and quot. in disc., coms. (b) and (j) cit. in disc. Former manager of a convenience store sued her former employer for intentional infliction of emotional distress and slander stemming from her employment termination. After the district court entered judgment on a jury verdict awarding plaintiff damages, this court reversed as to the claim for intentional infliction of emotional distress, affirmed as to the claim for slander, and remanded for apportionment of the damages. On remand, the district court apportioned the entire damages award to the slander claim. Affirming, this court held, inter alia, that, while the evidence of emotional injuries did not rise to the level of severity to support an independent tort of intentional infliction of emotional distress, plaintiff's emotional injuries were compensable as damages for her slander claim. Burroughs v. FFP Operating Partners, L.P., 70 F.3d 31, 32, 33.

C.A.5, 1995. Cit. in headnotes, cit. in case cit. in sup., com. (d) quot. in case quot. in sup., com. (g) cit. in sup. Railroad company employee sued employer for, inter alia, Title VII violations and intentional infliction of emotional distress, alleging that she received verbal abuse from co-workers and abusive phone calls and notes from anonymous sources. Texas federal district court dismissed, holding, in part, that the Title VII and intentional-infliction-of-emotional-distress claims were

preempted by Railway Labor Act (RLA). Reversing and remanding, this court held, in part, that plaintiff's state law claim of intentional infliction of emotional distress was independent of the collective-bargaining agreement (CBA) because its resolution did not require an interpretation of the CBA; therefore, this claim was not preempted by the RLA. CBA contained no provision related to sexual harassment or the right to work in a nonhostile environment. Hirras v. National R.R. Passenger Corp., 44 F.3d 278, 279, 283, appeal after remand 95 F.3d 396 (5th Cir.1996).

C.A.5, 1995. Com. (d) quot. in case quot. in sup. and cit. in headnote. A female research laboratory technician at a university sued the university health center and two doctors for, inter alia, Title VII retaliation and intentional infliction of emotional distress. Jury awarded damages on the emotional-distress claim. Reversing as to the emotional-distress award, this court held, in part, that, although defendant doctor may have lost control, behaved intemperately, rudely reprimanded plaintiff or overreacted in reporting her mistake to her supervisor, the evidence did not demonstrate conduct and actions so unjustifiable, so uncivilized, or so based on malice that they rose to the level of outrageous conduct. In response to each incident involving plaintiff's carelessness or incompetence, defendant doctor had a plausible basis to become upset with plaintiff's conduct. MacArthur v. University of Tex. Health Center Tyler, 45 F.3d 890, 891, 898.

C.A.5, 1994. Cit. in case cit. in sup. Employee of electric cooperative sued employer and its general manager in state court for intentional infliction of emotional distress arising from a job reassignment. On removal to federal district court, the district court denied plaintiff's motion to remand the action to state court and dismissed the action without prejudice. Affirming as modified, this court held, inter alia, that, because plaintiff's claim required analysis of the collective bargaining agreement to determine whether defendants' actions in reassigning plaintiff to a maintenance position were extreme and outrageous, a necessary element of his state law claim, his claim was preempted by a section of the Labor Management Relations Act vesting jurisdiction in federal courts to hear claims for violation of labor contracts and thus the district court did not err in denying plaintiff's motion to remand. Baker v. Farmers Elec. Co-op., Inc., 34 F.3d 274, 280.

C.A.5, 1994. Com. (k) cit. in disc., com. (j) quot. in sup. Former manager of a convenience store sued her employer in state court after the employer accused her of embezzlement, asserting intentional infliction of emotional distress and other claims. The case was removed to federal district court, which entered judgment on a jury verdict for plaintiff on the emotional-distress claim. Reversing in part and remanding, this court held, inter alia, that defendant's failure to contact plaintiff prior to initiating criminal proceedings against her was not extreme and outrageous conduct sufficient to support the emotional-distress claim and plaintiff's emotional injuries were not severe enough, as a matter of law, to meet the standard for intentional infliction of emotional distress. Burroughs v. FFP Operating Partners, L.P., 28 F.3d 543, 546, 549, appeal after remand 70 F.3d 31 (5th Cir.1995).

C.A.5, 1994. Cit. in headnotes, cit. and quot. in sup., coms. (d) and (h) cit. in case quot. in sup. Beneficiary of annuity sued insurer for stopping payment on his annuity check, alleging various causes of action, including intentional infliction of emotional distress. Affirming the district court's

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dismissal of the complaint, this court held that the determination in a prior state court action that insurer's conduct in not delivering the disputed funds to plaintiff did not rise to the level of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress barred plaintiff's instant claim on the ground of collateral estoppel. Daniels v. Equitable Life Assur. Soc. of U.S., 35 F.3d 210, 211, 216.

C.A.5, 1994. Cit. in headnotes, cit. in sup., coms. (d), (e), and (f) quot. in sup. Company office insurance agent who suffered mental breakdown sued employer in state and federal court alleging, among other claims, intentional infliction of emotional distress. Insurer had realized that its new "neighborhood office agent" program would disrupt existing company offices and agents that stayed in them, but it believed that new system was best way to facilitate growth. District court granted employer judgment as a matter of law on plaintiff's claim for intentional infliction of emotional distress. Affirming in part, this court held, inter alia, that defendant's alleged mistreatment of plaintiff was not sufficiently thoughtless to rise to level of outrageousness necessary to impose liability under Louisiana law. Plaintiff was not targeted for specific abuse and his grievances were a foreseeable result of application of defendant's new system. Furthermore, defendant did not abuse its position of trust or power and was not aware of plaintiff's preexisting health problems. Deus v. Allstate Ins. Co., 15 F.3d 506, 507, 508, 514-517, cert. denied ___ U.S. ___, 115 S.Ct. 573, 130 L.Ed.2d 490 (1994).

C.A.5, 1994. Cit. in disc. A vendor at an Air Force commissary sued the government under the Federal Tort Claims Act (FTCA), alleging that her supervisor had created a hostile work environment by making off-color sexual remarks and dirty jokes and by giving the vendor winks and nods, resulting in mental anguish, anxiety, embarrassment, and humiliation. The district court granted the government summary judgment. This court reversed and remanded, holding that plaintiff's claim for intentional infliction of emotional distress was not excluded from the reach of the FTCA. The court determined that plaintiff's claims did not arise out of an assault, a battery, or a slander. It noted that the components necessary to establish assault, battery, and slander were distinct from the elements of intentional infliction of emotional distress, and that the goals of these torts were also different. Truman v. U.S., 26 F.3d 592, 595.

C.A.5, 1993. Coms. (d) and (h) quot. in case quot. in sup. Independent contractor for public utility sued utility and its supervisory employee to recover damages for, inter alia, intentional infliction of emotional distress, alleging that he was defamed by supervisor's statements to others that he was discharged for falsifying a work-related document. Affirming the district court's dismissal of the claim, this court held, inter alia, that supervisor's conduct, as a matter of law, was not so extreme and outrageous as to permit recovery, since it did not exceed all possible bounds of decency and was not utterly intolerable in a civilized community. Danawala v. Houston Lighting & Power Co., 14 F.3d 251, 256.

C.A.5, 1993. Com. (d) cit. in headnote and quot. in case cit. in sup. A former police officer sued his former supervisors and the city that terminated him, asserting civil rights and state tort claims, including one for intentional infliction of emotional distress. This court, affirming the

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trial court's entry of judgment against the officer, held, inter alia, that, under Texas law, none of the defendants had acted outrageously in discharging the officer, as their statements were either accurate descriptions of the controversy surrounding the officer or, at worst, hyperbolic ramblings. Gillum v. City of Kerrville, 3 F.3d 117, 122, cert. denied ___ U.S. ___, 114 S.Ct. 881, 127 L.Ed.2d 76 (1994).

C.A.5, 1993. Subsec. (1) cit. in sup., com. (j) quot. in case cit. in sup. A retired sales manager sued his former employer and others for intentional infliction of emotional distress and other damage claims allegedly arising out of derogatory comments made by a presenter at an awards ceremony. The district court entered judgments for defendants. Affirming, this court held, inter alia, that the employer's conduct, in failing to take corrective action after the ceremony and in retracting its offer of continued employment after the manager retired, was not sufficiently extreme to support an intentional infliction of emotional distress claim. The court noted that the comments conveyed, at worst, a message that the manager had not earned top performance recognition. McKethan v. Texas Farm Bureau, 996 F.2d 734, 741, 742.

C.A.5, 1993. Com. (d) quot. in part in case cit. in sup. A Hispanic employee who was referred to as a "Mexican" and a "wetback" by his supervisor sued the employer, asserting claims for constructive discharge under Title VII and for intentional infliction of emotional distress. This court affirmed a grant of the employer's motion for summary judgment, holding, inter alia, that the supervisor's conduct, though repeated over a period of time, was not so extreme and outrageous as to support a claim for intentional infliction of emotional distress. Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239, 243.

C.A.5, 1992. Quot. in disc., com. (d) quot. in case quot. in disc. An at-will employee who was fired sued his former employer for intentional infliction of emotional distress and wrongful termination. The district court granted defendant's motion for summary judgment, finding that defendant's conduct of constantly criticizing plaintiff and threatening to terminate him was not extreme and outrageous and did not cause plaintiff to suffer severe emotional distress. This court affirmed, holding that the conduct complained of was within the realm of ordinary employee disputes, which under Texas law would not give rise to a claim for intentional infliction of emotional distress. While the defendant's alleged act of telling plaintiff's current employer that plaintiff was under psychiatric care fell outside the category of a nonactionable employment dispute, the court did not find this factually accurate report to rise to the level of extreme and outrageous behavior. Johnson v. Merrell Dow Pharmaceuticals, Inc., 965 F.2d 31, 33.

C.A.5, 1992. Com. (d). cit. in case quot. in sup. Employee who was demoted, reduced from a salary to an hourly wage, and eventually terminated sued former employer for intentional infliction of emotional distress, among other claims. The district court entered judgment on jury verdict for employee. Reversing and remanding for the district court to enter judgment for defendant, this court held that while defendant's actions may have been illegal and discriminatory, they did not constitute extreme and outrageous conduct, since plaintiff was not subjected to intentional and systematic humiliation. Moreover, plaintiff's duties following demotion were not menial or

demeaning but were duties that defendant required its other supervisors to do on occasion, and, indeed, were duties that defendant had often called on plaintiff to do himself before his demotion. Ramirez v. Allright Parking El Paso, Inc., 970 F.2d 1372, 1375.

C.A.5, 1991. Com. (d) quot. in sup. The father of a juvenile who committed suicide after being detained by a police officer for driving an automobile without a license sued the officer alleging, inter alia, intentional infliction of emotional distress. The district court directed a verdict for the defendant. Affirming in part, this court held that statements made by the officer to the plaintiff's decedent and his friends were not sufficiently outrageous to warrant the imposition of liability. White v. Walker, 950 F.2d 972, 978.

C.A.5, 1991. Cit. in ftn.; com. (g) quot. in ftn.; com. (d) cit. in case quot. in disc., quot. in disc. An employee sued his former employer for age discrimination, intentional infliction of emotional distress, and termination of long term disability benefits in retaliation for filing age discrimination charges under the Age Discrimination in Employment Act. The district court denied the defendant's motions for a directed verdict, judgment n.o.v., a new trial, and remittitur, and entered judgment on the jury award of damages for age discrimination and intentional infliction of emotional distress. Affirming, this court held that the jury determination on age discrimination was reasonable. It held, moreover, that demoting an executive manager to an entry-level warehouse position with menial janitorial duties was extreme and outrageous conduct demonstrating an intentional infliction of emotional distress; the demotion was contrived to humiliate the employee in the hope that he would quit. Wilson v. Monarch Paper Co., 939 F.2d 1138, 1141, 1143, 1144.

C.A.5, 1989. Com. (d) quot. in disc. An employee sued her supervisor, alleging claims under Title VII and a pendent state-law claim for intentional infliction of emotional distress. The district court found for the plaintiff on the emotional distress claim, but dismissed the Title VII claims for failure to prove a retaliatory discharge. Affirming, this court held, inter alia, that the defendant's intentional placement of two checks in the plaintiff's purse to make it appear that she was a thief constituted outrageous conduct giving rise to a claim for intentional infliction of emotional distress. The court said that the supervisor's subjecting the innocent plaintiff to an accusation of theft passed the bounds of tolerated conduct and was therefore outrageous. Dean v. Ford Motor Credit Co., 885 F.2d 300, 306.

C.A.5, 1989. Quot. in case quot. in disc. A woman who was portrayed in a book as assisting in her 45-year-old brother's marriage to an 11-year-old girl sued the book's publisher to recover damages for libel, for “false light” invasion of privacy, and for intentional and negligent infliction of emotional distress. The trial court dismissed the complaint for failure to state a claim. Affirming, this court held, inter alia, that in order to prevail on her defamation claim, the plaintiff had to establish a false and defamatory statement concerning another, an unprivileged publication to a third party, fault amounting at least to negligence on the part of the publisher, and the existence of either “per se” actionability or special harm. Mitchell v. Random House, Inc., 865 F.2d 664, 672.

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C.A.5, 1973. Cit. in sup. A tugboat owner filed a petition seeking exoneration or limitation of liability following the boat's crash into a bridge. The bridge operator sought damages and the representative of the deceased boat pilot sought damages for the pilot's death. The trial court held the ship's owner liable to the other two parties, finding that the owner was negligent in providing an unseaworthy vessel and that fit was responsible for the negligence of some of its employees. The appellate court reversed in part, holding that, as a matter of law, the pilot was chargeable with having knowledge of certain navigational hazards which in fact he did not have, and that he was thus contributorily negligent in not informing himself of the special hazards attendant upon the conditions known to him. The court remanded the issue of whether the owner was entitled to indemnification from the pilot's estate. The court also held, with regard to the suit of the bridge operator, that parol evidence was admissible to show, contrary to express contractual terms, that railroads, who had to use another bridge while the damaged one was being repaired, expected to be reimbursed for their extra expenses, the court finding that the contracts in question were not complete. In addition, the court denied grief damages to the pilot's survivors, finding this result indicated by the relevant federal laws. Petition of M/V Elaine Jones, 480 F.2d 11, 25, amended 513 F.2d 911 (5th Cir.1975), cert. denied 96 S.Ct. 71, (1975) 46 L.Ed.2d 60.

C.A.6

C.A.6, 2021. Com. (j) quot. in case quot. in sup. Mortgage borrower filed a class action against law firm and its principals, who sent him a letter regarding the possible foreclosure of his loan without first having an attorney provide a meaningful review of his foreclosure files, alleging that the letter violated federal and state statutes because it falsely represented or implied that it was from an attorney. The district court dismissed borrower's claims, finding that borrower failed to show that he suffered an injury in fact. Affirming, this court held that borrower's bare allegations of confusion and anxiety did not qualify as injuries in fact that could give rise to standing. The court cited Restatement Third of Torts: Liability for Physical and Emotional Harm § 46 and Restatement Second of Torts § 46 in explaining that liability for emotional distress arose only where the distress was extreme, and borrower did not make any allegations regarding the severity of his anxiety. Garland v. Orlans, PC, 999 F.3d 432, 440.

C.A.6,

C.A.6, 2020. Coms. (d) and (j) quot. in sup. Debtor who received letters from law firm about certain debts that he admittedly owed to bank sued law firm, alleging that it violated the Fair Debt Collection Practices Act by giving the impression that an attorney had reviewed his case and determined that he owed the debts, which made him anxious and afraid that law firm would sue him if he did not promptly pay. The district court granted law firm's motion to dismiss. Affirming, this court held that debtor lacked standing to sue, because he had not shown any injury-in-fact that was traceable to law firm's challenged conduct. The court noted that it was skeptical as to whether debtor's bare allegations of anxiety were sufficient to establish an injury in fact consistent with common-law requirements to recover for emotional harm under Restatement Second of Torts §

46, but explained that it did not need to resolve that issue, because debtor's anxiety, as alleged, amounted to a fear of a future harm, which was rarely cognizable as an injury in fact. Buchholz v. Meyer Njus Tanick, PA, 946 F.3d 855, 864, 870.

C.A.6

C.A.6, 2014. Com. (d) quot. in sup. Parents of arrestee brought, inter alia, a state-law claim for intentional infliction of emotional distress (IIED) against officers of a private medical clinic's police department. The district court granted defendants' motion for judgment on the pleadings. Reversing as to this claim and remanding, this court held that, at this stage in the proceedings, plaintiffs alleged sufficient facts to make plausible a claim that, under Ohio law, defendants' conduct was extreme and outrageous, as required for an IIED claim under Restatement Second of Torts § 46, Comment *d*. The court pointed to evidence that defendants broke into plaintiffs' home late at night without a warrant or exigent circumstances in attempting to arrest plaintiffs' son for minor traffic violations, blindly deployed stun guns through a broken window into plaintiffs' occupied home, verbally abused them, and used racial epithets throughout the encounter. Hayward v. Cleveland Clinic Foundation, 759 F.3d 601, 619.

C.A.6, 2014. Com. (d) quot. in case quot. in sup. Tenants brought a claim for outrageous infliction of emotional distress, inter alia, against purchaser that acquired tenants' rental home at a foreclosure sale, alleging that purchaser's actions in evicting them were outrageous and caused them severe emotional distress. The district court dismissed the complaint. Affirming in part, this court held that the conduct alleged by plaintiffs was not sufficiently extreme or atrocious to be considered outrageous under Kentucky law. The court explained that, while defendant's alleged conduct—which included having the local sheriff's office place plaintiffs' possessions in the yard, where more than $38,000 worth of their property was damaged or destroyed by rain—was unfortunate, the procedure that defendant followed to evict plaintiffs generally conformed to Kentucky law, providing support for the conclusion that it was not atrocious, and, in fact, was considered acceptable. Mik v. Federal Home Loan Mortg. Corp., 743 F.3d 149, 169.

C.A.6,

C.A.6, 2014. Com. (d) quot. in case quot. in sup. Former employee brought, inter alia, a state-law claim for intentional infliction of emotional distress (IIED) against employer and supervisor, alleging that supervisor had sexually harassed her. The district court granted summary judgment for defendants. Affirming in part, this court held that plaintiff's IIED claim failed under Kentucky law, because, while supervisor's alleged comments that plaintiff's appearance sexually aroused him were offensive to her, they were not sufficiently outrageous, under Restatement Second of Torts § 46, Comment *d*, to support a claim for IIED. Montell v. Diversified Clinical Services, Inc., 757 F.3d 497, 510.

C.A.6, 2013. Com. (d) quot. in case quot. in sup. Arrestee who was detained for driving under the influence brought, inter alia, a pendent state-law claim for intentional infliction of emotional distress against two county deputy sheriffs who searched him at the county jail, alleging that, even though he was physically compliant during the search, defendants knocked him unconscious and broke his tooth immediately after he asked one of them"while you're down there, you want to give me a blow job?" The district court granted summary judgment for defendants. Reversing as to this claim and remanding, this court held that a genuine issue of material fact existed as to whether defendants' assault of plaintiff for the sole transgression of goading defendants by making an off-color jibe was utterly intolerable in a civilized community, noting that a jury could reasonably conclude that defendants assaulted plaintiff with the intent not just to hurt him physically but to reprimand him for his remark—that is, to humiliate him. Burgess v. Fischer, 735 F.3d 462, 480.

C.A.6

C.A.6, 2011. Subsec. (1) cit. in disc. and adopted in case quot. in disc., subsec. (2) cit. and quot. in disc. Arrestee's daughter brought a claim for intentional infliction of emotional distress (IIED) against city police officer, alleging that she suffered severe emotional distress as a result of witnessing a highly charged incident during which defendant placed her mother in a chokehold, dragged her to his police car, and sprayed her with pepper spray. At trial, the district court granted defendant's motion for judgment as a matter of law on plaintiff's IIED claim. Affirming as to that claim, this court held that the district court correctly found that defendant's conduct was not directed at plaintiff, as required by Restatement Second of Torts § 46(1), and that, while the situation fit within the parameters of § 46(2), which subjected an actor to liability where the conduct was directed at a third person, Kentucky had not yet adopted that provision, and plaintiff never asked the district court to anticipate whether the Supreme Court of Kentucky would adopt § 46(2) if it were squarely presented with a case meeting its requirements. Arnold v. Wilder, 657 F.3d 353, 368.

C.A.6, 2011. Quot. in case quot. in sup. Participant in state's pretrial release program, who agreed to undergo random drug testing in order to participate in the program, sued private corporation that conducted the testing, alleging, among other things, that it subjected him to an unreasonable search in violation of the Fourth Amendment, as well as intentional infliction of emotional distress (IIED), by requiring him to provide a urine sample while directly facing one of its employees. The district court granted summary judgment for defendant. Affirming, this court held that defendant's use of the direct observation method of obtaining a urine sample did not constitute IIED. The court, citing its earlier conclusion that the direct observation method used here was reasonable under the Fourth Amendment, reasoned that such conduct did not go beyond all possible bounds of decency and would not be regarded as atrocious or as intolerable in a civilized community. Norris v. Premier Integrity Solutions, Inc., 641 F.3d 695, 703.

C.A.6, 2010. Com. (d) quot. in case quot. in sup. Father/personal representative of inmate who died of cancer while he was being held at a county jail as a pretrial detainee sued county, nurses, and

corrections officers in connection with the medical care that was provided to inmate. The district court, among other things, granted defendants' motion to dismiss plaintiff's claim for intentional infliction of emotional distress (IIED). Affirming that portion of the decision, this court held that, although nurses' purported conduct in ignoring for several months medical request forms from inmate that claimed he was seriously ill could reasonably be construed as deliberately indifferent to inmate's serious medical needs, it did not establish that nurses acted intentionally or in a manner that was sufficiently extreme or outrageous to satisfy an IIED claim under Michigan law. Jones v. Muskegon County, 625 F.3d 935, 948.

C.A.6, 2005. Com. (d) cit. in case quot. in disc. Pretrial detainee sued municipality and others for failing to provide her with insulin following her arrest, after which she was hospitalized with diabetic ketoacidosis. The district court granted municipality's motion for summary judgment against her claim for intentional infliction of emotional distress. This court affirmed in part, holding that a claim for intentional infliction of emotional distress required actual emotional distress characterized by some egregious misconduct. Detainee failed to show that her arrest was sufficiently distressful, particularly since she had been arrested five times before and had experienced a similar diabetic attack at another jail. Garretson v. City of Madison Heights, 407 F.3d 789, 799.

C.A.6, 2005. Cit. in sup., cit. in case quot. in sup., subsec. (1) quot. in sup. Employee brought, inter alia, claim for intentional infliction of emotional distress against former corporate employer, alleging that she suffered serious mental injury from outrageous discriminatory conduct against her at work by co-workers. The district court entered judgment for plaintiff on the claim and awarded punitive damages. This court affirmed, holding, inter alia, that corporate supervisor' and officials' reckless disregard of and utter refusal to address plaintiff's repeated complaints and requests for help in regard to a hostile work environment that subjected her to daily instances of outrageous sexual harassment for over a year and a half rendered corporate employer directly, rather than vicariously, liable for intentional or reckless infliction of emotional distress. Pollard v. E.I. DuPont De Nemours, Inc., 412 F.3d 657, 664, 667.

C.A.6, 2005. Com. (d) quot. in case quot. in sup. Former police officer accused of stealing official funds brought numerous claims, including a claim for intentional infliction of emotional distress, against municipality and others after he was arrested at his new place of employment—an event, along with his subsequent arraignment, covered by the media—and the charges against him were ultimately dropped. The district court dismissed or granted summary judgment for defendants on all claims. This court affirmed in part, holding, inter alia, that routine police conduct stemming from officer's arrest and detention did not rise to the level of outrageousness required to establish a claim for intentional infliction of emotional distress under Ohio law. Voyticky v. Village of Timberlake, Ohio, 412 F.3d 669, 678.

C.A.6, 2005. Com. (h) quot. in disc. Elected union representative brought suit against union and its officials, alleging, in part, intentional infliction of emotional distress, as the result of acts of reprisal against plaintiff after opposing a specific union agreement. District court granted

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defendants' motion for summary judgment. Affirming, this court held, inter alia, that plaintiff failed to sufficiently show that the insults and indignities to which he was subjected created a genuine issue of material fact as to whether defendants' conduct was so "extreme and outrageous" as to go beyond the bounds of decency and be considered intolerable in a civilized society. Webster v. United Auto Workers, Local 51, 394 F.3d 436, 442-443, cert. denied 546 U.S. 935, 126 S.Ct. 421, 163 L.Ed.2d 321 (2005).

C.A.6, 2003. Adopted in case cit. in disc., coms. (d) and (h) quot. in sup. Former family services worker with the Kentucky Cabinet for Families and Children sued Cabinet and male former supervisor for sexual harassment, discrimination, hostile work environment, retaliation, and the tort of outrage. District court dismissed all claims against supervisor, and dismissed claims of discrimination, retaliation, and outrage against Cabinet. This court reversed in part, holding, inter alia, that plaintiff satisfied elements of her tort-of-outrage claim against supervisor. Supervisor's behavior was outrageous, in that it went far beyond sexual jokes, comments, and innuendoes. There was sufficient evidence to send issues of causation and severity to the jury, as plaintiff testified that she experienced depression and sought psychological counseling after leaving her job. Akers v. Alvey, 338 F.3d 491, 496.

C.A.6, 2002. Com. (d) quot. in case quot. in sup. Husband of deceased prison employee sued state department of corrections and prison officials, alleging violation of his wife's substantive due-process rights by failing to prevent her murder by prisoner, sexually hostile work environment, and intention infliction of emotional distress. The district court granted prison summary judgment. Affirming, this court held, inter alia, that defendants' conduct was not intentional and did not rise to level of extreme and outrageous sufficient to support claim for intentional infliction of emotional distress. Sperle v. Michigan Dept. of Corrections, 297 F.3d 483, 496.

C.A.6, 2000. Com. (d) quot. in case quot. in sup., com. (j) quot. in case quot. in conc. op. Motorist who was stopped, questioned, and eventually released sued police officers involved, among others, for violations of 42 U.S.C. § 1983 and for intentional infliction of emotional distress. The district court entered summary judgment for defendants. Affirming, this court held that the facts and circumstances known to defendants at the time gave them reasonable suspicion justifying the stop, and that plaintiff had failed to establish that the manner in which defendants conducted themselves was extreme or outrageous. Concurrence would not have reached the issue of defendants' behavior, noting that plaintiff could not show that he suffered severe emotional distress as a result of the incident. Watkins v. City of Southfield, 221 F.3d 883, 890, 893.

C.A.6, 1999. Quot. in case quot. in disc. After a company fired its marketing director, the director sued the company for intentional infliction of emotional distress, among other claims. District court granted defendant summary judgment. This court affirmed, holding, inter alia, that defendant's conduct was not outrageous. The company's president was courteous to plaintiff and never tried to humiliate him, and plaintiff's upset stomach, loss of sleep, and financial concerns did not constitute a severe emotional injury. Godfredson v. Hess & Clark, Inc., 173 F.3d 365, 376.

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C.A.6, 1999. Subsec. (1) quot. in case quot. in sup. Borrowers brought suit for, in part, intentional infliction of emotional distress against bank and bank officers, arising from defendants' disclosure of plaintiffs' loan file to opposing attorney in underlying state court action. Affirming the district court's grant of summary judgment for defendants, this court held, inter alia, that plaintiffs failed to set forth all of the elements of a prima facie case under Ohio law, since plaintiffs did not allege that defendants' actions were outrageous, or that plaintiffs' resulting emotional distress was severe. Hahn v. Star Bank, 190 F.3d 708, 718, cert. denied 529 U.S. 1020, 120 S.Ct. 1423, 146 L.Ed.2d 314 (2000).

C.A.6, 1998. Cit. in headnote, com. (d) quot. in case cit. in disc. Securities brokers sued securities dealer for defamation and intentional infliction of emotional distress, alleging that defendant filed false Uniform Termination Notice of Securities Industry Regulation, or U-5, forms with the National Association of Securities Dealers. The district court entered summary judgment for defendant. Affirming, this court held, in part, that plaintiffs' defamation claim failed because the statements contained in the U-5 forms were true, and that the publication of truthful and accurate statements could not be considered extreme or outrageous. Andrews v. Prudential Securities, Inc., 160 F.3d 304, 305, 309.

C.A.6, 1997. Subsec. (1) quot. in case quot. in disc. Plaintiff brought an action under 42 U.S.C. § 1983 against a state trooper for an illegal search that resulted in plaintiff's arrest on drug charges. The district court entered judgment on a jury verdict for plaintiff. Affirming, this court held, inter alia, that plaintiff did not have to prove that he suffered severe emotional distress to recover for nonphysical injury under § 1983. Chatman v. Slagle, 107 F.3d 380, 384.

C.A.6, 1997. Com. (d) quot. in case quot. in disc. Female former employee who was sexually harassed by three supervisors sued supervisors and employer for violations of Title VII and the Kentucky Civil Rights Act (CRA). Employee also asserted a claim for the tort of outrage. The district court granted defendants' motions for summary judgment. Affirming, this court held, in part, that supervisors could not be found individually liable under either Title VII or the CRA, that employer was not liable for sexual harassment where it took prompt action to remedy the situation, and that supervisors' conduct, while crude and wholly inappropriate, was not atrocious and utterly intolerable as a matter of law. Wathen v. General Elec. Co., 115 F.3d 400, 407.

C.A.6, 1996. Cit. in ftn., com. (d) quot. but dist. Sales representative who claimed to have been sexually harassed by a co-worker brought civil-rights action against former employer, seeking recovery for, among other things, intentional infliction of emotional distress. The district court granted defendant's motion for summary judgment. Affirming, this court held that co-worker's conduct, which included telephoning plaintiff, sending her cards and notes, and asking her to join him on weekend getaways, was not sufficiently outrageous or atrocious as to support a claim for damages. Hartleip v. McNeilab, Inc., 83 F.3d 767, 769, 777.

C.A.6, 1995. Com. (d) quot. in case quot. in sup. The daughter of a nursing-home patient sued her brother, her brother's attorney, and the nursing home for, among other claims, intentional infliction

of emotional distress, alleging that defendants interfered with her visits with her mother. District court granted defendants' motion to dismiss this claim. This court reversed and remanded, holding, inter alia, that plaintiff stated an emotional-distress cause of action, because it was within the realm of imagination that hiding a 98-year-old, physically infirm mother from her adult daughter, and causing the daughter to be arrested for attempting to visit her mother, could constitute extreme and outrageous conduct. Miller v. Currie, 50 F.3d 373, 378.

C.A.6, 1994. Cit. in sup. and in disc., cit. generally in sup., quot. in case quot. in sup., coms. (d) and (g) quot. in case quot. in sup. Employee who was also a union official sued his employer and several co-workers in state court, asserting intentional infliction of emotional distress and other claims allegedly arising from administrative charges of sexual harassment having been brought against employee. After the case was removed to federal court, this court affirmed the district court's dismissal of the action, holding, inter alia, that, the Labor Management Relations Act preempted the emotional-distress claim, as reference to the collective-bargaining agreement would be required to determine whether employer and co-workers acted outrageously or whether they merely had pursued their legal rights in a permissible way. DeCoe v. General Motors Corp., 32 F.3d 212, 218-220.

C.A.6, 1994. Cit. in headnote, adopted in case cit. in disc., cit. generally in sup., subsec. (1) quot. in sup., com. (d) cit. in headnote and quot. in sup., com. (h) quot. in sup. Male employee who was demoted and transferred for violating employer's sexual-harassment policy sued employer for reverse discrimination and intentional infliction of emotional distress. Affirming the district court's grant of summary judgment for defendant, this court held, inter alia, that plaintiff's claim of intentional infliction of emotional distress was properly dismissed, since defendant's conduct in investigating allegations of sexual harassment against plaintiff and demoting him was not so extreme and outrageous as to support plaintiff's claim under Kentucky law, even though the alleged false statements of defendant's officials regarding plaintiff's behavior during years past might have been tortious and defendant's investigators' crude statements, comparing plaintiff's acts to the perpetration of heinous crimes, were insulting and vulgar. Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 798, 805, 806.

C.A.6, 1993. Com. (d) quot. in case cit. in disc., subsec. (1) quot. in sup. An accountant sued his former client and business associate for intentional infliction of emotional distress after the client allegedly deliberately misinformed the plaintiff's other associates that the plaintiff had engaged in criminal behavior and had threatened the safety of the client and his family. This court, reversing the district court's dismissal of the claim and remanding, held that this was a sufficient allegation of extreme and outrageous conduct under Michigan law to state an emotional distress claim. Mroz v. Lee, 5 F.3d 1016, 1017, 1019.

C.A.6, 1991. Subsec. (1) quot. in case quot. in sup., com. (d) quot. in sup. and quot. in case quot. in sup. A nuclear engineer formerly employed by the Tennessee Valley Authority (TVA) sued the TVA and some of its officials and employees alleging, among other claims, violation of his First and Fifth Amendment rights and intentional infliction of emotional distress. The district court

dismissed the plaintiff's claims. Affirming, this court held, inter alia, that the district court correctly dismissed the claim for intentional infliction of emotional distress because the actions by the TVA and its officers and employees were not sufficiently outrageous to support such an action. The court stated that while assigning the nuclear engineer to menial tasks, unfairly reprimanding him, giving him low performance appraisals, and barring him from promotions, bonuses, and raises may have been tortious conduct, it did not go beyond the pale of decency. Jones v. Tennessee Valley Authority, 948 F.2d 258, 266.

C.A.6, 1991. Subsec. (1) quot. in case cit. in disc., com. (d) quot. in case quot. in sup., com. (g) quot. in sup. An employee terminated after 35 years of service to his employer sued his employer for intentional infliction of emotional distress, inter alia. The district court granted the employer summary judgment. Affirming, this court held that the plaintiff had alleged no action on the part of the defendant that was sufficiently outrageous to constitute intentional infliction of emotional distress, noting that the plaintiff was terminated after being unable to explain discrepancies between his submission of expense account receipts and actual restaurant records showing that the amount spent was less than his receipts showed. The court concluded that falsification of expense account records was a serious breach of responsibility on the part of the employee and constituted just cause for termination. Rush v. United Technologies, Otis Elevator Div., 930 F.2d 453, 456, 457.

C.A.6, 1989. Cit. in disc., com. (g) quot. in disc. A former railroad employee who lost health benefits because his employer wrongfully told the group health insurer that the employee had quit his job sued his former employer and the insurer for intentional infliction of emotional distress, inter alia. The district court dismissed one count and removed the case to state court for lack of jurisdiction. Reviewing the case by way of mandamus, this court remanded the case to the district court with directions to vacate the order remanding the case to the state court and to dismiss the claim without prejudice. The court held that the plaintiff's claim for intentional infliction of emotional distress fell within the exclusive jurisdiction of the National Railroad Adjustment Board because the claim required interpretation of the collective bargaining agreement. The court stated that, because an actor was not liable when he had done no more than insist on his legal rights in a permissible way, a determination of the defendant employer's legal rights required resort to the provisions of the collective bargaining agreement. Beard v. Carrollton R.R., 893 F.2d 117, 122.

C.A.6, 1989. Com. (j) quot. in case cit. in disc. A terminated claims representative sued her employer insurance agency for age discrimination and tortious infliction of emotional distress, inter alia, after she was terminated following a series of verbal and written negative admonitions concerning her work performance. The only evidence of age discrimination was a solitary remark by her supervisor that he “needed younger blood.” This court affirmed the district court's award of summary judgment to the employer on the ground that the solitary remark was insufficient to create a triable issue of age discrimination. Additionally, the court held that the crude and sexually suggestive remarks allegedly made by her supervisor to her did not give rise to an actionable claim of tortious infliction of emotional distress. The court noted that she had never consulted a physician for assistance and never missed work during the time when these alleged outrageous episodes had occurred. Gagne v. Northwestern Nat. Ins. Co., 881 F.2d 309, 318.

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C.A.6, 1988. Cit. and quot. in disc., quot. in case quot. in disc., coms. (d), (g), (j), and (k) quot. in disc. The plaintiff was discharged by his employer when he refused to apologize to an upper-level manager after accusing him of making obscene and threatening telephone calls to the plaintiff's wife. Months later, when the plaintiff attempted to regain his job, the employer, during a series of meetings, imposed several conditions, including the requirements that he refuse to talk about the incident and that he work with the alleged obscene phone caller. When, at the end of the meetings, the plaintiff was told that the manager had confessed to making the phone calls, the plaintiff's demand for an out-of-court settlement for damages was refused and he sued the employer for wrongful discharge and intentional infliction of emotional distress. The district court entered judgment on the jury's verdict for the plaintiff. This court reversed the wrongful discharge award and affirmed the emotional distress award, holding that the company's conditioning the plaintiff's reemployment in such a manner was outrageous behavior that caused the plaintiff to suffer severe emotional distress. Pratt v. Brown Mach. Co., 855 F.2d 1225, 1238-1242.

C.A.6, 1987. Quot. in case quot. in disc., com. (d) quot. in disc. A real estate developer sued a city and its officials for malicious prosecution, infliction of emotional distress, and violation of due process. The trial court directed a verdict for the defendants. Affirming, this court held that the plaintiff had failed to establish a case of intentional infliction of emotional distress. The court reasoned that the efforts of the city officials to require the plaintiff to obtain permits before construction may have been misguided, but they did not remotely approach extreme and outrageous conduct. Coogan v. City of Wixom, 820 F.2d 170, 173, 174.

C.A.6, 1986. Cit. in disc. Two paraplegic prison inmates were treated abusively by a guard and confined under unhygienic conditions. The inmates sued the guard and various other defendants, alleging that the conditions of confinement were unconstitutional and that the guard's conduct had violated their constitutional rights. The trial court held that the conditions of confinement were unconstitutional and that the constitutional rights of one of the inmates had been violated; however, the court awarded that plaintiff only nominal damages, reasoning that injunctive relief was a more appropriate remedy than damages. This court reversed and remanded, holding that on remand the inmate might be able to recover damages based on the defendant guard's verbal abuse. The court reasoned that, in the absence of physical injury, the inmate would be required to prove that the guard's conduct was both extreme and outrageous and caused severe emotional distress in order to recover. Parrish v. Johnson, 800 F.2d 600, 611.

C.A.6, 1986. Quot. in disc., coms. (d) and (j) quot. in case quot. in sup., com. (g) quot. in sup. After an employer discharged an employee, the employee sued her former employer for race discrimination, breach of an implied employment agreement, retaliatory discharge, and intentional infliction of emotional distress. The trial court entered judgment for the defendant on the race discrimination claim but for the plaintiff on all of the other claims. This court reversed in part and remanded, holding that the evidence did not show that the plaintiff had suffered actual emotional distress of sufficient magnitude to allow her to recover from the defendant on her claim for intentional infliction of emotional distress. The court reasoned that the plaintiff did not display any

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emotional reactions that were atypical of those of any employee faced with an unpleasant work situation and that, to a certain extent, her distress was self-inflicted. Polk v. Yellow Freight System, Inc., 801 F.2d 190, 195, 196, appeal after remand 876 F.2d 527 (1989).

C.A.6, 1986. Quot. in part in sup. Three employees were discharged by their employer without a showing of good cause. One of the former employees sued the employer for intentional infliction of emotional distress, alleging that her employment contract required the employer to show good cause before the employee could be terminated. The trial court granted the defendant's motion for summary judgment. Affirming, this court held that, because the plaintiff's employment contract was terminable at will either with or without cause, the employer was not liable for intentional infliction of emotional distress when it had simply exercised its legal right to discharge the employee without cause. The court reasoned that the discharge of the employee without cause, regardless of the reasons for the termination, did not constitute extreme and outrageous wrongful conduct. Reid v. Sears, Roebuck and Co., 790 F.2d 453, 462.

C.A.6, 1980. Quot. in part and fol. and com. (d) cit. in sup. Newspaper reporters brought this action against undercover police officer, alleging violation of their civil rights, assault, battery, false imprisonment, and intentional infliction of emotional distress. Defendant officer counterclaimed, alleging that publication of his photograph by the reporters amounted to invasion of privacy and intentional infliction of emotional distress. The district court entered judgment for the defendant on his counterclaim. Plaintiffs appealed from the entry of this judgment, asserting that, in regard to the claim for intentional infliction of emotional distress, the evidence at trial was insufficient as a matter of law to permit submission to the jury. This court accepted plaintiffs' assertion and reversed that portion of the district court's holding. In doing so the court stated that defendant's evidence of his photograph being published, in conjunction with news articles expressing strong political views, failed to satisfy the requirement of extreme and outrageous conduct described in the Restatement (Second) of Torts as being one of the four distinct elements of proof necessary to sustain a claim. In all other respects the judgment of the district court was affirmed. Ross v. Burns, 612 F.2d 271, 273.

C.A.6, Bkrtcy.App.

C.A.6, Bkrtcy.App.2000. Subsec. (1) quot. in case quot. in disc. Ex-wife who had successfully sued now-bankrupt ex-husband for intentional infliction of emotional distress sought to have husband's judgment debt to her declared nondischargeable as one arising from a willful and malicious injury. The district court entered summary judgment for wife. Affirming, this court held, in part, that the lower court correctly gave collateral-estoppel effect to the finding by the jury in the earlier tort action that husband either intended to cause, or was substantially certain of bringing about, the consequences of his actions. In re Moffitt, 252 B.R. 916, 922.

C.A.7,

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C.A.7, 2022. Subsec. (1) quot. in diss. op. Consumer brought a putative class action against debt-collection agency, alleging that defendant violated the Fair Debt Collection Practices Act when it sent plaintiff a collection letter informing her that she was pre-approved for a discount payment plan for the payment of her debts, for which the statute of limitations had passed. The district court entered judgment on a jury verdict for plaintiff. This court vacated, remanded, and denied plaintiff's petition for en banc rehearing. The dissent argued that the majority erred in finding that plaintiff's psychological distress induced by defendant's attempt to collect expired debts did not constitute a concrete injury-in-fact granting her standing under the Act, because plaintiff's intangible harms had a close relationship to the common-law tort of intentional infliction of emotional distress as set forth by Restatement Second of Torts § 46(1). Pierre v. Midland Credit Management, Inc., 36 F.4th 728, 732-733.

C.A.7, 2022. Subsec. (1) quot. in diss. op. Consumer brought a putative class action against debt-collection agency, alleging that defendant violated the Fair Debt Collection Practices Act when it sent plaintiff a collection letter informing her that she was pre-approved for a discount payment plan for the payment of her debts, for which the statute of limitations had passed. The district court granted plaintiff's motion for summary judgment. This court vacated and remanded, holding that plaintiff's confusion and emotional distress, which arose from her concern about being sued for what appeared to be a restarted debt, did not constitute a concrete injury giving her standing to bring suit under Article III. Citing Restatement Second of Torts § 46(1), the dissent argued that plaintiff's intangible injuries closely followed those found in common-law torts contemplated by the Act, because, under the common law, plaintiff could recover for defendant's extreme and outrageous conduct that intentionally caused her severe emotional distress. Pierre v. Midland Credit Management, Inc., 29 F.4th 934, 947.

C.A.7, 2017. Com. (j) quot. in case quot. in sup. Former police officer for village sued village and three members of its police department for, among other things, intentional infliction of emotional distress (IIED) in connection with allegations that defendants fired him in retaliation for his exercise of protected speech at a community board meeting. The district court granted summary judgment for defendants. This court affirmed the dismissal of plaintiff's IIED claim, holding that plaintiff failed to offer any evidence that defendants' conduct was extreme and outrageous or caused him severe emotional distress. The court noted that, under Restatement Second of Torts § 46, the law intervened only where the distress inflicted was so severe that no reasonable person could be expected to endure it, and plaintiff admitted in his own brief that the "severity" of his emotional distress was "probably of the garden variety," which was insufficient to meet that standard. McGreal v. Village of Orland Park, 850 F.3d 308, 315.

C.A.7

C.A.7, 2016. Com. (d) quot. in case cit. and quot. in sup. Arrestees brought a claim for intentional infliction of emotional distress (IIED), inter alia, against law-enforcement officers, among others, as a result of defendants' interrogation tactics. The district court granted summary judgment in

favor of defendants. This court affirmed, holding that plaintiffs failed to show behavior that was sufficiently outrageous, under the standard set forth in Restatement Second of Torts § 46, Comment *d*, to support an IIED claim. The court rejected plaintiffs' argument that defendants' conduct during the interrogation was outrageous due to defendants' position of power and due to the emotional susceptibility of one of the plaintiffs due to a learning disability, concluding that defendants were entitled to try to solve crimes by investigating and interrogating suspects, and, here, acted appropriately in questioning plaintiffs using nothing more than ordinary interrogation tactics. Cairel v. Alderden, 821 F.3d 823, 836.

C.A.7, 2009. Com. (d) cit. in disc. Black inmate of state prison filed a federal civil-rights action against state department of corrections and prison personnel in connection with an incident in which a white guard hung a noose from the ceiling for plaintiff and others to see. The district court dismissed the suit. Affirming in part, this court held that the district court properly dismissed plaintiff's claim that the incident constituted cruel and unusual punishment in violation of his federal constitutional rights. The court noted that, while plaintiff stated that he was afraid that the guard would "snap" and "go postal," the incident did not justify such a fear, because it was not a credible threat to kill or to inflict any other physical injury; the test for what constituted "cruel and unusual punishment" was an objective one—not the actual fear of the victim, but what a "reasonable" victim would fear. Dobbey v. Illinois Dept. of Corrections, 574 F.3d 443, 445.

C.A.7, 2008. Com. (d) quot. in case quot. in sup. Employees brought state-law claims for intentional infliction of emotional distress (IIED) against employer, as part of their suit for discrimination and retaliation in violation of the Family and Medical Leave Act (FMLA). The trial court, inter alia, granted summary judgment for defendant on plaintiffs' IIED claims. Affirming as to that portion of the judgment, this court held that the IIED claims failed for lack of merit, since none of the conduct complained of by plaintiffs, which included being demoted, questioned, or criticized upon return from FMLA leave, passed over for raises or given reduced raises, denied tuition reimbursements, or given unexcused absences met the standard of extreme and outrageous behavior required to state an IIED claim under Illinois law. Breneisen v. Motorola, Inc., 512 F.3d 972, 983.

C.A.7, 2006. Cit. in case cit. in disc., com. (d) quot. in case quot. in disc. (general cite). Former assistant professor at state university sued university's board of trustees for, in part, intentional infliction of emotional distress under the Indiana Tort Claims Act, after university failed to reappoint him for another academic year. The district court granted summary judgment for defendant. Affirming, this court held, inter alia, that plaintiff's claim for intentional infliction of emotional distress failed, since defendant's decision not to reappoint plaintiff was not extreme or outrageous in light of the accusations against him of inappropriate behavior with his students and of unsatisfactory teaching, and plaintiff presented no evidence that he suffered severe emotional distress as a result of defendant's decision. Keri v. Board of Trustees of Purdue University, 458 F.3d 620, 650, cert. denied 549 U.S. 1210, 127 S.Ct. 1331, 167 L.Ed.2d 83 (2007).

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C.A.7, 2003. Com. (d) quot. in case quot. in sup. After a man was arrested and unsuccessfully prosecuted for home invasion and rape, he brought 42 U.S.C. § 1983 suit against police detectives who caused his arrests. He and his wife also brought state-law claims for false arrest, defamation, and intentional infliction of emotional distress. District court granted defendants summary judgment. This court affirmed, holding, inter alia, that wife's emotional-distress claim against one of the detectives failed, because even if officer called wife a "bitch" in connection with searching her home in an alleged outrageous fashion, his use of profanity was not extreme and outrageous conduct. Although she alleged rough treatment by police, she did not identify this officer as one of those who mistreated her. Beauchamp v. City of Noblesville, Ind., 320 F.3d 733, 747.

C.A.7, 2003. Com. (d) quot. in case quot. in disc. After bank closed the savings account of a customer who had a series of epileptic seizures in the bank branch lobby, customer sued bank for intentional infliction of emotional distress. The district court granted bank's motion for judgment as a matter of law. This court affirmed, holding that plaintiff's emotional-distress claim failed, because there was no evidence that bank intended to cause plaintiff severe emotional distress or knew that such distress was likely to result from closing the account. The court did not need to resolve whether bank's conduct was extreme and outrageous, but it noted that bank had control over plaintiff's entire savings and that it acted in a callous way to handle the serious medical condition of a long-time customer. Sanglap v. LaSalle Bank, FSB, 345 F.3d 515, 518.

C.A.7, 2001. Cit. in disc. Chapter 7 debtor sued creditor for alleged violation of automatic stay, claiming that creditor sought reaffirmation of its debt too aggressively. The bankruptcy court granted creditor summary judgment. The district court affirmed. Affirming, this court held that debtor could not recover damages for purely emotional injuries under the damages section of stay provision. Aiello v. Providian Financial Corp., 239 F.3d 876, 880.

C.A.7, 2001. Com. (d) quot. in case quot. in sup. and cit. generally in disc. Homeowner sued village mayor and fire chief for violations of 42 U.S.C. § 1983 and intentional infliction of emotional distress, alleging that defendant caused fire that destroyed his house and did not use best efforts to fight it. District court granted defendant judgment as a matter of law on emotional-distress claim and granted defendant's motion for judgment n.o.v. on § 1983 claim. This court reversed and remanded as to emotional-distress claim, holding, inter alia, that whether defendant was responsible for setting fire, such that he could be said to have engaged in extreme and outrageous conduct, was jury question where the house burned under questionable circumstances and property's condition was a source of longstanding animosity in village. Honaker v. Smith, 256 F.3d 477, 490, 496.

C.A.7, 2000. Quot. in case quot. in disc., com. (d) cit. in case cit. in disc. Employee sued employer for intentional infliction of emotional distress, among other claims, asserting that his co-workers and supervisors tormented him because he was mentally ill. District court granted employer summary judgment. This court affirmed, holding that plaintiff's emotional-distress claim failed, because he could not show that the employer intended to harm him, a requirement under state law. Plaintiff did not assert that the persons who tormented him were acting pursuant to a decision or

policy made through employer's regular decision making channels by persons authorized to do so. The employer's refusal to allow him to work overtime and the denial of a position change did not constitute outrageous conduct. However, the court rendered no opinion as to whether the other acts committed by plaintiff's co-workers and supervisors constituted extreme and outrageous conduct. Holbrook v. Lobdell-Emery Mfg. Co., 219 F.3d 598, 600-602, certiorari denied 531 U.S. 1013, 121 S.Ct. 570, 148 L.Ed.2d 489 (2000).

C.A.7, 1998. Com. (j) quot. in case quot. in disc. Individual sued host of nationally syndicated television talk show for tortious interference with contract, tortious interference with prospective economic advantage, defamation, and intentional infliction of emotional distress, alleging that defendant thwarted his plans to sell the tabloid press a story detailing their illicit drug use. The district court dismissed the complaint. Affirming in part, reversing in part, and remanding, this court held that plaintiff's allegations were sufficient to state claims for tortious interference and defamation; however, defendant's conduct, which was not extreme and outrageous, did not give rise to a cause of action for intentional infliction of emotional distress. Cook v. Winfrey, 141 F.3d 322, 331.

C.A.7, 1998. Quot. in case quot. in disc. Employee sued employer and union for breach of the duty of fair representation under the Labor Management Relations Act (LMRA) and for intentional infliction of emotional distress. The district court entered summary judgment for defendants. Affirming, this court held that union did not act arbitrarily, discriminatorily, or in bad faith in pursuing and processing plaintiff's grievances against employer, and that the LMRA displaced state law with regard to the tort of intentional infliction of emotional distress, because resolution of the claim, specifically whether defendants' conduct was extreme and outrageous, required interpretation of the parties' collective-bargaining agreement. Filippo v. Northern Indiana Public Service Corp., 141 F.3d 744, 750.

C.A.7, 1997. Adopted in case quot. in disc. Former employee who had injured his back at work sued employer for, in part, intentional infliction of emotional distress. The district court granted summary judgment for plaintiff. Affirming in part, this court held, inter alia, that plaintiff's supervisor's act of yelling at plaintiff out of the presence of others about his work restrictions and defendant's refusal to reassign plaintiff to the quality control department to accommodate his disability were not the sort of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress under Indiana law. McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159, 1167.

C.A.7, 1997. Com. (d) quot. in case quot. in disc. Former employee who was diagnosed with bipolar disorder sued former employer for violations of the Americans with Disabilities Act (ADA), alleging that he was terminated because of his illness. Employee also asserted a claim for intentional infliction of emotional distress in connection with the manner in which he was dismissed. The district court entered judgment on a jury verdict for employer on the ADA claim, and for employee on the claim for intentional infliction of emotional distress. Affirming in part, reversing in part, and remanding, this court held, in part, that employer's actions in dismissing

employee, which included calling him at home during his vacation and lying about the reasons for the dismissal, were not so outrageous as to support recovery for intentional infliction of emotional distress. Van Stan v. Fancy Colours & Co., 125 F.3d 563, 567.

C.A.7, 1995. Com. (j) cit. in headnote and cit. and quot. in sup., com. (p) quot. in sup. Associate producer of play sued playwright-employer for sex discrimination, breach of contract, and tortious infliction of emotional distress, after she was discharged. The district court entered judgment on a jury verdict for plaintiff on the emotional-distress claim. Affirming in part, this court held, inter alia, that defendant's conduct in firing plaintiff between 12 and 40 times and promptly rehiring her (all but the last time), following her around at work, stalking her during nonworking hours, banging on her apartment door late at night, calling her 10 to 30 times a night, and leaving messages on her answering machine that he hated her and wished her dead was extreme and outrageous, and the emotional distress that it inflicted was sufficiently severe to support the jury's verdict. Bristow v. Drake Street Inc., 41 F.3d 345, 346, 349, 350.

C.A.7, 1993. Coms. (d) and (j) quot. in cases cit. in disc. A black former employee sued her employer, alleging race discrimination in her transfer from a managerial to a nonmanagerial position. Affirming a grant of summary judgment for the employer, the court of appeals held, inter alia, that, under Illinois law, allegations that the employee was not allowed to supervise white subordinates, was reprimanded for no reason, was refused participation in a management incentive fund, was forced out of her management position, was falsely accused of poor sales and threatened with discipline, and was excluded from office activities did not establish the level of extreme and outrageous conduct needed to support a claim for intentional infliction of emotional distress. Harriston v. Chicago Tribune Co., 992 F.2d 697, 703.

C.A.7, 1993. Com. (d) quot. in part in disc. A plaintiff sued her brother for intentional infliction of emotional distress allegedly resulting from his preventing reconciliation with her mother and breaching a fiduciary duty to convince the mother to give money to plaintiff. Affirming the district court's grant of summary judgment for the brother, this court held, inter alia, that, under Illinois law, the brother's denial of entry to his home so that plaintiff could visit her mother and his preventing the mother from taking a handful of plaintiff's telephone calls over the course of a year were not extreme and outrageous conduct that would support the emotional distress claim. The court noted that plaintiff showed up unannounced at the brother's home in the company of one of the brother's ex-wives and that plaintiff had telephoned while her mother was napping. Lopacich v. Falk, 5 F.3d 210, 212.

C.A.7, 1989. Coms. (d) and (g) quot. in cases quot. in disc., com. (j) quot. in case quot. in ftn. An employee sued her employer in state court for intentional infliction of emotional distress arising from actions allegedly in retaliation for a back injury that restricted the employee's work hours and prevented her from performing voluntary stress-laden work. Upon removal, the district court dismissed the claim for failure to exhaust grievance and arbitration remedies under the collective bargaining agreement as required under federal law. This court affirmed, holding that since the emotional distress claim consisted of allegedly extreme and outrageous acts directly related to the

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terms and conditions of her employment, resolution of her claim would depend on an analysis of the terms of the collective bargaining agreement. Since the employee did not exhaust her grievance procedures, the claim was preempted by federal law and was properly dismissed. Douglas v. American Information Technologies Corp., 877 F.2d 565, 570-571.

C.A.7, 1982. Com. (d) cit. in conc. and diss. op. The plaintiff brought a diversity action against officers of the insurance company with whom her husband had been employed, seeking damages for intentional infliction of emotional distress. The plaintiff alleged that the termination of her husband's employment was a retaliatory action taken against the plaintiff on account of the plaintiff's exercise of loan privileges. The lower court granted the defendants' motion to dismiss the claim upon the ground that the husband was merely an employee at will of the defendants and the defendants had a legal right to terminate his employment without reasonable cause. The plaintiff appealed and this court reversed and remanded. It was determined that the lower court erred in finding that a cause of action for emotional distress could not be sustained where the defendants' conduct was the exercise of a legal right. The majority held that because the defendants had no right to punish the plaintiff, the alleged fact that they did so by firing the plaintiff's husband made the defendants' conduct extreme or excessive. The concurring and dissenting judge disagreed, arguing that the defendants' action was not so outrageous as to go beyond all bounds of decency to sustain a cause of action for intentional infliction of emotional distress, nor were the defendants taking advantage of a known vulnerability of the plaintiff. Geist v. Martin, 675 F.2d 859, 864.

C.A.7, 1972. Subsec. (1) and com. (e) and (f) cit. in sup. The plaintiff was the beneficiary of her husband's accidental death policy with the defendant. She alleged that her husband died accidentally and that defendant had no valid defense to her claim; yet defendant, knowing of the financial distress, repeatedly refused payment and attempted to thereby coerce her into compromising her claim. Plaintiff sought, in Count I, payment on the policy, and in Counts II and III damages for intentional infliction of severe emotional distress. The lower court dismissed Counts II and III; Count I was dismissed without prejudice and later settled in a state court. The Circuit Court reversed as to Counts II and III, holding that the Illinois Supreme Court had recognized the “new tort” of intentional infliction of emotional distress, and if plaintiff's allegations proved true she could be awarded compensatory, but not punitive damages. Eckenrode v. Life of America Insurance Company, 470 F.2d 1, 4.

C.A.8,

C.A.8, 2021. Com. (d) quot. in case quot. in sup. Former employee of a state agency filed a claim for intentional infliction of emotional distress against former employer, state, and certain former supervisors and coworkers, alleging that defendants suspended and later terminated her on the pretextual ground that she had engaged in insurance fraud, in retaliation for her testimony before a state oversight committee that had launched an unrelated investigation of the agency. The district court granted summary judgment for defendants. Affirming, this court held that defendants' conduct was not sufficiently outrageous to satisfy the outrageousness prong of her claim for

intentional infliction of emotional distress under Restatement Second of Torts § 46. The court reasoned, in part, that while one supervisor's testimony about her might have not been precisely accurate, it was hardly "beyond all possible bounds of decency." Ackerman v. State of Iowa, 19 F.4th 1045, 1061.

C.A.8

C.A.8, 2009. Adopted in case quot. in sup., com. (d) quot. in case quot. in sup., com. (j) quot. in sup. Male former employee brought a claim for intentional infliction of emotional distress (IIED) against former employer, alleging that two of defendant's managers falsely accused him of making homosexual advances to a co-worker, and that, as a result, he began having panic attacks and was diagnosed with posttraumatic stress disorder. The trial court granted summary judgment for defendant. Affirming, this court held that, under Missouri law, managers' alleged conduct was not sufficiently outrageous to state a claim for IIED. The court further held that plaintiff's reaction was not one consistent with a reasonable person under the circumstances; the decline of plaintiff's mental health was unfortunate, but there was no evidence that either manager, or anyone else, knew or suspected how strongly he would react to the allegation or realized that he was in a fragile or vulnerable state. Bailey v. Bayer CropScience L.P., 563 F.3d 302, 310, 311.

C.A.8, 2006. Com. (d) quot. in case quot. in sup. Former employee sued former employer and supervisor for, in part, intentional infliction of emotional distress, alleging that she suffered a miscarriage and depressive symptoms due to the distressing manner in which supervisor, knowing that she was pregnant, informed her that her position was being eliminated and that she would be forced to relocate. The district court granted summary judgment for defendants. Affirming, this court held, inter alia, that the facts of this case did not support the tort, since termination from a job, while potentially upsetting, did not in itself constitute extreme or outrageous conduct, and employee did not additionally allege a severe medical problem that made her vulnerable to emotional distress or that supervisor was hostile to her when he informed her of the news. Reynolds v. Ethicon Endo-Surgery, Inc., 454 F.3d 868, 873.

C.A.8, 2001. Coms. (d)-(f) cit. and quot. in conc. and diss. op. Student and her parents sued band teacher, among others, for, in part, intentional infliction of emotional distress. Affirming the district court's dismissal of the claim, this court held that defendant's actions in calling student “retarded,” “stupid,” and “dumb” in front of her classmates and throwing a notebook at her face, while unworthy of one entrusted with the responsibility of educating students, did not rise to the level of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Concurring and dissenting opinion argued that, because defendant intentionally publicly humiliated student, knowing that she was susceptible given her youth and the fact that she was undergoing mental-health counseling, his conduct met the extreme-and-outrageous element of plaintiffs' claim. Costello v. Mitchell Public School Dist., 266 F.3d 916, 927.

C.A.8, 1998. Com. (b) cit. in sup. Meatcutter who claimed that employer allowed its supervisors to harass him and transfer him to a store farther away from his home in retaliation for his criticism of employer's failure to enforce proper sanitation procedures in the meat departments of employer's stores sued employer in state court for, in part, slander and intentional and negligent infliction of emotional distress. Employer removed the case to federal district court, which granted employer's motion for summary judgment. Vacating and remanding, this court held that none of plaintiff's claims was preempted by the Labor Management Relations Act and that the district court thus had no removal jurisdiction over the case. The court said that the fact that the collective-bargaining agreement prohibited transfer of employees without justification or for discriminatory reasons had no legal significance in the context of this case, since plaintiff's claims were not dependent on interpretation of the collective-bargaining agreement, but on consideration of employer's conduct and motives and the effect of its behavior on plaintiff. Meyer v. Schnucks Markets, Inc., 163 F.3d 1048, 1052.

C.A.8, 1997. Com. (d) cit. in case quot. in disc. Employees at a residential program for developmentally disabled individuals sued the for-profit organization that operated the program, alleging sexual harassment due to the organization's failure to respond appropriately to the conduct of a mentally incapacitated resident toward program employees. District court granted the organization summary judgment. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that plaintiffs presented insufficient evidence to prove a claim of either intentional or negligent infliction of emotional distress under Minnesota law. The organization's response to plaintiffs' concerns was not extreme and outrageous conduct. Crist v. Focus Homes, Inc., 122 F.3d 1107, 1112.

C.A.8, 1997. Cit. in disc., com. (f) quot. in disc. Employees sued their former employer for, among other claims, the tort of outrage, alleging that the employer tolerated various forms of sexual harassment and other clearly inappropriate behavior by its supervisors and employees. The district court granted judgment as a matter of law to the employer on two of the plaintiffs' outrage claims. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that Arkansas courts would continue to adhere to the traditional elements of outrage, and that notice of peculiar susceptibility to emotional distress would merely be one factor given special emphasis when an aggrieved employee asserted an outrage claim. The court was confident that the Arkansas Supreme Court would hold that the right to be free from conduct of this sort extended to every person and not just to those known to possess temperaments that were peculiarly fragile. Manning v. Metropolitan Life Ins. Co., Inc., 127 F.3d 686, 690, 691.

C.A.8, 1991. Com. (j) quot. in case quot. in sup. A landlord sued the city and several police officers for intentional infliction of emotional distress, inter alia, alleging that he suffered illness and mental anguish as a result of police action in a civil dispute over abandoned property that led to the plaintiff's wrongful arrest. The district court granted summary judgment for the defendants. Affirming in part, this court held that the plaintiff's claim failed to meet the requirement that the emotional distress be so severe that no reasonable person could be expected to endure it. Peterson v. City of Plymouth, Minn., 945 F.2d 1416, 1421.

C.A.8, 1987. Com. (d) cit. in sup. A blind black attorney sued a legal services organization for employment discrimination and intentional infliction of emotional distress after the attorney was discharged from his position for violating his employment contract. The district court found for the organization, stating that since there was no basis for other discrimination claims, there was no support for the claim of intentional infliction of emotional distress. This court affirmed in part, concluding that the conduct complained of was not sufficiently outrageous to state a claim for intentional infliction of emotional distress, but it reversed and remanded on plaintiff's claim of retaliatory discharge. Johnson v. Legal Services of Arkansas, Inc., 813 F.2d 893, 901.

C.A.8, 1987. Com. (d) cit. in sup. The scores of a teacher who did very well on a state-mandated test were mistakenly sent to someone else. The teacher sued the testing company for intentional infliction of emotional distress and invasion of privacy. The trial court granted the defendant's motion for summary judgment. Affirming, this court held that the defendant's conduct, albeit negligent, did not begin to meet the standard of extreme and outrageous conduct and that the simple disclosure of private information to one other person did not involve publicity of a highly objectionable kind. Wood v. National Computer Systems, Inc., 814 F.2d 544, 545.

C.A.8, 1986. Com. (d) quot. in part in case cit. in sup. After arson destroyed a home, the owner's insurer requested her to submit personal and business financial records as part of its investigation. She refused to submit her business records, and the insurer sought a declaratory judgment that she had breached the insurance policy. She counterclaimed for, among other things, emotional distress. The lower court ruled in favor of the insurer on all issues, and this court affirmed. The owner alleged that her distress was solely attributable to the insurer's failure to pay her claim. This statement, however, failed to raise a material issue of fact sufficient to preclude the award of summary judgment, since Missouri law required conduct so outrageous in character and extreme in degree as to exceed all possible bounds of decency. Safeco Ins. Co. of America v. Costello, 799 F.2d 412, 414.

C.A.8, 1982. Cit. in disc., com. (j) cit. in disc. and quot. in part in disc. A former air traffic controller sued the air controllers union to recover for damages allegedly caused by the outrageous conduct of the union's agents. The plaintiff alleged that he had been shunned by several of the controllers after a disagreement he had with the local over its approach to labor/management relations, and that another union member tried to cause a systems error to “get at” the plaintiff. The plaintiff also claimed that the union tortiously attempted to interfere with his employment relationship with the Federal Aviation Administration, and caused him to suffer great mental anguish. The lower court entered judgment for the plaintiff. This court vacated the lower court and remanded. The court admitted that Missouri recognized the tort of emotional distress, having the following elements: extreme and outrageous conduct, intent or recklessness, and severe emotional distress. It noted that while the facts underlying the outrageous conduct and intent were collaterally estopped due to their litigation and adjudication in an earlier administrative proceeding, the union was not estopped from denying liability for the resulting emotional distress, as this element was not an issue in the administrative proceeding. The court stated that it was a jury issue to determine whether severe

emotional distress existed; although proof of emotional distress could be inferred from extreme and outrageous conduct, this inference was simply evidence and did not establish the necessary proof of emotional distress as a matter of law. The lower court's failure to decide the liability issue, because it felt that it was fully adjudicated in the administrative proceeding, was error. The court asserted that the element of emotional distress must be proved for the purposes of liability as well as damages. The court remanded on the issue of all damages, asserting that the total damage award seemed overgenerous, and suggested that the award of damages be itemized. Anthan v. Professional Air Traffic Controllers, 672 F.2d 706, 709-711.

C.A.8, 1982. Cit. generally in ftn. A farmer brought an action for intentional infliction of emotional distress against the federal government under the Federal Tort Claims Act alleging that the local Agricultural Stabilization and Conservation Service Committee (ASCS) had denied him the right to participate in the United States Department of Agriculture's feed grain program and had demanded repayment for the funds he had received from the program for certain prior years which it now claimed the plaintiff was not entitled to. The lower court granted partial summary judgment for the federal government, finding that the plaintiff was collaterally estopped from asserting that the feed program regulations were violated because, in an earlier case in the Court of Claims, it had already been determined that ASCS officials had not violated the regulations. The lower court held, however, that ASCS actions could constitute intentional emotional distress apart from being a violation of the feed program regulations, and that these acts were not protected by the discretionary function exception to the Federal Tort Claims Act. This court vacated the lower court decision and remanded because it could not determine whether the last act of the continuing tortious activity complained of occurred within the statute of limitations for the Federal Tort Claims Act. The court also found that the discretionary function exception to the Federal Tort Claims Act did not bar the plaintiff's suit as the decision to drop him from the program was made at an operational level not a policy or planning level. Gross v. United States, 676 F.2d 295, 304, appeal after remand 723 F.2d 609 (8th Cir.1983).

C.A.8, 1981. Cit. in ftn. and subsec. (2) cit. and quot. in ftn. Action was brought against a religious foundation and its principals seeking to recover for alienation of the affections of the plaintiffs' son and for intentional infliction of emotional distress. The lower court granted that defendants' motion to dismiss and the plaintiffs appealed. This court stated that generally a parent has no right to recover for the alienation of a child's affection. The court also stated that the plaintiffs, in order to state a cause of action for intentional infliction of emotional distress, must show extreme and outrageous conduct, willfully or wantonly performed, which caused severe emotional distress. However, the court held that the plaintiffs' claims, even if they would otherwise be recognized, were barred by the applicable statute of limitations. The judgment of the lower court granting the defendants' motion to dismiss was affirmed. Orlando v. Alamo, 646 F.2d 1288, 1291.

C.A.8, 1976. Subsec. (1) quot. and fol. and coms. (d) and (h) quot. and fol. and com. (i) cit. in sup. A customer brought this action against a moving company, alleging that the company had inflicted emotional distress by repeatedly misrepresenting, for a period of over 100 days, the time when the customer's household goods would be delivered. The district court had entered summary

judgment dismissing the complaint. On appeal, the defendant contended, inter alia, that as a matter of law, his conduct was not sufficiently outrageous to impose liability. In rejecting this argument and remanding for further proceedings, this court found that, in the absence of any explanation by the defendant, a reasonable jury could infer that the repeated misrepresentations were knowing falsehoods. Additionally, the court observed that a jury could find the likelihood that the plaintiff would suffer emotional distress was substantially certain, and, therefore, the defendant intended this result. It might also be inferred that the defendant realized at an early time that the plaintiff was experiencing distress from being deprived of her belongings, and that the repeated false assurances were made in reckless disregard of the plaintiff's emotional state. Hanke v. Global Van Lines, Inc., 533 F.2d 396, 399, 400.

C.A.9

C.A.9, 2016. Com. (j) cit. in case quot. in sup.; com. (f) quot. in sup. Student who had behavioral disabilities, and her parents, filed, inter alia, a claim for intentional infliction of emotional distress against school district and its employees, alleging that defendants failed to research and provide appropriate interventions and accommodations for student, attempted to restrain student, escorted student to an intervention room, and enlisted the assistance of a school security guard—an off-duty police officer—who ultimately restrained and arrested student. The district court granted summary judgment for defendants. This court affirmed in part, holding that there was no genuine issue of material fact as to whether defendants' conduct was extreme and outrageous. Citing Restatement Second of Torts § 46, Comments *f* and *j*, the court noted that the determinations of whether a defendant's conduct was outrageous and whether a plaintiff's emotional distress was severe were affected by the defendant's knowledge that the plaintiff was particularly susceptible to emotional distress. A.G. v. Paradise Valley Unified School Dist. No. 69, 815 F.3d 1195, 1209.

C.A.9, 2007. Com. (d) quot. in sup. Former employee brought various claims against former supervisor and employer, alleging sexual harassment by supervisor. The district court granted summary judgment for defendants. Reversing and remanding plaintiff's claim for intentional infliction of emotional distress against supervisor, this court held that a reasonable trier of fact could find that supervisor's actions, particularly in an employment context, rose to the level of extreme or outrageous conduct necessary to state such a claim under Arizona law, in light of plaintiff's allegations that supervisor repeatedly propositioned her both inside and outside of the office, and on one occasion followed her into a bathroom and waited for her to exit a toilet stall before grabbing her and sticking his tongue in her mouth. Craig v. M & O Agencies, Inc., 496 F.3d 1047, 1059.

C.A.9, 2007. Cit. in sup., com. (d) quot. in case quot. in sup. Mother of suspect who was shot and killed by police officer brought a state-law claim for intentional infliction of emotional distress (IIED), as part of her civil-rights action under § 1983, against city, county, and police officer. The district court granted summary judgment for defendants. Affirming, this court held that police officer's behavior could not have been outrageous, because officer acted in an objectively

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reasonable manner, and thus plaintiff's IIED claim failed. The court noted that, when fellow officers radioed that suspect was yelling threats at them and shooting at them, defendant officer, who had observed suspect's agitated behavior, saw him carrying a rifle, and knew that he had earlier that night shot at a car full of people, had probable cause to believe that suspect posed an immediate danger to those officers. Long v. City and County of Honolulu, 511 F.3d 901, 908.

C.A.9, 2004. Com. (h) quot. in case cit. in disc. Employee terminated for violating employer's harassment policy sued employer for religious discrimination, constitutional violations, wrongful discharge, and intentional infliction of emotional distress. The district court granted summary judgment for employer. Affirming, this court held, inter alia, that employee's intentional-infliction-of-emotional-distress claim failed because employer's actions in terminating plaintiff without pay, accusing plaintiff of having performed an "exorcism," and accusing her of proselytizing and harassing a gay subordinate could not be regarded as so "extreme and outrageous" as to permit recovery. Bodett v. CoxCom, Inc., 366 F.3d 736, 747.

C.A.9, 2003. Com. (j) quot. in case quot. in sup. After a range fire that started on railroad's right-of-way destroyed two families' mobile homes and personal property, the two families sued railroad for negligence and negligent infliction of emotional distress. Montana federal district court entered judgment on jury verdict for plaintiffs. This court affirmed, holding, inter alia, that one of the families presented sufficient evidence to prove their claim for negligent infliction of emotional distress, as district court correctly allowed jury to determine whether family suffered distress so severe that no reasonable person could be expected to endure it. During trial, the jury heard extensive testimony from the family members about their emotional health. Turner v. Burlington Northern Santa Fe R. Co., 338 F.3d 1058, 1062.

C.A.9, 2002. Com. (d) quot. in sup. (Erron. cit. as § 46(d).) Airline ground personnel who were fired after they were involved in an accident that resulted in damage to an airplane sued airline for violations of federal and state employment discrimination laws and for intentional infliction of emotional distress. Affirming the district court's grant of summary judgment for defendant, this court held, inter alia, that, even if defendant were liable for Title VII violations, its conduct in firing plaintiffs was not sufficiently extreme and outrageous to support claims for intentional infliction of emotional distress. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1068.

C.A.9, 2000. Com. (b) quot. in case quot. in disc. After insurer withdrew its defense of insured real-estate developers in a construction-defect suit and refused to pay the resulting default judgment, developers sued insurer for bad-faith refusal to defend, seeking, in part, consequential damages for emotional distress. Affirming in part the district court's entry of judgment on a jury verdict for plaintiffs, this court held, inter alia, that, since there was evidence that plaintiffs suffered substantial financial loss, they were entitled, under California law, to recover damages for their emotional distress incident to defendant's bad-faith denial of coverage. Pershing Park Villas v. United Pacific Ins., 219 F.3d 895, 903.

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C.A.9, 1996. Com. (g) cit. in sup. Construction contractor's employee at electric utility's nuclear power plant was terminated after utility summarily barred him from its plant following its undercover investigation linking employee to conversations at the plant regarding an off-site drug transaction; employee sued utility for, inter alia, intentional infliction of emotional distress. On remand, the district court entered judgment on a jury verdict for plaintiff on his emotional distress claim and denied defendant's motion for judgment as a matter of law. Reversing in part, this court held that the district court erred in denying defendant's claim for judgment as a matter of law, since defendant did not assert in outrageous fashion or in bad faith its right to exclude plaintiff from its property but merely asked him to leave. Mathis v. Pacific Gas and Elec. Co., 75 F.3d 498, 505.

C.A.9, 1994. Cit. in sup. Plane owners who refused consent to warrantless seizure of logbooks were arrested and told that U.S. Customs seizure of plane included logbooks, which plaintiffs had removed. Although U.S. attorney advised Customs officers that his office would not prosecute, they continued bookings, telling plaintiffs that charges would be filed. Arrestees sued federal government for intentional infliction of emotional distress, inter alia. This court affirmed the district court's dismissal on ground of sovereign immunity to extent claim involved plane's seizure and prosecutorial decisions but reversed dismissal to extent claim involved arrests. Noting that Customs supervisor's admission of arresting plaintiffs because they "made us mad," along with plaintiffs' allegation that they were paraded handcuffed through airport lobby, created material fact issue whether Customs officers arrested plaintiffs intending to inflict emotional distress, the court held that, if plaintiffs could prove that intent, they could assert both false-arrest and emotional-distress claims. Gasho v. U.S., 39 F.3d 1420, 1434.

C.A.9, 1994. Quot. in sup., com. (e) cit. in sup. A female casino employee sued the casino for, among other claims, sexual harassment and intentional infliction of emotional distress, after her supervisor publicly humiliated her through crude sexually explicit remarks. The Nevada federal district court granted defendant summary judgment. Reversing and remanding, this court concluded, inter alia, that it was unprepared to hold as a matter of law that public humiliation of an employee by her employer, accomplished through rude, crude sexually explicit remarks and actions, could not constitute intentional infliction of emotional distress. Steiner v. Showboat Operating Co., 25 F.3d 1459, 1466, cert. denied 513 U.S. 1082, 115 S.Ct. 733, 130 L.Ed.2d 636 (1995).

C.A.9, 1993. Com. (d) quot. in part in disc. A former employee sued her employer and several individual coemployees, alleging sex and age discrimination. Affirming dismissal of the claims against the coemployees, this court held that liability did not extend to them. A claim for emotional distress damages from denial of unemployment benefits was time-barred under California law, but even if it were not, such a denial was a common business decision and was simply not outrageous conduct sufficient to support an emotional distress claim. Miller v. Maxwell's Intern., Inc., 991 F.2d 583, 586.

C.A.9, 1992. Com. (d) cit. in sup. A county employee sued the county and other employees for age and sex discrimination and intentional infliction of emotional distress. Affirming the district court's

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dismissal, the court of appeals held that plaintiff's allegation of a co-worker's romantic involvement with a supervisor did not state a claim for "hostile work environment" sex discrimination, that the county's actions regarding plaintiff's overtime, job responsibility, job reclassification, and transfer were not due to age-based discrimination where the county had legitimate nondiscriminatory reasons for its actions, and that plaintiff had not alleged sufficiently extreme and outrageous conduct by defendants to support a claim for intentional infliction of emotional distress. Candelore v. Clark County Sanitation Dist., 975 F.2d 588, 591.

C.A.9, 1992. Com. (d) cit. and quot. in disc., com. (g) cit. in disc. Foreign seamen discharged in foreign ports sued the shipowners for intentional infliction of emotional distress, inter alia, after the shipowners told them to lie to their union about their substandard wages and noted in their seafarers' books that the seamen were discharged for requesting repatriation upon filing a wages claim to arrest the vessel. Washington federal district court entered judgment for seamen and Oregon federal district court entered judgment for shipowners. Upon consolidation, this court held, in part, that a claim for intentional infliction of emotional distress could not lie where shipowners were legally entitled to record accurate statements as to the employees' performance and the reason for discharge. The court also found that the act of making the seamen lie to the union was not beyond all possible bounds of decency and utterly intolerable in a civilized society. Su v. M/V Southern Aster, 978 F.2d 462, 473, 474, cert. denied ___ U.S. ___, 113 S.Ct. 2331, 124 L.Ed.2d 244 (1993).

C.A.9, 1990. Com. (d) quot. in case quot. in disc. A boiler operator, who worked under a collective bargaining agreement (CBA), was transferred to a lower position and subsequently fired when his employer could no longer reasonably accommodate the employee's religious need to observe his sabbath. The employee sued the employer for, among other things, wrongful termination and intentional infliction of emotional distress. The district court granted the employer's motion for summary judgment holding that the claims were preempted by the statute of limitations of § 301 of the Labor Management Relations Act. This court affirmed, holding, inter alia, that § 301 preempted the plaintiff's claim for intentional infliction of emotional distress, because such a claim arose out of his discharge and the defendant's conduct leading up to it and would require the court to decide whether the discharge was justified under the terms of the CBA. The court would have to examine and interpret the terms of the CBA dealing with "just cause" discharge and loss of seniority rights to determine whether the defendant's behavior was extreme and outrageous. Cook v. Lindsay Olive Growers, 911 F.2d 233, 239.

C.A.9, 1990. Cit. in ftn. An army civilian employee who alleged that she was sexually harassed by her supervisor sued the government under the Federal Tort Claims Act for intentional infliction of emotional distress, inter alia. The district court granted the defendant's motion for summary judgment. Reversing and remanding, this court held that the plaintiff's claim was not excluded as a matter of law from the Federal Tort Claims Act, since the conduct on which the plaintiff's claim relied did not involve a threat of imminent battery, an essential element of assault, which was excluded from the Federal Tort Claims Act. Sheehan v. U.S., 896 F.2d 1168, 1171, opinion amended 917 F.2d 424 (9th Cir.1990).

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C.A.9, 1989. Com. (d) quot. in disc. and in sup. A deputy's report of alleged violations of departmental rules and state criminal laws involving three co-workers led to a department-wide investigation. The deputy requested to be transferred to ensure his own safety, but the request was not honored. He sued the county and the deputy who authorized the investigation, claiming, inter alia, that the defendants' response to his whistle-blowing activities constituted an intentional infliction of emotional distress. The district court awarded summary judgment to the defendants. Affirming, this court held in part that the plaintiff failed to prove that the defendants' actions were so extreme or outrageous as to cause the plaintiff severe emotional distress. The court stated that there was no evidence that the defendants acted to punish or retaliate against the plaintiff. In addition, a statement by a corrections officer that he wished he knew who had reported the violations because "his ass is grass" was a mere threat and was not made directly to the plaintiff. Thomas v. Douglas, 877 F.2d 1428, 1435.

C.A.9, 1985. Cit. in disc., com. (d) quot. in case quot. in disc. The plaintiffs brought a federal claim under § 1983 for use of excessive force during their arrests and pendent state claims for assault and battery and intentional infliction of emotional distress against a sheriff's department for alleged intentional violation of their constitutional rights while they were being taken to jail. The court of appeals affirmed a jury verdict for the plaintiffs, holding that a violation of the Fourth Amendment may support a § 1983 claim despite the availability of state causes of action. The court noted that in an action for intentional infliction of emotional distress, the defendant's conduct must have been extreme and outrageous in degree, and that there was ample evidence in the present case to go to the jury on this issue. Robins v. Harum, 773 F.2d 1004, 1010.

C.A.9, 1982. Cit. and quot. in sup. The plaintiff's barn was burned under circumstances indicating that the fire might have been set. The plaintiff told the fire marshall that he had had trouble with juveniles vandalizing his property. He also told the fire marshall and the defendant insurance company that the barn might have double coverage under policies he held with the defendant and another insurer. The defendant's adjuster did not look at the other policy, although offered, but reported the double coverage to the state police. The police suggested to the defendant that the plaintiff might be charged with arson and that a deposition would aid their investigation. The defendant's agent obtained a sworn statement from the plaintiff by assuring him that the information gathered would be used only to determine coverage. Thereafter, the defendant's attorney delivered a copy of the plaintiff's statement to the police. The police investigation terminated with the conclusion that there was insufficient evidence to charge the plaintiff with arson. The defendant knew this, but an agent of the defendant identified himself as a state policeman, questioned the plaintiff's neighbors concerning the fire, and implied that the plaintiff had set it. The defendant insurer then warned the plaintiff that if he pursued his claim, the defendant would have him charged with arson. After the plaintiff filed a claim, he was summoned before a grand jury; the grand jury refused to indict. The plaintiff eventually collected on the policy and sued the defendant for outrageous conduct, alleging severe emotional distress. The lower court awarded both general and punitive damages. The defendant argued on appeal, inter alia, that its conduct had not been outrageous. This court stated that Oregon recognized the tort of outrageous

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conduct as defined by the Restatement. The court found that the evidence supported the conclusion that the defendant had not acted reasonably for an insurer investigating a claim. Affirmed. Green v. State Farm Fire And Cas. Co., 667 F.2d 22, 23-24.

C.A.9, 1972. Cit. and quot. in part but dist. Plaintiff sought to recover against an oil company for mental anguish when his car rolled into an intersection out of control after a service station attendant allegedly added something other than brake fluid to the braking system of plaintiff's car. The court held that plaintiff could not recover damages for mental anguish without bodily harm, or compensable damage flowing from emotional distress or contact between his car and another object, or without showing malice, intentional introduction of defective brake fluid, extreme and outrageous conduct, or conduct involving an unreasonable risk of causing distress. Wetzel v. Gulf Oil Corporation, 455 F.2d 857, 860, 861.

C.A.9, Bkrtcy.App.

C.A.9, Bkrtcy.App.2003. Cit. and quot. but dist., cit. in case quot. in disc., quot. in diss. op. Chapter 13 debtor sued creditor for willfully violating the automatic stay by obtaining a state judgment against it, asserting, in part, a claim for severe emotional distress. The bankruptcy court awarded emotional-distress damages and attorney's fees, but refused to award punitive damages. Vacating in part, this court remanded for a determination of whether debtor suffered a significant economic loss caused by the stay violation, and whether any loss he suffered caused him emotional injury. The dissent argued that emotional-distress damages could be awarded regardless of whether there was economic loss. In re Stinson, 295 B.R. 109, 121, 125.

C.A. 10,

C.A.10, 2016. Cit. in sup.; subsec. (1) cit. in case cit. in sup.; com. (d) quot. in case quot. in sup.; coms. (e) and (f) cit. in sup. Former employee brought claims sounding in, among other things, intentional infliction of emotional distress against former employer in connection with allegations that he was repeatedly sexually harassed by various supervisors and co-workers over the eight years of his employment. The district court granted summary judgment for employer. This court reversed as to employee's emotional-distress claim and remanded, holding that reasonable persons could differ as to whether the alleged conduct was extreme and outrageous under Restatement Second of Torts § 46. The court pointed to evidence that employee's direct and indirect supervisors abused their power over employee, that the sexual harassment took place over a considerable period of time, that employee was the victim of unwelcome and non-negligible physical contact, and that employee's tormentors knew that he suffered from PTSD but targeted him anyway. Hansen v. SkyWest Airlines, 844 F.3d 914, 926-928.

C.A.10

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C.A.10, 2007. Quot. in sup., cit. in case quot. in sup., com. (i) quot. in sup. Two former undercover police officers sued television station for, in part, intentional infliction of emotional distress, after it broadcast their identities and undercover status in the context of their suspected involvement in an incident of sexual assault for which they were later cleared. The district court granted defendant's motion to dismiss. Affirming, this court held, inter alia, that the mere broadcast of plaintiffs' identities and undercover status, as facts revealed in the course of accurate publication of newsworthy events, was not "so outrageous" as to be actionable under New Mexico law, even if defendant was aware that its actions could result in third parties making threats to plaintiffs. Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1222, 1224.

C.A.10, 2007. Coms. (e) and (j) quot. in conc. and diss. op. Husband and wife brought federal civil-rights action against police officers alleging, among other things, use of excessive force, after officers physically separated wife from her telephone, escorted her from her home, and kept her in a locked patrol car for nearly an hour in connection with the arrest of husband. The trial court, inter alia, denied defendants' motions for summary judgment asserting qualified immunity. This court affirmed. A concurring and dissenting opinion noted that the only injury alleged by wife was a temporary sense of intimidation and argued that, as with cases asserting intentional infliction of emotional distress, excessive-force claims asserting only nonphysical injury should only be available where outrageous conduct caused severe emotional distress. Cortez v. McCauley, 478 F.3d 1108, 1148.

C.A.10, 2007. Cit. and adopted in case cit. in sup., com. (h) cit. and quot. in sup. and adopted in case cit. in sup., com. (d) cit. and quot. in ftn. and quot. in case quot. in sup. Former employee of oilfield equipment manufacturer brought Title VII claim alleging a racially hostile work environment against manufacturer, and an additional state-law claim for intentional infliction of emotional distress. The district court granted summary judgment for defendant. Affirming in part, reversing in part, and remanding, this court held that while there was a triable issue as to whether defendant created a racially hostile work environment under Title VII, the trial court did not err in concluding as a matter of law that plaintiff's supervisors' conduct, which included subjecting plaintiff to insults about his Mexican ancestry over a period of four years, was not sufficiently outrageous to sustain a claim for intentional infliction of emotional distress. Herrera v. Lufkin Industries, Inc., 474 F.3d 675, 686-688.

C.A.10, 2006. Quot. in case quot. in sup. As part of a wider sexual-harassment suit, former college student sued former professor for, in part, intentional infliction of emotional distress. After a jury found in favor of professor, the district court denied plaintiff's motions for judgment as a matter of law or for a new trial. Affirming, this court held, inter alia, that a reasonable jury could have concluded that defendant's alleged conduct, including the fondling of plaintiff's breasts, was not extreme and outrageous or beyond all possible bounds of decency. The court noted, among other things, that plaintiff admitted that she never objected to defendant's conduct, that she voluntarily went to his office on a number of occasions, that she gave him back massages and a Valentine's Day card, that she consented to a "sternum adjustment," and that she remained in his office after the adjustment. Escue v. Northern OK College, 450 F.3d 1146, 1158.

C.A.10, 2005. Cit. in case cit. in sup., cit. and quot. in ftn., coms. (d) and (j) quot. in case quot. in sup., com. (i) quot. in sup. After prison inmate committed suicide by hanging himself, his estate and family sued government under Federal Tort Claims Act for intentional infliction of emotional distress. District court entered judgment on jury verdict for plaintiffs. This court affirmed in part, reversed in part, and remanded, holding that, since district court did not make explicit findings as to severity of each plaintiff's emotional distress, remand was necessary. Plaintiffs proved elements of outrageousness and causation, in light of defendant's treatment of family, including initial nondisclosure of death's unusual circumstances and obstinacy as to authorization for autopsy. Estate of Trentadue ex rel. Aguilar v. U.S., 397 F.3d 840, 855, 856.

C.A.10, 2004. Com. (d) quot. in case quot. in sup. Terminated police officer sued city, police union, and district attorney, alleging constitutional violations and intentional infliction of emotional distress, inter alia. Plaintiff alleged that, after he refused to sign a union letter of no confidence against the police chief, his office was ransacked, he was no longer allowed to work flexible hours, and he did not receive requested backup assistance during an incident involving gang members. District court granted defendants summary judgment. This court affirmed, holding, inter alia, that police union's actions did not amount to intentional infliction of emotional distress, because none of the circumstance alleged by plaintiff remotely approached extreme conduct. Montgomery v. City of Ardmore, 365 F.3d 926, 942.

C.A.10, 2004. Cit. in case quot. in sup., com. (i) cit. in case quot. in sup. Supermarket employee sued employer for sexual harassment and retaliation, as well as store manager and another employee for extreme and outrageous conduct. The district court entered judgment in favor of employer and individual employees on the retaliation and conduct claims, but in favor of plaintiff on the sexual-harassment claim. This court reversed and remanded, holding, inter alia, that the conduct of the manager was so close to the bounds of decency that a jury should determine whether it constituted extreme and outrageous conduct designed to inflict severe emotional distress on plaintiff. Riske v. King Soopers, 366 F.3d 1085, 1089, 1090.

C.A.10, 2003. Cit. in case cit. in sup., com. (d) quot. in case quot. in sup. Parents of eight preschool children sued Head Start agency and others for constitutional violations and intentional infliction of emotional distress, inter alia, alleging that their children were subjected to intrusive physical examinations, including genital examinations and blood tests, on school premises without parental notice or consent. District court granted defendants summary judgment. This court affirmed in part, holding, inter alia, that plaintiffs' claim for intentional infliction of emotional distress failed, because defendants' actions did not rise to the requisite level of extreme outrageousness. Plaintiffs' own expert opined that the examinations did not go beyond the reasonable bounds of standard well-child examinations. Dubbs v. Head Start, Inc., 336 F.3d 1194, 1218, cert. denied 540 U.S. 1179, 124 S.Ct. 1411, 158 L.Ed.2d 79 (2004).

C.A.10, 2001. Com. (e) cit. in case quot. in disc. Patient sued dentist and dental assistant for negligence and intentional infliction of emotional distress, after allegedly suffering injuries during

a dental procedure. The district court granted dental assistant judgment as a matter of law, but entered judgment on jury verdict in favor of patient against dentist. Affirming, this court held, inter alia, that dentist's conduct, which included losing consciousness as many as 10 to 15 times during plaintiff's medical procedure, satisfied the standard of extreme and outrageous conduct necessary for intentional infliction of emotional distress. Macsenti v. Becker, 237 F.3d 1223, 1242, cert. denied 533 U.S. 950, 121 S.Ct. 2593, 150 L.Ed.2d 752 (2001).

C.A.10, 2000. Cit. in case quot. in sup., subsec. (1) cit. in headnotes and quot. in sup., com. (j) cit. in headnote and quot. in case quot. in sup. After hoax victim whose business phone number was listed on an Internet bulletin board posting that announced the availability for sale of offensive T-shirts crudely referring to the Oklahoma City bombing received 80 angry, obscenity-laced phone calls, including death threats, he brought an action for, in part, intentional infliction of emotional distress against radio station whose talk-show host had urged listeners to call victim's phone number to express their opinions of the posting. The district court granted defendant summary judgment. Affirming in part, this court held, inter alia, that the emotional-distress claim failed because plaintiff failed to show that defendant behaved in an extreme and outrageous way toward him and that he suffered severe emotional distress. There was no evidence that the distress plaintiff suffered interfered with his ability to conduct his daily life affairs. Zeran v. Diamond Broadcasting, Inc., 203 F.3d 714, 720, 721.

C.A.10, 1999. Quot. in case cit. in disc. Delivery truck driver who was discharged for job abandonment after he failed to return to work following back surgery sued former employer for, in part, intentional infliction of emotional distress. The district court granted defendant summary judgment. This court affirmed, holding, inter alia, that there was no evidence that employer engaged in extreme and outrageous conduct. Taylor v. Pepsi-Cola Co., 196 F.3d 1106, 1111.

C.A.10, 1998. Cit. in headnote, subsec. (1) quot. in case cit. in disc., com. (d) quot. in case quot. in disc. Insured bean farmer sued insurer for, inter alia, negligent misrepresentation, abuse of process, and intentional infliction of emotional distress after defendant refused to adjust plaintiff's crop loss at the 999-pound-per-acre figure allegedly agreed upon by the parties. The district court entered summary judgment for defendant. Affirming, this court held, in part, that defendant did not intend to supply the figure at issue for the guidance of plaintiff in his business, nor, given his actual production, could plaintiff claim a payable loss under his policy with this figure; that defendant did not commit an abuse of process by bringing suit to collect premium payments from plaintiff, a Wyoming resident, in Iowa, since such a course of action was company policy; and that defendant's actions did not rise to the level necessary to support recovery under a theory of intentional infliction of emotional distress. Meyer v. Conlon, 162 F.3d 1264, 1266, 1275.

C.A.10, 1995. Cit. in case cit. in sup., com. (d) quot. in case quot. in sup. Insured homeowners sued their insurer for intentional infliction of emotional distress, alleging that insurer should be held liable for the conduct of several guards, hired to conduct surveillance of plaintiffs' property, who allegedly shot plaintiffs' pet dog. District court entered judgment on jury verdict for plaintiffs. This court reversed, holding that there was insufficient evidence for a reasonable jury to hold insurer

responsible for the guards' conduct under the doctrines of principal-agent liability. Noting that the alleged surveillance, by itself, could not be considered outrageous as a matter of law, the court stated that only by considering both the surveillance and the shooting of plaintiffs' dog could the alleged conduct be regarded as sufficiently outrageous to submit the tort claim to the jury. Clark v. Brien, 59 F.3d 1082, 1086, cert. denied 516 U.S. 1084, 116 S.Ct. 800, 133 L.Ed.2d 747 (1996).

C.A.10, 1995. Cit. in headnote, quot. in case quot. in sup., com. (d) quot. in case quot. in sup., com. (j) quot. in sup. Store manager whose employment was terminated during the store's investigation of an alleged petty-cash shortfall sued the store for, inter alia, intentional infliction of emotional distress, arising from her confrontation with the store's employee conducting the investigation. Affirming in part the district court's grant of summary judgment for defendant, this court held, inter alia, that the investigator's behavior did not rise to the level of extreme and outrageous conduct necessary to sustain an action for intentional infliction of emotional distress, since plaintiff acknowledged that the meeting did not last long and that she felt free to interrupt the confrontation twice and since the investigator's questions, while loud and pointed, and his alleged physical conduct in touching her arm and pushing her back in her chair did not cross the bounds between what was merely objectionable and what was actionable. Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1550, 1558.

C.A.10, 1994. Cit. in case cit. in sup. An African-American electrician sued his former employer for employment discrimination and the tort of outrage. District court granted defendant summary judgment. Affirming, this court held, inter alia, that plaintiff failed to state a viable outrage claim because the conduct of plaintiff's co-workers was not so extreme and outrageous as to permit recovery. Although plaintiff was called a variety of rude or vulgar names, he was not alone in facing such insults; almost everyone in the shop was called such names and similarly badgered. Bolden v. PRC Inc., 43 F.3d 545, 554.

C.A.10, 1994. Subsec. (1) and com. (d) quot. in ftn. (Erron. cit. as com. (d) to § 49.) Residents who had lived across a road from a waferboard-manufacturing plant sued the plant, asserting negligence and common-law nuisance claims arising from noise and various substances that were atmospherically transported to their property. The district court entered judgment on a jury verdict awarding plaintiffs compensatory and punitive damages. Affirming, this court held, inter alia, that, under Colorado law, defendant was not entitled to dismissal of the punitive damages claim following dismissal of a claim for the tort of outrageous conduct, as the standard for awarding punitive damages was not the same as that for the tort of outrageous conduct. Orjias v. Stevenson, 31 F.3d 995, 1012, cert. denied 513 U.S. 1000, 115 S.Ct. 511, 130 L.Ed.2d 418 (1994).

C.A.10, 1992. Cit. in disc., cit. in diss. op., quot. in ftn. to diss. op., subsecs. (1), (2), coms. (d), (e), (h), (i), (j), illus. 15, 16, and 1966 Appendix at 48 cit. in diss. op. Employee sued employer and co-worker for intentional or reckless infliction of emotional distress when co-worker used racial slurs against plaintiff while he was not present and plaintiff heard about the slurs through other workers. This court reversed and remanded the district court's finding for plaintiff, holding that because statements were not made directly to plaintiff, co-worker was not liable. The court

reasoned that there was little probability that plaintiff would hear of slurs because they were made in confidence; hence, conduct was not outrageous or reckless. A dissent argued that co-worker was reckless in making frequent slurs against plaintiff to other workers, increasing the probability that plaintiff would discover insults; moreover, common law did not support majority's requirement that plaintiff be present when slurs were made. Bouie v. Autozone, Inc., 959 F.2d 875, 878, 880-883.

C.A.10, 1992. Subsec. (1) quot. in case quot. in sup. At-will employee sued his former employer for intentional infliction of emotional distress, inter alia, after he was terminated without notice and was told by the employer not to seek other employment. Employee alleged discrimination on the basis of his handicap, multiple sclerosis. The district court granted employer summary judgment. This court reversed in part and remanded on other grounds but affirmed summary judgment for employer on the claim for emotional distress. It said that plaintiff had not provided evidence showing defendant's conduct to be extreme; moreover, plaintiff admitted in his testimony that the conduct was not outrageous. The court also noted that employer terminated plaintiff due to concerns for his safety in light of his deteriorating physical condition. Katzer v. Baldor Elec. Co., 969 F.2d 935, 939.

C.A.10, 1991. Subsec. (1) cit. in disc., com. (d) quot. in disc. and cit. in ftn., com. (h) cit. in disc., coms. (j) and (k) quot. in disc. An employee resigned from his job, alleging that his employer discriminated against him due to his Iranian national origin, by calling him derogatory names, compelling him to terminate his Iranian subordinates, and accusing him of criminal acts. The employee sued his former employer for several claims including federal civil rights violations and intentional infliction of emotional distress. After a bench trial, the Oklahoma federal district court ruled for the employer. Affirming, this court held, inter alia, that the employee's assertions of discrimination were legally inadequate to meet the narrow standard of extreme and outrageous conduct, and that the evidence as to the severity of his emotional distress was legally insufficient under Oklahoma law. The court reasoned that mere insults were not actionable under the intentional infliction of emotional distress tort, and that the distress of anxiety and a sick stomach was not of such a character that no reasonable person could be expected to endure it. Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379, 1387, 1389.

C.A.10, 1991. Com. (d) quot. in case quot. in sup. Alleging violation of the Colorado Auto Accident Reparations Act (CAARA), bad faith breach of contract, and intentional infliction of emotional distress, a passenger injured in an automobile accident sued the driver's insurance company when the insurance company failed to pay statutorily mandated personal injury protection benefits. The district court dismissed the bad faith claim, directed a verdict for the insurance company on the issue of intentional infliction of emotional distress, and entered judgment on a jury verdict for the plaintiff on her CAARA claims. Affirming in part and reversing and remanding in part, this court held, inter alia, that while the insurance company's refusal to make payments within the statutorily required 30 days and derogatory remarks made by an insurance agent concerning the plaintiff's gender and American Indian heritage were inconsiderate and unkind, they were not extreme and outrageous conduct sufficient to create a cause of action

for intentional infliction of emotional distress. Wilson v. State Farm Mut. Auto. Ins. Co., 934 F.2d 261, 266.

C.A.10, 1990. Com. (d) quot. in case quot. in disc. An employee was terminated by a newly appointed supervisor for alleged insubordination and poor communication skills. The employee sued his employer for violating the Age Discrimination in Employment Act, breach of employment contract, and intentional infliction of emotional distress. He also sued the supervisor for emotional distress damages and she counterclaimed, alleging emotional distress damages and prima facie tort. The district court granted summary judgment dismissing all of the claims. Affirming, this court held, inter alia: 1) the employee had not shown that the reasons for his dismissal were pretextual, from which a jury could infer age discrimination; 2) the employee was an at-will employee with no contractual rights; 3) the employee and the supervisor were involved in an ordinary employer-employee conflict incapable of supporting the emotional distress claims; and 4) the state of Oklahoma would not extend a prima facie tort action to private sex discrimination between co-workers. The court indicated that the parties' allegations of insubordination, yelling, cursing, criticizing, hostile reactions, and the hurt feelings naturally accompanying such conduct did not give rise to a cause for intentional infliction of emotional distress. Merrick v. Northern Natural Gas Co., 911 F.2d 426, 432.

C.A.10, 1989. Com. (b) quot. in case cit. in sup. An engineer was recruited by an Oklahoma company to work for an Italian corporation. In Italy the engineer was injured during a work-related car trip. He was unable to obtain workers' compensation benefits from his employer, consulted an attorney, and was fired shortly thereafter. He sued, inter alia, the recruiting company, its insurer, and the Italian corporation for breach of contract, intentional infliction of emotional distress, and wrongful discharge. The district court granted the defendants' motion for summary judgment on the emotional distress count. Affirming, this court said that the employer's conduct in handling the workers' compensation claim and in discharging the plaintiff while he was in the hospital did not, as a matter of law, constitute outrageous behavior, especially where the employer paid the plaintiff's medical expenses. Pytlik v. Professional Resources, Ltd., 887 F.2d 1371, 1379.

C.A.10, 1988. Cit. in disc., com. (d) quot. in case quot. in disc., com. (e) cit. in ftn. Two former employees sued their former employer for age discrimination and for intentional infliction of emotional distress after their positions were eliminated. The trial court granted the employees' claim for the intentional infliction of emotional distress. This court reversed, holding that the trial court should have directed a verdict for the employer on the claim for emotional distress. The court reasoned that there was insufficient evidence for a jury to find that the employer had exceeded the requisite threshold of liability for the intentional infliction of emotional distress; the plaintiffs had alleged nothing more than age discrimination, the manner of discharge had not been particularly unfair or abusive, and outrageous conduct by the employer had not been established. Grandchamp v. United Air Lines, Inc., 854 F.2d 381, 383, 384, cert. denied 489 U.S. 1080, 109 S.Ct. 1534, 103 L.Ed.2d 838 (1989).

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C.A.10, 1988. Subsec. (1) cit. in disc. The brother of a decedent sued the beneficiary of the decedent's will, the attorney who drafted the will, and a brokerage firm for, inter alia, intentional interference with inheritance and intentional infliction of emotional distress, based on allegedly fraudulent stock transfers. The trial court granted summary judgment to the attorney and the brokerage firm on all claims. Affirming, this court held, inter alia, that the plaintiff could not bring the claim for intentional interference with inheritance because he had no prospect of inheriting the transferred stock, and that neither the attorney's drafting the will nor the brokerage firm's transferring the stock pursuant to a letter apparently signed by the owner of the stock was conduct sufficiently extreme or outrageous to support a claim for intentional infliction of emotional distress. McKibben v. Chubb, 840 F.2d 1525, 1532.

C.A.10, 1987. Com. (h) cit. in case quot. in disc. In an effort to repossess a computer pursuant to a state court order, certain members of a city police department made a warrantless search of the home and office of a married couple. The couple sued the individual members of the police department, alleging, inter alia, that the officers' illegal search amounted to outrageous conduct and therefore the couple was entitled to punitive damages. The trial court entered a judgment on a jury verdict that found the defendants liable for the outrageous conduct claim and awarded the plaintiffs punitive damages. Affirming, this court held that the evidence was sufficient to support the jury's finding and punitive damages award. The court stated that, where reasonable men may differ, it was for the jury to determine whether the defendant's conduct was sufficiently extreme and outrageous to result in liability. Specht v. Jensen, 832 F.2d 1516, 1525.

C.A.10, 1984. Cit. in disc., com. (d) cit. in disc. A stepson sued in a diversity action individuals who had brought a conservatorship action against his stepfather and a number of individuals who had managed his stepfather's financial affairs. The district court dismissed the action for failure to state a claim. This court affirmed. The court noted that, while the tort of intentional or reckless infliction of emotional distress is recognized in Colorado, the stepson had not alleged outrageous conduct by the defendants sufficient to support a claim for relief on that theory. Swanson v. Bixler, 750 F.2d 810, 814, 815.

C.A.10, 1983. Cit. and quot. in sup., com. (d) quot. in case cit. in sup., coms. (f), (i), and (j) cit. in sup., coms. (h) and (i) quot. in case quot. in sup., subsec. (2) cit. in disc., illus. 9-13, 15, and 16 cit. in sup. The plaintiff, an illiterate Korean woman, commenced this action as the result of transactions between her husband and an account executive of the defendant investment company. The transactions were related to an account with the defendant which was solely in the plaintiff's name; they resulted in a loss of $30,000 to the account. The plaintiff alleged, inter alia, that the defendant's actions in making unauthorized transfers in her account constituted an intentional infliction of emotional distress because the loss of her savings threw the plaintiff into a deep depression which rendered her temporarily infertile and caused her to become a religious fanatic. The trial court entered judgment awarding the plaintiff $1,030,000 as compensatory damages and $3,000,000 as punitive damages. On appeal, the court examined the evidence in the case: the account executive avoided consulting the plaintiff before making unauthorized transactions in her account, knowing that such transactions were directly contrary to her wishes; he convinced her

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husband to misrepresent the facts to her and used the husband as a pawn, knowing that the plaintiff insisted on having the account in her name alone because of her husband's gullibility; the account executive continued to suggest high-risk investment decisions to the husband, knowing that the plaintiff was concerned with financial security; finally, even when the account showed a $30,000 loss, the executive persisted in trying to conduct other transactions with what remained of the plaintiff's savings. The court held that this evidence was sufficient to submit the case to the jury on a theory of intentional infliction of emotional distress. The court pointed out that although the plaintiff's reaction was somewhat extreme, it could not find as a matter of law that the evidence was wholly insufficient for the jury to find the defendant liable for the injury to the plaintiff. The judgment was affirmed, provided that the plaintiff accepted a reduction in the punitive damages award to $1,000,000. Malandris v. Merrill Lynch, Pierce, Fenner & Smith, 703 F.2d 1152, 1158, 1159, 1165, 1166, certiorari denied 464 U.S. 824, 104 S.Ct. 92, 78 L.Ed.2d 99 (1983).

C.A.10, 1982. Cit. in sup., com. (d), illus. 1 cit. in disc. The plaintiff was a 21-year-old man who joined a religious cult in Oklahoma. His father obtained a court order giving him temporary guardianship over the plaintiff, and hired professional deprogrammers to attempt to induce the plaintiff to leave the cult. The deprogrammers held the plaintiff in a motel room for a week where he alleged that he suffered various abuses. The plaintiff brought an action against the deprogrammers, alleging, inter alia, intentional infliction of emotional distress. The trial court directed a verdict for the defendants on that claim because the judge did not think that deprogramming per se was sufficient to constitute the outrageous conduct as required in the tort of intentional infliction of emotional distress. On appeal, this court affirmed in part, reversed in part, and remanded. The court held that under the facts of the case, the issue of whether the defendants' conduct had been significantly extreme and outrageous enough to result in liability should have been submitted to the jury. Taylor v. Gilmartin, 686 F.2d 1346, 1353, 1354, certiorari denied 459 U.S. 1147, 103 S.Ct. 788, 74 L.Ed.2d 994 (1983), rehearing denied 463 U.S. 1249, 104 S.Ct. 37, 77 L.Ed.2d 1456 (1983).

C.A.10, 1979. Subsec. (1) cit. in disc. Plaintiff physician brought action against a former patient who had brought a medical malpractice suit against him, claiming negligence in prosecution, abuse of process, invasion of privacy, and wanton misconduct in filing suit. The underlying malpractice action had not been disposed of at the time plaintiff filed his suit. The trial court dismissed, ruling that there was no recognizable negligence tort which arose from prosecuting a lawsuit, that plaintiff failed to set forth a legal cause of action for abuse of process, and that the claim sounding in invasion of privacy was not cognizable under the law of Kansas. The claim alleging wanton behavior was also summarily dismissed, and plaintiff appealed dismissal of all four claims. In regard to the complaint for invasion of privacy, the court stated that, under Kansas law, such action may have elements in common with that for intentional infliction of emotional distress. The court noted, however, that, in the situation here, there was no conduct so outrageous in character or extreme in degree to satisfy the elements of that tort, and, therefore, the trial court properly dismissed the claim. Regarding the other claims, the court held that the rulings of the trial court were correct and, accordingly, affirmed the judgment. Tappen v. Ager, 599 F.2d 376, 381.

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C.A.10, 1968. Subsec. (1) quot. in sup. The plaintiff members of the family of a passenger who was killed on an airplane of the defendant when the plane crashed not only successfully sued the defendant for the decedent's wrongful death, but also sought to recover for emotional distress inflicted upon them by the defendant's agents for (1) failing to identify the decedent as a passenger and repeatedly suggesting that she may have gone off with a man somewhere and missed the flight; (2) failing to inform them promptly that the decedent was aboard; and (3) retaining the decedent's body for 27 hours. The court affirmed a dismissal of the last two claims, but remanded a dismissal of the first claim because the record did not provide sufficient factual background to permit a determination as to whether the conduct of the defendant's agents was outrageous under the circumstances. Wood v. United Air Lines, Inc., 404 F.2d 162,165.

C.A.11

C.A.11, 2021. Cit. in case cit. in sup.; com. (d) cit. in case cit. in sup. Passengers of a cruise liner brought a putative class action against cruise operator, alleging, inter alia, that defendant negligently inflicted severe emotional distress on plaintiffs when they canceled a voyage due to an approaching hurricane on the day the ship was to set sail, resulting in plaintiffs being forced to travel to the ship and endure the hurricane in order to avoid preemptively canceling the trip themselves and suffering financial losses. The district court rejected a magistrate judge's report and recommendation and dismissed plaintiffs' action sua sponte. This court reversed and remanded, holding that the district court erred in failing to consider whether it had maritime jurisdiction over the action. In considering whether federal law recognized a claim for negligent infliction of emotional distress in maritime actions, the court noted that federal maritime law recognized claims for intentional infliction of emotional distress under Restatement Second of Torts § 46. McIntosh v. Royal Caribbean Cruises Ltd., 5 F.4th 1309, 1315.

C.A.11,

C.A.11, 2015. Com. (d) quot. in case cit. and quot. in sup. Arrestee brought a claim for, among other things, intentional infliction of emotional distress against officer who arrested him while he was wearing a towel wrapped around his waist, alleging that, although the towel fell off while he was walking from his apartment to the police car, officer refused to allow anyone to bring him clothes until after he reached the police station. The district court granted summary judgment for officer. Affirming, this court held that, even if officer's actions in forcing arrestee to be naked and refusing to allow him to put on clothing were extreme and outrageous, arrestee failed to show that he suffered severe emotional distress as a result of officer's actions, as required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. Moore v. Pederson, 806 F.3d 1036, 1053.

C.A.11, 2015. Coms. (d) and (e) quot. in case quot. in sup. Arrestee filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against deputy sheriff who arrested plaintiff in response to a breach-of-the-peace call, alleging that he was wearing only a towel when he was

arrested, he dropped his towel during the walk from his apartment to the patrol car and was not permitted to retrieve it, and he was not provided with clothing until after he was taken to the police station and booked. The district court granted defendant's motion for summary judgment. This court affirmed, holding that defendant failed to state a claim for IIED. The court cited Restatement Second of Torts § 46, Comments *d* and *e*, for an explanation of the claim's outrageous-conduct element, but explained that it did not need to determine if the plaintiff made such as showing, because plaintiff failed to show that he suffered severe emotional distress as a result of defendant's actions. Moore v. Pederson, 801 F.3d 1325, 1335.

C.A.11, 2012. Cit. and quot. in sup., adopted in case cit. in sup., com. (d) quot. in sup. and cit. in ftn., coms. (e) and (f) cit. in ftn. and cit. in case cit. in ftn. Hispanic male customer brought a § 1981 claim and a state-law claim for intentional infliction of emotional distress (IIED) against store and its white female cashier, alleging that cashier refused to serve him based on his race and publicly humiliated him by turning him away from her register in a loud and rude tone of voice. The district court granted defendants' motion to dismiss. Affirming, this court held, inter alia, that, although reprehensible, cashier's alleged conduct—verbal abuse that did not involve any obscenities, racial epithets, or threats of violence—did not meet the extremely high standard required to state a claim for IIED under Florida law. Lopez v. Target Corp., 676 F.3d 1230, 1236, 1237.

C.A.11

C.A.11, 2005. Quot. in case cit. in disc. Passenger sued airline for, in part, intentional infliction of emotional distress, alleging that a male airline employee made sexually explicit comments towards her when she was asked to remove batteries from a vibrating sex toy in her checked luggage, causing other male employees to laugh. The trial court dismissed this claim for failure to state a cause of action. Affirming, this court held that airline employee's alleged comments and gesture of licking his lips, while distasteful, were insufficient to support a claim for intentional infliction of emotional distress, which, under Florida law, required more than a showing of insults and indignities. Koutsouradis v. Delta Air Lines, Inc., 427 F.3d 1339, 1344.

C.A.11, 1996. Com. (d) quot. in case quot. in disc. After an employee of a pulp and paper plant told his supervisor of toxic chemical overexposure of employees, employee suffered continuous harassment, threats of termination, humiliation, supervisory indifference, and malicious discharge. Employee sued employer for, among other claims, intentional infliction of emotional distress. District court denied employer's motion for summary judgment on the emotional distress claim, stating that an employer's threats and retaliatory activities satisfied the requisite element of outrageousness supportive of a claim for intentional infliction of emotional distress. This court affirmed, holding that employee stated an emotional-distress claim. Harris v. Procter & Gamble Cellulose Co., 73 F.3d 321, 323.

C.A.11, 1994. Com. (j) quot. in case quot. in sup. After disgruntled investors sent principal of general partner of limited partnership in which investors owned interests a demand letter

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threatening to file a lawsuit against principal implicating him in fraudulent practices unless he paid them $75,000, plus accrued interest, principal sued investors for libel and intentional infliction of emotional distress. Affirming in part the district court's grant of summary judgment for defendants, this court held, inter alia, that, as a matter of law, plaintiff failed to show that defendants' conduct rose to the level of outrageousness and egregiousness necessary to sustain a claim for intentional infliction of emotional distress. Hammer v. Slater, 20 F.3d 1137, 1144.

C.A.11, 1993. Subsec. (1) quot. in case quot. in sup. Former employees sued their employer alleging that they were discharged in violation of ERISA; one employee also alleged that his involuntary early retirement violated the Age Discrimination in Employment Act and constituted intentional infliction of emotional distress. The district court granted summary judgment to the employer on all claims. Affirming as to all claims except the ADEA claim, this court held, inter alia, that, under Georgia law, forcing an employee to retire early was not such extreme and outrageous conduct as would support a claim of intentional infliction of emotional distress. Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1229.

C.A.11, 1993. Com. (d) quot. in conc. and diss. op., coms. cit. generally in ftn. to conc. and diss. op. Black former telephone company employee brought suit for employment discrimination against her former employer and asserted a state law claim for intentional infliction of emotional distress. This court affirmed the district court's order directing a verdict for defendant on the state law claim. The concurring and dissenting opinion argued that the case should be remanded for retrial of the state law claim on the ground that disputed facts existed, requiring the jury to decide whether defendant's conduct was outrageous enough to rise to the level required by the tort. Vance v. Southern Bell Tel. & Tel. Co., 983 F.2d 1573, 1581, 1583, cert. denied ___ U.S. ___, 115 S.Ct. 1110, 130 L.Ed.2d 1075 (1995).

C.A.11, 1991. Com. (d) quot. in case quot. in sup. and cit. generally in sup. A supervisor at a manufacturing plant was the subject of rumors alleging that he was a homosexual, was sexually promiscuous, used or sold drugs, and harassed or physically fondled female employees at the plant. The supervisor sued, among others, the manufacturer, alleging excessive publication of rumors by company representatives and failure of the manufacturer to take corrective action once company officials were made aware of the rumors. The district court entered an order of summary judgment for the manufacturer and dismissed the action. This court affirmed, holding, inter alia, that the reported omissions of the manufacturer fell far below the level of outrageous conduct necessary to maintain an action for intentional infliction of emotional distress, especially since the supervisor was never discharged or disciplined. The court stated that the alleged failure of the manufacturer to investigate the rumors in a complete and timely fashion constituted mere negligence at most. Martin v. Baer, 928 F.2d 1067, 1073, 1074.

C.A.11, 1990. Cit. in case cit. in disc., com. (d) quot. in case quot. in disc. Relatives of a serviceman shot down in Vietnam sued the United States for intentional infliction of emotional distress under the Federal Tort Claims Act after it allegedly falsely identified the man's remains, improperly issued an ultimatum about burial of the remains, and refused to return the man's

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name to unaccounted-for status after rescinding his identification. The district court granted the plaintiffs' motion for partial summary judgment. This court reversed and remanded, holding that the government's conduct was neither intentional nor outrageous. The court found no evidence that the government's acts in identifying, classifying, or attempting to bury the remains were done with the knowledge that they would cause the plaintiffs severe distress. Hart v. U.S., 894 F.2d 1539, 1548, certiorari denied 498 U.S. 980, 111 S.Ct. 509, 112 L.Ed.2d 521 (1990).

C.A.11, 1990. Coms. (d) and (e) quot. in cases quot. in disc. A landlord was arrested for continuing to lease a unit in a shopping center after becoming aware that the leased property was being used for prostitution. Continuing to lease the property with such knowledge violated a state statute. The charge against the landlord was eventually nolle prossed because the landlord agreed to testify in a felony case against the lessee and because the operation on the leased premises was being closed down. The landlord subsequently brought this action against the county sheriff and three sheriff's deputies who were present when he was arrested, alleging intentional infliction of emotional distress, inter alia. The district court denied the defendants' motions for directed verdict and for judgment n.o.v. Reversing, this court held that the district court erred in denying the defendants' motions, stating that the defendants did not act unreasonably in arresting the plaintiff for violating the statute and that a reasonable jury could not have found that the defendants' conduct was legally impermissible or was otherwise so extreme and indecent as to warrant tort damages under Florida law. Von Stein v. Brescher, 904 F.2d 572, 584.

C.A.11, 1986. Quot. in case quot. in disc. After two individuals were injured in a collision with a vehicle owned by a city, the injured individuals sued the city and its insurer for intentional infliction of emotional distress, alleging that the insurer had misrepresented the limits of its liability under the insured's policy. The trial court dismissed the plaintiffs' claim and entered judgment in favor of the defendants. Affirming, this court held that as a matter of law the facts alleged did not constitute intentional infliction of emotional distress. The court stated that the insurer could not be held liable for simply honoring its duty to defend its insured against claims that obviously exceeded policy limits. Davis v. Travelers Indem. Co. of America, 800 F.2d 1050, 1054.

C.A.11, 1982. Coms. (g) and (d) cit. in disc. The administratrix of an employee's estate brought an action against the decedent's employer for an alleged “tort of outrage” arising from the arbitrary reduction of the employee's monthly disability pay. The jury found for the plaintiff; the employer appealed from the trial court's denial of his motion for a judgment n.o.v. The appellate court reasoned that a “tort of outrage” existed when an individual's conduct went beyond all bounds of decency and resulted in severe emotional distress to another. The court affirmed the lower court's holding, reasoning that the defendant's behavior constituted the “extreme conduct” anticipated by the tort. Holmes v. Oxford Chemicals, Inc. Etc., 672 F.2d 854, 857.

C.A.D.C.

C.A.D.C.2021. Subsec. (1) quot. in case quot. in sup.; com. (j) quot. in sup. United States citizen who was arrested by agents of the Islamic Republic of Iran and held hostage for 100 days sued Iran under the "state sponsors of terrorism" exception to the Foreign Sovereign Immunities Act, seeking to hold it liable for torture, hostage taking, assault, battery, intentional infliction of emotional distress, and false imprisonment. After Iran failed to appear or respond, this court granted plaintiff's motion for a default judgment, holding that plaintiff sufficiently proved theories of liability found in well-established principles of law in support of her claims under the Act. The court reasoned, in part, that plaintiff established that defendant's agents intentionally inflicted emotional distress upon her within the meaning of Restatement Second of Torts § 46. Saberi v. Government of Islamic Republic of Iran, 541 F.Supp.3d 67, 82.

C.A.D.C.2019. Cit. in case quot. in sup. (general cite); subsec. (2)(a) cit. in case cit. in sup. American victims of terrorist bombings of U.S. embassies and victims' family members brought a lawsuit under the Foreign Sovereign Immunities Act against the Republic of Sudan, alleging that defendant was liable for intentional infliction of emotional distress (IIED), because it materially supported the terrorist organizations responsible for the bombings. The district court entered judgment for plaintiffs. After certifying a question to state court, this court affirmed, holding that the state court's interpretation of Restatement Second of Torts § 46, which permitted family members of bombing victims to pursue IIED claims despite not being physically present at the bombings, did not violate the Act's non-discrimination principle that required foreign states to be held no more liable than a private individual would under like circumstances. The court explained that the state court's construction of § 46 relied on reasoning that applied equally to state actors and non-state actors, because it provided exceptions to the physical-presence requirement for claims against non-state actors. Owens v. Republic of Sudan, 924 F.3d 1256, 1258, 1259.

C.A.D.C.2017. Cit. and quot. in sup. and in cases cit. in sup.; caveat and com. (*l*) quot. in sup., cit. in cases cit. in sup. Victims of U.S. embassy bombings brought an action against Republic of Sudan and Islamic Republic of Iran, asserting jurisdiction under the terrorism exception to the Foreign Sovereign Immunities Act based on allegations that defendants provided material support to a terrorist organization, and alleging, inter alia, a claim for intentional infliction of emotional distress (IIED). The district court denied Sudan's motion to vacate a default judgment entered against it. This court affirmed in part and vacated in part, and certified to the D.C. Court of Appeals the question of whether the presence requirement set forth in Restatement Second of Torts § 46 would preclude recovery for an IIED claim arising from a terrorist attack where the claimant was not present at the scene. The court analyzed § 46's presence requirement, noting that D.C. courts had applied § 46 in limiting recovery to the immediate family of a victim physically injured or killed, and pointed out that § 46's Caveat and Comment *l* left open the possibility of a situation where presence was not required. Owens v. Republic of Sudan, 864 F.3d 751, 807, 810-812.

C.A.D.C.2015. Com. (d) cit. in sup., com. (k) quot. in sup. Veteran brought an action against the United States, seeking damages under the Federal Tort Claims Act for, inter alia, intentional infliction of emotional distress (IIED), alleging that the Department of Veterans Affairs (VA), through the doctrine of respondeat superior, was liable for the actions of, among others, VA

police officers, who used excessive force and injured plaintiff while attempting to remove him from a group-therapy session for veterans. The district court granted summary judgment for defendant. Reversing in part, this court held that questions of material fact remained as to whether plaintiff's arrest was effectuated with reasonable force, noting that a serious case of excessive force could constitute outrageous behavior such that it satisfied an IIED claim. The court reasoned that plaintiff's allegations that he endured multiple hospital visits for a fractured rib and other injuries, that he suffered substantial trauma, and that his existing post-traumatic stress disorder was aggravated as a result of the incident were potentially sufficient to establish severe emotional distress under the standard set out in Restatement Second of Torts § 46. Harris v. U.S. Department of Veterans Affairs, 776 F.3d 907, 916, 917.

C.A.D.C.2014. Com. (d) quot. in sup. Parties who opposed construction of an Islamic community center near the site of the September 11th terrorist attacks brought a claim for intentional infliction of emotional distress (IIED), inter alia, against a proponent of the center and proponent's attorney, alleging that statements made in proponent's motion to dismiss an underlying action brought against him by plaintiffs, and in attorney's affidavit in that action, were defamatory. This court granted defendants' special motion to dismiss, holding that plaintiffs failed to show that they were likely to succeed on the merits of their IIED claim. Quoting Restatement Second of Torts § 46, Comment *d*, the court explained that plaintiffs needed to show that defendants' conduct was extreme and outrageous, beyond the mere insults present in this case. Forras v. Rauf, 39 F.Supp.3d 45, 56.

C.A.D.C.2007. Adopted in cases quot. in sup., subsec. (2) quot. in sup. As part of their § 1983 action for false arrest and malicious prosecution, arrestee and his wife brought a common-law claim for intentional infliction of emotional distress against the District of Columbia and three police officers. After the jury returned a verdict finding the District liable but the officers not liable on the emotional-distress claim, the district court denied defendants' motion for judgment as a matter of law on that claim as to wife. Reversing with respect to wife's claim and remanding, this court held, inter alia, that wife could not recover under District of Columbia tort law because she was not physically present when the allegedly extreme and outrageous conduct—the filing of a false and misleading affidavit and possible evidence tampering—took place. Pitt v. District of Columbia, 491 F.3d 494, 507.

C.A.D.C.2004. Cit. in case cit. in disc. Adult children and siblings of former hostage of terrorist group that was an agent of Iran's Ministry of Information and Security brought suit for intentional infliction of emotional distress and loss of solatium against government of Iran under terrorist exception to Foreign Sovereign Immunities Act. The district court dismissed plaintiffs' claims, holding, in part, that a third-party claimant had to be present at the scene of victim's torment to state a claim for intentional infliction of emotional distress. Affirming and remanding, this court held that neither the terrorist exception, which waived a foreign state's immunity without creating a cause of action against it, nor the Flatow Amendment, which provided a private right of action against only officials, employees, and agents of a foreign state, nor the two considered in tandem,

created a private right of action against a foreign government. Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024, 1029.

C.A.D.C.2003. Cit. and quot. in sup., subsec. (1) cit. and quot. in sup., subsecs. (2) and (2)(a) cit. in sup., subsec. (2)(b) cit. in disc., coms. (b) and (c) quot. in sup., com. (l) quot. in sup., caveat quot. in sup. Priest was held hostage by terrorist organization in Lebanon for 564 days and then suffered physically and emotionally for years. After his death, his estate, siblings, and nieces and nephews sued government of Iran for intentional infliction of emotional distress for providing support to terrorist organization. District court awarded damages to estate and siblings, but rejected claims of nieces and nephews. This court affirmed, holding that nieces and nephews could not recover, since they were not direct victims or immediate family members. Bettis v. Islamic Republic of Iran, 315 F.3d 325, 327, 331, 333-338.

C.A.D.C.2002. Com. (d) quot. in case quot. in disc. Former President's alleged mistress, whose attempt to publish "semiautobiographical" novel based on her relationship with President was allegedly stymied by President and his agents, sued President and agents for intentional infliction of emotional distress, inter alia, after President's attorney stated in the media that litigation against President by another purported mistress, as well as statements by witnesses in that case, including plaintiff, were scurrilous, salacious, a web of deceit and distortion, and "garbage." District court dismissed plaintiff's claims. This court affirmed dismissal of emotional-distress claim, holding, inter alia, that attorney's statements did not go beyond all possible bounds of decency. Furthermore, alleged threats by former Deputy White House Counsel did not amount to conduct utterly intolerable in a civilized community. Browning v. Clinton, 292 F.3d 235, 248.

C.A.D.C.1998. Quot. in case quot. in disc., com. (d) quot. in disc. and quot. in case quot. in disc. Automobile passenger was arrested when she refused police officer's order to remain in the car while he administered sobriety test to driver; she sued city and officer for, inter alia, violations of her Fourth Amendment rights and intentional infliction of emotional distress. The district court entered summary judgment for defendants. Affirming, this court held, in part, that it was reasonable for officer to order plaintiff to stay in the car in order to maintain control of the situation, and therefore he did not violate her Fourth Amendment rights, and that officer's alleged actions in threatening to arrest plaintiff, yelling at her, and detaining her for an unnecessarily long period of time were not sufficiently extreme and outrageous as to support a claim for intentional infliction of emotional distress. Rogala v. District of Columbia, 161 F.3d 44, 58.

C.A.D.C.1990. Quot. in case cit. in disc. An airline passenger who missed his appointment because the plane was delayed on the runway for three hours prior to takeoff sued the airline for intentional infliction of emotional distress, inter alia, after the pilot refused to grant his request to deplane. The district court granted the defendant's motion for summary judgment on the ground that the plaintiff failed to establish specific facts showing a genuine issue of fact to be tried. This court affirmed, holding that no reasonable juror would find that the pilot's refusal of the plaintiff's request constituted outrageous behavior or behavior that was so extreme as to go beyond all bounds of decency. Abourezk v. New York Airlines, Inc., 895 F.2d 1456, 1459.

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C.A.D.C.1987. Com. (d) quot. in disc. A blind attorney who had been denied a seat in the emergency exit row of an airplane by the airline sued the airline under the Rehabilitation Act, the Federal Aviation Act, and the United States Constitution and alleged that the airline had committed the tort of outrage and breached its contract of transportation. The trial court granted summary judgment for the airline. Affirming, this court held that the trial court correctly concluded that the plaintiff failed to state a relievable claim under any of the asserted theories. The court stated that the trial court properly found that the plaintiff had not alleged facts sufficient to show that the airline's conduct was so atrocious or intolerable as to constitute a tort of outrage. Anderson v. USAir, Inc., 818 F.2d 49, 56.

C.A.D.C.1986. Com. (e) quot. in sup. The plaintiffs sued policemen, a police chief, and a municipality for intentional infliction of mental distress, among other constitutional and common law tort claims, alleging that the police officers deliberately made false reports of criminal activity on the part of the plaintiffs. The trial court denied the defendants' motion for a directed verdict on the claim for emotional distress. Although this court reversed the trial court's decisions on the other claims, it affirmed the denial of the directed verdict, holding that an abuse of a position of authority, particularly by a police officer could constitute outrageous conduct and that it was for a jury to gauge whether the police in this case had acted so egregiously, intentionally, or recklessly as to cause the suspects severe emotional distress. Carter v. District of Columbia, 795 F.2d 116, 139.

C.A.D.C.1983. Cit. in ftn. in sup. Certain prison inmates brought a class action against the District of Columbia and several of its officials and employees, alleging that the conditions of their confinement violated their constitutional rights, the common law duty of due care owed them, and the statutory duty to provide inmates with safekeeping, care, protection, and instruction. After a jury verdict awarded the inmates damages, this appeal was taken. The judgment was reversed and the cause remanded. The court first held that the trial court had abused its discretion in granting a protective order that had sharply curtailed the ability of the defendants' counsel to discuss with their clients information obtained during discovery. The court noted that the order clearly disadvantaged the defendants and held that alternative methods of protection, less intrusive on the attorney-client relation, could have been used in safeguarding the inmates. In response to another contention by the defendants, the court also held that the trial court had erred in working a charge to the jury on the question of damages. The court indicated that inmates alleging violations of the constitutional rights could be compensated only to the extent that their interests protected by the Constitution had been infringed, and went on to hold that the inmates were entitled to recovery for the infringement of such interests as peace of mind and future earning capacity as protected by the constitutional prohibition of cruel and unusual punishment. Accordingly, the court found that a trial court instruction that seemed to indicate that the jury might award damages on the intrinsic value of a constitutional right was improper. Doe v. District of Columbia, 697 F.2d 1115, 1124.

Ct.Fed.Cl.

Ct.Fed.Cl.2012. Quot. in sup. Owner of property located in Tennessee sued the United States, alleging that defendant fraudulently misrepresented itself as the administrative division of the State of Tennessee in order to collect property taxes from plaintiff. Granting defendant's motion to dismiss, this court held, among other things, that it lacked subject-matter jurisdiction over plaintiff's claims alleging fraud and seeking compensation for emotional distress, because those claims sounded in tort and did not fall within the court's Tucker Act jurisdiction. Maxwell v. U.S., 104 Fed.Cl. 112, 118.

Ct.Fed.Cl.2002. Cit. and quot. in sup. In congressional-reference action arising from private bill to consider the amount, if any, of relief legally or equitably due from United States to former federal employee, employee based his entitlement to compensation on, in part, the Whistleblower Protection Act and the common-law theory of intentional infliction of emotional distress. Granting in part government's motion for summary judgment, the court held that employee's allegations that his supervisor yelled at him and became increasingly abusive and irascible failed to state a claim for intentional infliction of emotional distress. The court said that there was no evidence of motive on supervisor's part, and, moreover, supervisor's conduct in yelling at employee was not sufficiently outrageous to support the claim. Barlow v. U.S., 51 Fed.Cl. 380, 392, 394.

M.D.Ala.

M.D.Ala.2011. Com. (d) cit. in case quot. in sup. White male employee of an Alabama manufacturing plant sued employer's Korean parent corporation, alleging discrimination based on race and national origin, retaliation, and other claims. This court granted summary judgment for defendant on plaintiff's claim under Alabama law for intentional infliction of emotional distress, holding that the conduct alleged was not sufficiently outrageous to support liability. The court noted that plaintiff based the claim on defendant's alleged discrimination and retaliation against him, and that such claims did not fall within the three limited circumstances recognized by the Alabama Supreme Court for the tort of outrage: cases having to do with wrongful conduct in the context of family burial; cases where insurance agents employed heavy-handed, barbaric means to coerce a settlement; and cases involving egregious sexual harassment. Short v. Mando American, 805 F.Supp.2d 1246, 1276, 1277.

M.D.Ala.2006. Com. (d) quot. in case quot. in sup. After university discovered a scoring error and took title to the crown of university beauty pageant away from entrant, entrant and parents sued university and administrators for, among other things, intentional infliction of emotional distress—the tort of "outrage" in Alabama. Granting defendants' motion to dismiss this claim, this court held, inter alia, that the alleged conduct did not rise to the level of outrage as defined under Alabama law. The court reasoned that university's decision to correct the error, even after plaintiffs had been assured by an administrator in unequivocal terms that no investigation would be launched, did not offend all bounds of decency and could not be considered intolerable in a civilized society. Sykes v. Payton, 441 F.Supp.2d 1220, 1222.

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M.D.Ala.1998. Com. (d) quot. in case quot. in disc. A hotel housekeeper whose workers' compensation coverage was discontinued sued the hotel's insurer's claims management company for the tort of outrage, among other claims. This court granted defendant's motion for summary judgment on the outrage claim, holding, inter alia, that plaintiff failed to show: (1) that defendant intended to inflict emotional distress on plaintiff; (2) that plaintiff failed to establish that defendant knew or should have known that its actions would result in severe emotional distress to plaintiff; (3) that plaintiff failed to produce evidence of the extreme and outrageous nature of the conduct or the severity of her emotional distress; and (4) that plaintiff had not produced any evidence of her severe emotional distress. Wiggins v. Risk Enterprise Management Ltd., 14 F.Supp.2d 1279, 1284.

M.D.Ala.1996. Com. (d) cit. in disc. An insurer brought suit seeking a declaration that it had no contractual duty, under a policy insuring against negligent administration of an employee benefit program, either to defend or indemnify a store in a lawsuit brought by the store's former manager. The underlying lawsuit alleged outrageous conduct by the store through its intentional failure to timely report plaintiff's on-the-job injury to the claims adjuster, and through firing her under false pretexts. This court granted the insurer's request for a declaration that it had no duty to defend, holding, inter alia, that the policy explicitly excluded coverage for malicious or criminal acts or omissions, which conduct was but the departure point for an outrage claim. It noted that while an intentional-infliction-of-distress claim may be brought against an insurer who outrageously denies a clam, this obligation has no bearing on an insurer's duty to defend against such a claim under a policy limited on its terms to defense of negligence actions. Guaranty Nat. Ins. Co. v. Beeline Stores, Inc., 945 F.Supp. 1510, 1514.

M.D.Ala.1989. Quot. in disc. A husband and wife sued the contractor who built their home for, inter alia, breach of contract and the tort of outrage when, after completion of their home, numerous defects existed that the contractor refused to remedy. This court awarded the defendant summary judgment on these claims and stated that the defendant's failure to make repairs was not so extreme in degree, atrocious, or utterly intolerable as to subject him to liability based on outrage. Clark v. Jim Walter Homes, Inc., 719 F.Supp. 1037, 1046.

M.D.Ala.1988. Cit. in ftn., com. (i) cit. in ftn. A woman gave birth after doctors had assured her that her stomach pain was nothing more than a urinary-tract infection and a case of hemorrhoids. The woman provided details of the unexpected birth to a local newspaper. A national men's magazine reprinted the article, entitling it “Birth of a Hemorrhoid.” The woman sued the magazine for, inter alia, defamation and intentional infliction of emotional harm. This court granted the defendant's motion for summary judgment, holding that the plaintiff could not recover on her defamation claim because the article was not materially false. The court also held that the plaintiff could not recover on the emotional distress claim because the republication of the story was not egregious behavior, the plaintiff did not suffer any severe emotional distress, and there was no evidence that the defendants knew, or should have known, that their conduct was likely to result in emotional distress to the plaintiff. Grimsley v. Guccione, 703 F.Supp. 903, 906, 907, 909.

M.D.Ala.1981. Cit. in sup., com. (f) quot. in sup. and com. (g) quot. in part in sup. Erron. cit. as Torts. The plaintiff's employer, whose disability plan did not require the plaintiff to seek Social Security benefits and did not authorize a reduction of plaintiff's monthly disability check in anticipation of those benefits, reduced the plaintiff's check from $500 to $49.10, advising the plaintiff to seek the balance from the Social Security Administration. The plaintiff alleged that the employer committed the tort of outrage when it reduced the amount of the check, knowing that the plaintiff had a severe heart condition and permanent disability and was already distraught over his physical and financial condition. This proceeding was instituted on the employer's motion for a judgment n.o.v. or, in the alternative, for a new trial and on the plaintiff's motion for attorney's fees. The court stated that the Supreme Court of Alabama referred, with approval, to the Restatement of the Law of Torts, Section 46, to aid in determining when the facts warrant a finding of the tort of outrage. The court held that there was evidence that the jury could find that the defendant's deliberate and wrongful act of reducing the benefits of the plaintiff to $49 a month was callous and "utterly intolerable in a civilized society" and that the defendant had therefore committed the tort of outrage under the law of Alabama. The court found that the damages awarded were within the jury's discretion and were not excessive in light of the defendant's acts and the medical testimony as to the plaintiff's emotional suffering. The court also held that the attorney for the plaintiff was entitled to a fee of $4,500. Accordingly, the defendant's motion was denied and the plaintiff's motion was granted. Holmes v. Oxford Chemicals, Inc., 510 F.Supp. 915, 919, judgment affirmed 672 F.2d 854 (11th Cir.1982). See above case.

N.D.Ala.

N.D.Ala.2016. Com. (d) cit. in case quot. in sup. Former employee brought civil-rights claims against former employer in connection with her termination, alleging sexual harassment, disparate treatment, retaliation, and the state law tort of outrage. This court granted summary judgment for employer on employee's outrage claim, holding that employee's allegations that her supervisor engaged in sexually suggestive touching and made inappropriate sexual comments to employee did not amount to the type of "particularly egregious" sexual harassment that would support a claim of outrage under Alabama law. The court reasoned, in part, that, under Restatement Second of Torts § 46, the law would not hold a defendant liable in tort for behavior that amounted to mere insults, indignities, threats, or annoyances. Dates v. Frank Norton, LLC, 190 F.Supp.3d 1037, 1075.

N.D.Ala.2015. Com. (e) cit. in sup. Customer filed, inter alia, a claim for intentional infliction of emotional distress against electronics store, alleging that defendant's technical-support provider's employees viewed and retained nude photographs of plaintiff without her permission while servicing her external hard drives. This court denied in part defendant's motion for summary judgment, holding that there were genuine issues of material fact. The court explained that the alleged misconduct could be considered by a jury as sufficiently outrageous under Restatement Second of Torts § 46, Comment *e*, because plaintiff alleged that an employee abused the authority, access, or trust afforded to him by his position with defendant by viewing and downloading the photographs and showing them to at least two other employees. March v. Best Buy Stores, LP, 111 F.Supp.3d 1236, 1246.

N.D.Ala.2014. Com. (d) quot. in case quot. in sup. Pharmacist brought a state-law claim for intentional infliction of emotional distress (IIED), inter alia, against former employer and supervisor, claiming that supervisor engaged in harassing conduct by repeatedly questioning him about when he planned to retire and by reporting him to the Alabama Pharmacy Board for allegedly improperly refilling a prescription. Granting in part defendants' motion for summary judgment, this court held that the facts relied upon by plaintiff to show harassing behavior did not come anywhere close to the level of egregiousness necessary to support an IIED claim. The court cited Restatement Second of Torts § 46, Comment *d*, in noting that, for purposes of an IIED claim, a defendant's conduct had to be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. King v. CVS Caremark, Corp., 2 F.Supp.3d 1252, 1273.

N.D.Ala.2013. Com. (d) quot. in case quot. in sup. Terminated employee brought a state-law claim for outrage, inter alia, against former employer, seeking to hold defendant vicariously liable for a supervisor's alleged acts of inappropriately touching plaintiff on three separate occasions in such a way that plaintiff felt as though other employees thought that he was homosexual and were laughing at him as a result. Granting defendant's motion for summary judgment, this court held that plaintiff's complaint failed to reach the level of egregiousness required to state a claim for outrage under Alabama law. The court noted that, under Alabama law and Restatement Second of Torts § 46"mere insults, threats, annoyances, petty oppressions, or other trivialities" were insufficient to create liability for outrage. Burback v. BNSF Ry. Co., Inc., 963 F.Supp.2d 1255, 1267.

N.D.Ala.2013. Com. (d) cit. in case quot. in sup. African-American former employee of insurance agency sued agency and its principal, alleging, inter alia, a state-law claim for outrage. Granting summary judgment for defendants, this court held that, plaintiff's claim for outrage failed, because, while hitting employees and grabbing them by the arm, as plaintiff alleged that principal did in the instant case, was not acceptable conduct, that conduct and the other conduct alleged in this case, such as principal's racial statements, were. not sufficiently extreme and outrageous to support plaintiff's outrage claim. Foy v. Pat Donalson Agency, 946 F.Supp.2d 1250, 1276.

N.D.Ala.2013. Com. (d) cit. in case quot. in sup. Guardian and next friend of a 14-year-old female middle-school student who allegedly was raped in a boys' restroom by a 16-year-old male student at the school sued, among others, school teachers, asserting, inter alia, a claim for the tort of outrage. Granting defendants' motion for summary judgment, this court held, among other things, that, although it was negligent and perhaps wanton for defendants to send female student to meet with male student in order to catch him "in the act" of sexual harassment, defendants' conduct was not sufficiently extreme and outrageous to support plaintiff's outrage claim. The court noted that the tort of outrage was a limited remedy to be applied only in flagrantly egregious circumstances. Hill v. Madison County School Bd., 957 F.Supp.2d 1320, 1349.

N.D.Ala.1999. Com. (d) cit. in case cit. in disc. Participant in county food-stamp program brought, in part, a claim for the tort of outrage against state and county departments of human resources, county food-stamp office, and government employees. Granting defendants' motion to dismiss,

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the court held, inter alia, that defendants' alleged conduct of withholding the homeless shelter deduction and failing to average plaintiff's income did not rise to the level of egregiousness necessary to state a claim of outrage under Alabama law. Sanders v. Jefferson County Dept. of Human Resources, 117 F.Supp.2d 1199, 1209.

N.D.Ala.1997. Cit. in case quot. in disc., com. (d) quot. in case quot. in disc. Employee brought state court wrongful-discharge action against railroad, his former employer, alleging that he was terminated solely because of his participation as a member of a jury that returned a large verdict against railroad. Plaintiff also asserted a claim for intentional infliction of emotional distress. Defendant removed the case to this court on the ground that plaintiff's action was preempted by the Railway Labor Act (RLA). Granting plaintiff's motion to remand, the court held that a determination of whether defendant acted outrageously when it discharged plaintiff did not require interpretation or consideration of his collective-bargaining agreement, and thus his action was not preempted by the RLA. Johnson v. Norfolk Southern Corp., 953 F.Supp. 364, 367.

N.D.Ala.1982. Com. (d) cit. in sup. An employee sought damages from her employer for emotional distress, alleging that her manager had threatened her with termination, charged her with malicious gossip, talked to her in an ugly way, and suspended her. The defendant moved for summary judgment. This court found that the plaintiff may have been subject to insults and indignities; however, insults, indignities and threats did not amount to a cause of action under Alabama law entitling the plaintiff to damages for emotional distress. Therefore, the court granted the defendant's motion for summary judgment. Cushing v. General Time Corp., 549 F.Supp. 768, 770.

S.D.Ala.

S.D.Ala.2020. Cit. in sup., cit. in cases cit. and quot. in sup.; subsec. (1) and com. (d) quot. in sup. Former captain of a ship that was involved in a collision sued former employers, alleging that, after he declined defendants' offer for a new contract and began working for a new employer, defendants made false, misleading, and defamatory statements to his new employer regarding his professional competency and his responsibility for the collision. This court granted defendants' motion for summary judgment on plaintiff's claim for intentional infliction of emotional distress, holding that, even accepting plaintiff's allegations that defendants' statements were vindictive, they failed to describe behavior extreme and outrageous enough to support such a claim under Restatement Second of Torts § 46. Sangha v. Navig8 Ship Management PTE Ltd., 440 F.Supp.3d 1286, 1300, 1301.

S.D.Ala.1993. Quot. in ftn., subsec. (1) quot. in ftn. Former police officer sued mayor and police chief for retaliatory discharge in violation of First Amendment and the tort of outrage, alleging, in part, that defendants ordered a fellow police officer, who was subpoenaed by plaintiff to testify before county personnel board, not to appear at plaintiff's personnel board hearing. This court granted in part defendants' motion for summary judgment, holding, inter alia, that, as a matter of law, defendants' action of ordering police officer to ignore a subpoena to testify at plaintiff's

personnel board hearing was not conduct sufficiently extreme and outrageous as to constitute the tort of outrage. Angle v. Dow, 822 F.Supp. 1530, 1545.

D.Ariz.

D.Ariz.2022. Com. (h) quot. in sup., cit. in case quot. in sup. Employees of hospital, which operated under a contract with the federal government, brought, among other things, an action against the United States under the Federal Tort Claims Act (FTCA) for intentional infliction of emotional distress (IIED), alleging that hospital failed to investigate the lies of information-technology specialist's about specialist's criminal history of "attempted surreptitious videotaping," and failed to promptly and fully investigate cameras found in hospital bathrooms. This court denied defendant's motion for summary judgment, holding that there were triable issues of fact that precluded summary judgment on plaintiffs' claim. Citing Restatement Second of Torts § 46, Comment *h,* the court noted that it was for the jury to decide whether hospital's conduct was sufficiently extreme and outrageous to result in liability. Anthony v. United States, 632 F.Supp.3d 1017, 1042.

D.Ariz.2022. Cit. in sup., com. (d) quot. in case quot. in sup. Individual who was arrested for misdemeanor assault before the charges against him were dropped for lack of cooperation from the victim sued city and police officers for, among other things, intentional infliction of emotional distress (IIED), alleging that officers, who were responding to a report of a "male vs. female" physical altercation at arrestee's apartment, repeatedly used stun guns against him, even after he was physically unable to move, stunning him a total of seven times. This court granted defendants' motion for summary judgment, holding that, under state law and Restatement Second of Torts § 46, defendants were not liable for IIED. The court explained that officers' conduct was objectively reasonable given that they were responding to a call of domestic abuse, officers heard children crying loudly in arrestee's apartment, and arrestee repeatedly failed to comply with officers' commands. Oakry v. Tempe, City of, 629 F.Supp.3d 974, 988.

D.Ariz.2022. Subsec. (1) and com. (b) quot. in disc., com. (j) quot. in case quot. in sup. Parents of students in a public school district, who formed a private social-media group to discuss issues related to district's policies, sued, among others, father of a member of district's school board, alleging that they suffered serious emotional distress when they discovered that father had collected voluminous sensitive and personal information about parents in an online account and shared that information with district and others. This court granted in part father's motion to dismiss, holding that parents failed to state a claim for intentional infliction of emotional distress under Arizona law. The court reasoned, in part, that, while one parent alleged that she vomited when she reviewed the information about her and other parents, that single instance was a "transient" emotional response to an upsetting situation and was insufficient to show severe emotional distress under Restatement Second of Torts § 46. Wray v. Greenburg, 646 F.Supp.3d 1084, 1108, 1109.

D.Ariz.2019. Cit. in case cit. in sup. (general cite); com. (h) cit. in sup. Passengers brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against airline, alleging that defendant lost a funerary urn containing the ashes of plaintiffs' deceased daughter. This court granted in part defendant's motion for summary judgment, holding that the record indicated that plaintiffs were not sufficiently emotionally distressed to succeed on their IIED claim. The court explained that, according to Arizona caselaw, plaintiffs had to demonstrate that their extreme mental and emotional distress was accompanied by physical ailments, such as headaches, in order to succeed on an IIED claim as set forth in Restatement Second of Torts § 46. The court further explained that, under § 46, Comment *h*, it was for the court to determine as a matter of law whether a defendant's acts could be sufficiently extreme and outrageous to state a claim for relief. Pierre-Canel v. American Airlines, 375 F.Supp.3d 1044, 1055, 1056.

D.Ariz.2019. Com. (h) cit. in disc. Festival attendee brought a lawsuit against, among others, public university's governing body and university's law-enforcement officers, alleging that defendants committed intentional infliction of emotional distress (IIED) when they arrested him for violating a university policy that banned speech amplified by microphones during the festival. This court granted defendant's motion to dismiss, holding, inter alia, that defendants' conduct was not extreme and outrageous, as required for a successful IIED claim. The court explained that, under Restatement Second of Torts § 46, Comment *h*, it was entitled to decide whether defendants' alleged acts reasonably constituted extreme and outrageous conduct without making findings of fact. Spears v. Arizona Board of Regents, 372 F.Supp.3d 893, 921.

D.Ariz.2017. Com. (b) quot. in case quot. in sup. Following a physical altercation between patrons at a motocross park, plaintiff who was injured in the altercation brought a claim for intentional infliction of emotional distress against defendants who were also involved in the altercation. This court granted defendants' motion for summary judgment on plaintiff's claim, holding that plaintiff failed to proffer evidence upon which a jury reasonably could conclude that he experienced severe mental anguish as a result of defendants' actions. The court explained that, under Arizona law and Restatement Second of Torts § 46, a plaintiff had to show that a defendant engaged in extreme and outrageous conduct, that the defendant intended to cause emotional distress or recklessly disregarded the near certainty that such distress would result, and that severe emotional distress occurred as a result of the defendant's conduct. Lewis v. Dirt Sports LLC, 259 F.Supp.3d 1039, 1047.

D.Ariz.2013. Subsec. (1) cit. in case quot. in sup. Former employee sued former employer that was self-insured for workers' compensation and subsidiary of employer that handled adjustment of employees' workers' compensation claims, alleging intentional infliction of emotional distress and other claims in connection with defendants' handling of her claim for a work-related injury to her right hand; among other things, plaintiff asserted that her supervisor falsely informed her physician that employer had surveillance video of employee pushing a shopping cart with both hands after the accident. Denying defendants' motion for summary judgment on plaintiff's claim for intentional infliction of emotional distress, this court held that, if a jury found that supervisor lied to physician in an attempt to influence the care that physician was providing to employee, it

could also find that such conduct rose to the level of outrageousness necessary for such a claim. The court reasoned that Arizona courts had recognized the unique relationship between insured and insurer, and that a jury could find that an insurer's exploitation of that power relationship for purposes of financial gain was outrageous. Demetrulias v. Wal-Mart Stores Inc., 917 F.Supp.2d 993, 1012.

D.Ariz.2012. Com. (d) cit. in case quot. in sup. In consolidated cases, members of county board of supervisors, county court judges, and county staff members sued members of county sheriff's office and county attorney's office, asserting, among other things, claims for intentional infliction of emotional distress (IIED). This court denied defendants' motions to dismiss these claims, holding that the alleged retaliatory conduct of defendants, as officials vested with governmental authority, against plaintiffs, as well as their alleged targeted harassment of plaintiffs, including their filing of a federal civil Racketeer Influenced and Corrupt Organizations Act suit against plaintiffs, was sufficiently outrageous to state an IIED claim, and, further, plaintiffs sufficiently alleged that defendants acted against them with the intention of causing, or at least with reckless disregard of the risk of, emotional injury. Donahoe v. Arpaio, 869 F.Supp.2d 1020, 1061.

D.Ariz.2002. Com. (d) quot. in sup. After employee was fired for alleged substance abuse, she sued employer for intentional infliction of emotional distress, inter alia, alleging that employer required her to submit to drug screening, required her to give urine sample, and conducted interview that covered inappropriate subjects. This court dismissed in part, holding, inter alia, that the emotional-distress claim was preempted by § 301 of Labor Management Relations Act. The court stated that any claim for extreme and outrageous conduct related to enforcement of employer's substance-abuse policy must arise from terms of collective-bargaining agreement (CBA), and that without interpreting CBA's terms, the court could not determine if employer's conduct was extreme and outrageous in view of substance-abuse policy. Robinson v. Fred Meyers Stores, Inc., 252 F.Supp.2d 905, 915.

D.Ariz.1997. Com. (d) quot. in case quot. in sup. A taxpayer sued the government, alleging intentional and negligent infliction of emotional distress as a result of its harassment in attempting to collect unpaid tax assessments made against him. Granting defendant's motion for summary judgment, the court held, inter alia, that plaintiff failed, as a matter of law, to establish that defendant's agents committed any acts that were extreme and outrageous so as to state a claim for relief for intentional infliction of emotional distress. Rayes v. U.S., 967 F.Supp. 1162, 1165.

D.Ariz.1996. Cit. in headnotes, cit. in sup., com. (d) quot. in case quot. in sup. Medical laboratory, its owner, and owner's wife sued television network for, inter alia, public disclosure of private facts and intentional infliction of emotional distress after network secretly taped owner's admission that his employees were fatigued, then aired a news program in which its reporter stated that laboratory had misread pap smear slides. Network moved for summary judgment. Granting the motion, the court held that laboratory, as a corporation, could not maintain an action for invasion of privacy; wife's privacy action failed because her claim was merely derivative of her husband's; owner could not recover for invasion of privacy because the disclosed facts were matters of public record and

could not be considered highly offensive to a reasonable person; and the use of hidden cameras to record owner's comments was neither atrocious nor outrageous. Matter of Medical Laboratory Management Consultants, 931 F.Supp. 1487, 1489, 1493, 1494.

D.Ariz.1995. Cit. generally in disc., cit. generally in case quot. in sup., com. (d) quot. but dist., com. (h) cit. in case quot. in sup. Disabled airline passenger sued airlines, airport, and skycap service, alleging federal and state law causes of action, including intentional infliction of emotional distress. Plaintiff, who was 73 years old and suffered from severe arthritis of the knees, contended that defendants acted outrageously when a skycap pushed his wheelchair to a shuttle bus stop, then forced him out without providing handicapped facilities or handicapped access to the bus. Granting defendants' motion for summary judgment, the court held that they acted neither obnoxiously nor intolerably by failing to treat plaintiff as more incapacitated than he appeared to be. The evidence indicated that plaintiff was not forced from the wheelchair but stepped out of it without protest and, moreover, rejected fellow passengers' offers for a seat and boarded the bus without requesting assistance. Adiutori v. Sky Harbor Intern. Airport, 880 F.Supp. 696, 707, affirmed 103 F.3d 137 (9th Cir.1996).

E.D.Ark.

E.D.Ark.1995. Cit. in ftn., coms. (g)-(i) cit. in disc. Owner of a store located in front of a county detention facility was raped by an unsupervised "trusty" pretrial detainee, who had been directed by the county deputy sheriff to unload groceries from a police car behind the store. Store owner brought a § 1983 civil-rights claim, as well as pendent state-law tort claims, against the county, the deputy sheriff, and others. Granting in part defendants' motion to dismiss, the court held that plaintiff failed to state a claim against defendants under Arkansas' tort of outrage, since defendants' conduct in granting detainee trusty status and allowing him to leave the detention facility unsupervised was pursuant to county policy and thus did not constitute outrageous conduct; even if that conduct were sufficiently egregious to be actionable, defendants were not liable absent an allegation that they intended harm to befall plaintiff or that the attack was a substantially certain or highly probable consequence of the unsupervised release. Davis v. Fulton County, Ark., 884 F.Supp. 1245, 1262, 1264, affirmed 90 F.3d 1346 (8th Cir.1996).

E.D.Ark.1984. Cit. in disc., quot. in case cit. in sup., coms. (d) and (i) quot. in case quot. in sup., com. (f) and illus. 9-13 cit. in case quot. in disc., com. (h) quot. in disc. and cit. in case quot. in disc. Plaintiff sued her broker, alleging that she was defrauded into purchasing securities that were not suited to her needs, and as a result she suffered severe emotional distress. Defendant moved for partial summary judgment on the emotional distress claim, arguing, inter alia, that plaintiff had failed to adequately establish her claim. The court granted summary judgment, noting that the court was to determine whether conduct may reasonably be regarded as so outrageous as to permit recovery. Here plaintiff had not alleged conduct on the part of defendants that was so outrageous as to trigger liability, such as subterfuges, threats, exploitation, or speculative investment. LeCroy v. Dean Witter Reynolds, Inc., 585 F.Supp. 753, 762, 764-766.

W.D.Ark.

W.D.Ark.1995. Com. (d) quot. in case quot. in disc., com. (h) cit. in case quot. in disc. Employee who was accused of theft and was terminated after he admitted that he had given away property belonging to his employer without permission or authorization brought a claim for the tort of outrage against employer. Granting employer's motion for summary judgment, the court held, in part, that employer's actions did not rise to the level of extreme and outrageous conduct and employee failed to present sufficient evidence that he suffered emotional distress as a result of that conduct to establish a claim for the tort of outrage. Crenshaw v. Georgia-Pacific Corp., 915 F.Supp. 93, 97.

W.D.Ark.1994. Cit. in headnotes, cit. and quot. in disc., cit. in case quot. in disc., subsecs. (1) and (2) cit. in disc., com. (d) quot. in sup., cit. in disc. and cit. in case quot. in disc., coms. (g) and (j) cit. in disc. and cit. in case quot. in disc., com. (l) cit. in disc. (erron. cit. as com. 1). Former member of bible study group sued group leader for intentional infliction of emotional distress, alleging that leader brainwashed him and caused the separation of plaintiff and his wife, also a group member. After the court entered judgment on a jury verdict for plaintiff, defendant moved for judgment as a matter of law. Granting the motion, the court held that the alleged brainwashing was nothing more than religious indoctrination and was insufficient to establish outrageousness, and that plaintiff could not recover under a theory of intentional infliction of emotional distress for the extreme conduct he alleged was directed at his now ex-wife, a third party. Poindexter v. Armstrong, 934 F.Supp. 1052, 1052-1057.

W.D.Ark.1986. Coms. (d) and (j) cit. in sup. A teacher who received another teacher's score report on a competency examination and whose own score was sent to another sued the computer service that provided the scores for negligence, mental anguish, extreme emotional distress, and invasion of privacy. This court granted the service's motion for summary judgment, finding that the inadvertent switching of test scores fell far short of the wilful and wanton conduct necessary to support a claim for emotional distress, particularly when the plaintiff, instead of hiding in embarrassment, called other teachers and appeared on local television. The invasion of privacy claim failed because she never contended that the defendant had ever communicated the plaintiff's scores to anyone except the person who had inadvertently received them. Wood v. National Computer Systems, Inc., 643 F.Supp. 1093, 1097, judgment affirmed 814 F.2d 544 (8th Cir.1987). See above case.

C.D.Cal.

C.D.Cal.2009. Com. (h) cit. in disc. Debtor sued debt collectors for, among other things, intentional infliction of emotional distress (IIED) allegedly caused by defendants' attempts to collect on plaintiff's debt. This court, concluding that the complaint failed to allege any facts showing how plaintiff suffered emotional distress, dismissed the IIED claim with leave to amend

to include allegations regarding the nature of plaintiff's distress. The court, however, rejected defendant's argument that plaintiff did not properly plead the elements of the claim, since plaintiff's complaint explicitly recited each of the four elements, and also rejected defendant's argument that the court should find, without benefit of a fuller record, that defendants' alleged conduct was not sufficiently "outrageous" as a matter of law. Robinson v. Managed Accounts Receivables Corp., 654 F.Supp.2d 1051, 1062.

C.D.Cal.2001. Com. (d) cit. in sup. Equal-opportunity-housing association and African-American building manager sued city and director of landlord association that practiced tenant screening, alleging that defendants engaged in unfair housing practices in violation of federal and state laws, and asserting a claim for intentional infliction of emotional distress. Denying defendant director's motion for summary judgment on plaintiff manager's emotional-distress claim, the court held, inter alia, that a genuine issue of material fact existed as to whether director's discriminatory remarks at a landlord-association meeting attended by manager transcended the bounds of behavior usually tolerated in a civilized society, and might be considered outrageous conduct. Inland Mediation Bd. v. City of Pomona, 158 F.Supp.2d 1120, 1157.

C.D.Cal.1999. Com. (d) quot. in disc. Attorney brought state-court suit against trustee of trust with which his client had a partnership relationship, alleging intentional infliction of emotional distress, among other claims. Upon removal, this court denied the attorney's motion to amend his complaint to add a trustee of another trust as a nondiverse defendant. Plaintiff alleged that the other trustee had sent him faxes advising him to contact his insurance company regarding claims that other trustee knew were not covered by insurance. The court held, inter alia, that other trustee's conduct was insufficient to support an emotional distress claim. Clinco v. Roberts, 41 F.Supp.2d 1080, 1084.

C.D.Cal.1997. Com. (d) cit. generally in headnote and quot. in disc. A former employee of a store brought a claim for intentional infliction of emotional distress under California law against the store manager, among others, alleging that defendant failed to investigate incidents of harassment against him by co-workers and told him that the incidents were "all in his head," and also alleging that he overheard defendant say to another employee, "I wish Danny would quit." Granting defendant's motion for summary judgment, the court held that plaintiff failed to establish a prima facie case for intentional infliction of emotional distress, since defendant's conduct in making the alleged offensive statements was not outrageous and there was no evidence that defendant intended to inflict emotional harm on plaintiff. Dove v. PNS Stores, Inc., 982 F.Supp. 1420, 1421, 1424.

C.D.Cal.1996. Com. (d) quot. in case quot. in sup. Applicant brought a claim for intentional infliction of emotional distress, as well as other causes of action, against insurer, alleging that insurer's denial of his application for life insurance was based solely and improperly on his wife's HIV-positive status. Granting in part defendant's motion to dismiss, the court held, inter alia, that plaintiff failed to state a claim for intentional infliction of emotional distress because the denial of insurance coverage did not rise to the requisite level of outrageous conduct. Kotev v. First Colony Life Ins. Co., 927 F.Supp. 1316, 1324.

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C.D.Cal.1987. Cit. in disc., com. (h) cit. in ftn. An antipornography lecturer filed suit against a magazine, its publisher, and the publisher's corporation, asserting claims under the United States Constitution and state obscenity statutes and suing for intentional infliction of emotional injury, libel, invasion of privacy, and outrage. A Wyoming federal court dismissed the constitutional and statutory claims and granted the defendants' motion for change of venue. This court granted the defendants' motion for summary judgment on the remaining claims, holding that the plaintiff failed to state claims for libel and invasion of privacy, that the emotional injury and outrage claims were identical, and that since defamation was the gravamen of the action, a separate action for emotional injury was not sustainable. The court dismissed the invasion of privacy claim, which was based on the public disclosure of private facts, because that tort was not recognized under the applicable state law and no facts were disclosed. The court dismissed the outrage claim because the tort of outrage embodied the state's tort of intentional infliction of emotional distress. Dworkin v. Hustler Magazine, Inc., 668 F.Supp. 1408, 1420, 1421, judgment affirmed 867 F.2d 1188 (9th Cir.1989), cert. denied 493 U.S. 812, 110 S.Ct. 59, 107 L.Ed.2d 26 (1989).

E.D.Cal.

E.D.Cal.2015. Com. (d) cit. in case quot. in sup. Female arrestee brought a claim for intentional infliction of emotional distress (IIED), inter alia, in connection with her arrest and booking for possession of a controlled substance against, among others, male police officer who entered the strip-search area and began questioning her while she was still undressed. This court denied officer's motion to dismiss that claim, holding that arrestee pleaded specific facts that a reasonable trier of fact could find extreme and outrageous under Restatement Second of Torts § 46. The court pointed to arrestee's allegations that officer resumed questioning her while she was undressed in retaliation for her earlier resistance to answering his questions. Blanco v. County of Kings, 142 F.Supp.3d 986, 1102.

E.D.Cal.2010. Cit. in sup., com. (e) quot. in sup. City police officer who was range master for city's police-training shooting range sued county and county sheriff, asserting, inter alia, a claim for intentional infliction of emotional distress (IIED) in connection with sheriff's investigation of an accidental shooting of a county resident with a stray bullet from the training range. Granting summary judgment for defendants as to plaintiff's IIED claim, this court held that plaintiff's contention that defendants abused a relation or position of power over him by disclosing his personal information, including his home address, driver's license number, and telephone numbers, to the news media did not assert conduct that was sufficiently extreme and outrageous to support his IIED claim, in the absence of any evidence that a special relationship existed between plaintiff, as a witness in the investigation, and sheriff's office. Clark v. County of Tulare, 755 F.Supp.2d 1075, 1091.

E.D.Cal.2008. Com. (j) cit. in case cit. in sup. Insured homeowners sued insurer in connection with its alleged bad-faith response to their claims for a flooding incident involving contaminated water

that resulted in their being unable to remain in their home for almost a year. Denying summary judgment for insurer on insureds' claim for intentional infliction of emotional distress, this court held, inter alia, that, while plaintiffs had not pointed to any evidence of severe emotional distress, and the facts that they presented did not individually show extreme and outrageous conduct, whether the facts were sufficient collectively was better resolved at the close of insureds' evidence. The court noted that, under California law, the duration of the emotional distress was one of the factors to be considered in determining its severity. Hergenroeder v. Travelers Property Cas. Ins. Co., 249 F.R.D. 595, 621.

E.D.Cal.Bkrtcy.Ct.

E.D.Cal.Bkrtcy.Ct.2015. Cit. in sup., subsec. (1) quot. in ftn. Judgment creditor brought an adversary proceeding against Chapter 13 debtor who had uploaded a private video of her to a pornography website without her permission, seeking a determination that the debt represented by her judgment against him for invasion of privacy and intentional infliction of emotional distress was nondischargeable because it arose from his willful or malicious conduct. This court denied debtor's motion to dismiss, holding that the torts of intentional infliction of emotional distress and invasion of privacy constituted "personal injury to an individual," as required to except the debt from discharge. The court reasoned that the conduct required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46 constituted a personal injury under the Bankruptcy Code. In re Grossman, 538 B.R. 34, 43.

E.D.Cal.Bkrtcy.Ct.2011. Illus. 12 cit. in case cit. in sup. Chapter 7 debtor husband and wife filed a motion seeking damages and other relief against lender that held three deeds of trust on their home, alleging that, after they had already received a discharge in bankruptcy and surrendered the home to lender, lender violated the discharge by sending them 24 letters over a 10-month period in which it demanded that they continue to honor their obligations in connection with the home. Granting the motion in part, this court held that debtors were entitled to recover damages for emotional distress. The court reasoned, in part, that whether a defendant knew that a plaintiff had a special susceptibility to emotional distress was a factor that could be considered in determining whether the alleged conduct was outrageous, and pointed out that lender did not halt its communication with husband even after his psychiatrist sent a letter to lender asking it to do so. In re Nordlund, 494 B.R. 507, 524.

N.D.Cal.

N.D.Cal.2019. Com. (d) quot. in sup. Passenger brought, among other things, claims of intentional infliction of emotional distress (IIED) against airline and airline employee, alleging that he suffered severe emotional distress after defendants improperly removed him from a flight and subjected him to questioning by law-enforcement officers after another passenger reported overhearing him speaking in Arabic and using words such as "inshallah," "shahid," and "ISIS." This court granted in part defendants' motion for summary judgment, holding that defendants' conduct was

not extreme or outrageous enough to sustain an IIED claim. The court explained that defendants' conduct was discriminatory, distressing, and embarrassing, but discriminatory conduct alone was not sufficiently atrocious or utterly intolerable under Restatement Second of Torts § 46, Comment *d*, to sustain an IIED claim. Makhzoomi v. Southwest Airlines Co., 419 F.Supp.3d 1136, 1161.

N.D.Cal.2011. Subsec. (1) quot. in sup. Airline passenger sued airline for, inter alia, intentional infliction of emotional distress (IIED), alleging that flight attendant yelled at her in close proximity, resulting in saliva hitting her face, and punched her in the arm, causing her to scream and feel numb, because she impermissibly used the first class restroom. This court denied in part defendant's motion for judgment on the pleadings, holding that, at the pleadings stage, plaintiff only needed to allege facts that *could* support a claim of IIED, and she had done this by putting forth evidence of behavior that could be interpreted as extreme, and by alleging that she suffered extreme emotional distress as a result. Keum v. Virgin America Inc., 781 F.Supp.2d 944, 953.

N.D.Cal.1988. Com. (d) quot. in case quot. in disc. The former secretary of a federal district court judge sued the judge and a private association of judges for intentional infliction of emotional distress, inter alia, after she was discharged. The court dismissed the claim as to the private association and partially dismissed as to the judge, holding that the plaintiff did not allege sufficient facts to establish that the conduct of the defendants, in regard to their insistence that she perform work for the private association and that she not discuss or complain of that work, was extreme and outrageous. The court held, however, that the plaintiff's allegations against the judge of offensive touching, frequent demented tirades of obscenities, and threats of a bad recommendation did assert facts sufficient to allow a trier of fact to conclude that his conduct was extreme and outrageous. Garcia v. Williams, 704 F.Supp. 984, 1003.

N.D.Cal.1977. Cit. but dist. Plaintiff, a probationary tympanist for a symphony orchestra, who was denied tenure with the orchestra, brought a suit alleging that the orchestra players' committee vote denying her tenure violated the express requirement of a previous settlement agreement that provided for the holding of a second vote on plaintiff's tenure. (On a previous vote, plaintiff had been denied tenure.) Plaintiff further alleged that the second vote against her was an intentional wrongful act which caused her emotional distress and anguish. In granting summary judgment for the defendants, the court held, inter alia, that the simple vote of the committee, even if it occurred exactly as alleged in plaintiff's complaint did not amount to the kind of outrageous conduct beyond all bounds of decency that is required for the tort of intentional infliction of emotional distress. Jones v. Musicians Union of S.F. Local No. 6, Etc., 446 F.Supp. 391, 395.

S.D.Cal.

S.D.Cal.2010. Com. (d) quot. in sup. As part of his § 1983 action against his ex-wife's attorneys, city, city police officers, and others, arising from an alleged conspiracy to have him arrested in order to obtain incriminating child-custody evidence against him, former husband brought a claim for, inter alia, intentional infliction of emotional distress (IIED) against process server, alleging

that, while serving him with divorce papers, defendant angrily warned plaintiff, "you have no idea who you're fucking with." Granting defendant's motion to dismiss the IIED claim, this court held that the claim failed because plaintiff did not adequately allege that defendant's conduct was extreme or outrageous, or that he suffered severe emotional distress as a result of her conduct; while plaintiff urged the court to infer a threat of physical or other particular sorts of harm from defendant's language, defendant's threat could, at best, be described as cryptic or vague. Steel v. City of San Diego, 726 F.Supp.2d 1172, 1190.

S.D.Cal.2007. Cit. in disc. (general cite). Former employee of subcontractor that provided services at a nuclear electric generating station sued former employer over his termination. Granting in part defendant's motion to dismiss, this court held, inter alia, that plaintiff's claim for intentional infliction of emotional distress (IIED) was barred by the federal enclave doctrine, because the station was located on a military base that was within the exclusive territorial jurisdiction of the federal government. The court explained that California's recognition of this tort followed the amendment of the Restatement of Torts in 1947, and the government acquired the base no later than 1942; thus, because an IIED claim did not come within a reservation of jurisdiction by California and had not been adopted by Congress, it was inapplicable here. Stiefel v. Bechtel Corp., 497 F.Supp.2d 1138, 1149.

S.D.Cal.1999. Com. (d) cit. in disc. and quot. in case quot. in disc. Former employee sued former employer for, inter alia, intentional infliction of emotional distress, alleging that she suffered retaliation after complaining about a supervisor's behavior. After the jury returned a verdict for plaintiff, defendant moved for judgment as a matter of law and for a new trial. Entering judgment as a matter of law and conditionally granting the motion for a new trial, the court held, in part, that the conduct complained of constituted everyday management decisions and, while disagreeable to plaintiff, did not rise to the level of outrageousness necessary to support an action for intentional infliction of emotional distress. Helgeson v. American Intern. Group, Inc., 44 F.Supp.2d 1091, 1095.

S.D.Cal.1986. Com. (d) cit. in case quot. in disc. After an employer demoted an employee, the employee sued the employer and his immediate supervisors, alleging, inter alia, intentional infliction of emotional distress. The court denied the defendants' motion to dismiss the plaintiff's claim for intentional infliction of emotional distress, holding that dismissal of the claim was inappropriate at the present stage of the litigation. The court noted, however, that the plaintiff was required to satisfy a heavy burden to prove that he was entitled to recover under the emotional distress theory and that it appeared inherently improbable that he would be able to prove what he had alleged under this set of facts. Clement v. American Greetings Corp., 636 F.Supp. 1326, 1331.

D.Colo.

D.Colo.2023. Com. (j) quot. in sup. and cit. in case cit. in sup. Former director at an electronic voting-systems company sued owner and host of a podcast for intentional infliction of emotional

distress, alleging that defendants repeatedly invited a guest onto the podcast who falsely alleged that plaintiff had fraudulently rigged a presidential election, despite knowing that people were harassing plaintiff based on the guest's accusations. This court denied defendants' special motion to dismiss under the state's anti-SLAPP statute, holding that plaintiff sufficiently alleged that he was likely to succeed on the merits of his claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court reasoned, in part, that plaintiff met his burden of showing that he experienced severe emotional distress by submitting evidence to show that he had endured credible fear for his own life and the lives of his family, in addition to suffering significant anxiety and depression. Coomer v. Make Your Life Epic LLC, 659 F.Supp.3d 1189, 1206.

D.Colo.2014. Com. (d) quot. in case quot. in sup. Owner of pornographic films sued individuals who allegedly infringed on plaintiff's copyrighted work by using the internet and a peer-to-peer file sharing protocol to reproduce, distribute, display, or perform plaintiff's protected films; defendant counterclaimed, claiming, among other things, outrageous conduct. This court granted plaintiff's motion to dismiss defendant's counterclaims, holding that plaintiff did not engage in outrageous conduct within the meaning of Restatement Second of Torts § 46 when it filed its copyright-infringement claim against defendant and offered to settle for an amount within the statutory-damages parameters. The court reasoned that the embarrassing nature of plaintiff's work was insufficient to give rise to an claim for outrageous conduct where, as here, there was a factual basis supporting plaintiff's allegations that the work was protected by copyright laws, and an infringement was traced to defendant's Internet Protocol (IP) address. Purzel Video GmbH v. Smoak, 11 F.Supp.3d 1020, 1029.

D.Colo.2014. Com. (d) quot. in case quot. in sup. Owner of pornographic films sued individuals who allegedly infringed on plaintiff's copyrighted work by using the internet and a peer-to-peer file sharing protocol to reproduce, distribute, display, or perform plaintiff's protected films; defendant counterclaimed, claiming, among other things, outrageous conduct. This court granted plaintiff's motion to dismiss defendant's counterclaims, holding that plaintiff did not engage in outrageous conduct within the meaning of Restatement Second of Torts § 46 when it filed its copyright-infringement claim against defendant and offered to settle for an amount within the statutory-damages parameters. The court reasoned that the embarrassing nature of plaintiff's work was insufficient to give rise to an claim for outrageous conduct where, as here, there was a factual basis supporting plaintiff's allegations that the work was protected by copyright laws, and an infringement was traced to defendant's Internet Protocol (IP) address. Purzel Video GmbH v. St. Pierre, 10 F.Supp.3d 1158, 1167.

D.Colo.2009. Com. (d) quot. in disc. Investors who were swindled in a Ponzi scheme by licensed securities broker sued broker's employer, a broker-dealer, as well as its alter ego, asserting, among other things, a claim for outrageous conduct. This court dismissed the claim, holding, inter alia, that, regardless of the egregiousness of broker's conduct, no reasonable person could find that the conduct of defendants rose to the extreme level of outrageousness required to sustain this tort; plaintiffs pointed to no cases finding outrageous conduct in a broker-dealer's failure to report or

stop misconduct leading to financial losses, and the court's own research revealed none. Dolin v. Contemporary Financial Solutions, Inc., 622 F.Supp.2d 1077, 1090.

D.Colo.2009. Adopted in case cit. in disc., com. (j) cit. and quot. in sup. Corporation and its shareholders brought a claim for intentional infliction of emotional distress (IIED), inter alia, against insurer, alleging that defendant knew that plaintiffs were suffering financially, and purposely chose to delay and deny insurance benefits to them on an insurance claim. Granting summary judgment for defendant on the IIED claim by corporation and husband/shareholder, but not on the claim by wife/shareholder, this court held that wife's reference in her deposition testimony to "unreal" physical and emotional stress, coupled with the allegations that defendant's adjuster threatened to delay payment of insurance benefits after a fire that effectively closed the business that provided wife's livelihood, was sufficient to permit a reasonable factfinder to conclude that the distress she suffered was severe. Johnstown Feed & Seed, Inc. v. Continental Western Ins. Co., 641 F.Supp.2d 1167, 1179, 1180.

D.Colo.2009. Com. (b) cit. in disc. Borrower sued lender after defendant provided negative credit information regarding plaintiff's payment history to various credit-reporting agencies, thereby adversely affecting plaintiff's credit rating, despite having been correctly informed by plaintiff that the loan had been paid in full. This court denied defendant's motion to dismiss plaintiff's claim under Colorado law for outrageous conduct (intentional infliction of emotional distress), holding that the claim was not preempted by the federal Fair Credit Reporting Act; an outrageous-conduct claim was not a claim for "defamation, invasion of privacy, or negligence," nor was it necessarily "in the nature of" such a claim, since outrageous-conduct claims occupied a well-established niche in the common law, discrete from the claims specifically described in the statute. Llewellyn v. Shearson Financial Network, Inc., 622 F.Supp.2d 1062, 1069.

D.Colo.2009. Com. (d) quot. in case quot. in sup. State prisoner brought a pro se *Bivens* action against Immigration and Customs Enforcement (ICE) agent in his individual capacity, alleging, among other things, that defendant's lodgment of an immigration detainer against him was outrageous conduct sufficient to support a claim for intentional infliction of emotional distress. Adopting the recommendations of the magistrate judge, this court granted summary judgment for defendant. The magistrate judge found that there were no facts alleged showing that defendant's conduct was extreme and outrageous, or that he acted recklessly with the intent of causing plaintiff severe emotional distress; defendant simply followed standard procedures after plaintiff lied to him about his nationality. Nasious v. Two Unknown B.I.C.E. Agents at Arapahoe County Justice Center, 657 F.Supp.2d 1218, 1232.

D.Colo.2008. Com. (d) quot. in sup. Former employee brought employment-discrimination action against, among others, two former supervisors and a senior manager, alleging that defendants conspired to force his co-workers to create false documentation of his poor performance and then used it to discipline him, leaving him with no choice but to quit. Granting in part defendants' motion to dismiss plaintiff's claim for outrageous conduct, this court held, inter alia, that defendants' alleged conspiracy to build a case for his termination was not so outrageous in character, and so

extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community; while the alleged conduct was contemptible, conduct that could be illegal or that some might consider reprehensible was not necessarily actionable under Colorado law. Preston v. Atmel Corp., 560 F.Supp.2d 1035, 1039.

D.Colo.2007. Com. (d) cit. in case quot. in sup. As part of her sexual-harassment/wrongful-termination suit, former teacher's assistant at school brought claim for intentional infliction of emotional distress (IIED) against school counselor and supervisor, alleging that, after sharing certain personal information with counselor in confidence, counselor passed the information to principal, who then used the information to prey upon her emotions and start a sexual relationship, and that, after she ended the relationship with principal, supervisor retaliated against her. This court dismissed plaintiff's IIED claims against both defendants, holding that a breach of trust by a supposed confidant was a commonplace in society and not sufficiently outrageous conduct to support an IIED claim, and supervisor's alleged actions—withdrawing his good treatment of her after she ended the relationship with principal, restricting her movements in the school, and terminating her employment—were also not sufficiently outrageous. Silver v. Primero Reorganized School District No. 2, 619 F.Supp.2d 1074, 1078.

D.Colo.2006. Com. (d) cit. in case quot. in disc. After charges against her were dropped for lack of probable cause, woman who was arrested for interference with police authority sued three officers who arrested her, their supervisor, the chief of police, city attorney, deputy city attorney, and mayor for, in part, intentional infliction of emotional distress. This court, inter alia, adopted the magistrate's recommendation to grant summary judgment on this claim for supervisor, chief of police, and mayor on ground that there was no evidence that any of those defendants were involved in the alleged illegal search and seizures or the alleged use of excessive force against plaintiff, and for city attorney and deputy city attorney on ground that they were absolutely immune from liability for their prosecutorial acts. Barton v. City and County of Denver, 432 F.Supp.2d 1178, 1212, affirmed 2007 WL 3104909 (10th Cir.2007).

D.Colo.2000. Com. (d) quot. in case quot. in disc. Terminated police officer sued city, among others, for, inter alia, intentional infliction of emotional distress in connection with his discharge pursuant to defendant's policy on sexual harassment. Dismissing the complaint, the court held, in part, that neither the manner of discharge nor defendant's conduct was sufficiently egregious to allow plaintiff to recover under a theory of intentional infliction of emotional distress. Katz v. City of Aurora, 85 F.Supp.2d 1012, 1032, judgment affirmed 13 Fed.Appx. 837 (10th Cir.2001).

D.Colo.2000. Com. (d) quot. in disc. Former employee sued former employer for, inter alia, intentional infliction of emotional distress. After entry of summary judgment for defendant, defendant moved for sanctions and fees incurred in fighting the meritless action. Granting the motion in part and denying it in part, the court held, among other things, that plaintiff's mistaken belief as to whether the conduct complained of constituted outrageous behavior did not render her claim a frivolous one. Shackelford v. Courtesy Ford, Inc., 96 F.Supp.2d 1140, 1146.

D.Colo.1999. Com. (d) quot. in case quot. in disc. Former district attorney's office employee sued the district attorney under 42 U.S.C. § 1983 for First Amendment retaliatory discharge, intentional infliction of emotional distress, and intentional interference with prospective business advantage. Plaintiff alleged that defendant fired him because plaintiff had refused to participate in a conspiracy to remove the city police chief and had expressed concerns to defendant about defendant's excessive drinking. This court accepted the magistrate's recommendation that defendant's motion for summary judgment be granted in part and denied in part. The court held, inter alia, that plaintiff's emotional-distress claim failed, because, although plaintiff's allegations supported an inference that his discharge was unfair, he failed to establish outrageous conduct. Jandro v. Foster, 53 F.Supp.2d 1088, 1097.

D.Colo.1998. Cit. in disc., com. (f) cit. in sup. Judgment creditors who prevailed as plaintiffs in personal-injury action sued tortfeasor's insurer for, inter alia, breach of contract, willful breach of contract, and intentional infliction of emotional distress after insurer refused to satisfy the $3 million judgment entered against tortfeasor. Creditors also sought recovery under a theory of promissory estoppel. Insurer moved to dismiss. Granting the motion in part and denying it in part, this court held that creditors lacked standing to sue for bad-faith breach of an insurance contract, that creditors could sue to recover amounts not exceeding the limits of tortfeasor's insurance policy, that creditors' allegations that they detrimentally relied on insurer's promise to post an appeal bond in the underlying litigation survived the motion to dismiss, and that creditors had established that insurer engaged in a pattern of extreme and outrageous conduct. Cassidy v. Millers Cas. Ins. Co. of Texas, 1 F.Supp.2d 1200, 1213.

D.Colo.1997. Cit. in headnotes, adopted in case quot. in disc., com. (d) cit. in case quot. in disc. Female former employee sued former employer for, inter alia, gender-based discrimination and discriminatory termination in violation of Title VII, violations of the Equal Pay Act, and the common law tort of intentional infliction of emotional distress. Defendant moved for summary judgment. Granting the motion, the court held, in part, that plaintiff could not sustain her Title VII or Equal Pay Act claims, and that the conduct complained of, namely, discharge from employment, did not constitute outrageous conduct sufficient to give rise to a cause of action for intentional infliction of emotional distress. Noel v. Medtronic Electromedics, Inc., 973 F.Supp. 1206, 1208, 1216.

D.Colo.1997. Cit. in headnote, adopted in case quot. in disc. In employment-discrimination action, workers alleged, among other things, that employer committed the tort of intentional infliction of emotional distress. Defendant moved to dismiss. Granting the motion in part and denying it in part, the court held, inter alia, that, where the allegations forming the basis of their claim for intentional infliction of emotional distress were the same as those supporting their discrimination claim, plaintiffs had failed to state an independently cognizable claim for which relief could be granted. Visor v. Sprint/United Management Co., 965 F.Supp. 31, 32, 33.

D.Colo.1996. Com. (d) cit. in sup. College professor who alleged that he was denied tenure in retaliation for his intervention on behalf of an applicant rejected for a teaching position brought

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an action for, in part, intentional infliction of emotional distress against the college and college trustees and officials. Granting defendants' motion to dismiss, the court held, inter alia, that, especially in the context of this particular employment dispute, plaintiff failed to show that defendants' conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, so as to state a claim under Colorado law for intentional infliction of emotional distress. Thornton v. Kaplan, 937 F.Supp. 1441, 1458.

D.Colo.1995. Cit. in headnotes, adopted in case cit. in disc., com. (d) quot. in case quot. in disc. Former male employee who was dismissed for sexually harassing a female co-worker sued employer for, inter alia, intentional infliction of emotional distress. Plaintiff maintained that the harassment charges against him were bogus and defendant acted outrageously in fabricating them. Granting defendant's motion for summary judgment, the court held that where, as here, other employees corroborated defendant's conclusion that plaintiff created a hostile work environment for his co-worker and, at the time of his termination, plaintiff was on final written warning for sleeping on the job, defendant's decision to discharge him could not be considered atrocious or utterly intolerable to a civilized society. Bellairs v. Coors Brewing Co., 907 F.Supp. 1448, 1451, 1459, affirmed 107 F.3d 880 (10th Cir.1997).

D.Colo.1994. Cit. in sup. Sales representative who was fired after allegedly falsifying cigarette sales records sued her employer for civil-rights violations, fraud, and intentional infliction of emotional distress, among other claims. Plaintiff alleged that her supervisor misled her with respect to a “gratis,” a free product entry on plaintiff's documentation records, that he lied about having spoken with a customer about the gratis, and that he misrepresented his conversation with one of the managers of plaintiff's allegedly falsified accounts, who had tried in vain to state his opinion to the supervisor that someone inside the company was out to get plaintiff. Granting in part and denying in part defendant's motion for summary judgment, this court held, inter alia, that plaintiff stated a cause of action for intentional infliction of emotional distress, citing the alleged lies, together with the fact that supervisor had been disciplined in the past for altering an audit of an employee in order to fire that employee. Davies v. Philip Morris, USA, 863 F.Supp. 1430, 1440.

D.Colo.1993. Cit. in headnote, subsec. (a) quot. in part in disc. Insured and her spouse sued insurer for benefits under an insurance policy and for bad faith and outrageous conduct. Dismissing spouse's claims, the court held, inter alia, that spouse's secondhand distress resulting from insurer's nonpayment of benefits to insured was not a sufficient basis for spouse's claims; moreover, insurer's implied promise of good faith applied only to insured, and spouse was neither a target nor a witness of any alleged outrageous conduct by insurer. Dean v. Allstate Ins. Co., 878 F.Supp. 1397, 1398, 1400.

D.Colo.1993. Cit. in case cit. in disc. Man convicted of murder and sexual assault of a mother and murder of her one-and-one-half-year-old daughter, who died of dehydration before mother's body was discovered, sued murdered woman's husband and two men husband had hired to kill his wife for negligence, negligent infliction of emotional distress, malicious prosecution, and intentional infliction of emotional distress, among other claims. Plaintiff spent nine years in prison before

hired killer confessed that he and other defendant had killed the woman at husband's direction. Noting that husband had participated in the investigation of the murders and had testified as a witness for the state at the trial in which plaintiff was convicted, the court denied husband's motion to dismiss, stating that there was a duty on the part of a knowingly guilty party not to actively facilitate an innocent man's conviction and imprisonment and a duty not to lie under oath, and that, without husband's actions, plaintiff would not have spent nine years behind bars. Purvis v. Hamwi, 828 F.Supp. 1479, 1483.

D.Colo.1991. Subsec. (1) quot. in case quot. in disc., com. (d) quot. in case quot. in sup. A woman who had a group insurance policy was diagnosed with lung cancer. The insurer terminated the group policy but continued to pay the woman's medical expenses, although it subsequently contended that it was not required to do so. The woman sued the insurer for a declaratory judgment that she was covered under the policy and for damages under several claims, including breach of contract, negligent misrepresentation, and outrageous conduct. Granting the insured's motion for summary judgment on her declaratory judgment claim and the insurer's motion for summary judgment on the various damages claims, this court held, inter alia, as a matter of law that the insurer's conduct in this case was not sufficiently outrageous to permit recovery under the outrageous conduct claim. Buell v. Security General Life Ins. Co., 779 F.Supp. 1573, 1578, affirmed in part, reversed in part 987 F.2d 1467 (10th Cir.1993).

D.Colo.1991. Quot. in case cit. in sup., com. (i) quot. in case quot. in disc. Individuals and businesses who owned land near a nuclear weapons plant sued the companies that formerly operated the plant, alleging that the plaintiffs incurred injury and damages caused by releases or threatened releases of hazardous substances. The court denied the defendants' motion to dismiss the plaintiffs' outrageous conduct claim, provided that the plaintiffs filed an adequate amended complaint within 20 days. The court found that the plaintiffs failed to plead that they suffered severe emotional distress and that the defendants intended to inflict severe emotional distress or acted recklessly in the deliberate disregard of the high probability that emotional distress would follow. Cook v. Rockwell Intern. Corp., 755 F.Supp. 1468, 1478, 1479.

D.Colo.1991. Quot. in case quot. in sup. A National Football League (NFL) referee sued the NFL for claims under the Age Discrimination in Employment Act and for outrageous conduct, alleging that he had been demoted because of his age. Denying the NFL's motion to dismiss, the court held, inter alia, that reasonable jurors could differ on whether the NFL's conduct was outrageous when the referee alleged that the NFL's demotion was an attempt to humiliate him during nationally televised football games and to justify firing him based on inadequate performance in a new position. Dreith v. National Football League, 777 F.Supp. 832, 838.

D.Colo.1991. Com. (d) quot. in case cit. in disc. A former employee who was discharged after she refused to sign a consent form disclosing any medications she was taking sued her employer for intentional infliction of emotional distress, inter alia. The court granted the defendant's motion for summary judgment, holding that the defendant's conduct was not outrageous, since neither the defendant's request that the plaintiff provide, prior to taking a drug test, a list of medications

prescribed by her physician nor the manner in which she was terminated was so extreme as to be beyond the bounds of decency and to be regarded as intolerable. Mares v. Conagra Poultry Co., Inc., 773 F.Supp. 248, 253, affirmed 971 F.2d 492 (10th Cir.1992).

D.Colo.1991. Subsec. (1) and com. (d) quot. in disc. A former employee sued her employer for outrageous conduct, inter alia, alleging that the defendant discriminated against her because of her sex by denying her promotions, pay, and benefits commensurate with those of her male coworkers and subjecting her to a sexist work environment. Granting in part the defendant's motion for summary judgment, the court held that the plaintiff's allegation that the defendant wrongfully obtained her bank statement did not support her claim for outrageous conduct, even though the action might have caused her to feel outraged and agitated. The court also stated that the pleadings contained no evidence that the defendant obtained the statement unlawfully, and, since the plaintiff's affidavit that the defendant gained access to her account and ordered a printout of her bank statement was not based on her personal knowledge, it did not create a material issue of fact. Robyn v. Phillips Petroleum Co., 774 F.Supp. 587, 591.

D.Colo.1991. Cit. in sup. On the way to a sales call, the insured was injured when he slipped and fell in a parking lot. He sought to recover for his injuries from the defendant, his automobile insurance carrier. The defendant initially started to pay benefits, but then denied coverage because it contended that the insured's employer's workers' compensation policy was primary. The insured and his wife sued the defendant for intentional infliction of emotional distress, inter alia, alleging that their large outstanding medical bills caused them mental and physical anxiety, including dizziness and stomach pains. The court granted defendant summary judgment and dismissed with prejudice. It held that plaintiffs failed to demonstrate as a matter of law that defendant's conduct met the minimum threshold of outrageousness needed to maintain an action for intentional infliction of emotional distress. Schultz v. Allstate Ins. Co., 764 F.Supp. 1404, 1411.

D.Colo.1991. Com. (d) quot. in case quot. in disc. The children of a man who died of a gunshot wound to the head and whose death was originally reported as a suicide but later found by a grand jury to have been a homicide sued the county coroner's office, the city police department, county and city officers, and their father's widow alleging, among other state and federal claims, defamation and outrageous conduct. Granting motions to dismiss in part and denying them in part, this court held, inter alia, that dismissal of the outrageous conduct claim would be inappropriate since the children had alleged conduct, such as initially refusing entry to the accident scene to the county coroner, failing to conduct an autopsy, and failing to conduct ballistics or trace metal detection tests, that in the context of all the trial evidence, a jury could deem outrageous. Stump v. Gates, 777 F.Supp. 808, 826.

D.Colo.1990. Com. (d) quot. in case quot. in disc. A sales employee who was terminated after refusing to sign a no-compete agreement sued the employer for outrageous conduct, inter alia. The court granted in part the defendant's motion for summary judgment, holding that the defendant's conduct, implementing its business judgment to include no-compete clauses, was not so outrageous in character or so extreme in degree as to go beyond all bounds of decency and be regarded as

atrocious and utterly intolerable in a civilized community; moreover, the manner of the discharge was not outrageous. Vaske v. Ducharme, McMillen & Associates, Inc., 757 F.Supp. 1158, 1164.

D.Colo.1989. Com. (d) quot. in case quot. in disc. A sheriff's lieutenant pursued and pulled over a speeding car. The driver's father became agitated and kept coming out of the car after repeatedly being told not to interfere with the officer's duty. Finally, the father was arrested and taken into custody. He sued the police officer under federal and state law, namely for civil rights violations, invasion of privacy, assault, false arrest and outrageous conduct. This court granted summary judgment in favor of the defendant, holding, inter alia, that the defendant was immune from liability for reasonable actions taken while he was working within the scope of his official duty and authority. The court also rejected the outrageous conduct claim. Noting that outrageous conduct is presumably the result of an aggregation of all the other torts alleged, the court concluded that there was no genuine issue of material fact that the officer went beyond the bounds of reasonable police procedure in making an arrest, or that the arrest or any of the associated acts were willful and wanton. Navratil v. Parker, 726 F.Supp. 800, 806-807.

D.Colo.1988. Com. (g) quot. and cit. in disc. After a woman brought a civil suit against a man who had been convicted of sexually assaulting her, during discovery the defendant's psychiatrist examined the plaintiff. When the defendant's lawyer and the defendant's insurer's lawyer used the testimony of the psychiatrist about the plaintiff to obtain a new trial for the defendant in the criminal proceedings, the plaintiff sued the defense attorneys for negligence, outrageous conduct regarding the misuse of discovery, and invasion of privacy. The court granted the defense attorneys' motions for summary judgment only as to the invasion of privacy claim because the information revealed by the attorneys was in the public record. The court concluded that there was an inference of abuse of the discovery process because the defense could not have obtained the psychiatric testimony in the criminal case. Rohda v. Franklin Life Ins. Co., 689 F.Supp. 1034, 1044.

D.Colo.1987. Quot. in case quot. in sup., com. (e) cit. in sup. A teacher who claimed that her strongly expressed support for an expansion of the school district's foreign language program evoked retaliatory actions against her sued the school district and district officials, asserting a federal claim for infringement of her First Amendment rights and pendent state law claims of assault and outrageous conduct. The court denied the defendants' motion for summary judgment, holding in part that fact issues existed as to whether the alleged demotion to substitute teacher and the alleged harassment and assault constituted outrageous conduct. The court stated that those allegations, if proven, might be adjudged to constitute extreme and outrageous conduct and that any of the defendants' permissible conduct might have become extreme and outrageous because they were in positions of authority over the plaintiff. Kirk v. Smith, 674 F.Supp. 803, 810-812.

D.Colo.1987. Com. (e) cit. in disc. (Erron. cit. as Contracts 2d.) An employee sued his employer for breach of employment contract and for emotional distress inflicted by the employer's outrageous conduct and abuse of its position of authority over the plaintiff, alleging that he was harassed, coerced into accepting a lateral transfer, and constructively discharged as a result of his participation in the prosecution of a race discrimination claim brought against the employer by a

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former employee. This court granted in part and denied in part the defendant's motion for summary judgment, holding, inter alia, that the plaintiff failed to show that the defendant's conduct reached the level of egregiousness necessary to sustain a claim for outrageous conduct, and that the claim for liability based on abuse of a position of authority also failed, where the plaintiff had already established a claim and remedy for the conduct complained of under his breach of contract claim. Price v. Federal Exp. Corp., 660 F.Supp. 1388, 1397.

D.Colo.1987. Cit. in disc., com. (d) quot. in part in disc. A staff legal officer in the state court administrator's office was pressured into resigning by the state court administrator shortly after a confrontation between the two at a staff meeting. The state court administrator gave an unfavorable account of the former legal officer's job performance to the latter's prospective employer. The former legal officer sued the state court administrator under a federal civil rights statute and under state law for defamation and several other claims. The court granted summary judgment to the defendant on every claim except the defamation claim. The court held that fact issues existed as to whether the defendant's communication to the plaintiff's prospective employer was made maliciously or with reckless disregard as to its veracity. The court noted that if it was not, then the communication was a valid exercise of the defendant's qualified privilege. Steinberg v. Thomas, 659 F.Supp. 789, 795.

D.Colo.1987. Cit. in case quot. in sup., com. (d) cit. and quot. in sup., coms. (g) and (j) quot. in sup., cit. in case quot. in ftn. An airline pilot sued his former employer after he was abruptly discharged, alleging, inter alia, breach of an implied contract of employment, promissory estoppel, and intentional infliction of emotional distress. This court granted the employer's motion for summary judgment, holding, inter alia, that the employer's conduct was not sufficiently outrageous to impose liability for intentional infliction of emotional distress because the employer had the right to terminate the plaintiff without cause. Therrien v. United Air Lines, Inc., 670 F.Supp. 1517, 1523-1525.

D.Colo.1986. Coms. (f) and (h) cit. in sup. The plaintiff sued her insurer on a variety of theories, including outrageous conduct and negligence, for mishandling her daughter's group health insurance claim. After initially refusing payment, the insurer recanted. This court denied in part and granted in part the insurer's motion for summary judgment. It concluded that the plaintiff's reliance on trust law principles was misplaced; that the insurance company's conduct could, however, be considered outrageous, in view of the vulnerable mental condition of the plaintiff; and that her negligence claim was precluded by the state's unfair or deceptive practices act. Simmons v. Prudential Ins. Co. of America, 641 F.Supp. 675, 683, 684.

D.Colo.1984. Subsec. (1) cit. in disc. After the defendant private investigator accused the plaintiff priest of certain improper conduct, the priest and his religious order sued for outrageous conduct. When the defendant did not appear, the plaintiffs moved for a default judgment on this issue. The court determined that the defendant's conduct did not rise to a level of outrageousness that was actionable, basing its determination partly on the existence of other remedies for the plaintiffs. Bolduc v. Bailey, 586 F.Supp. 896, 902.

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D.Colo.1984. Cit. in sup., subsec. (1) quot. in ftn. in sup., com. (d) quot. in ftn. in sup. The plaintiff sued for negligent and intentional infliction of severe emotional distress and for defamation after the defendant directed derogatory comments at him and allegedly assaulted him with a soft drink bottle. This court granted the defendant's motion for summary judgment. The defendant's conduct may have been unsavory, said the court, but it was not so "outrageous in character, and so extreme in degree" to go beyond the bounds of human decency—the criteria for conduct that amounts to infliction of severe emotional distress. King v. Burris, 588 F.Supp. 1152, 1155-1157.

D.Colo.1983. Com. (d) quot. in case quot. in ftn. The plaintiff brought an age discrimination case against his former employer, and added claims for breach of contract and outrageous conduct. The defendant moved for summary judgment, which this court granted as to certain damages requested and as to the breach of contract claim, but denied as to the claim for outrageous conduct and for certain compensation requested. This court found that the issues relating to the outrageous conduct claim were factual, and were to be resolved by a jury according to the conscience of the community. Smith v. Montgomery Ward & Co., Inc., 567 F.Supp. 1331, 1335.

D.Colo.1982. Cit. in disc., com. (d) quot. in sup. An employee brought an action against the federal Department of Education and individual employees, alleging outrageous conduct, breach of contract, and other claims. Shortly after the plaintiff was hired as a collection agent for the Office of Student Financial Assistance, increased manual tasks were added to her duties. The plaintiff claimed that she informed her supervisor that the additional duties exacerbated her rheumatoid arthritis, but the supervisor rejected her requests for reasonable accommodations. The court dismissed the plaintiff's claim of outrageous conduct based on its finding that the defendants' acts were not "outrageous." The court concluded that the plaintiff was entitled to go to the jury with her other claims. Gelman v. Department of Educ., 544 F.Supp. 651, 653.

D.Colo.1982. Cit. in case quot. in sup., subsec. (2) cit. in sup. and cit. in case quot. in ftn. in sup., subsec. (2)(a) cit. and quot. in sup., com. (l) quot. but not fol. The plaintiffs brought an action against the employees of a county emergency service board, seeking damages for the death of their husband and father. The plaintiffs alleged that the defendants had received notice that the decedent required emergency ambulance service but failed to respond promptly, and that this delay proximately caused the death of the decedent. The plaintiffs alleged that the defendants caused the decedent and themselves intentional infliction of emotional distress. The plaintiffs also sought to charge the county and the emergency services board for the emotional harm caused under the doctrine of respondeat superior. This court granted the defendants' motion to dismiss in part and denied it in part. The court held that because the Colorado survival statute provided for the tort action of intentional infliction of emotional distress to survive the injured party, the plaintiffs could bring that action. But it stated that under Colorado law, the plaintiffs could not recover for their own emotional distress where they were not present at the scene of the alleged outrageous conduct. The court stated that although the Colorado supreme court had recently rejected the impact rule in cases seeking damages for the negligent infliction of emotional distress, allowing a plaintiff to recover if he was in danger of receiving bodily harm from the defendant's negligence, it had not

indicated a willingness to forego the requirement that a family member be present at the time of the alleged outrageous conduct to collect damages for intentional infliction of emotional distress. Healy v. Counts, 536 F.Supp. 600, 602, 603.

D.Colo.1982. Cit. in ftn. The plaintiff, whose criminal trial ended in a mistrial, brought a civil rights action against the federal district judge who presided at the trial, the federal prosecutors, various court officials, city police, and state district attorneys. The complaint alleged that the conduct of the defendants violated the plaintiff's constitutional rights. The plaintiff also sought to recover damages for false arrest, malicious prosecution, outrageous conduct, and defamation. This court dismissed the plaintiff's complaint against all defendants, finding, inter alia, that the federal defendants were immune from liability, that the plaintiff failed to plead sufficient facts for some claims, and that he failed to exhaust administrative remedies. The plaintiff's state law claims, including outrageous conduct, were best dealt with by the state courts, and with the dismissal of the plaintiff's federal claims, the court ceded jurisdiction over them. Martinez v. Winner, 548 F.Supp. 278, 336.

D.Colo.1982. Cit. and quot. in part in sup., com. (d) quot. in part in sup. The plaintiff alleged that he had been wrongfully fired from his employment with the defendant company and, alternatively, that the defendant had wrongfully refused to allow him to resign. The defendant moved to dismiss all of the plaintiff's claims, arguing that none of them stated a claim upon which relief could be granted. The plaintiff alleged, inter alia, that the defendant's conduct had been outrageous, and that it was intended to cause and did cause the plaintiff severe emotional distress. This court found that Colorado had adopted the Restatement (Second) of Torts, so that there was a cause of action in Colorado for the intentional or reckless infliction of emotional distress. This court stated that such claims will normally be cognizable only in cases where the defendant has engaged in a pattern of conduct which either intended to cause, or recklessly did cause, severe emotional distress. The court found that the plaintiff's allegations were insufficient to state a claim for extreme and outrageous conduct; therefore, these claims were dismissed, although other claims were found to be sufficient. Rawson v. Sears, Roebuck & Co., 530 F.Supp. 776, 779, 780.

D.Colo.1982. Cit. and quot. in disc. Com. (d) cit. in ftn. in disc. The plaintiff executed an order for service with the defendant, through an agent, whereby it was agreed that the defendant would move the plaintiff's household goods from Chicago to Seabrook, Maryland during a specified time period. Two weeks before shipment was to take place, the defendant notified the plaintiff that delivery could not be completed by the specified date. Plaintiff made alternate arrangements resulting in the goods arriving later than originally planned and forcing the plaintiff to begin work in a new job several days later than planned. The plaintiff brought suit for breach of contract and fraudulent misrepresentation, seeking compensatory and punitive damages. Reviewing the plaintiff's claim for damages for mental distress occasioned by the defendant's conduct, the court held, inter alia, that because the mental distress doctrine requires extreme conduct performed intentionally or recklessly, the defendant's advance notification to the plaintiff, which enabled alternate arrangements to be made, reflected favorably upon the defendant's consideration for the

plaintiff and removed the defendant from the ambit of the mental anguish doctrine. Rothenberg v. Aero Mayflower Transit Co., 495 F.Supp. 399, 407.

D.Colo.1977. Cit. in op. Plaintiff, football player brought an action against defendant player on an opposing team for negligence and reckless misconduct. During the course of a professional football game, defendant struck plaintiff in the back of the head out of frustration and anger due to the interception of a pass intended for him. The court held that the level of violence and the frequency of emotional outbursts in professional football games were such that plaintiff must have recognized and accepted the risk that he would be injured by such an act as that committed by defendant, and that even if defendant breached a duty which he owed to him, plaintiff could not recover because he must be held to have assumed the risk of such an occurrence. Hackbart v. Cincinnati Bengals, Inc., 435 F.Supp. 352, 356, judgment rev'd 601 F.2d 516 (9th Cir.), cert. denied 444 U.S. 931, 100 S.Ct. 275, 62 L.Ed.2d 188 (1979).

D.Colo.Bkrtcy.Ct.

D.Colo.Bkrtcy.1992. Com. (a) quot. in sup. Businessman contributed money as part of his partnership with a pet food business. Dispute existed as to whether the money was a loan or a capital infusion. Pet food company president and his wife were induced to sign guaranty notes and loan documents. They were not informed of the content of the documents that they signed, but relied on representations of businessman and his attorney. Later, businessman withdrew from the partnership, and pet food company filed for Chapter 11 bankruptcy protection. Businessman filed an adversary proceeding, seeking, inter alia, a declaratory judgment to enforce the notes and loan documents. This court held, in part, that businessman and his attorney were liable for extreme and outrageous conduct because they falsely represented their intentions and deliberately took advantage of couple's trust in them. Their conduct was reckless and with intent to cause severe harm, which was evidenced by damage to couple's marriage and social life. In re S & D Foods, Inc., 144 B.R. 121, 169.

D.Conn.

D.Conn.2020. Com. (d) quot. in sup. Father, who had obtained custody of his minor children in family court, brought, among other things, claims of intentional infliction of emotional distress (IIED) against unlicensed social worker, alleging that defendant published false statements on her website claiming that plaintiff had viciously abused his minor children and was an accused child abuser, and comparing him to other prominent child abusers despite knowing plaintiff's case history suggesting the contrary, which resulted in plaintiff suffering from headaches, weight loss, and sleeplessness. While denying defendant's motion for judgment on partial findings on other grounds, this court held that plaintiff's IIED claim failed because he did not demonstrate that he suffered from severe emotional distress. The court explained that, although defendant's conduct given the circumstances and her intent to "out" plaintiff as a child abuser on a public website was extreme and outrageous as defined by Restatement Second of Torts § 46, Comment *d*, plaintiff

failed to carry his burden of proof that he suffered severe emotional distress, because he did not seek medical treatment for his symptoms or testify as to their intensity and frequency. Powell v. Jones-Soderman, 433 F.Supp.3d 353, 377-378.

D.Conn.2015. Com. (d) quot. in case quot. in sup. Former employee sued former employer for age discrimination and intentional infliction of emotional distress, alleging that defendant overreacted to a single incident in which employee lost his temper in order to terminate his employment on the basis of his age. This court granted summary judgment for employer, holding that employer's conduct did not rise to the level of atrocity and intolerability required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court pointed out that, by his own account, employee was terminated after he became embroiled in a workplace dispute and used profanity, and nothing employee described was sufficiently outrageous that it would cause a reasonable juror to consider employer's conduct outrageous. Fetcho v. Hearst Connecticut Post, LLC, 103 F.Supp.3d 207, 220.

D.Conn.2014. Com. (d) quot. in case quot. in sup. Tenant, along with his conservator, filed a claim for, among other things, intentional infliction of emotional distress (IIED) against police officers, alleging that defendants mistakenly believed that the suspect of a violent crime was present and living in his apartment, battered down his door, searched him and the apartment, destroyed some of his possessions, and derided him when he asked to speak to his mother, causing him severe emotional distress. This court denied defendants' motion for summary judgment for the IIED claim. Quoting Restatement Second of Torts § 46, Comment *d*, the court pointed out that plaintiff needed to show that defendants' conduct was outrageous and extreme, and concluded that, after viewing the evidence in the light most favorable to plaintiffs, defendants acted with sufficiently extreme and outrageous conduct to support the IIED claim. Waller v. City of Middletown, 50 F.Supp.3d 171, 199.

D.Conn.2013. Com. (d) quot. in sup. Former employee brought, inter alia, a pendent state-law claim for intentional infliction of emotional distress (IIED) against former employer, alleging that his co-workers repeatedly made offensive comments and drawings based on his Romanian national origin and ethnicity over a period of several years, and that defendant failed to address his complaints of harassment. Granting summary judgment for defendant, this court, applying Restatement Second of Torts § 46, Comment *d*, held that plaintiff's IIED claim failed because, while this alleged behavior was shameful and reprehensible, it was not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and be regarded as atrocious. Kovaco v. Rockbestos-Surprenant Cable Corp., 979 F.Supp.2d 252, 262.

D.Conn.2011. Com. (d) quot. in sup. and in case quot. in sup., com. (e) quot. in ftn. After medical school terminated African American resident, resident sued school, hospital, and residency director and associate director, alleging intentional infliction of emotional distress (IIED), inter alia. Denying defendants' motion to dismiss as to IIED, this court held that it was at least more plausible than speculation that defendants' conduct could be viewed as an abuse of a hierarchical power relationship, rising to the level of extreme and outrageous conduct. The court pointed to evidence

that, among other things, plaintiff was in a subordinate relationship to the individual defendants, defendants assigned plaintiff high-risk patients that he could not properly treat and gave him failing grades for procedures he never performed, and defendants interfered with plaintiff's ability to be part of any other residency program. Craig v. Yale University School of Medicine, 838 F.Supp.2d 4, 10-12.

D.Conn.2009. Com. (d) cit. in case cit. in disc. Principal of public elementary school brought intentional-infliction-of-emotional-distress (IIED) and other claims against school superintendent, alleging that he threatened and intimidated her, publicly accused her of illegal activity in front of the teachers and staff of her school, and, after accessing her e-mail account without permission, read a communication that she had sent to her lawyer and forwarded it to his own e-mail account. This court denied defendant's motion for summary judgment on the IIED claim, holding that it was unwilling to find, as a matter of Connecticut law, that defendant's alleged conduct was not extreme or outrageous. The court noted, however, that, in order for plaintiff to prevail, the recitation of defendant's alleged conduct had to arouse the anger of the average representative of the community and cause him or her to exclaim, "Outrageous!" Brown-Criscuolo v. Wolfe, 601 F.Supp.2d 441, 454.

D.Conn.2009. Com. (d) quot. in sup. African-American teacher's aide at city's public middle school brought federal employment-discrimination claims and a state-law claim for intentional infliction of emotional distress (IIED) against white school principal, school system, and city, alleging, among other things, that principal subjected her to constant harassment targeted at her professional competence and socioeconomic status, publicly insulted her in highly personal ways, failed to act on her complaints that a white teacher was verbally abusing underperforming minority children in her presence, and took charge of supervising her personally in order to give her poor evaluations and instigate her transfer. Denying summary judgment for defendants on the IIED claim, this court held, inter alia, that, while some of principal's alleged conduct fell short of being actionable in isolation, a reasonable jury could find that principal's actions were outrageous in the larger context. Davis v. City of Hartford, 601 F.Supp.2d 488, 494.

D.Conn.2009. Coms. (d), (e), (f), and (h) quot. in sup. Administrator of estate of employee who committed suicide brought various claims against employer in connection with supervisor's handling of employee's requests for leave under the Family and Medical Leave Act. Denying summary judgment for defendant on plaintiff's claim for intentional infliction of emotional distress, this court held, inter alia, that a genuine issue of material fact remained as to whether defendant's conduct was extreme and outrageous, in light of evidence that supervisor was in a position of actual authority over employee, that supervisor had knowledge that employee was particularly susceptible to emotional distress, and that supervisor had, among other things, subjected employee to verbal abuse in front of co-workers. Delise v. Metro-North R. Co., 646 F.Supp.2d 288, 291.

D.Conn.2009. Com. (d) quot. in case quot. in ftn. City police department employee who was terminated for absenteeism arising from her alcoholism brought federal discrimination claims against city, as well as a claim for intentional infliction of emotional distress under Connecticut law.

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This court dismissed the distress claim on statutory governmental immunity grounds, but noted that the claim would have failed in any event, since there was nothing in the record to demonstrate that the conduct of the chief of police, which plaintiff sought to impute to city, was atrocious and utterly intolerable in a civilized community. Nanos v. City of Stamford, 609 F.Supp.2d 260, 267.

D.Conn.2009. Com. (d) quot. in case quot. in sup. Bar patrons who were arrested after they were involved in an altercation with two allegedly intoxicated off-duty police officers in the bar's parking lot sued city and off-duty officers, as well as a police sergeant and the officers who arrested plaintiffs and investigated the incident, alleging intentional infliction of emotional distress, as part of their § 1983 action against defendants. This court granted in part and denied in part defendants' motion for partial summary judgment, holding that plaintiffs' emotional-distress claims, insofar as they were based on allegations of unreasonable force, denial of medical treatment, and false arrest/false imprisonment against various defendants, failed as a matter of law, but that genuine issues of material fact existed as to the emotional-distress claims based on unreasonable force against off-duty officers, and those based on malicious prosecution against various officers. Zainc v. City of Waterbury, 603 F.Supp.2d 368, 392.

D.Conn.2008. Com. (j) quot. in sup., cit. in case cit. in sup. Former employee of town sued town and former co-worker for racial discrimination, alleging, among other things, that co-worker made inappropriate and offensive remarks to her and others at their place of employment. Granting summary judgment for defendants, this court held, inter alia, that plaintiff's claim for intentional infliction of emotional distress against co-worker failed because plaintiff failed to show that co-worker's remarks caused her severe emotional distress under Connecticut law. The court pointed out that plaintiff admitted in a deposition that her emotional distress was caused not by co-worker, but rather by town's inadequate response, noting that plaintiff initially claimed that she was "okay with everything" and that she "wanted to let it go," after co-worker apologized for the remarks. Buster v. City of Wallingford, 557 F.Supp.2d 294, 302.

D.Conn.2008. Com. (d) quot. in sup. Mother of the only African-American student in his kindergarten and first-grade classes sued school superintendent, principal, her son's teachers, and others, alleging that her son was the target of racial slurs and racially motivated physical abuse by his classmates and that defendants did nothing to stop the discriminatory conduct. Denying defendants' motions for summary judgment as to plaintiff's claim for intentional infliction of emotional distress (IIED), this court held that, if the jury were to find that defendants knew about allegations of racial discrimination, and yet failed to respond to them adequately, the average member of the community would regard that conduct as extreme and outrageous, and thus could find the defendants liable for IIED. DiStiso v. Town of Wolcott, 539 F.Supp.2d 562, 569.

D.Conn.2008. Com. (d) quot. in case quot. in sup. Foreign national sued the United States under the Federal Tort Claims Act, alleging, among other things, that United States Immigration and Customs Enforcement agents arrested and detained him even though he was in a lawful immigration status, and then detained him for an additional 42 days after he agreed to voluntarily depart from the country. This court denied the government's motion to dismiss plaintiff's claim

for intentional infliction of emotional distress, holding, inter alia, that agents' conduct in arresting plaintiff and taking him into custody, alongside a general prison population, even though they knew or should have known that he had committed no immigration violation, could be deemed sufficiently outrageous to state a claim under Connecticut law, as could the additional detention. El Badrawi v. Department of Homeland Sec., 579 F.Supp.2d 249, 279.

D.Conn.2008. Com. (d) cit. in case quot. in sup. Former dispatcher for same-day package-delivery company brought disability-based discrimination claims against company, and an additional Connecticut-law claim for intentional infliction of emotional distress (IIED). This court, inter alia, granted summary judgment for defendant on the IIED claim, holding that while plaintiff's co-workers' alleged conduct in, among other things, ribbing plaintiff over bowel accidents caused by his multiple sclerosis, leaving a scatological children's book near his work station, and posting a caricature of him running in the Special Olympics with a cane could be viewed as unpleasant and insensitive, it was not sufficient to satisfy the claim's requirement of extreme and outrageous conduct as a matter of law. Murphy v. BeavEx, Inc., 544 F.Supp.2d 139, 155.

D.Conn.2008. Com. (d) cit. in case cit. in sup. Former state employee brought, as part of her § 1983 action, a claim for intentional infliction of emotional distress against two of her co-workers, alleging that defendants falsely accused her of violating employer's clock-in policy. Granting summary judgment for defendants, this court held that plaintiff failed to produce evidence creating a genuine issue of material fact as to whether defendants' conduct was sufficiently extreme and outrageous. The court explained that, in the context of the workplace, where an employer had an interest in having employees report improper conduct by fellow employees, the mere making of a false accusation, without more, did not constitute extreme and outrageous conduct; here, there was no evidence of anything more, such as, for example, fabrication of evidence to support a false accusation. Torres-Hicks v. Connecticut Housing Finance Authority, 575 F.Supp.2d 393, 407.

D.Conn.2007. Com. (d) quot. in case quot. in sup. Town employee brought, as part of her civil-rights action, a state-law claim for intentional infliction of emotional distress against town and co-workers. Granting summary judgment for defendants, this court held, inter alia, that plaintiff's emotional-distress claim failed because her allegations that her co-workers and supervisors had questioned her about her chronic medical condition and about her leave under the Family and Medical Leave Act, critiqued her work, treated her coldly and possibly rudely, ordered her to remove her father from her work area when he came to pick her up, and asked her to identify supervisors who had allowed her father to remain in the work area did not state the extreme and outrageous conduct necessary to support her claim. Goldfarb v. Town of West Hartford, 474 F.Supp.2d 356, 376.

D.Conn.2007. Com. (d) quot. in sup. Terminated employee brought age-discrimination suit under state and federal statutes, and an additional claim for intentional infliction of emotional distress. Granting summary judgment for defendant on the emotional-distress claim, this court held that defendant's conduct was, at most, insulting, not extreme and outrageous, and thus plaintiff could not proceed with the claim under Connecticut law; while it was possible that plaintiff was

terminated because of his age, and employment discrimination was illegal, such discrimination did not per se give rise to a claim for intentional infliction of emotional distress. Koestner v. Derby Cellular Products, 518 F.Supp.2d 397, 403.

D.Conn.2006. Com. (d) quot. in case quot. in sup. As a part of a wider discriminatory-workplace action, former employee sued her former supervisor and a co-worker for intentional infliction of emotional distress, after she was arrested for breach of the peace based on these defendants' allegations. Denying in part defendants' motions for summary judgment, this court held, inter alia, that a fact issue existed as to whether defendants' alleged actions in calling the city police department and knowingly reporting false information to a police officer so as to give the impression that plaintiff was stalking or threatening them constituted the extreme and outrageous conduct required to support a claim for intentional infliction of emotional distress. Crocco v. Advance Stores Co. Inc., 421 F.Supp.2d 485, 503.

D.Conn.2005. Com. (d) cit. in case quot. in disc. White worker formerly employed by city brought a civil-rights action against city, raising several causes of action related to discriminatory treatment he received, and his subsequent termination, following his involvement in an action alleging that city had engaged in discriminatory practices against minority employees. Granting summary judgment for city, this court held, inter alia, that worker's allegations did not, as a matter of law, meet the standard for outrageous conduct to support his claim for intentional infliction of emotional distress. Although there was evidence that worker had been disciplined by city, this evidence did not support the charge that city's employees, in disciplining him, acted in an extreme and outrageous manner. Bond v. City of Middletown, 389 F.Supp.2d 319, 342.

D.Conn.2005. Com. (d) quot. in case quot. in sup. African-American nurse's aide who was fired from a nursing home sued the home for, in part, intentional infliction of emotional distress, alleging that she was falsely accused of patient abuse twice, falsely disciplined, disciplined for behavior for which others were not disciplined, and was the subject of offensive remarks and a campaign to fire her or make her resign. This court granted defendant summary judgment, holding, inter alia, that defendant's conduct was not extreme and outrageous. While defendant's actions might have been offensive, insulting, and hurtful, no reasonable person could view them as atrocious and utterly intolerable. Jackson v. Health Resources of Rockville, Inc., 357 F.Supp.2d 507, 521.

D.Conn.2005. Com. (d) quot. in case quot. in disc. Former employees sued food manufacturer and their former supervisor for sexual harassment. Defendants moved for summary judgment on plaintiffs' claim for intentional infliction of emotional distress, and plaintiffs responded that it was a jury question whether defendants' conduct was extreme and outrageous to permit recovery. Granting in part defendants' motion for summary judgment, the court found that this claim failed as a matter of law, as no reasonable jury could conclude that manufacturer's inadequate response to plaintiffs' allegations of sexual harassment was extreme and outrageous, even if the allegations were true and even if manufacturer handled the allegations in a negligent manner. Presley v. Pepperidge Farm, Inc., 356 F.Supp.2d 109, 137.

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D.Conn.2004. Com. (d) cit. in case quot. in disc. Homeowners brought action for damages arising from allegedly unconstitutional entry and search of their home by police sergeant and officers. Granting in part defendants' summary-judgment motions, this court held, inter alia, that defendants' acts did not rise to the level of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. The facts showed that multiple police officers acted without proper legal justification to enter and search home; however, they behaved politely and did not threaten or abuse homeowners, and there was no showing of any intent to cause emotional harm. Abdella v. O'Toole, 343 F.Supp.2d 129, 140.

D.Conn.2004. Com. (d) cit. in case quot. in disc. Deputy sheriff sued sheriff's department and his supervisors for age discrimination and intentional infliction of emotional distress, inter alia. Plaintiff alleged that defendants engaged in a pattern of discrimination against employees on the basis of age, and that his age motivated defendants to demote him from full-time status to part-time status. This court granted in part defendants' motion to dismiss, holding, inter alia, that defendants' conduct was not extreme and outrageous. The court stated that, although employment discrimination was illegal, it did not per se give rise to a claim for intentional infliction of emotional distress in this case. Allen v. Egan, 303 F.Supp.2d 71, 78.

D.Conn.2004. Com. (d) cit. in case quot. in disc. After an African-American firefighter was fired, he sued the town, the town manager, the fire chief, and the assistant fire chief for race discrimination, retaliation, and harassment, and intentional infliction of emotional distress, inter alia. Plaintiff alleged that defendants failed to maintain a work environment safe and free from harassment, retaliation, and discrimination, that the breach of this duty caused plaintiff's work-related stress disorder, and that defendants acted in reckless disregard of plaintiff's civil rights. This court granted defendants summary judgment, holding, inter alia, that defendants' conduct was not so extreme and outrageous as to support a claim for intentional infliction of emotional distress. Diggs v. Town of Manchester, 303 F.Supp.2d 163, 185.

D.Conn.2004. Com. (d) quot. in sup. Terminated employee sued employer for Title VII discrimination, hostile work environment, and intentional infliction of emotional distress, inter alia, alleging that her supervisor told her that she did not speak proper English, that her co-workers often followed her around the office, that supervisor used profanity on at least one instance when speaking with her, that supervisor relocated her to a cubicle where there was more office traffic, and that a co-worker once searched her desk. This court granted defendant summary judgment, holding, inter alia, that none of defendant's actions were so egregious or oppressive as to rise to the level of extreme and outrageous conduct. Rose v. Panolam Industries International Inc., 301 F.Supp.2d 239, 247.

D.Conn.2004. Com. (d) quot. in disc., com. (h) cit. in disc. Resident brought action against two towns after they changed their common border, resulting in resident's property being switched from one town to the other. Resident alleged violations of due process, equal protection, takings clause, and intentional infliction of emotional distress. Granting towns' motion to dismiss all claims, this court found, inter alia, that resident's intentional-infliction-of-emotional-distress claim failed

because she could not show that the towns' actions constituted "extreme and outrageous" conduct that went beyond all grounds of decency or caused resident severe mental distress. Scott v. Town of Monroe, 306 F.Supp.2d 191, 199.

D.Conn.2003. Com. (h) cit. in sup., com. (d) quot. in sup. and cit. in ftn. Teacher sued city, state board, and various other school defendants following nonrenewal of his employment contract, alleging, among other things, intentional infliction of emotional distress. Granting defendants' motion to dismiss, this court held, inter alia, that defendants' actions in connection with decision not to renew teacher's employment contract, which included evaluations and recommendations, questions regarding teacher's qualifications, rude behavior, and hearing appeals, did not rise to level of extreme and outrageous conduct necessary to sustain claim for intentional infliction of emotional distress. Golnik v. Amato, 299 F.Supp.2d 8, 15.

D.Conn.2003. Com. (d) quot. in sup., com. (h) cit. in sup. Estranged lover sued former girlfriend, who was police officer, and another officer who had investigated plaintiff's complaints against girlfriend, alleging civil rights violations and intentional infliction of emotional distress, inter alia. This court denied in part girlfriend's motion for summary judgment, holding that there were fact issues as to whether girlfriend's conduct was sufficiently extreme and outrageous to support emotional-distress claim. Jury could determine that girlfriend physically threatened plaintiff with harm from herself and members of police department, that she used her department connections to stop the investigation into her conduct, that she lied under oath, and that she used her connections to attack plaintiff's credibility and character and to improperly influence a court. Stack v. Perez, 248 F.Supp.2d 106, 110.

D.Conn.2003. Com. (d) quot. in sup., com. (h) cit. in sup. Estranged lover sued former girlfriend, who was police officer, and another officer who had investigated plaintiff's complaints against girlfriend, alleging civil rights violations and intentional infliction of emotional distress, inter alia. District court granted defendants summary judgment. This court granted in part plaintiff's motion for reconsideration, holding that there were fact issues as to whether investigating officer's conduct was sufficiently extreme and outrageous to support emotional-distress claim. Although officer believed plaintiff told the truth, he contacted district court, FBI, and plaintiff's employer, advising them that plaintiff had set forth no truthful allegations against former girlfriend and that he would not recommend that girlfriend be disciplined. He also discouraged plaintiff from pursuing legitimate claim. Stack v. Jaffee, 248 F.Supp.2d 100, 104-105.

D.Conn.2002. Com. (d) quot. in case quot. in disc. A secretary in a town's building department sued town's personnel director and a town burgess for 42 U.S.C. § 1983 violations and intentional infliction of emotional distress. Personnel director had issued a disciplinary warning in retaliation for secretary's faxing to a state official an inquiry questioning whether the requirements listed in a town job posting were in accordance with state statute. This court granted in part defendants' motion for summary judgment, holding, inter alia, that while personnel director's conduct might have been unlawful, its unlawfulness did not automatically make it extreme and outrageous. While

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director's warning might have been a sufficient predicate for First Amendment retaliation liability, it was not, in and of itself, extreme and outrageous. Aquavia v. Goggin, 208 F.Supp.2d 225, 237.

D.Conn.2002. Com. (d) quot. in case quot. in disc. Nurse at locked nursing facility in correctional center sued her supervisor for, in part, intentional infliction of emotional distress, after defendant physically prevented her from leaving the facility despite plaintiff's pleas that she be allowed to depart for medical reasons. Denying in part defendant's motion for summary judgment, this court held, inter alia, that genuine issues of material fact existed as to whether defendant's coercive exercise of power, during which plaintiff was deprived of her liberty and became extremely agitated, was sufficiently outrageous to state a cause of action for intentional infliction of emotional distress. Barstow v. Shea, 196 F.Supp.2d 141, 150.

D.Conn.2002. Cit. in sup., cit. in case cit. and quot. in sup., cit. in case cit. in ftn., com. (i) quot. in sup. Female employee sued former employer for Title VII sex and race discrimination, retaliation, intentional and negligent infliction of emotional distress, and negligent supervision. This court denied employer's motion for summary judgment as to sex-discrimination and negligent-supervision claims, but granted summary judgment to employer on the other claims. Plaintiff's claim of intentional infliction of emotional distress failed, because employer's alleged failure to investigate or warn others about plaintiff's co-worker's offensive conduct was not intentional or reckless. The court stated that the Connecticut Supreme Court did not intend to engraft a simple negligence standard onto this intentional tort. Brunson v. Bayer Corp., 237 F.Supp.2d 192, 207, 208.

D.Conn.2002. Com. (d) quot. in sup. and ftn., com. (h) cit. in sup. Insurance-company employee who was fired sued employer for intentional infliction of emotional distress, inter alia. This court granted defendant summary judgment on the claim, holding, inter alia, that defendant's conduct was not extreme or outrageous. Plaintiff failed to show that her termination was carried out in an unreasonable, humiliating, or embarrassing manner. She was not terminated in front of her co-workers, she was not yelled at or denigrated during the termination process, she was not forced to clean out her work area in front of co-workers, and she was not paraded to building's main entrance in front of others. Davis v. Liberty Mutual Ins. Co., 218 F.Supp.2d 256, 265.

D.Conn.2002. Com. (d) quot. in sup. Insured sued liability insurer for, in part, bad-faith tort, alleging that defendant failed to provide her with coverage and a defense in an underlying state-court action. Granting defendant's motion to dismiss, the court held, inter alia, that, to the extent that plaintiff's bad-faith claim implicitly contained a claim for intentional infliction of emotional distress, plaintiff failed to allege that any of the actions taken by defendant were done in a manner that was so egregious or oppressive as to rise to the level of extreme and outrageous conduct, and thus failed to state a claim for intentional infliction of emotional distress. Martin v. American Equity Ins. Co., 185 F.Supp.2d 162, 165.

D.Conn.2001. Com. (d) quot. in sup. Employee who claimed that he had been sexually harassed by a male supervisor brought, in part, a pendent common-law state claim for intentional infliction

of emotional distress against employer. Granting in part defendant's motion to dismiss, the court held, inter alia, that defendant's alleged negligent failure to prevent the sexual harassment did not rise to the level of intentional, extreme, and outrageous conduct that would support a claim for intentional infliction of emotional distress. Abate v. Circuit-Wise, Inc., 130 F.Supp.2d 341, 348.

D.Conn.2001. Coms. (d), (h), and (j) cit. in disc. Public school teacher sued board of education, board members, and certain school employees for, in part, intentional infliction of emotional distress, arising from defendants' response to her wearing to school a tee shirt with the words "JESUS 2000—J2K." Granting defendants' motion for summary judgment, this court held, inter alia, that defendants' requiring plaintiff to change or cover her tee shirt and vice principal's conduct in pounding on plaintiff's classroom door to get her attention and contacting the assistant superintendent before going to see plaintiff were not sufficiently extreme or outrageous to support a claim for intentional infliction of emotional distress. Downing v. West Haven Board of Ed., 162 F.Supp.2d 19, 33, 34.

D.Conn.2001. Com. (d) quot. in sup. and cit. in ftn. in sup., com. (h) cit. in disc. African-American employee who quit his job after he was accused of stealing and was demoted sued his former employer for, in part, intentional infliction of emotional distress. Granting defendant's motion for summary judgment, the court held, inter alia, that plaintiff's interview by defendant and his suspension and demotion did not exceed all bounds of decency, and were not sufficiently extreme and outrageous to support his claim for intentional infliction of emotional distress. Etienne v. Wal-Mart Stores, Inc., 186 F.Supp.2d 129, 136, 137.

D.Conn.2001. Com. (d) quot. in sup. Surgeon brought action for, inter alia, intentional infliction of emotional distress against medical school and other physicians in connection with school's conduct in failing to reappoint him and allowing privatization of cardiothoracic surgery practice to the exclusion of plaintiff. Granting defendants summary judgment, this court held, inter alia, that school's actions did not rise to the level of extreme and outrageous conduct necessary to sustain claim for intentional infliction of emotional distress. Franco v. Yale University, 161 F.Supp.2d 133, 141.

D.Conn.2001. Com. (d) quot. in ftn. Prison counselor sued department of corrections for Title VII violations, equal protection and due process violations, and intentional infliction of emotional distress, among other claims, alleging that she was threatened and harassed for pursuing grievance procedures available to her in challenging poor job-performance evaluations. This court granted in part defendant's motion for judgment on the pleadings, holding, inter alia, that plaintiff failed to satisfy the "extreme and outrageous" standard required to prove a claim of intentional infliction of emotional distress. The average member of the community would not find plaintiff's supervisors' actions of entering plaintiff's office and locking the door to prevent her from leaving to be extreme and outrageous. Garris v. Department of Corrections, 170 F.Supp.2d 182, 189.

D.Conn.2001. Com. (d) quot. in ftn. Driver sued city police officer for intentional infliction of emotional distress, among other claims, alleging that the officer found her at fault in a 1996

accident in retaliation for her complaint against him to the department of motor vehicles in 1990. This court granted defendant summary judgment, holding, inter alia, that plaintiff failed to satisfy the requirement of extreme and outrageous conduct to sustain a claim of intentional infliction of emotional distress. The average member of the community would not find defendant's acts in investigating routine traffic accidents and attributing fault to one of the drivers to be extreme and outrageous. Menon v. Frinton, 170 F.Supp.2d 190, 198.

D.Conn.2001. Com. (d) quot. in case quot. in sup. Female employee sued employer after she was terminated, alleging age and gender discrimination and intentional infliction of emotional distress. Granting in part defendant's motion for summary judgment, this court held, inter alia, that the mere act of firing plaintiff did not satisfy the requirements of extreme and outrageous conduct necessary to support claim for intentional infliction of emotional distress. Pascal v. Storage Technology Corp., 152 F.Supp.2d 191, 214.

D.Conn.2001. Com. (d) quot. in sup. Employee sued employer for sexual harassment and intentional infliction of emotional distress, among other claims, alleging that her supervisor made sexual comments and performed highly offensive and unwelcome touchings, including his rubbing up against her, touching her shoulders and back, and pulling her bra strap. This court dismissed plaintiff's emotional-distress claim, holding, inter alia, that employer's conduct and/or inaction in failing to act sooner to prevent supervisor's harassment did not rise to the requisite level of extreme and outrageous conduct. Roberts v. Circuit-Wise, Inc., 142 F.Supp.2d 211, 218.

D.Conn.2001. Com. (d) quot. in disc. and cit. in ftn., com. (h) cit. in disc. Arrestee who was forcibly removed from his vehicle by police officers during an investigative traffic stop after he refused to exit the car and one of the officers drew her gun on him sued city and police officers for, in part, intentional infliction of emotional distress. Granting in part defendants' motion for summary judgment, the court held, inter alia, that defendants' actions did not constitute the extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Smith v. City of New Haven, 166 F.Supp.2d 636, 645.

D.Conn.2001. Com. (d) quot. in disc. and cit. in ftn., com. (h) cit. in disc. Former employee sued employer for, in part, intentional infliction of emotional distress. Granting defendant's motion to dismiss, the court held that defendant's alleged actions in intentionally assigning difficult and tedious work in a discriminatory manner, implying that plaintiff's work was "slow," and using plaintiff in order to remain eligible for state contracts under federal and state civil-rights laws did not constitute the extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Whitaker v. Haynes Const. Co., Inc., 167 F.Supp.2d 251, 254, 255.

D.Conn.2000. Com. (d) quot. in disc. Female municipal employee sued city for sex discrimination and retaliation in violation of Title VII, alleging that she was transferred to a less desirable position and even threatened with physical harm after she complained of a sexually hostile workplace. Plaintiff also asserted a state-law claim for intentional infliction of emotional distress. Granting in part and denying in part defendant's motion to dismiss, the court held, in part, that plaintiff's sex-

discrimination claim was untimely, that she could proceed on her claim for retaliation, and that the conduct complained of, though offensive, was not so egregious as to support recovery under a theory of intentional infliction of emotional distress. Ericson v. City of Meriden, 113 F.Supp.2d 276, 292, decision affirmed 55 Fed.Appx. 11 (2d Cir.2002).

D.Conn.2000. Com. (d) quot. in case quot. in disc. Educational consultant sued former employer for breach of contract and intentional infliction of emotional distress, among other claims, alleging that defendant severely harassed and mistreated him, unfairly placed him on a 60-day performance-improvement plan, and then constructively fired him. This court denied in part defendant's motion for summary judgment, holding, inter alia, that fact issues existed as to whether defendant's conduct was sufficiently extreme and outrageous to constitute intentional infliction of emotional distress. Grossman v. Computer Curriculum Corp., 131 F.Supp.2d 299, 310.

D.Conn.2000. Cit. generally in disc. Female former police officer sued town in which she was employed and male supervisor for, among other things, sexual harassment and intentional and negligent infliction of emotional distress. The district court granted defendant town summary judgment, holding, inter alia, that town's alleged refusal to protect plaintiff from male supervisor's sexual harassment was not sufficiently extreme or outrageous to support plaintiff's claim of intentional infliction of emotional distress. Miner v. Town of Cheshire, 126 F.Supp.2d 184, 195.

D.Conn.2000. Com. (d) cit. in disc. Chief legal counsel for the state department of environment protection sued her superiors for, inter alia, intentional infliction of emotional distress and 42 U.S.C. § 1983 violations, alleging that defendants retaliated against her for giving the department certain legal advice. This court denied in part defendants' motion to dismiss, holding, inter alia, that plaintiff failed to state a viable claim for intentional infliction of emotional distress because defendants' conduct was not extreme and outrageous. Rapkin v. Rocque, 97 F.Supp.2d 244, 246.

D.Conn.1999. Com. (d) quot. in sup. Former employee brought employment discrimination action against employer, asserting claims under federal law and a pendent state-law claim for, inter alia, intentional infliction of emotional distress. Granting in part defendant's motion for summary judgment, the court held that defendant's alleged negligent failure to prevent sexual harassment of plaintiff by her co-workers did not rise to the level of intentional, extreme, and outrageous conduct that would support a claim for intentional infliction of emotional distress. Dobrich v. General Dynamics Corp., Electric Boat Div., 40 F.Supp.2d 90, 104.

D.Conn.1999. Com. (d) quot. in sup. Scientific-affairs coordinator for drug company sued company for intentional infliction of emotional distress, among other claims. This court granted in part company's motion for summary judgment, holding, inter alia, that plaintiff's emotional-distress claim failed, because no rational factfinder could conclude that the alleged conduct of yelling at, reprimanding, and transferring plaintiff for work-related issues was extreme and outrageous conduct. Farricielli v. Bayer Corp., 116 F.Supp.2d 280, 286.

D.Conn.1999. Com. (d) quot. in disc. Female former employee sued co-workers and employer for, inter alia, "hostile work environment" sexual harassment, retaliation, and intentional infliction of emotional distress. Defendants moved for summary judgment. Granting the motion as to individual defendants and granting in part and denying in part employer's motion, the court held, among other things, that material factual issues existed as to whether offensive epithets used by plaintiff's supervisor could serve as a basis for her "hostile work environment" claim against employer, and that a reasonable juror could conclude that plaintiff was terminated in retaliation for complaining about supervisor's conduct; however, plaintiff had failed to establish that any action taken by employer was so outrageous as to support recovery under a theory of intentional infliction of emotional distress. Newtown v. Shell Oil Co., 52 F.Supp.2d 366, 375.

D.Conn.1999. Cit. generally in sup. Former employee who was injured during an assault in his office sued his former employer, among others, alleging, in part, that defendant's termination of his employment after he filed a worker's compensation claim constituted intentional infliction of emotional distress. Granting in part defendant's motion to dismiss, the court held, inter alia, that plaintiff's allegations that he was wrongfully terminated and falsely accused by defendant of "disagreeable conduct" did not state the extreme or outrageous conduct that was necessary to sustain a claim for intentional infliction of emotional distress. Venterina v. Cummings & Lockwood, 117 F.Supp.2d 114, 119.

D.Conn.1998. Com. (d) quot. in disc. Sixty-year-old former employee who believed that his position was eliminated because of his age sued former employer for violations of the Age Discrimination in Employment Act. Plaintiff also asserted common law claims for, inter alia, intentional infliction of emotional distress. Defendant moved for summary judgment. Granting the motion in part and denying it in part, the court held that, while plaintiff had established a prima facie case of age discrimination, he had failed to show that defendant's conduct was so extreme and outrageous as to rise to the level necessary to support a claim for intentional infliction of emotional distress. Rose v. James River Paper Co., 2 F.Supp.2d 245, 253.

D.Conn.1998. Com. (d) quot. in disc. An African-American radiology technician for a hospital sued the hospital for, among other claims, wrongful termination and intentional infliction of emotional distress. This court granted in part and denied in part defendant's motion for summary judgment, holding, inter alia, that, although defendant may not have applied the hospital's progressive discipline policies in an ideal manner, its behavior did not rise to the level of extreme and outrageous conduct. Plaintiff was an at-will employee who was terminated because her supervisors believed her performance violated hospital policies relating to patient care. Instances in which plaintiff's supervisor stated to her, "How could you, a black, single mother, go away on vacation?" and "How could you, a single mother, afford to send your children to private school?" constituted conduct that was merely insulting, reflected bad taste, or resulted in bad feelings. Thomas v. St. Francis Hosp. and Medical Center, 990 F.Supp. 81, 91, affirmed 198 F.3d 235 (2d Cir.1999).

D.Conn.1998. Com. (h) cit. in disc. A male nurse sued his employer for Title VII violations and intentional infliction of emotional distress, among other claims, alleging that he endured harassment and a delay in his promotion because of his gender and his homosexuality. This court granted defendant summary judgment, holding, inter alia, that plaintiff's allegations that defendant discriminated against him, disciplined him, denied him a promotion, and harassed him failed to allege extreme or outrageous conduct. White v. Martin, 23 F.Supp.2d 203, 208, affirmed 198 F.3d 235 (2d Cir.1999).

D.Conn.1997. Com. (d) quot. in case quot. in sup. City employee sued a city council member, among others, for violations of her civil rights under § 1983 and for intentional infliction of emotional distress under Connecticut common law, alleging that defendant's cruel and abusive treatment as her supervisor caused her to have a nervous breakdown. Granting in part defendant's motion for summary judgment, the court held, inter alia, that defendant's alleged conduct in ordering plaintiff to purchase illegal drugs and to stand guard while defendant ingested them, ordering plaintiff to perform personal errands and tasks for defendant's private employer, making repeated telephone calls to plaintiff at her home, threatening to terminate plaintiff's employment and replace her with an individual of another race, implementing discriminatory sick-time policies, monitoring work attendance, and repeatedly criticizing plaintiff in the presence of others was not sufficiently extreme and outrageous to sustain a claim for intentional infliction of emotional distress. DeLeon v. Little, 981 F.Supp. 728, 738.

D.Conn.1997. Com. (d) quot. in sup. An employee brought a state-law employment discrimination lawsuit against her employer and asserted, in part, a common law cause of action for intentional infliction of emotional distress. Granting defendant's motion for summary judgment, the court held, inter alia, that plaintiff's allegations that she received 25 cents per hour less than other security guards and that, when she brought this to the attention of defendant and began investigating, she was subjected to adverse employment conditions, including being transferred to two other locations, being disciplined, and being reprimanded, failed to assert conduct on the part of defendant that was sufficiently extreme and outrageous to support a claim for intentional infliction of emotional distress. Hill v. Pinkerton Sec. & Investigation Services, 977 F.Supp. 148, 160.

D.Conn.1997. Cit. in disc., com. (d) cit. in disc. In wrongful-discharge action, former employee sued former employer for, inter alia, negligent infliction of emotional distress. After the court entered judgment on a jury verdict for employee, employer renewed its motion for judgment as a matter of law. Denying the motion, the court, after providing a brief history of the torts of intentional and negligent infliction of emotional distress, held that to support a workplace claim for the latter, a worker was required to prove that the employer's conduct in the termination process was unreasonable, and that, in this case, the evidence was sufficient to support such a finding. Malik v. Carrier Corp., 986 F.Supp. 86, 90, affirmed in part, reversed in part 202 F.3d 97 (2d Cir.2000).

D.Conn.1996. Com. (d) quot. in case quot. in sup., com. (h) cit. in sup. Employee who allegedly was advised that he was being terminated for poor performance and then was escorted out of the building “like a criminal” sued his former employer for, inter alia, intentional infliction of

emotional distress. Granting defendant's motion for summary judgment, the court held, in part, that defendant's alleged conduct did not rise to the level of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Johnson v. Chesebrough-Pond's USA Co., 918 F.Supp. 543, 552, affirmed 104 F.3d 355 (2d Cir.1996).

D.Conn.1996. Com. (d) quot. in disc. Former employee of town waste-water treatment plant who was allegedly terminated because of his age sued plant superintendent and first selectman, among others, for, inter alia, violations of 42 U.S.C. §§ 1983 and 1985, and for intentional infliction of emotional distress. Defendants moved to dismiss. Granting the motion in part and denying it in part, the court held that plaintiff was entitled to proceed with his § 1983 claim, and that plaintiff could pursue his claim for intentional infliction of emotional distress based on his bare allegations of defendants' extreme and outrageous conduct; however, plaintiff had failed to allege sufficient facts to state a claim of conspiracy under § 1985. Reed v. Town of Branford, 949 F.Supp. 87, 92.

D.Conn.1996. Com. (d) quot. in case quot. in sup. A white female police officer in a town's police department sued the town and a police lieutenant, alleging violations of her constitutional rights and asserting a state-law claim for intentional infliction of emotional distress. Dismissing the complaint, the court held, inter alia, that plaintiff failed to state a claim for intentional infliction of emotional distress because plaintiff's allegations that the lieutenant made derogatory comments about plaintiff's marriage to a black man, referred to plaintiff as “bitch,” gave her an assignment babysitting a group of young children because it was considered unfitting for a male officer, and disciplined her more severely than a male officer did not describe conduct that met the “extreme and outrageous” standard necessary to assert such a claim under Connecticut law. Williams v. Perry, 960 F.Supp. 534, 541.

D.Conn.1995. Com. (i) cit. in disc. In civil rights action, individual sued municipality and municipal employees for, inter alia, unintentional infliction of emotional distress. Defendants moved to dismiss. Granting in part and denying in part the motion, the court held that plaintiff's emotional-distress claims were based on defendants' negligence and, therefore, barred by the qualified immunity that protected municipal employees from liability for negligent performance of discretionary acts. To the extent that plaintiff's complaint could be read as stating a claim for intentional, willful, wanton, or reckless infliction of emotional distress, it was merely duplicative of the other counts. Karbowicz v. Borough of Naugatuck, 921 F.Supp. 77, 77-78.

D.Conn.1994. Quot. in case cit. in disc. Female employee of telephone company brought Title VII sex-discrimination claim against employer and individual supervisors. Plaintiff also alleged various state law claims, including intentional infliction of emotional distress. Granting in part and denying in part defendants' motion to dismiss, the court dismissed one supervisor from the case and held that plaintiff's claim of intentional infliction of emotional distress against employer was barred by the exclusive provisions of the state workers' compensation statute, but she could proceed against the remaining supervisor. The court could not say that the behavior plaintiff described and complained of was not so outrageous as to be actionable. Gregory v. Southern New England Telephone Co., 896 F.Supp. 78, 85.

D.Conn.1993. Com. (d) quot. in disc. A discharged teacher's assistant sued the school and its director of personnel, alleging wrongful discharge, breach of contract, and other state law claims. Granting in part defendants' motion for summary judgment, this court held, inter alia, that discharge of the plaintiff for writing an anonymous letter alleging an incident of child abuse at the school was not extreme and outrageous conduct sufficient to support a claim of intentional infliction of emotional distress, even if, as plaintiff alleged, defendants failed to conduct an adequate investigation before dismissing her and even if defendants knew or should have known that the dismissal was not justified. Ziobro v. Connecticut Institute for the Blind, 818 F.Supp. 497, 502.

D.Conn.1987. Subsec. (1) and com. (d) quot. in case quot. in disc. A senior executive whose employment was terminated with entitlement to three years' salary and benefits sued the company on contract and fraud claims, and for intentional infliction of emotional distress, alleging denial of reimbursement of his daughter's medical expenses under a basket plan additional coverage policy. This court granted summary judgment for the defendant, holding that the plaintiff had failed to prove the existence of the additional coverage, and the allegations, even if proved, did not approach the outrageous character required to maintain the claim for intentional infliction of emotional distress. Economu v. Borg-Warner Corp., 652 F.Supp. 1242, 1253, affirmed 829 F.2d 311 (2d Cir. 1987).

D.Conn.1987. Com. (d) quot. in disc. An employee sued his former employer for fraudulent representations and intentional infliction of emotional distress following his termination from his sales position. This court granted the defendant's motion to dismiss, holding, inter alia, that the plaintiff's allegations were insufficient as a matter of law to support a cause of action for intentional infliction of emotional distress, where the claims were based for the most part on misrepresentations regarding the plaintiff's prospects and the company's past performance, which did not rise to the level of extreme and outrageous conduct necessary to support a claim on this tort. Kintner v. Nidec-Torin Corp., 662 F.Supp. 112, 114.

D.Conn.1986. Cit. in disc., com. (d) quot. in sup., com. (h) cit. in sup. The general manager of a company resigned when he was denied a leave of absence for medical reasons. When he later reapplied for his vacant position, the company refused to hire him. He sued the company for intentional infliction of emotional distress. The court granted the defendant's motion for summary judgment, stating that the defendant's conduct could not be reasonably regarded as so extreme and outrageous as to go beyond all possible bounds of decency. In addition, the court noted that the plaintiff had not sustained severe emotional distress. Reed v. Signode Corp., 652 F.Supp. 129, 136, 137.

D.Conn.1985. Subsec. (1) cit. in disc., coms. (d) and (h) cit. in disc. After the employment of a foreign national was terminated, he sued his former employer for intentional infliction of emotional distress, and his wife sued for loss of consortium. The defendant moved to dismiss a number of counts of the complaint, and this court granted the motion. It ruled that the plaintiff had failed to introduce facts from which a jury would be permitted to infer that the defendant's conduct had been

sufficiently extreme and outrageous to recover for intentional infliction of emotional distress. The court also ruled that the wife's claim for loss of consortium, allegedly the result of her husband's emotional strain and job-hunting trips outside this country, necessarily failed because Connecticut would not recognize such a claim in the absence of physical injury to the spouse. Collins v. Gulf Oil Corp., 605 F.Supp. 1519, 1521, 1522, 1524.

D.Del.

D.Del.2011. Cit. in sup. Former employee brought a state-law claim for, inter alia, intentional infliction of emotional distress (IIED) against employer, its subsidiary, and headhunter, alleging that his employment was terminated because he refused to provide pre-employment medical records, engaged in protected whistle-blowing activities, and was subjected to racial profiling and discrimination. This court granted headhunter's motion to dismiss the IIED claim, holding that plaintiff failed to allege facts indicating that defendants' conduct was extreme or outrageous, or that plaintiff suffered emotional distress so severe as to give rise to an actionable claim. Tani v. FPL/Next Era Energy, 811 F.Supp.2d 1004, 1024.

D.Del.2008. Quot. in sup. Supermarket deli worker brought federal civil-rights and Delaware common-law claims against supermarket, alleging discrimination and harassment. This court, inter alia, granted defendant's motion for summary judgment on plaintiff's claim for intentional infliction of emotional distress, holding that plaintiff failed to escape the exclusivity provision of the Delaware Workers' Compensation Act by showing defendant's deliberate intent to bring about an injury to her. The court found no evidence that defendant intended to cause plaintiff emotional distress, concluding that, at worst, plaintiff showed only that defendant negligently failed to investigate her complaints of harassment and discrimination by her supervisors and co-workers. Nieves v. Acme Markets, Inc., 541 F.Supp.2d 600, 611.

D.Del.2006. Com. (d) quot. in case quot. in sup. State prisoner infected with the Hepatitis C Virus brought pro se civil-rights suit against state department of corrections officers and contract medical company's employees, including a claim for intentional infliction of emotional distress, alleging that defendants' failure to provide him with a medical evaluation by a liver specialist and a liver biopsy amounted to outrageous conduct that had caused him great emotional distress and anxiety. This court granted summary judgment for defendants, holding, inter alia, that, despite evidence from outside doctor that the biopsy was needed, defendants' conduct in denying the treatment was not sufficiently extreme and outrageous to support the distress claim, because it was in line with medical standards adopted by the department of corrections and medical company. Jordan v. Delaware, 433 F.Supp.2d 433, 444.

D.Del.1999. Subsec. (1) cit. in case quot. in disc., com. (d) quot. in case quot. in disc. and quot. in ftn., coms. (h) and (j) cit. in cases quot. in disc. Contract employee for state agency sued employees of another state agency, alleging, among other things, that defendants' actions caused her employment contract to be terminated. Entering partial summary judgment for defendants, the

court held, inter alia, that a confrontation during which defendants grabbed plaintiff could not serve as a basis for recovery under a theory of negligent or intentional infliction of emotional distress, or false imprisonment. Lloyd v. Jefferson, 53 F.Supp.2d 643, 673, 674.

D.Del.1996. Subsec. (1) cit. in disc. Female former bank employees sued former supervisor for, inter alia, violations of Title VII, intentional infliction of emotional distress, tortious interference with contract, and tortious interference with another's performance of his own contract. Defendant moved to dismiss. Granting the motion in part and denying it in part, this court held that defendant could not be found individually liable under Title VII; that the exclusivity provision of the state Workers' Compensation Act barred the claim for intentional infliction of emotional distress; that defendant could be found to have tortiously interfered with plaintiffs' at-will employment agreements; and that material factual issues existed as to whether defendant was acting within the scope of his employment when he allegedly induced the contract breaches. Nelson v. Fleet Nat. Bank, 949 F.Supp. 254, 259.

D.Del.1993. Cit. in headnote, quot. in sup., com. (d) quot. in sup. A man suffered permanent injury to his foot after hospital personnel labelled him homosexual and transferred him to another hospital because of his perceived sexual orientation and HIV status. Man sued hospital and treating physician for intentional infliction of emotional distress and discrimination under the Rehabilitation Act. This court denied in part defendants' motions for summary judgment, holding, inter alia, that plaintiff stated cause of action for intentional infliction of emotional distress because jury could find that doctor's alleged refusal to render medical treatment to plaintiff for unacceptable discriminatory reasons based on hospital staff members' derogatory comments that plaintiff was homosexual was extreme and outrageous conduct, especially in light of the fact that doctor knew that his refusal to treat plaintiff could cause plaintiff serious permanent injury. Furthermore, hospital could be liable for emotional distress because jury could find extreme and outrageous defendant's actions in branding plaintiff a homosexual, thereby causing doctor's refusal to treat plaintiff, and in transferring plaintiff for inappropriate discriminatory reasons. Miller v. Spicer, 822 F.Supp. 158, 159, 168.

D.Del.1985. Subsec. (1) and com. (d) quot. in disc. Two injured employees who were entitled to disability benefits sued an insurance company for its failure to pay or its delay in making payments for compensable medical treatment, alleging wrongful termination of benefits without a hearing on the merits in violation of a state compensation statute, and intentional infliction of emotional distress suffered from loss of reputation and impaired credit ratings. The district court dismissed the statutory claim, holding that the nonpayment of bills in itself did not constitute a “termination of compensation” within the meaning of the statute. The court denied the insurance company's motion for summary judgment on the claim for intentional infliction of emotional distress, holding that there was insufficient evidence on the record to say that no reasonable fact finder could determine that the insurance company's intentional withholding of payments constituted extreme and outrageous conduct. Correa v. Pennsylvania Mfrs. Ass'n Ins. Co., 618 F.Supp. 915, 928.

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D.Del.1982. Com. (d) quot. in part in sup., subsec. (1) quot. in sup. The plaintiff brought an action alleging that her former employer had violated her constitutional rights and committed breach of contract and various state torts by constructively discharging her through forced resignation. On motion for summary judgment by the defendant, the court dismissed the constitutional claims, noting that they were based on the Fourteenth Amendment and ruling that the conduct of the defendant with respect to the plaintiff was not state action. The court also granted the defendant summary judgment on the breach of contract claim, indicating that the plaintiff's employment was at will and that the terms of her employment had not been altered by guarantees contained in an employee handbook published after her hiring. After holding that the libel, slander, and defamation claims were barred by the statute of limitations, the court also granted judgment to the defendant on the plaintiff's other state law claims. The court noted that the plaintiff's own admissions showed that the elements for intentional and/or negligent infliction of mental distress were lacking. The plaintiff's testimony demonstrated she had suffered neither emotional problems nor bodily or physical harm as a result of the defendant's actions, and the defendant's actions were insufficient, as a matter of law, to constitute the outrageous conduct on which liability for such claims was founded. Avallone v. Wilmington Medical Center, Inc., 553 F.Supp. 931, 938.

D.D.C.

D.D.C.2023. Cit. in sup. In an action arising from terrorist attacks in Iraq and Afghanistan, victims of the attacks and their family members filed claims under the Foreign Sovereign Immunities Act against the Islamic Republic of Iran, alleging that defendant provided material support and resources to the terrorists who were responsible for the attacks. Granting in part plaintiffs' motion for default judgment, the court held that plaintiffs sufficiently alleged a claim for solatium, which, under the Act, were indistinguishable from claims for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court reasoned, in part, that acts of terrorism were by definition extreme and outrageous conduct intended to cause emotional distress, and that the attacks at issue were directed at victims, and the Act exempted the requirement that family members be present at the time of the attack when the attackers were terrorists. Roth v. Islamic Republic of Iran, 651 F.Supp.3d 65, 94, 95.

D.D.C.2023. Subsec. (1) cit. in case quot. in sup. U.S. Navy sailors, who were injured in a terrorist bombing of a U.S. Navy ship, and their family members brought, among other things, a claim for intentional infliction of emotional distress (IIED) against Iran, alleging that defendant provided material support and resources to terrorist group responsible for the attack. This court granted plaintiffs' motion for default judgment, holding that defendant would be held liable for damages on plaintiffs' IIED claim under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act. The court noted that acts of terrorism by their very definition were extreme and outrageous conduct and intended to cause severe emotional distress, such that defendants were liable under Restatement Second of Torts § 46. Taitt v. Islamic Republic of Iran, 664 F.Supp.3d 63, 90.

D.D.C.2022. Subsec. (1) quot. in case quot. in sup., subsec. (2) cit. in case cit. in sup. Family of 16-year-old victim who was shot and killed by member of terrorist group filed wrongful-death and survival claims against the Syrian Arab Republic and Islamic Republic of Iran, seeking to hold defendants liable for materially supporting the group in carrying out the attack under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act. This court granted plaintiffs' motion for default judgment against defendants, holding, among other things, that plaintiffs established that defendants intentionally inflicted emotional distress, such that defendants would be held liable to plaintiffs for solatium damages. The court cited Restatement Second of Torts § 46 in reasoning that presence was not required in cases involving terrorism, because terrorism was sufficiently extreme and outrageous to demonstrate that it was intended to inflict severe motional harm on those not present at the site of the attack. Ben-Yishai v. Syrian Arab Republic, 642 F.Supp.3d 110, 129.

D.D.C.2022. Subsecs. (1) and (2) quot. in sup. Victims of terrorist attacks in Israel and victims' families, who were citizens of the United States and Israel, sued Iran and Syria, seeking compensatory and punitive damages under the terrorism exception to the Foreign Sovereign Immunities Act based on allegations that defendants provided material support and resources to the terrorists who carried out the attacks. This court granted in part plaintiffs' motion for a default judgment after defendants failed to respond or appear, holding that defendants were liable to all United States plaintiffs who were related to victims of the attacks for intentional infliction of emotional distress under Restatement Second of Torts § 46, regardless of whether they were present at the attacks. The court pointed to evidence that defendants supported the terrorists with the intent to cause harmful contact, that acts of terrorism were inherently extreme and outrageous, and that those plaintiffs suffered mental anguish hand trauma as a result of the attacks. Borochov v. Islamic Republic of Iran, 589 F.Supp.3d 15, 36, 37.

D.D.C.2022. Cit. in sup., subsec. (1) quot. in sup., subsec. (2) cit. and quot. in sup. Victims of terrorist attack in Israel and victims' family members filed claims for battery and loss of solatium against Iran under the terrorism exception to the Foreign Sovereign Immunities Act, alleging that Iran provided material support to the terrorists who committed the attack. This court granted in part plaintiffs' motion for a default judgment after defendant failed to respond, holding, among other things, that plaintiffs had established defendant's liability the federal private right of action for their solatium claims. The court noted that, under the Act, a claim for loss of solatium was indistinguishable from a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46; here, the court reasoned, plaintiffs sufficiently alleged that defendant provided material support to the terrorists with the understanding and intent that the terrorists would carry out attacks in Israel, and plaintiffs suffered severe emotional distress as a result. Mark v. Islamic Republic of Iran, 626 F.Supp.3d 16, 34.

D.D.C.2022. Subsec. (1) quot. in case quot. in sup., subsec. (2)(a) cit. in case cit. in sup. As part of a wider action, family of American servicemembers and a military contractor who were injured or killed in terrorist attacks while serving in Iraq sued the Islamic Republic of Iran under the terrorism exception of the Foreign Sovereign Immunity Act, seeking damages for loss of solation based

on allegations that defendant's support of the attacks caused plaintiffs extreme emotional distress. This court granted plaintiffs' motion for a default judgment, holding that plaintiffs stated a valid theory of recovery as to their claims for intentional infliction of emotional distress (IIED) under Restatement Second of Torts § 46. The court noted that IIED claims under the Act could be brought by immediate family members of victims of terrorist attacks even if the family members were not present at the site of the attack. Stearns v. Islamic Republic of Iran, 633 F.Supp.3d 284, 352, 353.

D.D.C.2021. Cit. in sup.; com. (d) cit. in sup. Convicted motorist brought, among other things, claims for intentional infliction of emotional distress (IIED) and use of excessive force against police officer and the District of Columbia, alleging that police officer, upon stopping plaintiff for his unregistered vehicle, attempted to stop plaintiff from fleeing while police officer was holding onto the engine hood by injuring him with a firearm. This court granted defendant's motion for summary judgment, holding that plaintiff's IIED claim failed as a matter of law, because police officer's conduct was not extreme or outrageous. Citing Restatement Second of Torts § 46, the court explained that police officer's conduct was not unreasonable under the circumstances for the purposes of the excessive-force claim, and plaintiff did not contest defendants' assertion that a finding of reasonableness precluded a finding of extreme and outrageous conduct. Bushrod v. District of Columbia, 521 F.Supp.3d 1, 30.

D.D.C.2021. Cit. in sup., cit. in case cit. in sup. (general cite). Family members of deceased terrorist-attack victims, among others, brought a claim for solatium under the terrorism exception to the Foreign Sovereign Immunities Act against the Islamic Republic of Iran, alleging that defendant trained, funded, and supported the terrorist attack that killed decedents. This court granted plaintiffs' motion for default judgment, holding that plaintiffs sufficiently alleged a claim for intentional infliction of emotional distress (IIED). The court pointed out that a claim for solatium under the terrorism exception of the Act was indistinguishable from an IIED claim as set forth in Restatement Second of Torts § 46, and explained that terrorist acts were by their nature extreme and outrageous, the attack caused severe emotional distress in plaintiffs, defendant's conduct was directed at decedents, and plaintiffs were decedents' immediate family members. Selig v. Islamic Republic of Iran, 573 F.Supp.3d 40, 63.

D.D.C.2020. Quot. in case quot. in sup.; subsec. (1) quot. in case quot. in sup.; com. (*i*) and caveat cit. in case cit. in sup. Immediate family members and estates of deceased victims of bombings at the U.S. embassy in Lebanon filed an action under the terrorism exception to the Foreign Sovereign Immunities Act against Iran, alleging that defendant sponsored and supported the terrorist bombings, and seeking damages for intentional infliction of emotional distress (IIED). This court granted in part plaintiffs' motion for default judgment, holding, inter alia, that they established the basis of defendant's liability for injuries directly inflicted on decedents and injuries indirectly on family members. The court explained that it was self-evident that defendant's role in the bombings was intended to cause a high degree of emotional distress to both decedents and immediate family members, and noted that an act of terrorism, by its very definition, was an extreme and outrageous act that met the requirement for an IIED claim under Restatement Second of Torts § 46. Barry v. Islamic Republic of Iran, 437 F.Supp.3d 15, 44, 50, 51.

D.D.C.2020. Com. (d) cit. in sup. Former patient filed claims for, among other things, intentional infliction of emotional distress against fertility clinic after it dismissed her as a patient. This court granted in part and denied in part clinic's motion for summary judgment, holding that, while patient could go forward on her claim for intentional infliction of emotional distress based on her allegations that clinic discriminated against her and retaliated against her, she could not proceed based on allegations that clinic's regional manager used "aggressive language" during a phone call in which she presented patient with the option of leaving the clinic's practice. The court reasoned that, while the regional manager's call was undoubtedly distressing, her tone and choice of language was not plausibly outrageous enough to have added to that distress in an actionable way under Restatement Second of Torts § 46. E.M. v. Shady Grove Reproductive Science Center P.C., 496 F.Supp.3d 338, 408.

D.D.C.2020. Subsec. (1) and (2) quot. in case quot. in sup. Family of U.S. Marines service member who was stationed at the U.S. embassy in Lebanon brought claims of intentional infliction of emotional distress (IIED) under the terrorism exception to the Foreign Sovereign Immunities Act against the Islamic Republic of Iran, alleging that defendant provided material support to the terrorists who perpetrated the bombing, and that the attack severely traumatized service member and substantially deteriorated plaintiffs' relationship with him. This court granted plaintiffs' motion for entry of default judgment, holding that plaintiffs provided satisfactory evidence for their IIED claim. The court observed that, under federal caselaw, plaintiffs did not need to show that they were present at the site of the attack to sustain their claim for IIED under Restatement Second of Torts § 46 so long as they were the immediate family members of service member, because terrorism by its nature was directed at both service member and his family. Ewan v. Islamic Republic of Iran, 466 F.Supp.3d 236, 245, 246.

D.D.C.2020. Quot. in sup. U.S. citizens residing in Israel, among others, brought claims of intentional infliction of emotional distress (IIED) against Syria and Iran, asserting jurisdiction under the terrorism exception to the Foreign Sovereign Immunities Act, alleging that defendants provided material support to a terrorist group whose attack destroyed plaintiffs' home while plaintiffs were away. This court denied in part plaintiffs' motion for entry of default judgment, holding that plaintiffs failed to establish a waiver of sovereign immunity under the Act, because they failed to satisfactorily prove the elements of an IIED claim. The court explained that the emotional distress plaintiffs suffered when they witnessed the destruction of their home, without evidence that they also suffered any physical injury or were the direct targets of the attack, could not form the basis of an IIED claim under Restatement Second of Torts §§ 46 and 47. Force v. Islamic Republic of Iran, 464 F.Supp.3d 323, 362.

D.D.C.2020. Quot. in sup.; subsec. (2)(a) cit. in case cit. in sup.; com. (d) quot. in case quot. in sup.; com. (*i*) quot. in sup. (erron. quot. as com. (d)). Brother of deceased U.S. Army service member brought a state-law claim for intentional infliction of emotional distress (IIED) under the terrorism exception to the Foreign Sovereign Immunities Act against the Islamic Republic of Iran, among others, alleging that defendant provided material support to terrorist groups who abducted,

tortured, and murdered service member. This court granted plaintiff's motion for entry of default judgment, holding that plaintiff substantiated his IIED claim under Restatement Second of Torts § 46. The court explained that plaintiff satisfactorily established that he was the immediate family member of service member, that defendant's conduct was extreme, outrageous, and intentional, and that he suffered devastating emotional trauma from the loss of his brother; furthermore, plaintiff was not required to have been present for defendant's outrageous conduct against service member, because caselaw established that family members did not need to personally witness the tortious action to sustain an IIED claim under § 46. Fritz v. Islamic Republic of Iran, 466 F.Supp.3d 13, 17-19.

D.D.C.2020. Subsecs. (2)(a) and (2)(b) quot. in case quot. in sup. Family members of employee of the U.S. embassy in Kenya, who was injured in a terrorist bombing of the embassy, brought, among other things, a claim for intentional infliction of emotional distress (IIED) against the Republic of Iran and the Iranian Ministry of Information and Security, asserting jurisdiction under the terrorism exception to the Foreign Sovereign Immunities Act, and alleging that defendants provided material support to the terrorists that bombed the embassy, which resulted in plaintiffs suffering severe emotional damages. This court granted plaintiffs' motion for default judgment, holding that plaintiffs demonstrated that they were entitled to solatium damages caused by defendants' support of the terrorists. The court explained that, although plaintiffs were not the direct victims of the bombing, they had a valid IIED claim under Restatement Second of Torts § 46, because they established that the terrorist bombing was outrageous and extreme, they suffered severe emotional distress, and they were the immediate family members of the victim. Kinyua v. Republic of Sudan, 466 F.Supp.3d 1, 9.

D.D.C.2020. Subsecs. (1), (2)(a), and (2)(b) quot. in cases quot. in sup. In an action arising from the 1998 bombing of a U.S. Embassy in Kenya, U.S. nationals or employees of the U.S. government who were direct victims of the bombings, along with their immediate family members, filed claims under the Foreign Sovereign Immunities Act against the Islamic Republic of Iran, among others, alleging that defendants provided material support to the terrorists that perpetrated the bombings. On remand, this court held that Iran was liable to victims' family members for solatium damages stemming from victims' injuries. The court noted that immediate family members of injured victims were not required to independently satisfy the "presence" requirement to recover for intentional infliction of emotional distress under Restatement Second of Torts § 46, because a terrorist attack, by its nature, was directed not only at the victims but also at the victims' families. Sheikh v. Republic of Sudan, 485 F.Supp.3d 255, 266.

D.D.C.2019. Quot. in sup., cit. in case cit. in sup.; subsecs. (1) and (2)(a) cit. in case cit. in sup. Former captive and his sister brought, among other things, claims for intentional infliction of emotional distress (IIED) under the terrorism exception to the Foreign Sovereign Immunities Act against the Islamic Republic of Iran, alleging that defendant's threats against and torture of former captive for more than three years while he was detained in Iran caused plaintiffs severe emotional distress. This court entered a default judgment against defendant, holding that plaintiffs adequately alleged sufficient facts to support their IIED claim. The court explained that, under Restatement

Second of Torts § 46, torture, threats, and keeping a person in inhumane conditions for more than three years constituted extreme and outrageous conduct, and that, under § 46, sister was entitled to bring an IIED claim, because defendant's conduct was directed at her immediate family. Abedini v. Government of Islamic Republic of Iran, 422 F.Supp.3d 118, 133, 135.

D.D.C.2019. Subsec. (1) quot. in sup., cit. in case cit. in sup. (general cite). Victims of a terrorist bombing of a U.S. embassy brought an action against the Islamic Republic of Iran, asserting jurisdiction under the terrorism exception to the Foreign Sovereign Immunities Act based on allegations that defendant sponsored the terrorist bombing, and alleging, inter alia, a claim of intentional infliction of emotional distress (IIED). This court granted in part plaintiffs' motion for default judgment, holding that plaintiffs articulated the elements of an IIED claim by establishing that defendant provided material support for the terrorists and caused plaintiffs' injuries and trauma. The court explained that acts of terrorism were by definition extreme and outrageous conduct as defined by Restatement Second of Torts § 46, because such acts were intended to cause the highest degree of emotional distress. Barry v. Islamic Republic of Iran, 410 F.Supp.3d 161, 176, 177.

D.D.C.2019. Cit. in sup.; subsec. (1) cit. in sup. Family of an American war journalist who was killed in Syria by an artillery attack launched by the Syrian military brought an action under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act against the Syrian Arab Republic. After defendant failed to plead or otherwise defend against the complaint, this court granted plaintiffs' motion for a default judgment against defendant, finding that plaintiffs had provided more than satisfactory evidence to demonstrate that journalist's death resulted from an extrajudicial killing committed by defendant. The court cited Restatement Second of Torts § 46 in noting that plaintiffs could recover under a theory of intentional infliction of emotional distress even though they were not personally present at the scene, because defendant intentionally carried out an attack that caused plaintiffs severe emotional distress. Colvin v. Syrian Arab Republic, 363 F.Supp.3d 141, 157.

D.D.C.2019. Subsec. (1) quot. in case quot. in sup.; subsec. (2)(a) and com. (j) quot. in sup.; caveat cit. in sup. United States servicemembers and others filed a private cause of action against the North Korean government in connection with allegations that defendant was liable as a state sponsor of terrorism for the actions of its agents, who kidnapped, imprisoned, and tortured servicemembers for almost a year. After defendant failed to respond or appear, this court granted plaintiffs' motion for a partial default judgment, holding that defendant was liable to plaintiffs under the terrorism exception to the Foreign Sovereign Immunities Act. The court reasoned, in part, that plaintiffs showed that defendant was liable for intentional infliction of emotional distress under Restatement Second of Torts § 46, given the uncontroverted evidence that defendant's actions were extreme and outrageous and were intended to cause—and did cause—extreme distress and terror in servicemembers, their estates, and their families. Doe v. Democratic People's Republic of Korea Ministry of Foreign Affairs Jungsong-Dong, 414 F.Supp.3d 109, 128.

D.D.C.2019. Subsec. (1) quot. in case quot. in sup. Journalist, brother, and mother brought, among other things, claims for intentional infliction of emotional distress (IIED) under the terrorism

exception of the Foreign Sovereign Immunity Act against the Islamic Republic of Iran, alleging, inter alia, that plaintiffs suffered severe emotional distress when defendant took journalist hostage, threatened him, and tortured him for more than a year. This court granted plaintiffs' motion for default judgment, holding that plaintiffs sufficiently established the elements of their IIED claims. The court reasoned that journalist's detention and torture constituted extreme and outrageous conduct that inflicted severe emotional distress under Restatement Second of Torts § 46(1), and explained that brother and mother were entitled to bring an IIED claim for the torture inflicted upon journalist, because they were the immediate family members of the target of defendant's outrageous conduct. Rezaian v. Islamic Republic of Iran, 422 F.Supp.3d 164, 179.

D.D.C.2019. Cit. in sup. (general cite). Estate and family of deceased Iraqi contractor brought claims under the Foreign Sovereign Immunities Act against the Islamic Republic of Iran, alleging that defendant formed, trained, funded, supplied, and directed the terrorist organization that kidnapped, tortured, and killed contractor. This court granted in part plaintiffs' motion for a default judgment, holding that certain plaintiffs stated claims for intentional infliction of emotional distress under the applicable District of Columbia law. The court noted that the District of Columbia had adopted the standard in Restatement Second of Torts § 46 for intentional infliction of emotional distress, and concluded that plaintiffs had satisfied all of the elements in § 46, because acts of terrorism were, by their very definition, extreme and outrageous, and five of the six plaintiffs had presented evidence that they suffered severe emotional distress due to the acts of terrorism directed at contractor. W.A. v. Islamic Republic of Iran, 427 F.Supp.3d 117, 140.

D.D.C.2018. Subsec. (1) and com. (*l*) quot. in sup. In an action arising from the bombing of a residential complex in Saudi Arabia, surviving victims and their family members brought an action under the terrorism exception of the Foreign Sovereign Immunities Act against the Islamic Republic of Iran and a branch of its armed forces, alleging that defendants provided material support to the terrorist organization that carried out the bombing. After defendants failed to appear, this court granted in part plaintiffs' motion for a default judgment, holding that defendants were liable to both surviving victims and their families for intentional infliction of emotional distress under Restatement Second of Torts § 46, because plaintiffs alleged that defendants engaged in extreme and outrageous conduct by providing material support to a known terrorist organization, and the organization's attack caused plaintiffs extreme emotional distress. The court noted that, although victims' family members were not present at the time of the attack, defendants' conduct was sufficiently outrageous and intended to inflict severe emotional harm on persons who were not present, such that family members were not required to have been present to recover for their emotional distress. Akins v. Islamic Republic of Iran, 332 F.Supp.3d 1, 36, 37.

D.D.C.2018. Subsec. (1) quot. in disc.; subsec. (2)(a) cit. in case cit. in disc.; com. (*l*) quot. in disc. After United States citizen was killed in a terrorist attack in Jerusalem, decedent's parents and siblings filed a lawsuit under the Foreign Sovereign Immunities Act (FSIA) against the Islamic Republic of Iran, alleging that defendant had supported and caused the terrorist attack that resulted in decedent's death. This court granted plaintiffs' motion for default judgment, holding, inter alia, that the FSIA permitted plaintiffs to bring various tort claims against foreign governments. The

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court cited Restatement Second of Torts § 46 in explaining that plaintiffs' claim for intentional infliction of emotional distress was meritorious because the extreme and outrageous nature of the terrorist attack waived the general requirement of their physical presence at the time of the wrongful act. Estate of Hirshfeld v. Islamic Republic of Iran, 330 F.Supp.3d 107, 141.

D.D.C.2018. Com. (d) quot. in case quot. in sup. Employee filed a breach-of-contract action against former employer, and, more than 11 years later, sought to add a claim for intentional infliction of emotional distress (IIED) based on allegations that defendant failed to maintain health insurance for plaintiff's family, threatened a public smear campaign against plaintiff, and misrepresented the grounds for plaintiff's departure from employment. This court denied plaintiff's motions for leave to amend the complaint and for reconsideration, holding that plaintiff's IIED claim did meet the plausibility standard for surviving a motion to dismiss, because it lacked specific allegations about defendant's allegedly extreme and outrageous behavior. The court quoted Restatement Second of Torts § 46, Comment *d*, in explaining that the proposed amended complaint lacked factual details to show that defendants conduct was sufficiently outrageous to support an IIED claim. Klayman v. Judicial Watch, Inc., 296 F.Supp.3d 208, 216.

D.D.C.2017. Cit. in case quot. in sup.; subsec. (1) quot. in sup.; com. (*l)* cit. in sup. Parents, grandparents, and estate of infant killed in a terrorist attack by Hamas brought an action under the Foreign Sovereign Immunities Act (FSIA) against the Islamic Republic of Iran and the Syrian Arab Republic, claiming that defendants provided material support to the terrorists and were liable under several tort theories, including wrongful death, assault, battery, and intentional infliction of emotional distress (IIED). This court granted plaintiffs' motion for default judgment, holding that plaintiffs demonstrated satisfactory evidence establishing the elements of the terrorism exception to the FSIA and that the attack was an extrajudicial killing for which defendants acted as state sponsors. Relying on Restatement Second of Torts § 46 in discussing the IIED claims, the court explained that parents were permitted to recover as members of infant's immediate family who were present at the attack and grandparents were permitted to recover, even though they were not physically present, because defendants' support of terrorism was sufficiently outrageous and specifically intended to inflict severe emotional harm on those not present. Braun v. Islamic Republic of Iran, 228 F.Supp.3d 64, 81.

D.D.C.2017. Com. (d) quot. in cases quot. in sup. Customer filed a pro se action against pharmacy and its chief executive officer, seeking to assert claims for negligence and intentional infliction of emotional distress in connection with various incidents in which a pharmacist gave her the incorrect medication or medical supplies and delayed her ability to receive the correct medication and supplies. Granting summary judgment for defendants, this court held, among other things, that plaintiff failed to allege facts that, if proven true, established conduct by defendants that was extreme and outrageous, as required to state a claim for intentional infliction of emotional distress. The court explained that, under District of Columbia law and Restatement Second of Torts § 46, the conduct alleged had to be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. Carty v. CVS Pharmacy, LLC, 264 F.Supp.3d 190, 196.

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D.D.C.2017. Subsec. (2)(a) cit. in disc.; com. (j) quot. in sup. U.S. citizen, her husband, and her five children injured in a Hamas bus attack in Israel brought an action under the terrorism exception to the Foreign Sovereign Immunities Act against the Islamic Republic of Iran, alleging that defendant had long-provided material support and resources to Hamas' terroristic activities. This court granted plaintiffs' motion for default judgment, holding that they demonstrated defendant's liability for their injuries under theories of battery, intentional infliction of emotional distress, and solatium. The court cited Restatement Second of Torts § 46 for various forms of demonstrating emotional distress, noting that liability was imposed only where the distress inflicted was so severe that no reasonable man could be expected to endure it, and pointed out that the extreme and outrageous character of a defendant's conduct was important evidence of the existence of emotional distress. Cohen v. Islamic Republic of Iran, 238 F.Supp.3d 71, 84, 85.

D.D.C.2017. Cit. in ftn. and cit. in case quot. in ftn. (general cite). Family of U.S. citizen who was kidnapped and murdered in Israel by members of a terrorist organization brought an action under the Foreign Sovereign Immunities Act against the Islamic Republic of Iran and others, alleging that defendants assisted the organization and were therefore liable for, among other things, intentional infliction of emotional distress in connection with the kidnapping and murder. After a hearing, this court entered a default judgment against defendants in favor of plaintiffs. In making its decision, the court noted that the Act provided a private right of action against responsible foreign states to U.S. citizens who were victims of state-sponsored terrorism, and that federal courts looked to Restatement Second of Torts § 46 as the controlling substantive law in claims for intentional infliction of emotional distress arising under the Act. Fraenkel v. Islamic Republic of Iran, 248 F.Supp.3d 21, 34.

D.D.C.2017. Com. (d) quot. in sup. Individual who suffered from physical and mental impairments filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against law firm that had represented clients in an action against plaintiff, alleging that defendant discriminated against him on the basis of his disability by ignoring his counsel's request that a computer or tablet be provided for his use during a deposition because of his disability and reliance on visual aids, and that defendant's failure to provide him with either of those items caused him stress and led him to seek help from a health-care facility. This court granted defendant's motion to dismiss, holding that, even if defendant was aware of plaintiff's particular susceptibility, its failure to provide him with a laptop or tablet was not the type of behavior required to support an IIED claim. The court quoted Restatement Second of Torts § 46, Comment *d*, in describing the type of outrageous and extreme behavior necessary to establish liability for an IIED claim. Jefferson v. Stinson Morrison Heckler LLP, 249 F.Supp.3d 76, 84.

D.D.C.2017. Coms. (d) and (f) quot. in case quot. in sup. Elderly couple brought, inter alia, an action against healthcare worker who was hired to provide services to plaintiffs in their home, alleging intentional infliction of emotional distress based on claims that defendant had robbed them. This court denied defendant's motion to dismiss plaintiffs' IIED claim, holding that the alleged conduct, if proven, was sufficient to rise to the level of extreme and outrageous conduct necessary to support an IIED claim. The court explained that, under Restatement Second of

Torts § 46, Comment *d*, mere indignities or threats were not sufficiently outrageous and that the relationship between the parties was relevant especially where a defendant had knowledge that a victim was peculiarly susceptible, and reasoned that, here, plaintiffs' alleged that defendant was hired and given permission to enter the home in order to provide medical care to physically disabled plaintiffs and was not permitted to intrude into locked areas in order to steal plaintiffs' property. Mann v. Bahi, 242 F.Supp.3d 6, 10, 11.

D.D.C.2017. Com. (d) quot. in case quot. in sup. Former security officer for university police department brought claims for, among other things, intentional infliction of emotional distress against university in connection with its suspension and termination of his employment after he was charged with driving while impaired by alcohol. This court granted defendant's partial motion to dismiss, holding that plaintiff's allegations—that defendant suspended and terminated his employment, confiscated his security license and keys, and denied him access to its properties—fell short of the high standard required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. While defendant's actions might have been distressing to plaintiff, none of defendant's actions constituted extreme or outrageous conduct or rose above a normal employment decision, and the law did not impose a general duty of care to avoid causing mental distress. Nono v. George Washington University, 245 F.Supp.3d 141, 148.

D.D.C.2017. Com. (j) quot. in sup. Individual who was arrested after he got into an altercation with employees of a liquor store sued arresting officers, police department, and the District of Columbia, alleging that one officer used excessive force against him after he was restrained, by beating him such that he suffered a broken nose, a head contusion, and a subgaleal hematoma. This court denied in part defendants' motion to dismiss plaintiff's claim for intentional infliction of emotional distress, holding that plaintiff presented sufficient evidence that he experienced severe emotional distress, as required to state a claim under Restatement Second of Torts § 46. The court pointed to plaintiff's deposition testimony that he experienced nightmares and flashbacks about the arrest, and that they continued for years after it occurred. Williams v. District of Columbia, 268 F.Supp.3d 178, 195.

D.D.C.2017. Com. (d) quot. in case quot. in sup. Ticket agent of Chinese descent who worked for a bus company in the District of Columbia brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against the District of Columbia, alleging that she suffered emotional distress when, within a six-month period, she had four incidents with defendant's police department, including two arrests arising from disputes between plaintiff and bus patrons and "would-be robbers;" that the police department failed to send a Chinese-speaking officer or interpreter, used excessive force in handling her, and retaliated against her; and that she was afraid of being arrested again and was extremely anxious whenever she saw a police officer. This court denied defendant's motion to dismiss, holding that plaintiff sufficiently pleaded the elements of an IIED claim. The court quoted Restatement Second of Torts § 46, Comment *d*, in explaining the "extreme and outrageous conduct" element of an IIED claim, and concluded that, here, the police officer's conduct as alleged in the complaint was sufficiently extreme and outrageous to state an IIED claim. Xingru Lin v. District of Columbia, 268 F.Supp.3d 91, 103.

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D.D.C.2016. Subsec. (2)(a) cit. case quot. in sup. Injured victim of a terrorist attack carried out by Hamas at his yeshiva in Gaza, and his family members, brought an action under the "state-sponsored terrorism" exception to the Foreign Sovereign Immunities Act against the Islamic Republic of Iran and the Iranian Ministry of Information and Security, alleging that defendants financially funded and provided tactical support and equipment to Hamas. This court granted plaintiffs' motion for default judgment due to defendants' failure to respond to the complaint, holding that plaintiffs established their claims for, among other things, intentional infliction of emotional distress (IIED). The court explained that defendants were liable for IIED if they acted consistent with the criteria set forth in Restatement Second of Torts § 46(2)(a), and that acts of terrorism were per se extreme and outrageous conduct. Bluth v. Islamic Republic of Iran, 203 F.Supp.3d 1, 21.

D.D.C.2016. Com. (d) quot. in case quot. in sup. Former graduate student, acting pro se, brought a claim for intentional infliction of emotional distress (IIED) against university in connection with allegations that, on two occasions, university denied her application for readmission to complete her doctorate degree in history based either on her credentials or her lack of progress and possible plagiarism. Granting university's motion to dismiss, this court held that student failed to state an IIED claim against university, because, while she might have experienced pain and suffering as a result of her inability to complete her graduate studies through university, it could not be said that university's decision to deny her readmission rose to the level of extreme or outrageous conduct required to state such a claim under Restatement Second of Torts § 46. Holloway v. Howard University, 206 F.Supp.3d 446, 453.

D.D.C.2016. Cit. in sup., cit. in case quot. in sup., adopted in case cit. in sup.; Caveat cit. and quot. in sup.; com. (*l*) cit. in sup. In consolidated actions, victims who were injured and estates and families of victims who were injured or killed in terrorist bombings sued, among others, the Republic of Sudan, alleging that defendant provided assistance to the terrorist organization that carried out the bombings. After conducting hearings, this court entered final judgments against defendant, and denied defendant's subsequent motion to vacate the judgments as to certain family-member plaintiffs, holding that it was not clear that District of Columbia law required those plaintiffs to have been present at the bombings in order to recover for intentional infliction of emotional distress (IIED). Although the District of Columbia had adopted the standard laid out in Restatement Second of Torts § 46, which suggested that presence was usually required for family members to recover on an IIED claim, § 46 also contained a Caveat on which courts in the district had relied in holding that terrorist attacks were a form of outrageous conduct to which the presence requirement did not apply. Owens v. Republic of Sudan, 174 F.Supp.3d 242, 287.

D.D.C.2016. Subsec. (1) quot. in sup. After a terrorist organization shot down an airplane and took survivors of the crash hostage, former hostages and family of hostage who was killed sued the Republic of Cuba, alleging that, under the terrorism exception to the Foreign Sovereign Immunity Act, defendant was liable for sponsoring the organization. This court granted plaintiffs' motion for a default judgment and awarded plaintiffs damages, holding that plaintiffs sufficiently alleged that

defendant provided the organization with the materials, training, and resources necessary to carry out torts against the hostages, including the tort of intentional infliction of emotional distress as set forth in Restatement Second of Torts § 46. The court pointed to evidence that the hostages were forcibly marched through the jungle, denied medical care, refused communication with their loved ones, kept in cages, chained to trees and one another, prevented from performing basic bodily functions and needs, mock executed, and regularly told they would be killed, and that the hostages suffered extreme emotional anguish as a result. Stansell v. Republic of Cuba, 217 F.Supp.3d 320, 343.

D.D.C.2016. Subsecs. (1) and (2) and com. (d) quot. in sup. Families and estates of two American victims of a terrorist attack in Jordan brought an action under the Foreign Sovereign Immunities Act (FSIA) against Syrian Arab Republic and Syrian Military Intelligence, alleging that defendants sponsored the attack and were therefore responsible for victims' deaths. After defendants failed to enter appearances or defend against plaintiffs' claims, this court granted plaintiffs' motion for a default judgment, finding that defendants were jointly and severally liable for victims' deaths, and awarded damages. The court reasoned, in part, that plaintiffs were entitled to recover damages for intentional infliction of emotional distress under Restatement Second of Torts § 46, because they were members of victims' immediate families and defendants' conduct was sufficiently outrageous and intended to inflict severe emotional harm upon persons who were not present. Thuneibat v. Syrian Arab Republic, 167 F.Supp.3d 22, 39.

D.D.C.2015. Subsec. (1) cit. in case quot. in sup. Kenyan, Tanzanian, and United States citizens who were injured or killed in suicide bombings of the United States embassies in Kenya and Tanzania, and their immediate family members, sued the Republic of Sudan, the Islamic Republic of Iran, and related entities, seeking to hold defendants responsible for their alleged roles in supporting, funding, and carrying out the attack. After granting summary judgment on liability against defendants, this court awarded plaintiffs damages, holding that, under the Foreign Sovereign Immunities Act, all plaintiffs who were injured in the bombings could recover for their pain and suffering as well as their economic losses, and their immediate family members—if U.S. nationals—could recover for solatium. The court cited Restatement Second of Torts § 46 in reasoning that acts of terrorism, by their very definition, amounted to extreme and outrageous conduct and were thus compensable by analogy under the tort of intentional infliction of emotional distress. Amduso v. Republic of Sudan, 61 F.Supp.3d 42, 47.

D.D.C.2015. Com. (d) quot. in case quot. in sup. African American and Hispanic former employees of hotel sued owner of the hotel and past and present managers of the hotel, alleging racial discrimination in violation of federal and District of Columbia laws, and intentional and negligent infliction of emotional distress (IIED). Granting in part defendants' motion to dismiss, this court held that the allegations in plaintiffs' complaint, which consisted solely of run-of-the-mill discrimination claims, failed to approach the demanding standard required to state an IIED claim under Restatement Second of Torts § 46. While plaintiffs claimed that they were called “trash” on at least two occasions, that an offensive poster appeared in their workspace, that they were fired from their jobs, and that they were replaced by non-minorities, the court reasoned that courts had

repeatedly held that conduct more egregious than these "mere insults" and employment-related slights did not meet the exacting IIED bar. Asare v. LM-DC Hotel, LLC, 62 F.Supp.3d 30, 36.

D.D.C.2015. Subsecs. (1) and (2)(a) cit. in sup. Family of sailor who was killed during the terrorist bombing of a U.S. Navy ship in Yemen brought claims for intentional infliction of emotional distress (IIED) under the Foreign Sovereign Immunities Act against, among others, the states of Iran and Sudan, alleging that defendants provided material support and resources to the terrorists that carried out the attack. After plaintiffs obtained default judgments against the Iranian and Sudanese defendants, this court awarded plaintiffs damages, holding that plaintiffs established that defendants enabled the terrorists to perpetrate the attack, thereby causing sailor's death and plaintiffs' resulting mental anguish, bereavement, and grief. The court noted that, under Restatement Second of Torts § 46, a defendant was potentially liable for IIED to family members of injured persons if the defendant engaged in extreme and outrageous conduct that was directed at the persons and intentionally or recklessly caused severe emotional distress, but not necessarily bodily harm, to such persons' immediate family members. Flanagan v. Islamic Republic of Iran, 87 F.Supp.3d 93, 115.

D.D.C.2015. Com. (d) quot. in sup. and quot. in case quot. in sup. Black off-duty police officer brought a claim for intentional infliction of emotional distress against white on-duty police officer following an incident in which defendant raced his car to block plaintiff's path, forcefully handcuffed him, and detained him despite the fact that he had committed no crime, while threatening, berating, and insulting him and other officers who identified him as a police officer. This court denied defendant's motion for summary judgment, holding that genuine disputes of material facts existed as to whether defendant's actions were sufficiently extreme and outrageous to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court noted that, under District of Columbia law, a police officer's abuse of a position of authority could be considered outrageous conduct, but that a police officer who abused a position of power was still not liable for mere insults, indignities, or annoyances that were not extreme or outrageous. Greene v. Shegan, 123 F.Supp.3d 88, 92.

D.D.C.2015. Subsec. (1) cit. in case quot. in sup. Kenyan citizens who were injured or killed in a suicide bombing of the United States embassy in Kenya sued the Republic of Sudan, the Islamic Republic of Iran, and related entities, seeking to hold defendants responsible for their roles in allegedly supporting, funding, and carrying out the attack. After granting summary judgment on liability against defendants, this court awarded plaintiffs damages, holding that foreign national U.S.-government-employee plaintiffs who were injured in the bombing were entitled to recover under the Foreign Sovereign Immunities Act for pain and suffering caused by the attack. The court cited Restatement Second of Torts § 46 in reasoning that acts of terrorism, by their very definition, amounted to extreme and outrageous conduct and were thus compensable by analogy under the tort of intentional infliction of emotional distress. Onsongo v. Republic of Sudan, 60 F.Supp.3d 144, 148.

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D.D.C.2015. Subsec. (1) cit. in case quot. in sup. Kenyan, Tanzanian, and United States citizens who were injured or killed in suicide bombings of the United States embassies in Kenya and Tanzania sued the Republic of Sudan, the Islamic Republic of Iran, and related entities, seeking to hold defendants responsible for their roles in allegedly supporting, funding, and carrying out the attacks. After granting summary judgment on liability against defendants, this court awarded plaintiffs damages, holding that United States citizens and foreign national U.S.-government-employee plaintiffs who were injured in the bombing were entitled to recover under the Foreign Sovereign Immunities Act for pain and suffering caused by the attack. The court cited Restatement Second of Torts § 46 in reasoning that acts of terrorism, by their very definition, amounted to extreme and outrageous conduct and were thus compensable by analogy under the tort of intentional infliction of emotional distress. Opati v. Republic of Sudan, 60 F.Supp.3d 68, 76.

D.D.C.2015. Subsec. (1) cit. and quot. in case cit. and quot. in sup.; subsec. (2)(a) cit. in case cit. in sup. Family members and administrators of estate of victim who was killed in a bombing in Jerusalem filed, inter alia, an intentional-infliction-of-emotional-distress (IIED) claim under the "terrorism exception" of the Foreign Sovereign Immunities Act (FSIA) against the Islamic Republic of Iran and its ministry of information and security, alleging that defendants supported and funded the bombing. This court granted in part plaintiffs' motion for default judgment as to liability and damages, holding that plaintiffs stated a valid theory of recovery for an IIED claim. Citing Restatement Second of Torts § 46, the court explained that acts of terrorism, by their very definition, amounted to extreme and outrageous conduct and, because they were intended to inflict severe emotional harm on those not present at the site of the attack, plaintiffs did not need to be present at the time of the attack to recover. Roth v. Islamic Republic of Iran, 78 F.Supp.3d 379, 400.

D.D.C.2015. Cit. in sup. Motorist brought a claim for intentional infliction of emotional distress against the United States, following the dismissal of assault charges that were filed against him in connection with an incident in which he "intentionally almost struck" an officer with the U.S. Capital Police. Granting defendant's motion to dismiss, this court held that the allegations in plaintiff's complaint failed to mount the high bar of outrageousness that a plaintiff had to meet in order to state a claim for intentional infliction of emotional distress. The court noted that, under Restatement Second of Torts § 46, whether the conduct complained of was sufficiently outrageous to permit recovery for intentional infliction of emotional distress was a question of law that had to be decided by the court in the first instance. Smith v. United States, 121 F.Supp.3d 112, 124.

D.D.C.2015. Com. (d) quot. in case quot. in sup. Terminated employee brought claims sounding in, among other things, wrongful termination, race discrimination, retaliation, and intentional infliction of emotional distress (IIED) against former employer. This court granted defendant's motion for judgment as a matter of law on plaintiff's IIED claim, holding that plaintiff's conclusory allegations did not rise to the requisite level of outrageousness to state an IIED claim, and that plaintiff had adduced no evidence to support such a claim even after an extensive discovery period. The court noted that the District of Columbia followed Restatement Second of Torts § 46, which set a very high bar for satisfying the requisite level of outrageousness, which went well beyond

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mere insults, indignities, or annoyances. Sun v. District of Columbia Government, 133 F.Supp.3d 155, 175.

D.D.C.2015. Com. (d) quot. in cases quot. in sup. Residential mortgage borrower brought claims for, among other things, intentional infliction of emotional distress against lender and others, alleging that defendants fraudulently attempted to foreclose or claimed the right to foreclose on his property without the right to do so. This court granted defendants' motion to dismiss, holding that plaintiffs failed to state a claim for intentional infliction of emotional distress. The court reasoned that defendants' conduct was not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, as required to state such a claim under Restatement Second of Torts § 46. Taylor v. Wells Fargo Bank, N.A., 85 F.Supp.3d 63, 73.

D.D.C.2015. Subsec. (1) cit. in case quot. in sup. Kenyan and Tanzanian citizens who were injured or killed in suicide bombings of the United States embassies in Kenya and Tanzania sued the Republic of Sudan, the Islamic Republic of Iran, and related entities, seeking to hold defendants responsible for their roles in allegedly supporting, funding, and carrying out the attacks. After granting summary judgment on liability against defendants, this court awarded plaintiffs damages, holding that foreign national U.S.-government-employee plaintiffs who were injured in the bombing were entitled to recover under the Foreign Sovereign Immunities Act for pain and suffering caused by the attack. The court cited Restatement Second of Torts § 46 in reasoning that acts of terrorism, by their very definition, amounted to extreme and outrageous conduct and were thus compensable by analogy under the tort of intentional infliction of emotional distress. Wamai v. Republic of Sudan, 60 F.Supp.3d 84, 89.

D.D.C.2014. Subsec. (1) cit. in case quot. in sup. U.S. citizens injured in embassy bombings in Kenya, along with their family members, brought an action under the "terrorism exception" of the Foreign Sovereign Immunities Act (FSIA) against the Republic of Sudan and its ministry of the interior, and the Islamic Republic of Iran and its ministry of information and security, alleging that defendants supported, funded, and otherwise carried out the bombings. The district court entered judgment on liability in favor of plaintiffs and referred the claims to a special master for a determination of damages. This court adopted the special master's report, with modifications. Applying the general principles of tort law, the court held that plaintiffs were entitled to damages on their federal claims. Citing Restatement Second of Torts § 46, the court explained that acts of terrorism, by their very definition, amounted to extreme and outrageous conduct, and therefore, were compensable by analogy under the tort of intentional infliction of emotional distress. Khaliq v. Republic of Sudan, 33 F.Supp.3d 29, 32.

D.D.C.2014. Com. (d) quot. in case quot. in sup. Employee brought an action against private university for, among other things, intentional infliction of emotional distress, alleging that she was mistreated, placed on administrative leave, and demoted after co-workers learned that she had signed a petition to place an amendment to ban gay marriage on the state ballot. Granting defendant's motion to dismiss, this court held that plaintiff failed to allege sufficient facts to support an IIED claim. Citing Restatement Second of Torts § 46, Comment *d*, the court explained that,

generally, a successful IIED claim required conduct that was so outrageous and extreme as to go beyond all possible bounds of decency, but in the employment context, the conduct needed to be even more extreme and outrageous. McCaskill v. Gallaudet University, 36 F.Supp.3d 145, 160.

D.D.C.2014. Subsec. (1) cit. in case quot. in sup. Victims of embassy bombings in Tanzania, along with their families, brought an action under the "terrorism exception" of the Foreign Sovereign Immunities Act (FSIA) against the Republic of Sudan and its ministry of the interior, and the Islamic Republic of Iran and its ministry of information and security, alleging that defendants supported, funded, and otherwise carried out the bombings. The district court granted summary judgment on liability against defendants and referred the claims to a special master for a determination of damages. This court adopted the special master's report, with modifications. Applying the general principles of tort law, this court held that plaintiffs were entitled to damages on their federal claims. Citing Restatement Second of Torts § 46, the court explained that acts of terrorism, by their very definition, amounted to extreme and outrageous conduct, and therefore, were compensable by analogy under the tort of intentional infliction of emotional distress. Mwila v. Islamic Republic of Iran, 33 F.Supp.3d 36, 40.

D.D.C.2014. Com. (d) quot. in case quot. in sup. After taxicab driver was acquitted of criminal charges in connection with his arrest during a traffic stop, driver brought claims for, among other things, intentional infliction of emotional distress (IIED) against the District of Columbia, alleging that it was vicariously liable for the actions of the police officer who initiated the stop that resulted in his arrest, and who had previously issued him five traffic tickets on two other occasions, all of which were eventually dismissed. This court granted summary judgment for defendant, holding that no jury could reasonably find that the officer's actions—in making two traffic stops with no use of force, arrest, or other threatening behavior, and in making a third stop in which she did not interact improperly with plaintiff—were so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, as required to state a claim for IIED under Restatement Second of Torts § 46. Singh v. District of Columbia, 55 F.Supp.3d 55, 65-66.

D.D.C.2014. Subsec. (1) quot. in case quot. in sup., subsec. (2)(a) cit. in case cit. in sup. Victims who were injured and estates of victims who were killed in a terrorist bombing of a U.S. Marine Corps barracks in Lebanon sued the Islamic Republic of Iran and the Iranian Ministry of Information and Security, seeking to hold defendants liable for the bombing under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act (FSIA). This court granted in part plaintiffs' motion for a default judgment, holding that all but one plaintiff had established a valid theory of recovery on their claims for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court noted that, while the "immediate family" requirement was strictly construed in FSIA cases, the "presence" requirement was not, because terrorism was sufficiently extreme and outrageous to demonstrate that it was intended to inflict severe emotional harm on even those not present at the site of the act. Worley v. Islamic Republic of Iran, 75 F.Supp.3d 311, 336.

D.D.C.2013. Cit. in case cit. in sup. Arrestee, for herself and on behalf of her teenage daughters, brought, inter alia, a pendent state-law claim for intentional infliction of emotional distress (IIED) against police officers, alleging that defendants unlawfully entered her apartment without a warrant, and used excessive force in arresting her and the wrong daughter for assaulting another teenager. Granting defendants' motion for summary judgment as to this claim, this court held that plaintiffs' IIED claim failed because there was no evidence that defendants' conduct caused plaintiffs severe emotional distress. The court concluded that, while plaintiffs alleged that they suffered emotional and physical distress, and exhibited signs of depression, nervousness, lack of sleep, and loss of appetite, these facts provided no indication that their distress was "of so acute a nature that harmful physical consequences might be not unlikely to result." Garay v. Liriano, 943 F.Supp.2d 1, 23.

D.D.C.2013. Subsecs. (1), (2)(a), and (2)(b) quot. in case quot. in sup. Family of 14-year-old U.S. citizen who was killed in a suicide bombing in Israel sued the Islamic Republic of Iran under the state-sponsored terrorism provision of the Foreign Sovereign Immunities Act, alleging that defendant was responsible for the attack. Granting plaintiffs' motion for a default judgment, this court awarded, among other things, solatium damages, holding that plaintiffs had satisfied the causation requirement for such an award by showing that defendant was potentially liable to plaintiffs under a theory of intentional infliction of emotional distress. The court reasoned that plaintiffs were either the parents or siblings of the decedent, and, while none of the plaintiffs were present at or witnesses to the attack, acts of terrorism were by definition extreme and outrageous, and thus a plaintiff in an action involving terrorism did not have to be present at the place of the outrageous conduct in order to recover emotional-distress damages. Goldberg-Botvin v. Islamic Republic of Iran, 938 F.Supp.2d 1, 9, 10.

D.D.C.2013. Com. (d) quot. in case quot. in sup. Mother of 16-year-old daughter who was killed in a retaliatory drive-by shooting while attending a funeral service for a young homicide victim brought various claims against the District of Columbia, police chief, and other government agencies and officials, alleging, among other things, that defendants negligently failed to prevent daughter's death and failed to provide adequate police protection for African American youths in the District of Columbia in general. Granting in part defendants' motion to dismiss plaintiff's claim for intentional infliction of emotional distress, this court held that, although the actions of the shooters—in indiscriminately opening fire on a crowd of teenagers with an assault rifle—constituted heinous acts that might form the basis of such a claim, the actions of defendants that allegedly contributed to daughter's death, while unsettling if true, did not themselves support a finding that defendants committed extreme and outrageous conduct. Jefferies v. District of Columbia, 917 F.Supp.2d 10, 41.

D.D.C.2013. Coms. (d) and (h) quot. in cases quot. in sup. Former employee of contractor that provided plumbing services to the District of Columbia Department of Corrections brought, inter alia, a state-law claim for intentional infliction of emotional distress (IIED) against contractor, alleging that defendant falsely accused him of turning off the heating system at the District of Columbia jail and then deprived him of his dignity and humiliated him by walking him off the

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job site. Granting defendant's motion to dismiss this claim, this court held that, while the indignity and humiliation that plaintiff alleged that he suffered in being discharged was understandable, defendant's alleged actions were not sufficiently outrageous to state a claim for IIED under District of Columbia law, but rather represented the sort of employer—employee conflicts that were not actionable under this tort. Morris v. Carter Global Lee, Inc., 997 F.Supp.2d 27, 41.

D.D.C.2012. Subsec. (1) cit. in case quot. in sup., subsecs. (2)(a) and (2)(b) quot. in case quot. in sup., caveat quot. in case quot. in sup. Family and estate of a U.S. citizen who died in a terrorist bombing in Israel sued the Islamic Republic of Iran and the Iranian Ministry of Information and Security, seeking to hold defendants responsible for citizen's death under the state-sponsored terrorist exception of the Foreign Sovereign Immunities Act. After defendants failed to timely appear, answer, or otherwise move, this court entered judgment for plaintiffs, holding, among other things, that defendants were liable under the exception for intentional infliction of emotional distress as to each plaintiff. The court reasoned that plaintiffs had satisfied all of the elements of such a claim as set forth in the Restatement Second of Torts § 46; in addition, plaintiffs were members of citizen's immediate family and, while plaintiffs were not present and witnesses to the bombing, the presence requirement was relaxed in cases involving terrorism. Bodoff v. Islamic Republic of Iran, 907 F.Supp.2d 93, 103, 104.

D.D.C.2012. Cit. and quot. in sup., subsec. (2)(a) cit. in sup. After a default judgment on liability was entered in an action brought by servicemen and family members under the state-sponsored exception to the Foreign Sovereign Immunities Act (FSIA) against Iran and its intelligence service, arising from the 1983 terrorist bombing of the U.S. Marine barracks in Lebanon, the action was referred to a special master for consideration of plaintiffs' claims for damages. This court held, inter alia, that surviving servicemen's children born after the date of the bombing could not collect, under the FSIA's state-sponsored terrorism exception, awards for intentional infliction of emotional distress, or solatium; while the bombing's impact on servicemen and their families continued long after the attack, Restatement Second of Torts § 46, required that the bombing be "directed at" a third person, and the special master went too far in assuming that the attack was directed at unborn family members, a potentially unlimited class. Davis v. Islamic Republic of Iran, 882 F.Supp.2d 7, 14, 15.

D.D.C.2012. Cit. in case cit. in disc. In resolving whether judgment creditors could garnish United States bank accounts held by judgment debtor Islamic Republic of Iran, this court explained that it would look to, among other things, the Restatement First of Property to determine whether defendant had an ownership interest in the accounts sufficient for attachment and execution under the Terrorism Risk Insurance Act or the Foreign Sovereign Immunities Act (FSIA), which had preempted District of Columbia law. The court noted that it had previously applied the Restatement Second of Torts § 46 to claims for intentional infliction of emotional distress brought under the FSIA. Estate of Heiser v. Islamic Republic of Iran, 885 F.Supp.2d 429, 445.

D.D.C.2012. Com. (d) quot. in case quot. in sup. Former employee brought, inter alia, a state-law claim for intentional infliction of emotional distress (IIED) against former employer, among

others, alleging that defendant's vice president used a racial epithet when he ordered plaintiff out of his office. Granting summary judgment for defendant, this court held that defendant was not liable for IIED, because vice president's alleged comment, though offensive, was not the type of action that met the standard of extreme and outrageous conduct under District of Columbia law. Etoh v. Fannie Mae, 883 F.Supp.2d 17, 42.

D.D.C.2012. Quot. in case quot. in sup., subsec. (1) cit. in case quot. in sup., subsecs. (2)(a)-(2)(b) quot. in sup. Serviceman injured in the 1983 bombing of the U.S. Marine barracks in Beirut, Lebanon, brought suit, along with his family, against the Islamic Republic of Iran and the Iranian Ministry of Information and Security, pursuant to the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act, alleging that defendants created and supported the terrorist organization that carried out the attack. This court granted plaintiffs' motion for a default judgment, holding, inter alia, that defendants were liable under a theory of intentional infliction of emotional distress for the mental anguish and suffering that all of the plaintiffs endured as a result of the attack, even though plaintiff family members were not present and did not witness the bombing; the Beirut terrorist bombing qualified as an extreme and outrageous act sufficient to warrant recovery for non-present plaintiffs. Fain v. Islamic Republic of Iran, 856 F.Supp.2d 109, 123, 124.

D.D.C.2012. Com. (d) quot. in case quot. in sup. African-American employees of the District of Columbia Fire and Emergency Medical Services brought racial-discrimination claims under federal law, as well as a state-law claim for intentional infliction of emotional distress (IIED), against the District of Columbia. Granting summary judgment for defendant on the IIED claim, this court held, inter alia, that plaintiffs' allegations that defendant falsely accused them of professional misconduct and transferred them, and that defendant's acts were racially motivated, did not state conduct that was sufficiently extreme and outrageous to constitute an IIED claim. Hamilton v. School District of Columbia, 852 F.Supp.2d 139, 153.

D.D.C.2012. Cit. in case quot. in sup., subsec. (1) quot. in sup., subsecs. (1)-(2)(a) cit. in case cit. in sup. Former sailors who were injured in a terrorist attack on a Navy vessel, along with several of their spouses who, while not on the vessel during the attack, allegedly suffered emotional distress upon learning of the incident, sued the Republic of Sudan under the state-sponsored-terrorism exception to the Foreign Sovereign Immunities Act, arguing that defendant was liable for their injuries by virtue of its support for the terrorist organization that perpetrated the bombing. This court entered a default judgment against defendant, holding, inter alia, that defendant was liable to plaintiff sailors for intentional infliction of emotional distress (IIED), because defendant's support of the bombing was both intentional and reckless and caused sailors emotional distress; further, defendant was liable to plaintiff spouses for IIED, because terrorism, which was unique among the types of tortious activities in its extreme methods and aims, fell within an exception to the tort's "presence" requirement, and spouses provided uncontroverted evidence that they suffered severe emotional and physical injuries as a result of the injuries sustained by their husbands. Harrison v. Republic of Sudan, 882 F.Supp.2d 23, 30, 46, 47.

D.D.C.2012. Com. (d) quot. in case quot. in sup. Estate of deceased group-home resident brought, inter alia, a pendent claim under District of Columbia law for intentional infliction of emotional distress (IIED) against the District of Columbia, group home, home's corporate officers, and doctor, alleging that defendants caused decedent emotional distress by subjecting him to severe neglect and substandard nursing and medical care. Granting summary judgment for group home, its officers, and the District of Columbia, this court held that it was unnecessary for it to reach the question of whether defendants' conduct was sufficiently outrageous to maintain their IIED claim, because plaintiff placed absolutely no facts in the record to support his claim that defendants' conduct—outrageous or not—caused decedent to suffer severe emotional distress. Harvey v. Mohammed, 841 F.Supp.2d 164, 184.

D.D.C.2012. Com. (d) quot. in case quot. in sup. Pedestrian brought, inter alia, a state-law claim for intentional infliction of emotional distress (IIED) as part of his federal civil-rights action against police officer and others, alleging that officer, who was conducting pedestrian traffic control during an outdoor festival, yelled at him and forcefully pushed him as he was walking in the street in an effort to get him to move onto the sidewalk. Granting in part defendants' motion for summary judgment, this court held that, even if a jury found that officer used physical force to remove pedestrian from the street, no reasonable jury could find that officer's conduct was sufficiently outrageous to support plaintiff's IIED claim; liability under the tort did not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Muhammad v. District of Columbia, 881 F.Supp.2d 115, 125.

D.D.C.2012. Quot. in case quot. in sup., subsec. (1) cit. in case quot. in sup., subsecs. (2)(a)-(2)(b) quot. in sup. After former general of the pre-Revolutionary Iranian government was assassinated while exiled in France, decedent's grandson sued the Islamic Republic of Iran and the Iranian Ministry of Information and Security under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act, alleging that defendants were responsible for the assassination. This court granted plaintiff's motion for a default judgment following defendants' failure to appear or respond to the complaint, holding, among other things, that plaintiff could recover under a theory of intentional infliction of emotional distress even though he was not present at the assassination. The court reasoned that terrorism was unique among the types of tortious activities in both its extreme methods and aims, and that all acts of terrorism were by definition extreme and outrageous and intended to cause the highest degree of emotional distress, literally, terror. Oveissi v. Islamic Republic of Iran, 879 F.Supp.2d 44, 54.

D.D.C.2012. Cit. in sup., cit. in ftn. Son of United States citizen who was abducted, held, and tortured by Lebanese terrorists over the course of three years sued Islamic Republic of Iran and Iran's Ministry of Information and Security for their support of the terrorists. After defendants failed to appear or otherwise respond, this court granted in part plaintiff's motion for a default judgment, holding that defendants were liable for plaintiff's injuries under the Foreign Sovereign Immunities Act (FSIA), because defendants' acts would give rise to common-law tort liability for intentional infliction of emotional distress. The court concluded that the restriction set forth in Restatement Second of Torts § 46 that a plaintiff could not recover for intentional infliction of

emotional distress if not physically present to witness the harm done was inapplicable for purposes of the FSIA. Reed v. Islamic Republic of Iran, 845 F.Supp.2d 204, 212.

D.D.C.2012. Quot. in case quot. in sup., subsec. (1) cit. in case quot. in sup., subsecs. (2)(a)-(2)(b) quot. in sup. Estate of victim killed in a suicide bombing of a restaurant in Israel brought suit, along with his father, who was injured in the attack, and other family members, against the nations of Syria and Iran and certain of their ministries, pursuant to the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act, alleging that defendants supported the terrorist organization that carried out the attack. This court entered judgment for plaintiffs, holding, inter alia, that defendants were liable under a theory of intentional infliction of emotional distress for the mental anguish and suffering that decedent's father, mother, and sister endured as a result of the attack; the presence requirement did not apply to this case, because all acts of terrorism were by their very definition extreme and outrageous and intended to cause the highest degree of emotional distress, literally, terror. Wultz v. Islamic Republic of Iran, 864 F.Supp.2d 24, 36, 37.

D.D.C.2012. Cit. in case cit. in sup., subsec. (1) cit. in case quot. in sup., subsecs. (2)(a)-(2)(b) quot. in case quot. in sup. Hostage and estate of hostage held in Turkey for 21 days by terrorists, along with members of both of their families, brought suit against the Syrian Arab Republic pursuant to the updated state-sponsored terrorism exception of the Foreign Sovereign Immunities Act (FSIA), alleging that the kidnapping was conducted with defendant's full knowledge and support. Granting plaintiffs' motion for a default judgment against defendant, this court held, inter alia, that it had jurisdiction over plaintiffs' claims that were based on the severe emotional distress of the family plaintiffs. The court concluded that the test for emotional distress claims under FSIA's state-sponsored terrorism exemption was satisfied, reasoning that a terrorist attack constituted extreme and outrageous conduct; by bankrolling and otherwise supporting a terrorist organization responsible for the kidnapping of hostages, defendant acted recklessly to cause severe emotional distress to their family members; each of the family-member plaintiffs suffered severe emotional distress as a result of the kidnapping; and all of them fell into the definition of "immediate family." Wyatt v. Syrian Arab Republic, 908 F.Supp.2d 216, 229.

D.D.C.2011. Cit. in sup., cit. in case cit. in sup. After two American citizens were injured and one was killed in execution-style shootings carried out by Palestinian terrorists during an airplane hijacking in 1985, injured citizens, decedent's estate, and family members brought suit under the state-sponsored-terrorism exception to the Foreign Sovereign Immunities Act against the Syrian Arab Republic and its agents. Dismissing from the case plaintiff husband and son of one injured victim, this court held that those two plaintiffs did not have the necessary standing to bring a solatium claim. The court reasoned that the section of the Restatement Second of Torts most relevant to solatium claims was § 46, which did not extend causes of action beyond members of the victim's "immediate family" at the time of injury; here, plaintiff husband had not yet met victim at the time of the attack, and son was not yet born. Baker v. Socialist People's Libyan Arab Jamahirya, 775 F.Supp.2d 48, 74, 78.

D.D.C.2011. Com. (d) quot. in case quot. in sup. Hotel employee brought an action against employer for intentional infliction of emotional distress (IIED), inter alia, alleging that other hotel employees threatened and harassed him after he reported their suspicious behavior to authorities. Granting defendant's motion for summary judgment, this court held that, although a reasonable jury could find that plaintiff's assertions of employees' repeated and sustained threats of physical violence and death over a three year span were sufficiently extreme and outrageous to make out a claim for IIED, defendant could not be held vicariously liable for employees' behavior because employees were acting outside the scope of their employment. The court found no evidence that employees were motivated in any part by a desire to advance the interests of defendant when they threatened and harassed plaintiff; to the contrary, they appeared to have acted solely for the accomplishment of their independent, malicious, mischievous, and selfish purposes. Beyene v. Hilton Hotels Corp., 815 F.Supp.2d 235, 248, 249.

D.D.C.2011. Com. (d) quot. in case quot. in sup. African-American former employee brought racial discrimination and retaliation claims, as well as a pendent state-law claim for intentional infliction of emotional distress (IIED), against former employer and co-workers. Dismissing plaintiff's IIED claim, this court held that plaintiff's allegations that co-workers scrutinized her movements in order to determine whether her behavior or demeanor violated the terms of employer's written warning, which directed her to refrain from using a tone of voice or physical gestures that reasonably could be construed as intimidating to any employee, such that she arrived at work each day expecting to be fired, did not assert conduct rising to the level of outrageousness necessary to state an IIED claim. Brown v. Children's Nat. Medical Center, 773 F.Supp.2d 125, 137-138.

D.D.C.2011. Com. (d) quot. in cases quot. in sup. Arrestee sued the United States, asserting a claim for, inter alia, intentional infliction of emotional distress (IIED) based on the purported actions of a District of Columbia police officer during a vehicle stop, the alleged ongoing harassment of plaintiff by members of the federal government, and a statement allegedly made by a Secret Service agent threatening to have plaintiff deported. Granting defendant's motion to dismiss the claim, this court held that neither police officer's inquiry during the course of a vehicle stop about the custody status of plaintiff's children, whom officer knew had been the subject of a custody dispute, nor the investigation and questioning of plaintiff by Secret Service agents (including the associated threat about deportation) after his ex-wife apparently reported to authorities that plaintiff was going to kill the President were sufficiently outrageous to state an IIED claim. Olaniyi v. District of Columbia, 763 F.Supp.2d 70, 95.

D.D.C.2011. Subsec. (1) cit. in case quot. in sup., subsecs. (2)(a)-(2)(b) quot. in sup., caveat quot. in case quot. in sup. Family members of eight servicemen killed in the bombing of the U.S. Marine Corps barracks in Beirut, Lebanon, brought a claim for intentional infliction of emotional distress (IIED) against the Islamic Republic of Iran under the state-sponsored-terrorism exception to the Foreign Sovereign Immunities Act (FSIA), alleging that defendant created and supported the terrorist organization that carried out the attack. This court entered an order finding defendant responsible for plaintiffs' mental anguish and suffering and thus liable under the FSIA's

state-sponsored terrorism exception; the requirements of a bystander IIED claim were met here, since plaintiffs were the immediate family of the victims, and the presence requirement could be foregone due to the nature of defendants' outrageous terrorist acts. Taylor v. Islamic Republic of Iran, 811 F.Supp.2d 1, 15, 16.

D.D.C.2011. Com. (d) quot. in sup., com. (i) cit. in sup. Arrestee sued the District of Columbia and arresting police officers, asserting a claim for, inter alia, intentional infliction of emotional distress (IIED) under District of Columbia law. This court denied one police officer's motion for summary judgment as to the IIED claim, holding that genuine issues of material fact existed as to whether police officer engaged in outrageous conduct or acted with the requisite intent or recklessness when she allegedly helped detain plaintiff for investigation of theft at the request of a fellow officer, and looked on while that fellow officer, who at the time was moonlighting as a security guard at a motel and had mistakenly stopped plaintiff for absconding from the motel without paying the bill, handcuffed plaintiff, removed cash from her pocket to pay the motel bill, gave her a receipt, and told her to "get out." Zhi Chen v. District of Columia, 808 F.Supp.2d 252, 261.

D.D.C.2010. Subsec. (1) cit. in case quot. in sup., subsecs. (2)(a)-(2)(b) quot. in sup., caveat quot. in case quot. in sup. Family members of American military servicemen injured in the 1983 suicide bombing of the U.S. Marine barracks in Beirut, Lebanon, brought claims for intentional infliction of emotional distress (IIED), inter alia, against the Islamic Republic of Iran and its intelligence ministry under the state-sponsored-terrorism exception to the Foreign Sovereign Immunities Act, alleging that, by creating and directing the terrorist organization that carried out the attack, defendants were legally responsible for the severe mental anguish and toll that the barracks bombing wreaked upon them. This court entered a default judgment against defendants, holding, inter alia, that defendants were liable to plaintiffs for IIED; because acts of terrorism were by their very definition extreme and outrageous and intended to cause the highest degree of emotional distress, immediate-family members, like plaintiffs here, did not have to be present at the scene of the terrorist bombing to recover for their severe emotional injuries suffered as a result of the attack. Anderson v. The Islamic Republic of Iran, 753 F.Supp.2d 68, 86.

D.D.C.2010. Com. (d) quot. in case quot. in sup. African American members and officers of the District of Columbia Fire and Emergency Medical Services Department brought an action for discrimination against the Department and the District of Columbia. This court denied without prejudice the District's motion to dismiss plaintiffs' pendent claim under District of Columbia law for intentional infliction of emotional distress (IIED), holding that, while it was questionable whether plaintiffs' factual allegations that the department's management falsely accused plaintiffs of lying and discharging their duties inappropriately and wrongly transferred them out of an elite unit were sufficient to support an IIED claim, the District had failed to discuss the IIED count in its memorandum. Hamilton v. District of Columbia, 720 F.Supp.2d 102, 114.

D.D.C.2010. Cit. in sup., com. (d) quot. in case quot. in sup. After mortgagee asserted that mortgagor had defaulted on his home-mortgage loan, mortgagor brought a claim for intentional infliction of emotional distress (IIED), inter alia, against mortgagee, mortgagee's successor by

merger, and successor's vice president. Dismissing the IIED claim, this court held that, while plaintiff's allegations that, among other things, defendants discriminated against him by virtue of his race and ethnicity, failed to credit his mortgage payments in a timely manner, and overcharged him for private mortgage-insurance premiums might describe poor business practices and a truly unpleasant experience for plaintiff, those acts did not rise to the level of atrocious or outrageous conduct, as required to state a claim for IIED under D.C. law. Ihebereme v. Capital One, N.A., 730 F.Supp.2d 40, 54.

D.D.C.2010. Com. (j) quot. in sup. Mother and four children who lived in an apartment owned and operated by the District of Columbia Housing Authority's public housing program sued authority, its executive director, and one of its employees, alleging that defendants wrongfully failed to provide them with a "heat controlled and rodent-free apartment." Denying, as to authority and employee, defendants' motion to dismiss plaintiffs' claim for intentional infliction of emotional distress under District of Columbia law, this court held that a reasonable juror could find that these defendants' conduct was outrageous and committed in reckless disregard of plaintiffs' welfare. The court cited plaintiffs' allegations that defendants were aware that one child had a special physical condition that required him to avoid excessive heat, that the apartment lacked a thermostat, that vermin ate the child's feeding tube and deprived him of essential nutrition, and that defendants failed to take action sooner despite the imminent nature of plaintiffs' requests. Morton v. District of Columbia Housing Authority, 720 F.Supp.2d 1, 10.

D.D.C.2010. Subsec. (1) quot. in sup., subsecs. (1)-(2)(a) cit. in sup., Caveat quot. in sup. and cit. in case quot. in sup. American military servicemen injured in the 1983 suicide bombing of the U.S. Marine barracks in Beirut, Lebanon, brought claims for intentional infliction of emotional distress (IIED), inter alia, against the Islamic Republic of Iran and the its intelligence agency, alleging that they suffered severe emotional and physical injuries from the blast; several family members of victims also brought IIED claims, alleging that extreme and outrageous conduct directed at third-person relatives caused them severe emotional distress. Entering judgment for plaintiffs, this court held that defendants were liable for IIED, because acts of terrorism were by their very definition extreme and outrageous and intended to cause the highest degree of emotional distress. The court further held that one did not have to be present at the time of a terrorist attack upon a third person to recover for severe emotional injuries suffered as a result; thus, family members, although not present at the Beirut bombing, could recover for the emotional injuries they suffered as a result of that attack. Murphy v. Islamic Republic of Iran, 740 F.Supp.2d 51, 74, 75.

D.D.C.2010. Subsec. (1) cit. in case quot. in sup. Father of American military serviceman killed in the bombing of a U.S. military residence in Saudi Arabia sued the Islamic Republic of Iran and its agencies or instrumentalities under the new state-sponsored-terrorism exception to the Foreign Sovereign Immunities Act (FSIA), seeking punitive damages that were denied him in his prior action against defendants under the old exception. Entering a default judgment against defendants, this court held that, although plaintiff in this case did little more than allege that his son died and that defendants were responsible for his death, plaintiff's prior action against defendants, in which defendants were found liable for intentional infliction of emotional distress under Missouri

law, provided an obvious theory of recovery here under the new exception to the FSIA; thus, defendants were also liable to plaintiff in this action on the theory that one who by extreme and outrageous conduct intentionally or recklessly caused severe emotional distress to another was subject to liability for such emotional distress. Rimkus v. Islamic Republic of Iran, 750 F.Supp.2d 163, 184.

D.D.C.2010. Subsec. (1) quot. in case quot. in sup., subsecs. (2)(a)-(2)(b) quot. in sup. Three airmen, along with one airman's mother, brought suit under the state-sponsored-terrorism exception to the Foreign Sovereign Immunities Act (FSIA) against the Islamic Republic of Iran and others, alleging that defendants provided material support and assistance to the terrorist organization responsible for the bombing of the Khobar Towers U.S. military housing complex, in which 19 serviceman were killed and hundreds injured, including plaintiffs. This court found for plaintiffs and awarded damages, holding, among other things, that all four plaintiffs could rely on theories of intentional infliction of emotional distress to recover. The court reasoned that defendants, in working with terrorist organization to plan and execute the attack, sought to cause severe emotional distress to air force personnel living in the towers, and airmen plaintiffs were certainly afflicted with such distress; as to mother, while the tort generally required that a family member not herself injured be present in order to recover, FSIA courts had not strictly enforced this requirement in terrorism cases, which by their nature involved horrific and terrifying acts. Valencia v. Islamic Republic of Iran, 774 F.Supp.2d 1, 14.

D.D.C.2010. Subsec. (1) quot. in sup., subsec. (2)(a) cit. in sup., caveat quot. in sup. In consolidated actions, survivors of a terrorist truck bombing and relatives and estates of victims killed in the bombing sued Islamic Republic of Iran and Iranian Ministry of Information and Security, alleging that defendants provided operational control over and financial and technical assistance to Iranian agents of the terrorist organization that constructed, deployed, and exploded the bomb. This court entered a default judgment against defendants and, after a nonjury trial, awarded plaintiffs damages, holding, among other things, that defendants were liable to survivors and their immediate family members for intentional infliction of emotional distress; acts of terrorism were by their very definition extreme and outrageous and intended to cause the highest degree of emotional distress, and plaintiffs' assertions that they did, in fact, suffer severe emotional injury from the blast were uncontroverted. Valore v. Islamic Republic of Iran, 700 F.Supp.2d 52, 77-79.

D.D.C.2009. Coms. (d) and (j) quot. in disc., com. (i) cit. in disc. Detainee sued police officers and others, after an alleged incident in which officers, acting on a mistaken belief that she had failed to pay a $60 bill at a local inn, accosted her in the early morning hours, transported her against her will in a police car to the inn, searched her and removed $60 from her pocket, and then released her without any formal proceedings, all the while ignoring her pleas for help or for an interpreter. Denying in part defendants' motion to dismiss, this court held that plaintiff adequately stated a claim for intentional infliction of emotional distress, citing her allegations that, as a result of the incident, she had developed an abiding fear of police officers, she had become afraid to venture outside at night, and she had experienced emotional distress so severe that she had had difficulty at work. Chen v. District of Columbia, 256 F.R.D. 267, 272, 273.

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D.D.C.2009. Cit. in case quot. in ftn. (general cite). Relatives and estates of two deceased United States citizens sued Syrian Arab Republic and others for acts that supported and facilitated the kidnapping, torture, and murder of decedents. This court denied defendants' motion to vacate a default judgment it had entered against defendant under the Foreign Sovereign Immunities Act (FSIA). The court noted that, under the FSIA, state law no longer controlled the nature of the liability and damages that could be sought when United States citizens who were victims of state-sponsored terrorism sued a responsible foreign state, because Congress had provided the "specific source of law" for recovery, and that federal courts looked to the Restatement Second of Torts, and not state law, to provide content to Congress's express intentions. The court cited a case accepting the Restatement Second of Torts as delineating the controlling substantive law for intentional infliction of emotional distress as a proxy for state common law. Gates v. Syrian Arab Republic, 646 F.Supp.2d 79, 82.

D.D.C.2009. Com. (d) quot. in disc. and sup. and quot. in ftn., com. (f) cit. in sup., com. (i) cit. in disc., com. (j) quot. in sup. and in ftn. Arrestee brought, inter alia, claim for intentional infliction of emotional distress (IIED) against city, asserting that she was unlawfully arrested and detained overnight for allegedly entering city's transit system without paying. This court granted judgment as a matter of law for city, holding that police officers' alleged actions in confining plaintiff for several hours in a cell at a hospital with a man dressed as a woman and taking no corrective action even after being informed of the situation; making inappropriate, lewd, and sexual remarks about her and to her; and transporting her in an "intentionally reckless" manner in the back of a police vehicle did not constitute sufficiently extreme and outrageous conduct to support her IIED claim as a matter of District of Columbia law. Halcomb v. Woods, 610 F.Supp.2d 77, 80, 81, 83-85.

D.D.C.2009. Cit. in disc. In 20 consolidated cases involving more than 1,000 individual plaintiffs, victims of terrorist attacks sued the Islamic Republic of Iran under the state-sponsor-of terrorism-exception to the Foreign Sovereign Immunities Act, alleging that Iran provided material support to the terrorist organizations that perpetrated the attacks. After Congress repealed the exception to sovereign immunity under the Act and replaced that provision with a new statute that, among other things, made punitive damages available to plaintiffs in such actions, this court held, inter alia, that, in analyzing the new statute, it would rely on well-established principles of law, such as those found in the Restatement Second of Torts, like § 46, rather than on "federal common law." In re Islamic Republic of Iran Terrorism Litigation, 659 F.Supp.2d 31, 60, 61.

D.D.C.2008. Quot. in sup. Survivors of an Israeli citizen assassinated in New York City, together with two individuals wounded after the attack, sued the Islamic Republic of Iran and its Ministry of Information and Security under the terrorist exception to the Foreign Sovereign Immunities Act, alleging that defendants provided material support and assistance to the terrorist organization that carried out the bombing. This court entered a default judgment against defendants, holding, inter alia, that plaintiffs had standing to recover for intentional infliction of emotional distress under Restatement § 46(2); decedent's wife was present at the time of the assassination, and plaintiffs who were not present had standing by virtue of the fact that terrorist attacks were directed

both at victims and at victims' families. In addition, plaintiffs satisfied the elements of the claim, including suffering severe emotional distress proximately caused by defendants' actions. Acosta v. The Islamic Republic of Iran, 574 F.Supp.2d 15, 28.

D.D.C.2008. Cit. in case quot. in disc. Widow, along with other family members, brought claims for intentional infliction of emotional distress (IIED) under the state-sponsored terrorism exception of the Foreign Sovereign Immunities Act against the Islamic Republic of Iran and its intelligence agency in connection with defendants' involvement in the assassination of her husband, the former Prime Minister of Iran. This court, after entering a default judgment against defendants, and holding a trial on damages, here found, inter alia, that defendants' assassination of decedent was an outrageous act that, as a terrorist attack, was intended to cause emotional distress to widow, and did cause such severe distress, as evidenced by widow's wearing of black ever since decedent's death in 1991 and by her intention not to remarry or have another relationship. Decedent's son's IIED claim failed, however, for lack of severe distress, because he testified that his father died when he was young and that he had no memory of his father; decedent's stepdaughter's claim also failed, because she was not a "direct victim" for purposes of the claim, having not been adopted by decedent when no legal barrier prevented him from doing so. Bakhtiar v. Islamic Republic of Iran, 571 F.Supp.2d 27, 36.

D.D.C.2008. Cit. in sup. Mother and siblings of an American victim of a suicide bombing in Israel brought a claim for intentional infliction of emotional distress (IIED) against the Islamic Republic of Iran and the Iranian Ministry of Information and Security under the terrorist exception to the Foreign Sovereign Immunities Act, alleging that defendants provided material support and assistance to the terrorist organization that carried out the bombing. This court entered a default judgment against defendants, holding, inter alia, that, under Ohio and Virginia law, defendants were liable for IIED on a theory of vicarious liability. The court reasoned that defendants' conduct was extreme and outrageous, plaintiffs suffered severe emotional distress as a result of decedent's tragic and untimely death, and defendants' actions proximately caused decedent's death and the subsequent emotional distress experienced by plaintiffs. Beer v. Islamic Republic of Iran, 574 F.Supp.2d 1, 12.

D.D.C.2008. Subsec. (d) quot. in sup. Apartment resident involved in altercation with her neighbor sued police officer and others, alleging that responding officer used excessive force to subdue and detain her without legal basis. Denying defendants' motion for summary judgment as to plaintiff's claim for intentional infliction of emotional distress, this court held that the determination of whether officer's conduct was extreme or outrageous belonged to a jury. The court noted that questions of fact remained as to whether officer had been informed by the crowd that plaintiff had a knife, whether he forced her to the ground after having been informed that it was neighbor, and not she, who had the knife, whether he threatened her with jail, and whether he threatened to have her children taken by child protective services. Cotton v. District of Columbia, 541 F.Supp.2d 195, 206.

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D.D.C.2008. Com. (d) quot. in case quot. in sup. Terminated employee who was of Lebanese national origin and had pro-Zionist beliefs sued former employer, alleging that defendant's actions in failing to promote him and in terminating him were motivated by anti-Semitism and racism. Granting summary judgment for defendant on plaintiff's claim for intentional infliction of emotional distress, this court held, inter alia, that plaintiff failed to present any evidence in support of his allegations that defendant's actions were deceptive, atrocious, and uncivilized; the undisputed evidence showed that plaintiff was not qualified for and did not apply for the position that he believed he should have been promoted to, and that he was terminated for admittedly leaving his work site without permission and starting a fight with a co-worker. Elhusseini v. Compass Group USA, Inc., 578 F.Supp.2d 6, 23.

D.D.C.2008. Cit. in case cit. in sup. Four siblings of airline passenger killed in the mid-air Lockerbie terrorist bombing sued Libya and a high-ranking member of the Libyan External Security Organization who was convicted for his role in the bombing. This court, inter alia, denied member's motion to dismiss plaintiffs' claims for their own injuries, brought under the Flatow Amendment, including a claim for intentional infliction of emotional distress (IIED). The court held that, as the death of a loved one due to terrorism or airplane sabotage could cause mental suffering and anguish for several United States nationals—and not just the victim's legal representative—the Flatow Amendment necessarily contemplated actions by more than just a decedent's legal representative; claims under the Amendment for such suffering, i.e., solatium, followed Restatement Second of Torts § 46's articulation of IIED, which permitted recovery for all immediate family members meeting its criteria. Fisher v. Great Socialist People's Libyan Arab Jamahiriya, 541 F.Supp.2d 46, 55.

D.D.C.2008. Cit. in case cit. in ftn. (general cite). Relatives of United States civilian contractors who were beheaded by a terrorist group in Iraq sued the Syrian Arab Republic for damages under the Foreign Sovereign Immunities Act (FSIA) and state law, alleging that Syria provided material support and resources to the terrorist group. After Syria failed to appear, this court entered a default judgment in favor of plaintiffs under recent amendments to the FSIA, but dismissed plaintiffs' state-law claims, holding, inter alia, that, under the amendments, state law no longer controlled the nature of the liability and damages that could be sought when a foreign government was sued under the FSIA. The court additionally noted that federal courts looked to the Restatement Second of Torts, and not state law, to provide content to Congress's express intentions, citing as an example a case that accepted the Restatement as delineating the controlling substantive law for intentional infliction of emotional distress as a proxy for state common law. Gates v. Syrian Arab Republic, 580 F.Supp.2d 53, 66.

D.D.C.2008. Com. (d) cit. in case quot. in sup. Police officer brought civil-rights and other claims against police captain and District of Columbia after captain arrested officer for allegedly making threats against another officer while seeking medical attention due to stress caused by his interactions with other officer. This court granted summary judgment for defendants, holding, inter alia, that captain's decision to seek a warrant against plaintiff was not unreasonable or lacking in probable cause, and that captain's actions in arresting plaintiff on Christmas Day, detaining

him overnight, and subjecting him to a criminal trial did not approach the requisite standard of "outrageousness" necessary to state a claim for intentional infliction of emotional distress. Jackson v. District of Columbia, 541 F.Supp.2d 334, 344.

D.D.C.2008. Adopted in case cit. in sup. Parents and siblings of an American victim who was injured in a suicide bombing in Israel brought a claim for intentional infliction of emotional distress (IIED) under the terrorist exception to the Foreign Sovereign Immunities Act against the Islamic Republic of Iran and its intelligence agency, alleging that defendants provided material support and assistance to the terrorist organization that carried out the bombing. This court entered a default judgment against defendants, holding that no presence requirement was necessary for an IIED claim arising from a terrorist attack, and thus plaintiffs, who were not present at the attack, had standing to seek recovery. The court further held that defendants' actions proximately caused the severe emotional distress experienced by plaintiffs, who endured and would continue to endure a level of emotional distress that far surpassed the level of distress a reasonable person was expected to suffer. Kirschenbaum v. Islamic Republic of Iran, 572 F.Supp.2d 200, 211.

D.D.C.2008. Com. (d) quot. in case cit. in sup. Terminated 54-year-old female employee brought state and federal discrimination claims against employer, as well as a common-law claim for intentional infliction of emotional distress (IIED). Dismissing the IIED claim, this court held, inter alia, that plaintiff failed to plead facts sufficient to amount to extreme and outrageous conduct, or to support a reasonable inference of severe emotional distress; the sexist insults alleged and the differential treatment as a manager plaintiff perceived might have been actionable under other theories, but did not reach the high bar set by the common law for this tort. Marshall v. Honeywell Technology Solutions, Inc., 536 F.Supp.2d 59, 70.

D.D.C.2008. Com. (d) quot. in case quot. in disc. Terminated employee of federally and municipally funded nonprofit organization sued former employer, alleging retaliation, breach-of-contract, whistleblower, and intentional-infliction-of-emotional-distress (IIED) claims. This court granted summary judgment for defendant as to the IIED claim, holding that it was not enough for plaintiff to assert that an alleged manager had responded with "F—k you [plaintiff's name]" when approached about the negative effects that that manager's performance was having on the organization's mentally retarded clients. The court reasoned that such a retort was a "mere insult" between co-workers that exemplified intra-workplace mistreatment only, and, as a matter of law, was not the "truly outrageous" conduct required of an IIED claim. Martin v. Arc of Dist. of Columbia, 541 F.Supp.2d 77, 86.

D.D.C.2008. Cit. in sup., subsec. (2) cit. in sup. Former crewmembers of a United States vessel who were kidnapped, imprisoned, and tortured by North Korean agents, and widow of one such crewmember who was now deceased, sued North Korea pursuant to the "terrorism exception" of the Foreign Sovereign Immunities Act. This court entered a default against defendant based on its failure to answer or respond to the complaint and awarded damages to plaintiffs under the laws of California, Illinois, Virginia, and Pennsylvania. The court noted that, while Pennsylvania had not expressly recognized the tort of intentional infliction of emotional distress, asserted here by

plaintiffs, its courts had cited the Restatement Second of Torts § 46(2) for the minimum elements necessary to sustain such a cause of action. The court stated that all acts of terrorism were by their very definition extreme and outrageous and intended to cause the highest degree of emotional distress, literally, terror, in their targeted audience. Massie v. Government of Democratic People's Republic of Korea, 592 F.Supp.2d 57, 76.

D.D.C.2008. Cit. in sup. Father of an American serviceman killed in a terrorist bombing of a U.S. military facility in Saudi Arabia brought a claim for intentional infliction of emotional distress (IIED) against the Islamic Republic of Iran and certain of its agencies under the terrorist exception to the Foreign Sovereign Immunities Act, alleging that defendants provided material support and assistance to the terrorist organization that carried out the bombing. This court entered a default judgment against defendants, holding, inter alia, that, under Missouri law, the elements of plaintiff's claim for IIED were met. The court reasoned that defendants' conduct was intentional, extreme, and outrageous, and was the proximate cause of plaintiff's emotional distress, and that plaintiff suffered—and would likely continue to suffer—severe emotional distress as a result of decedent's tragic and untimely death. Rimkus v. Islamic Republic of Iran, 575 F.Supp.2d 181, 197.

D.D.C.2008. Com. (d) quot. in sup. Mother and siblings of a U.S. citizen residing in Israel who was abducted and executed by a terrorist organization brought a claim for intentional infliction of emotional distress (IIED) under the terrorist exception to the Foreign Sovereign Immunities Act against the Islamic Republic of Iran and the Iranian Ministry of Information and Security, alleging that defendants provided material support and assistance to the terrorist organization. This court entered a default judgment against defendants, holding that plaintiffs established the elements of their claim for IIED. The court reasoned that terrorists perpetrated acts that were deliberately outrageous, that a terrorist attack—by its nature—was directed not only at the victims but also at the victims' families, and that decedent's abduction and execution caused plaintiffs severe emotional distress. Wachsman ex rel. Wachsman v. Islamic Republic of Iran, 603 F.Supp.2d 148, 156-157.

D.D.C.2008. Com. (d) quot. in sup. Estate and relatives of United States citizen who was abducted and executed by terrorists while he was residing in Israel sued Islamic Republic of Iran and Iranian Ministry of Information and Security for allegedly providing training and support to the terrorists. Denying without prejudice plaintiffs' motion for a default judgment against defendants after defendants failed to appear, this court held, inter alia, that plaintiffs' claim for intentional infliction of emotional distress failed because, while plaintiffs sufficiently alleged that the terrorists engaged in extreme and outrageous acts that were intentional or reckless, their evidence of severe emotional distress was deficient and violated the court's directives. Wachsman ex rel. Wachsman v. Islamic Republic of Iran, 537 F.Supp.2d 85, 98.

D.D.C.2007. Cit. in sup. and disc., adopted in cases cit. in sup., cit. in cases cit. in sup. and cit. but dist., subsecs. (1) and (2) and com. (*l*) cit. in disc., subsec. (2)(a) quot. in disc. Children of Americans allegedly held as hostages and tortured by the former Iraqi regime in the 1990s sued Iraq for intentional infliction of emotional distress, seeking damages for the emotional distress they allegedly suffered during their fathers' captivity. Denying defendant's motion to dismiss, this

court held, inter alia, that, under the common law of plaintiffs' domiciles of Florida and Oklahoma, plaintiffs, as former hostages' close relatives, stated a cognizable claim for intentional infliction of emotional distress, even though they were not present when the alleged outrageous acts occurred. Beaty v. Republic of Iraq, 480 F.Supp.2d 60, 93-99.

D.D.C.2007. Cit. in sup., subsecs. (1) and (2) cit. in case cit. in sup., com. (*l*) cit. and quot. in sup. Parents, sister, and grandmother of American student who was killed in a terrorist attack in Jerusalem sued Islamic Republic of Iran and Iranian Ministry of Intelligence and Security for allegedly providing material support and assistance to the terrorist organization that orchestrated and carried out the attack. Granting a default judgment for plaintiffs, this court held, inter alia, that defendants were liable to parents and sister for intentional infliction of emotional distress. The court, however, dismissed grandmother's distress claim, reasoning that, under California law, standing for intentional infliction of emotional distress was limited to a victim's near relatives, or immediate family. Bennett v. Islamic Republic of Iran, 507 F.Supp.2d 117, 129.

D.D.C.2007. Com. (d) quot. in case quot. in sup., quot. in ftn. Arrestee who was taken into custody and held overnight for violating a restraining order of which he claimed he was unaware at the time of the arrest sued university police officer and officer's employer for, in part, intentional infliction of emotional distress. This court dismissed the claim, since plaintiff conceded that the arrest might not have caused him the kind of severe emotional distress required to make a case for emotional distress. The court noted that liability did not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities, and recovery was not permitted merely because conduct caused mental distress. Black v. District of Columbia, 480 F.Supp.2d 136, 140.

D.D.C.2007. Com. (d) quot. in case quot. in sup. Pet owners whose pets were temporarily seized by the local humane society brought a common-law claim for intentional infliction of emotional distress, as part of their § 1983 action alleging the unconstitutionality of the District of Columbia's animal-protection statute, against humane society, its employees, and the District of Columbia. Granting in part defendants' motion to dismiss, this court held, inter alia, that the temporary seizure of an animal, which was conducted in a relatively benign manner, did not constitute the extreme and outrageous conduct necessary for an intentional-infliction-of-emotional-distress claim. Daskalea v. Washington Humane Society, 480 F.Supp.2d 16, 39.

D.D.C.2007. Cit. in case cit. in disc. Family members of victims of a terrorist bombing of an airplane over Lockerbie, Scotland, brought suit against, among others, Libyan head of airline security. Denying in part defendant's motion to dismiss, this court held, inter alia, that, even though plaintiffs were not decedents' legal representatives, they had standing under both the Anti-Terrorism Act and the Flatow Amendment to pursue claims against defendant for the injuries that they themselves suffered as a result of the bombing. The court noted that claims under the Flatow Amendment for solatium, i.e., mental suffering and anguish caused by the death of a loved one, followed the Restatement Second of Torts § 46 articulation of intentional infliction of emotional distress, which permitted recovery for all immediate family members meeting the criteria. Hurst v. Socialist People's Libyan Arab Jamahiriya, 474 F.Supp.2d 19, 31.

D.D.C.2007. Com. (d) quot. in cases quot. in disc.; com. (f) quot. in case quot. in sup. (cit. as § 46); com. (j) quot. in sup. Terminated university librarian sued his supervisor and university, alleging that after returning from a period of medical leave for depression and requesting certain accommodations for his disability, defendants took a series of illegal and retaliatory actions against him. This court, inter alia, denied supervisor's motion to dismiss plaintiff's claim for intentional infliction of emotional distress. The court held that, while plaintiff's allegations that supervisor harassed him with intimidating and inappropriate questions on his first day back, retroactively lowered his performance rating, and tried to get him to resign would not of themselves have constituted extreme and outrageous conduct, plaintiff also alleged, sufficiently to survive dismissal, that supervisor acted with full knowledge of plaintiff's fragile mental state and serious mental-health condition. Langer v. George Washington University, 498 F.Supp.2d 196, 200, 201.

D.D.C.2007. Subsec. (2)(a) quot. in sup. and applied in case cit. in sup., com. (*l*) cit. in sup. Grandson of former chief of Iranian armed forces under the Shah sued Islamic Republic of Iran and others, alleging that agents of the Republic carried out the murder of his grandfather on a Paris street. This court reluctantly dismissed plaintiff's complaint, holding, inter alia, that his claim for intentional infliction of emotional distress failed for lack of standing. The court explained that, under controlling California law, standing to bring a claim against a defendant resulting from the death of an individual was conferred on those who were entitled to inherit property of the deceased under California's probate code, and grandson, whose father was still alive, was not so entitled; similarly, under this court's common-law approach to this tort, a member of a victim's "immediate family" could recover for distress caused by a terrorist act at which he was not present, but not a grandchild. Oveissi v. Islamic Republic of Iran, 498 F.Supp.2d 268, 282, 283.

D.D.C.2007. Cit. in disc. and sup., adopted in case cit. in sup., caveat and com. (*l*) cit. in sup., subsecs. (1) and (2) cit. in disc. and sup. and in case cit. in sup. After this court found the Islamic Republic of Iran liable for damages arising from its involvement in the 1983 terrorist bombing of the United States Marine barracks in Beirut, Lebanon, that killed 241 American servicemen, it here assessed, among other things, the validity of 753 plaintiffs' consolidated claims for intentional infliction of emotional distress (IIED). The court held, inter alia, that those plaintiffs who were near relatives of victims and domiciled in states that did not require a plaintiff to be present when the tortfeasor's conduct was directed at a third party had standing to assert their IIED claims; additionally, those domiciled in states that had not addressed the issue of presence, as well as those domiciled in states that allowed plaintiffs to recover only when the conduct was "directed at" the third-party plaintiffs themselves, had standing, since terrorism, by its nature, was directed not only at the victims but at the victims' families. Peterson v. Islamic Republic of Iran, 515 F.Supp.2d 25, 41, 42, 45, 47.

D.D.C.2006. Com. (d) quot. in sup. Executive director of nonprofit chess organization brought various pro se federal civil-rights claims and an additional common-law claim for intentional infliction of emotional distress against numerous organizations and individuals involved in sponsoring student chess tournaments, several of whom allegedly devised a racially motivated

scheme to deny minority children the opportunity to win chess scholarships. This court granted defendants' motions to dismiss, holding, inter alia, that the retaliatory conduct alleged by plaintiff in support of his emotional-distress claim, including an assertion that certain of the defendants caused him to be falsely arrested, even if true, was not sufficiently outrageous and extreme to permit recovery under this tort. Bennett v. U.S. Chess Federation, 468 F.Supp.2d 79, 90.

D.D.C.2006. Com. (d) cit. in ftn. in sup. After he was arrested by a university police officer for violating a restraining order, arrestee sued officer, university, and the District of Columbia, alleging tortious conduct and constitutional violations arising out of the arrest. This court granted defendants' motion to dismiss, holding, inter alia, that plaintiff's claim for intentional infliction of emotion distress could not be sustained, because officer's alleged actions in holding plaintiff overnight and refusing to investigate plaintiff's claim that he was unaware of the restraining order was not conduct so outrageous and extreme that it went beyond all bounds of decency so as to be regarded as atrocious in a civilized community. Black v. District of Columbia, 466 F.Supp.2d 177, 180.

D.D.C.2006. Adopted in case cit. in disc., subsec. (1) and coms. (d) and (i) quot. in case quot. in disc. United States serviceman who was injured in a terrorist bombing while serving in Saudi Arabia brought action with his parents under the Foreign Sovereign Immunities Act against the Islamic Republic of Iran, an Iranian official, and an Iranian military entity, alleging that defendants were liable for damages from the attack. Entering a default judgment for plaintiffs, this court held, inter alia, that the elements of serviceman's claim for intentional infliction of emotional distress under Florida law were satisfied; defendants' conduct in providing material support and facilitation to the terrorist organization in order to bring about the bombing was intended to cause severe emotional distress, and was also an extreme and outrageous act beyond all bounds of civil decency. Blais v. Islamic Republic of Iran, 459 F.Supp.2d 40, 56.

D.D.C.2006. Cit. in sup., cit. in ftn., adopted in cases cit. in disc., subsec. (1) quot. in case quot. in sup., subsec. (2) cit. in disc., coms. (d) and (i) quot. in case quot. in disc., com. (*l*) cit. and quot. in sup. and in disc., caveat cit. in disc. and in ftn. Family members and estates of servicemen killed in a 1996 bombing on a United States military base in Saudi Arabia brought suit for, in part, intentional infliction of emotional distress against the Islamic Republic of Iran and various Iranian organizations, alleging that defendants were liable for damages due to their provision of material and support to the terrorist organization that allegedly orchestrated and carried out the bombing. Entering judgment for plaintiffs, this court held, inter alia, that, under the laws of the applicable states, there was sufficient evidence to support the conclusion that defendants' extreme and outrageous conduct intentionally caused severe emotional distress to plaintiffs. Estate of Heiser v. Islamic Republic of Iran, 466 F.Supp.2d 229, 272, 305, 319, 328, 329, 333, 341, 344-346, 349, 352, 354, 355.

D.D.C.2006. Com. (d) quot. in case cit. in sup. Husband, parents, and estate of United States citizen killed in a suicide bombing in Israel sued the Islamic Republic of Iran and its Ministry of Information and Security under the terrorism exception to the Foreign Sovereign Immunities

Act for providing material assistance to the terrorist organization that orchestrated the bombing. Entering judgment for plaintiffs, this court held, inter alia, that each element of a claim for intentional infliction of emotional distress was satisfied. First, defendants provided material support to organization with the intent that it would carry out attacks that would cause severe emotional distress; second, material support of terrorism was extreme and outrageous and went beyond all bounds of decency; third, defendants' actions proximately caused the death and plaintiffs' subsequent emotional distress; and, fourth, the distress was so severe that no reasonable person would be expected to endure it. Greenbaum v. Islamic Republic of Iran, 451 F.Supp.2d 90, 104.

D.D.C.2006. Com. (d) quot. in sup. Homeowner who was arrested and detained for two days on felony assault charges for allegedly attempting to hit her neighbor with a copper pipe brought § 1983 civil-rights action and various civil-tort claims against city and several individual city police officers, after she was acquitted of the charges in a bench trial. Granting summary judgment for defendants, this court held, inter alia, that plaintiff's claim for intentional infliction of emotional distress failed because the arrest, incarceration, and initiating of criminal proceedings against plaintiff was not conduct that rose to the level of outrageousness as to be beyond all possible bounds of decency as required by this tort; additionally, plaintiff submitted little more than conclusory statements in support of her assertion that she suffered the required element of "severe emotional distress." Lyles v. Micenko, 468 F.Supp.2d 68, 75.

D.D.C.2006. Com. (i) quot. in case quot. in sup. Same-sex couple who were photographed at their wedding while kissing sued nonprofit organization and others for damages and an injunction to prevent further use of this image in an advertising campaign that challenged various public policy positions taken by a nonparty. This court, inter alia, dismissed plaintiffs' claim for intentional infliction of emotional distress, holding that the conduct alleged did not come close to demonstrating the outrageous conduct necessary to establish the claim. The court reasoned that plaintiffs simply alleged that defendants used plaintiffs' photograph, which was taken by a newspaper photographer in a public place, in an advertisement designed to expose third party's alleged views on the military and same-sex marriage. Raymen v. United Senior Ass'n, Inc., 409 F.Supp.2d 15, 26.

D.D.C.2005. Quot. in sup., com. (j) quot. in case quot. in disc. Following the filing of an amended complaint and supplemental brief by injured victims and family members of deceased victims of the1983 bombing of the American embassy in Beirut, Lebanon, against the Islamic Republic of Iran and its Ministry of Intelligence and Security for their alleged involvement in the bombing, this court entered judgment for plaintiffs and awarded them compensatory damages. Stating that plaintiffs' claims were governed by the laws of their separate domiciles, the court found, inter alia, that estate of deceased victim who had been domiciled in Florida stated a valid claim of intentional infliction of emotional distress under Florida law, and that claims of decedents' survivors under Virginia law would be treated as claims for compensatory damages under the wrongful-death statute and not as claims for intentional infliction of emotional distress. Dammarell v. Islamic Republic of Iran, 404 F.Supp.2d 261, 285, 297.

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D.D.C.2005. Com. (d) cit. in case quot. in disc. Former municipal employee brought several claims against municipality after he was suspended following an inquiry into his allegedly improper and illegal conduct as an alcoholic-beverage-regulation investigator. This court dismissed plaintiff's claim for intentional infliction of emotional distress, holding, inter alia, that his allegations of an investigation into his conduct and the possible public disclosure of information in his personnel file, even if true, did not describe behavior that was sufficiently extreme and outrageous to sustain such a claim. Evans v. District of Columbia, 391 F.Supp.2d 160, 170.

D.D.C.2005. Subsec. (1) adopted in case cit. in disc.; subsec. (2) cit. and quot. but not fol., cit. in ftn., and cit. in case cit. in disc. Estate and surviving family members of serviceman killed in the 1983 Marine barracks bombing in Beirut, Lebanon, sued the Islamic Republic of Iran, and others. While entering judgment for plaintiffs, this court held that, under the restrictive caselaw of Kentucky, plaintiffs could not recover damages for intentional infliction of emotional distress (IIED) under a solatium theory. The court reasoned that, because the conduct at issue was directed at a third person (decedent) and not plaintiffs, the only conceivable cause of action that plaintiffs could have had for IIED would have been under Restatement Second of Torts § 46(2), which had not been adopted by Kentucky courts, and, in any event, would have required plaintiffs to have observed the bombing. Holland v. Islamic Republic of Iran, 496 F.Supp.2d 1, 30.

D.D.C.2005. Com. (d) quot. in disc. Townhome resident brought suit for, in part, intentional infliction of emotional distress against her adjoining neighbors, alleging that defendants' initiation of a complaint with the police that led to plaintiff's arrest, incarceration, and subsequent criminal trial based on false allegations that plaintiff attempted to hit defendant wife with a copper pipe caused plaintiff severe emotional distress. Granting defendants' motion for summary judgment, this court held, inter alia, that plaintiff failed to establish that defendants' alleged conduct rose to the requisite level of outrageousness or that plaintiff suffered the necessary severe emotional distress to sustain her claim for intentional infliction of emotional distress. Lyles v. Micenko, 404 F.Supp.2d 182, 187.

D.D.C.2005. Subsec. (1) quot. in sup. Two American citizens, one presently residing in Texas and the other in California, sued a foreign sovereign that had been designated as a "state sponsor of terrorism," in part for intentional infliction of emotional distress during plaintiffs' detention there in 1980. Entering a default judgment in favor of plaintiffs, this court held, inter alia, that the law of both Texas and California recognized the tort of intentional infliction of emotional distress and controlled this case; because the foreign sovereign was not immune from suit under the Foreign Sovereign Immunities Act, and, by its extreme and outrageous conduct toward plaintiffs it had committed this tort, it was responsible for its misconduct. Price v. Socialist People's Libyan Arab Jamahiriya, 384 F.Supp.2d 120, 134.

D.D.C.2005. Com. (d) quot. in sup., quot. in ftn., and quot. in case quot. in sup.; com. (h) quot. in case quot. in sup. After government contractor's computer technician was killed in Colombia and delivery of his remains was delayed, his parents sued contractor for intentional infliction of

emotional distress, inter alia, alleging that defendant intentionally withheld information regarding the circumstances of technician's death. This court dismissed the case, holding that a delay of four business days in sending the remains was not outrageous. Also, defendant's withdrawal of information was not, as a matter of law, extreme or outrageous conduct, since there was no evidence that defendant withheld information from plaintiffs for any reason other than a clearly legitimate business reason—the desire to avoid violating its contractual duties. Ross v. Dyncorp., 362 F.Supp.2d 344, 358, 359, 362.

D.D.C.2005. Subsec. (2)(a) quot. in ftn. Widow of a United States Army Sergeant who was killed in the bombing of the United States Embassy in Lebanon in 1983 sued Islamic Republic of Iran, certain of its related organizations and officials, and a terrorist group, seeking compensatory and punitive damages for wrongful death, solatium, and intentional infliction of emotional distress. This court entered judgment for plaintiff, holding, inter alia, that plaintiff established considerable loss as a direct result of defendants' extreme and outrageous conduct. Sergeant's killing resulted in severe emotional trauma to plaintiff and her daughter, and defendants intentionally caused those injuries, in fact and proximately, by planning, supplying, and supporting embassy bombing in which sergeant was killed. Salazar v. Islamic Republic of Iran, 370 F.Supp.2d 105, 115.

D.D.C.2004. Cit. in case quot. in disc. Physician sued former employer and others for, inter alia, intentional infliction of emotional distress. This court granted in part defendants' motion to dismiss, holding that claim for intentional infliction of emotional distress failed because there was no extreme and outrageous conduct. At best, plaintiff could prove that defendants knew that he needed tail coverage to cover risk of injurious acts predating employment, intentionally or negligently failed to secure coverage or notify him that he had no such coverage, and then covered up those failures. Fraud, alone, was not enough to state claim for intentional infliction of emotional distress. Hayes v. Chartered Health Plan, 360 F.Supp.2d 84, 88.

D.D.C.2003. Cit. in sup., subsecs. (1) and (2) cit. in sup., subsec. (2)(a) quot. in sup., com. (l) quot. in sup. Former prisoners of war during 1991 Gulf War and their family members sued Iraq, Saddam Hussein, and Iraqi Intelligence Service under Foreign Sovereign Immunities Act, alleging personal injuries and intentional infliction of emotional distress. This court entered judgment for plaintiffs and awarded compensatory and punitive damages, holding that defendants were liable for injuries they intentionally caused when they assaulted and battered POWs and intentionally inflicted emotional distress on POWs and their families. Defendants engaged in outrageous conduct through physical and mental torture, denial of requests to notify families, the forced making of propaganda tapes by POWs, and refusal to permit inspection of prisoners' conditions. When defendants tortured POWs, they intended to and did cause emotional distress to POWs' immediate family members. Acree v. Republic of Iraq, 271 F.Supp.2d 179, 216, 217, vacated 370 F.3d 41 (D.C.Cir.2004).

D.D.C.2003. Subsec. (2)(a) cit. in case quot. in sup. Victims of September 11, 2001 terrorist attacks and their families sued nearly 200 entities or persons, alleging that defendants provided material support, aided and abetted, or conspired with terrorists who perpetrated attacks. Plaintiffs also stated claims for, inter alia, intentional infliction of emotional distress. This court denied in part

defendants' motion to dismiss, holding, inter alia, that since plaintiffs stated viable claims for aiding and abetting against Islamic foundation and its Oregon branch, plaintiffs also stated common-law claims for emotional distress. The court stated that terrorist attack on civilians was intended to cause emotional distress to victims' families, and it did not matter that family members were not physically present. Burnett v. Al Baraka Inv. and Development Corp., 274 F.Supp.2d 86, 108.

D.D.C.2003. Com. (d) quot. in case quot. in sup. Plaintiff, who was arrested for murder after he was falsely identified as man withdrawing money from same ATM used by victim on night of murder, but was released when it became apparent that time indicated by bank's camera was inaccurate, sued District of Columbia and police detective responsible for investigation and arrest for intentional infliction of emotional distress, inter alia. This court granted in part defendants' motion for summary judgment, holding, inter alia, that while detective might have been negligent in failing to double-check information before completing arrest and filling out detention affidavit, his failure to verify a fact did not equate to a reckless or deliberate lie about existence of that fact. Arrest supported by this sort of careless error was not sufficiently outrageous to support emotional-distress claim. Liser v. Smith, 254 F.Supp.2d 89, 106.

D.D.C.2003. Cit. in sup. Abductee who was kidnapped in Beirut and held for 65 days by members of Hizbollah, an Iranian-sponsored terrorist organization, brought suit under the Foreign Sovereign Immunities Act (FSIA) against the Islamic Republic of Iran and the Iranian Ministry of Information and Security, asserting, in part, various common-law claims. Entering judgment for plaintiff, the court held that common-law claims could be asserted against state sponsors of terrorism under the FSIA, and that the evidence adduced at hearing clearly supported defendants' liability for, in part, battery, assault, false imprisonment, and intentional infliction of emotional distress. Regier v. Islamic Republic of Iran, 281 F.Supp.2d 87, 100.

D.D.C.2002. Quot. in sup. Family of Navy petty officer murdered during terrorist airline hijacking brought wrongful-death and survival action against Islamic Republic of Iran and Iranian intelligence service, seeking, in part, damages for loss of solatium. Entering judgment for plaintiffs, the court recognized a cause of action for loss of solatium under the federal common law by relying on the Restatement Second of Torts § 46, and held, inter alia, that plaintiffs were entitled to loss-of-solatium damages because they experienced grave emotional distress as a result of the terrorists' extreme and outrageous conduct. Stethem v. Islamic Republic of Iran, 201 F.Supp.2d 78, 89.

D.D.C.2002. Cit. and quot. in ftn. (Erron. cit. as § 3.) Longtime companion of CIA agent who was abducted in Lebanon and died in captivity brought suit under the Foreign Sovereign Immunities Act on behalf of decedent's estate, herself, and decedent's sister against the Islamic Republic of Iran for funding and directing terrorist acts against decedent, seeking, in part, damages for loss of solatium. Entering judgment for plaintiff, the court held, inter alia, that because defendant's conduct was patently outrageous and the emotional distress caused to plaintiff and decedent's sister was undeniable, plaintiff was entitled to damages for solatium. Surette v. Islamic Republic of Iran, 231 F.Supp.2d 260, 269, 270.

D.D.C.2002. Quot. in case quot. in disc. African-American employee who was a member of the Jehovah's Witness faith sued employer for intentional infliction of emotional distress, defamation, retaliation, and Title VII violations, alleging that she had been discriminated against and harassed by employer on the basis of her sex, race, and religion. This court dismissed the emotional-distress claim, holding, inter alia, that plaintiff's allegations that were not barred by the statute of limitations failed as a matter of law to support her emotional-distress claim. Employer's conduct of allowing a coemployee who had physically and verbally attacked plaintiff to return to work before her suspension expired, transferring plaintiff involuntarily to the day shift, and firing plaintiff was not outrageous. Thompson v. Jasas Corp., 212 F.Supp.2d 21, 27.

D.D.C.2001. Cit. and quot. in sup. Victim of kidnap and torture and his family brought suit under theory of respondeat superior against Islamic Republic of Iran and the Iranian Ministry of Information and Security, which funded and controlled fundamentalist group responsible for the kidnapping. The court entered default judgment in favor of plaintiffs, holding, inter alia, that plaintiff and his siblings had claim for intentional infliction of emotional distress, but his nieces and nephews did not. Jenco v. Islamic Republic of Iran, 154 F.Supp.2d 27, 35, judgment affirmed 315 F.3d 325 (C.A.D.C.2003). See above case.

D.D.C.2001. Quot. in sup. American university professor who was kidnapped in Lebanon and detained and tortured for six and one-half years sued the Islamic Republic of Iran, which financially supported and directed the terrorist organization that held plaintiff hostage. After defendant failed to respond, the district court entered a default judgment awarding plaintiff compensatory and punitive damages. Finding, inter alia, that plaintiff suffered severe emotional distress at the hands of his captors, and that the infliction of the distress was attributable to defendant, the court held defendant liable for intentional infliction of emotional distress. Sutherland v. Islamic Republic of Iran, 151 F.Supp.2d 27, 49, 50.

D.D.C.2001. Quot. in sup. After a United States Naval officer died in terrorist bomb explosion while on duty at the United States Embassy in Lebanon, the victim's family sued the Islamic Republic of Iran and an Iranian governmental agency for wrongful death. This court entered judgment for plaintiffs for compensatory and punitive damages, holding, inter alia, that the Foreign Sovereign Immunities Act entitled plaintiffs to monetary damages for solatium, or loss of the victim's society and companionship. The act of purposefully detonating a large explosive charge adjacent to an occupied building constituted extreme and outrageous conduct in any civilized society. Wagner v. Islamic Republic of Iran, 172 F.Supp.2d 128, 136.

D.D.C.2000. Cit. in case quot. in disc., cit. generally in case cit. in ftn. A source who was quoted in a magazine article sued the magazine, the magazine's owner, and the reporter for breach of contract and intentional infliction of emotional distress, among other claims, alleging that the reporter intentionally misrepresented himself, that he broke his promise of confidentiality, and that he falsely reported that the source had attempted to sell her story to a tabloid. This court granted defendants' motions to dismiss, holding, inter alia, that, although the reporter's conduct may have been contrary to journalistic standards and upsetting to sources like plaintiff, plaintiff had not pled

facts supporting the conclusion that the reporter's conduct was extreme and outrageous. Steele v. Isikoff, 130 F.Supp.2d 23, 36.

D.D.C.1997. Quot. in case quot. in disc. Former employees of the White House Travel Office sued aviation consulting and charter firm for intentional infliction of emotional distress and tortious interference with contract. Plaintiffs alleged that they were dismissed after defendant, in an attempt to win the Office's air-charter business, discredited plaintiffs by falsely accusing them of illegal activity and making these accusations known to top White House officials. Granting defendant's motion to dismiss, the court held that the alleged wrongdoing was not sufficiently extreme or outrageous as to give rise to a claim for intentional infliction of emotional distress; that there could be no liability for tortious interference with contract where plaintiffs were at-will employees; and that even a charge of intentional interference with prospective economic advantage would fail, as plaintiffs served at the pleasure of the President and the current administration. Dale v. Thomason, 962 F.Supp. 181, 184.

D.D.C.1997. Cit. in disc. A couple who had adopted a three-year-old Russian boy brought suit against the adoption agency and three of its employees for, in part, intentional infliction of emotional distress, after they discovered that the child suffered from one or more serious neurological and visual disorders that were irreversible. Granting defendants' motion for summary judgment, the court held, inter alia, that defendants were not liable for intentional infliction of emotional distress, since no motive was shown for defendants to have deliberately deceived plaintiffs as to the child's health, and no conduct was ascribed to them that in any respect resembled the "extreme or outrageous" conduct held necessary to prove the tort under District of Columbia law. Ferenc v. World Child, Inc., 977 F.Supp. 56, 60, affirmed 172 F.3d 919 (D.C.Cir.1998).

D.D.C.1997. Cit. in headnote, com. (h) cit. in disc. Widower whose wife, a longtime smoker, died from a stroke brought on by respiratory failure caused by emphysema sued cigarette manufacturer for, inter alia, intentional infliction of emotional distress, alleging that defendant deliberately manipulated the nicotine level in its cigarettes in order to profit from increased sales generated as a result of smokers' nicotine addiction. Plaintiff also sought recovery under a theory of strict products liability. Granting in part and denying in part defendant's motion to dismiss, the court held that, even if defendant's conduct was outrageous, plaintiff had failed to show that defendant acted with the intent to cause severe emotional distress to plaintiff and his late wife. However, the court could not say as a matter of law that cigarettes were not unreasonably dangerous, and questioned the precedential value of authority stating that cigarettes made with "good tobacco" were not inherently dangerous. Witherspoon v. Philip Morris Inc., 964 F.Supp. 455, 456, 462.

D.D.C.1997. Com. (d) quot. in case quot. in disc. Homeowners, their son, and daughter-in-law sued United States for violations of the Federal Tort Claims Act, alleging that agents of the U.S. Park Police committed the torts of negligence, negligent and intentional infliction of emotional distress, and trespass while executing a search warrant for plaintiffs' home. Entering judgment in part for plaintiffs, the court held that agents were negligent in conducting a second pat-down of daughter-in-law, damaging plaintiffs' personal property, and detaining son overnight on a weapons charge;

that plaintiffs' emotional trauma, which included recurrent nightmares and increased nervousness, was minimal and did not support a finding of negligent infliction of emotional distress; that the manner in which agents executed the search warrant was not so extreme and outrageous as to give rise to a claim for intentional infliction of emotional distress; and that the existence of a valid search warrant was an absolute defense to an action for trespass. Wright v. U.S., 963 F.Supp. 7, 18.

D.D.C.1996. Quot. in case quot. in disc. In 1992, a college employee missed one month of work when she was unexpectedly hospitalized because of complications associated with her pregnancy. Two years later, after the employee told her supervisors that she was again expecting, she received a negative performance evaluation and she was fired. The supervisor had told her, "I need to know if you're going to be able to handle the stress of fall registration; if not, I need to get you out of here and get someone else in." The employee sued the college and the supervisor for negligent and intentional infliction of emotional distress. This court granted defendants' motion for summary judgment on the intentional-infliction-of-emotional-distress claim, holding, inter alia, that defendants' words and actions were distressful, but as a matter of law they did not rise to the requisite level of outrageousness and recklessness. Harvey v. Strayer College, Inc., 911 F.Supp. 24, 28.

D.D.C.1996. Com. (d) quot. in case quot. in sup. Client brought an action for, in part, intentional infliction of emotional distress against his former criminal defense trial attorney, alleging that certain of defendant's trial tactics caused plaintiff's conviction for drug distribution. Granting defendant's motion for summary judgment, the court held, inter alia, that plaintiff did not prove that the conduct complained of in this case, i.e., defendant's failure to adequately investigate identification evidence, adequately interview potential witnesses, make any pretrial motions, move for a mistrial, vigorously cross-examine, or zealously advocate, constituted extreme and outrageous behavior or that defendant intentionally inflicted emotional distress; therefore, plaintiff did not establish a prima facie case of intentional infliction of emotional distress under District of Columbia law. Williams v. Callaghan, 938 F.Supp. 46, 51.

D.D.C.1994. Com. (d) quot. generally in case quot. in disc. and cit. generally in headnote, com. (h) quot. in disc. An employee sued his former employer for intentional infliction of emotional distress, after he suffered severe injuries from an attempted suicide that occurred as a result of his supervisor's false accusation that he had stolen a carpet from the employer's president's residence. The court granted defendant's motion to dismiss, holding that the supervisor's conduct was not outrageous because his conduct in withdrawing his accusation when he learned it was false clearly showed the absence of malice. The court also held that the supervisor's failure to apologize once he discovered the truth was insufficient to support his emotional-distress claim. Chung v. Lee, 852 F.Supp. 43, 44, 45.

D.D.C.1994. Com. (d) quot. in part in sup. Terminated employee sued her former employer, asserting intentional infliction of emotional distress and other claims. Denying employer's motion to dismiss one claim but granting it for all others, including the emotional-distress claim, this court held, inter alia, that, under District of Columbia law, since the complaint alleged nothing more than

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discharge from employment, employee had failed to allege sufficiently extreme and outrageous conduct to establish a claim for intentional infliction of emotional distress. Underwood v. Archer Management Services, Inc., 857 F.Supp. 96, 99.

D.D.C.1994. Com. (e) quot. in case quot. in sup. Former employee of the District of Columbia Department of Corrections sued the District of Columbia and her supervisor for sexual harassment and intentional infliction of emotional distress. The court entered judgment on a jury verdict awarding plaintiff damages. Denying defendants' posttrial motion for judgment as a matter of law on plaintiff's claim of intentional infliction of emotional distress, the court held that the record contained testimony of defendant supervisor's conduct that reasonable individuals could find outrageous, as well as evidence that plaintiff's trauma arose as a consequence of that conduct. Webb v. Hyman, 861 F.Supp. 1094, 1102.

D.D.C.1991. Quot. in case cit. in disc., com. (d) quot. in case quot. in disc. A divorced husband and his parents sued a magazine publisher, an editor, and a freelance writer for libel and intentional infliction of emotional distress based on the magazine's publication of an article concerning the plaintiff husband's highly publicized child visitation dispute. The court dismissed the claims of the plaintiff husband and his father but denied the defendants' motion for summary judgment on the claims made by the plaintiff husband's mother, on the ground that reasonable persons could differ as to whether the conduct of the publisher and editor supported her allegations. Foretich v. Advance Magazine Publishers, Inc., 765 F.Supp. 1099, 1104.

D.D.C.1991. Com. (d) quot. in disc. Dog owners were walking their unleashed dogs when one of the dogs was shot by a police officer who feared the dog was going to harm his police dog. The dog owners brought an action for damages against the United States, pursuant to the Federal Tort Claims Act, alleging assault and battery, false arrest, property loss, and negligent and intentional infliction of emotional distress. On the count of intentional infliction of emotional distress, the district court held in favor of the defendant. The court reasoned that the officer's conduct did not rise to the requisite level of outrageousness and atrocity to warrant recovery under this theory, and the plaintiff's distress resulted from what she perceived to be the senseless shooting of her pet, not from any disregard for her own safety. Kaiser v. U.S., 761 F.Supp. 150, 156.

D.D.C.1990. Quot. in case cit. in disc., com. (d) quot. in disc. A father who was involved in a bitter, highly publicized child custody dispute and his parents sued the publisher of a magazine, among others, for defamation and intentional infliction of emotional distress on the basis of certain statements made in the “Letters from Readers” page and an editorial comment thereon. Denying the defendant's motion to dismiss, the court held that the plaintiff stated a claim for intentional infliction of emotional distress as to one of the statements, relating to a childhood incident in which the plaintiff's mother handed him his dead infant sister's body “so he could arrange for the funeral.” Foretich v. Glamour, 753 F.Supp. 955, 970.

D.D.C.1990. Quot. in case quot. in disc., com. (d) quot. in case quot. in sup. A temporary firefighter working at a hospital whose contract was not renewed after the hospital transferred from federal

government to District of Columbia control sued the District of Columbia for, inter alia, intentional infliction of emotional distress. The plaintiff contended that he did not know that his employment was temporary and was not told he could do something to retain his employment once he was notified of his impending termination. Granting the defendant's motion for summary judgment, the court refused to believe that the defendant lacked knowledge of his temporary status when all of his employment forms clearly stated the temporary nature of his appointment. Moreover, because it was undisputed that the plaintiff became aware of, and applied for, the position of firefighter before his termination date, the court held that, even if the defendant failed to personally inform the plaintiff that his employment was temporary and that he should apply for a firefighter vacancy, this would not rise to the level of conduct needed to establish a claim for intentional infliction of emotional distress. Russell v. District of Columbia, 747 F.Supp. 72, 80, 81.

D.D.C.1990. Com. (d) quot. generally in case quot. in disc. A female former police sergeant was arrested by officers of the United States Park Police and a local police department after she allegedly resisted an attempt to catch her by refusing to show a license and registration and almost hitting an officer with her car in trying to flee. The arrestee sued the arresting officer and the United States, alleging violations of the federal civil rights statute and the Federal Tort Claims Act, and also asserting common law tort claims for false arrest, false imprisonment, malicious prosecution and negligent and intentional infliction of emotional distress. This court granted summary judgment in favor of the defendants and held, inter alia, that the defendant officer's behavior was not sufficiently extreme or outrageous to warrant relief for intentional infliction of emotional distress. Moreover, the court stated that the degree of force used to arrest the plaintiff was reasonable in view of the plaintiff's attempts to resist. Stevens v. Stover, 727 F.Supp. 668, 672.

D.D.C.1989. Com. (d) quot. in case cit. in disc. An airline passenger who requested to be allowed off of an airplane when his New York City-bound flight was delayed on the runway for about three hours sued the airline for false imprisonment, intentional and negligent infliction of emotional distress, and punitive damages after the request was denied. The airline moved for summary judgment, and the passenger moved for partial summary judgment on his claim of false imprisonment. Denying the plaintiff's motion and granting the defendant airline's motion, this court held that, by buying his ticket, the passenger gave the pilot express consent to fly him to New York City, an agreement that did not guarantee arrival at his destination by a specific time or provide that the plaintiff could unilaterally determine that he should be deplaned. Additionally, the court held that the plaintiff's claim of intentional infliction of emotional distress was deficient because it did not establish that the defendant caused an emotional disturbance so acute in nature that harmful physical consequences would be likely to result. Abourezk v. New York Airline, Inc., 705 F.Supp. 656, 665, decision affirmed 895 F.2d 1456 (D.C.Cir.1990). See above case.

D.D.C.1989. Quot. in case quot. in sup. A former bank vice president sued the bank for intentional infliction of emotional distress, inter alia, alleging that she suffered severe emotional distress as a result of being fired by the defendant, witnessing the defendant's efforts to maintain that she was guilty of misconduct, and being a known diabetic. The court granted summary judgment to the defendant on this issue, stating that the plaintiff's allegations fell far short of the standard for

intentional infliction of emotional distress of unusually outrageous conduct and that the tort should not be successfully pursued by merely alleging unfair circumstances surrounding a termination of employment. Cunningham v. United Nat. Bank of Washington, 710 F.Supp. 861, 864.

D.D.C.1989. Com. (d) quot. in case quot. in disc. After a husband and wife learned that the real estate investment properties they had purchased from the defendant's investment association in a joint venture were worth less than what they had paid for them, they sued the defendant and the association, among others, on a theory of fraud, inter alia. The defendant counterclaimed on a theory of intentional infliction of emotional distress. The court dismissed the counterclaim, holding that the defendant failed to satisfy her burden of proof. The court rejected the defendant's testimony that the plaintiff husband tormented the defendant by wearing her late husband's clothes in her presence after she refused to sell the plaintiffs' investment properties. Weiss v. Lehman, 713 F.Supp. 489, 502, order amended and supplemented on rehearing 759 F.Supp. 1 (D.D.C.1989).

D.D.C.1988. Com. (d) quot. in case quot. in sup. A catering company sued the owner of a special events planning business to recover unpaid debts; the defendant counterclaimed, alleging intentional infliction of emotional distress caused by the plaintiff company's employees' abusive conduct during their collection efforts. This court granted the plaintiff's motion for summary judgment on the emotional distress claim, finding that the defendant had presented insufficient proof of outrageous conduct. The court concluded that the plaintiff's employees' allegedly rude and insulting behavior in response to the defendant's unpaid debt was not so extreme as to be regarded as atrocious, and that the defendant failed to demonstrate any causal connection between the conduct of the plaintiff's employees and the harm she allegedly suffered. Ridgewells Caterer, Inc. v. Nelson, 688 F.Supp. 760, 764.

D.D.C.1987. Com. (d) quot. in case cit. in disc. Apartment tenants sued the building owner and manager who allegedly contracted unskilled maintenance men, claiming that they suffered the intentional infliction of emotional distress as a result of a gas explosion and collapsed ceiling in their apartments. This court granted the defendants' motion for summary judgment, holding that the defendants' conduct would at most constitute negligence. The court stated that the use of unskilled workers could not as a matter of law be deemed so extreme in degree as to go beyond all possible bounds of decency. Longus v. First Columbia Management, Inc., 664 F.Supp. 13, 15.

D.D.C.1986. Cit. in case quot. in disc. Transcendental meditation students sued the founder of the transcendental meditation movement for intentional infliction of mental distress. This court granted the defendant's motion for summary judgment because the students failed to show that the defendant's acts were calculated to cause them emotional harm and an associated risk of physical injury, and because the students failed to cite any case law supporting their claim that a continuing injury can rise to the level of outrageousness necessary to constitute intentional infliction of emotional distress. Doe v. Yogi, 652 F.Supp. 203, 209.

D.D.C.1986. Quot. in case quot. in sup., com. (j) cit. in sup. An employee sued her former employer for intentional infliction of emotional distress arising out of an allegedly hostile work

environment. Holding for the defendant, this court reasoned that the plaintiff's stress was incident to her job responsibilities and did not result from extreme and outrageous conduct on the part of her former employer, and that stress alone was insufficient to meet the threshold requirement of severe emotional distress. Green v. American Broadcasting Companies, Inc., 647 F.Supp. 1359, 1362, 1363.

D.D.C.1986. Quot. in case quot. in sup., com. (d) quot. in case quot. in sup. A management-level accountant who had worked for his employer for over a decade was reassigned to a "temporary" position at a much reduced salary after the company suffered a severe financial crisis and reduced its staff. The accountant sued the company for age discrimination and other unlawful acts. This court granted defendant's motion for summary judgment, holding, inter alia, that the plaintiff's claim for intentional infliction of emotional distress failed because the defendant's alleged breach of confidentiality, dismissal without prior disciplinary procedures, and attempts to force the plaintiff's resignation, while perhaps insensitive and unfair, did not approach the level of extreme and outrageous conduct required for liability. Schoen v. Consumers United Group, Inc., 670 F.Supp. 367, 378-379.

D.D.C.1985. Coms. (d) and (h) quot. in sup. A blind man who was told to move to another seat because he was sitting next to the plane's emergency exit sued the airline for violating federal statutes, outrageous conduct, and breach of contract. Both sides moved for summary judgment. This court granted the defendant's motion because the airline's request was for safety purposes and based on a policy that did not discriminate against blind people. Since the conduct was in accord with the FAA's published policy designed to keep emergency exits as freely accessible as possible, the conduct did not go beyond all bounds of decency or permit recovery on the outrageous conduct claim. Finally, the court found that there was no breach of contract because the airline did not refuse to transport the passenger and did not guarantee the passenger's right to sit wherever he wished. Anderson v. USAir, Inc., 619 F.Supp. 1191, 1197, judgment affirmed, 818 F.2d 49 (D.C.Cir.1987). See above case.

D.D.C.1981. Com. (d) quot. in part and cit. in sup. The plaintiffs voluntarily accompanied two FBI agents to the Washington Field Office for questioning. The FBI had received a report that the plaintiffs had sought at two banks in Virginia to change currency that the bank tellers noticed to be part of a ransom paid in a kidnapping case then under investigation. During the course of the questioning, the plaintiffs gave the agents conflicting accounts concerning the source of the money they changed at the banks. Based on this inconsistency, the agents arrested the plaintiffs. After detaining them overnight, the plaintiffs were brought before the District of Columbia Superior Court, which asked to see the warrants for the plaintiffs' arrest. The agents explained that the warrants were issued in the Eastern District of Virginia and had not yet been received in Washington. The judge ordered the plaintiffs released from custody; however, as soon as the plaintiffs left the courthouse, federal marshalls arrested them, relying on the federal warrant issued in Virginia. The plaintiffs were detained for two days and a U.S. Magistrate found that they had been arrested on probable cause. The plaintiffs waived their right to a hearing in the District of Columbia so that they would be transferred to the Eastern District of Virginia. There the plaintiffs

testified before a grand jury investigating the kidnapping and all charges against them were dropped. The plaintiffs instituted an action against the United States and nine individuals and the District of Columbia for false arrest and imprisonment, assault and battery, intentional infliction of emotional distress, defamation, and invasion of privacy. On motion of the defendants for summary judgment, the District Court held, inter alia, that the plaintiffs' claim that the defendants caused emotional distress was insufficient in the absence of alleged facts that would constitute the sort of conduct that is necessary to give rise to liability for intentional infliction of emotional distress. The court noted that conduct must be beyond the bounds of decency and regarded as atrocious and utterly intolerable in a civilized community. Therefore, since the court found that the plaintiffs' complaint did not state such occurrences that would give rise to a claim under this standard of extreme or outrageous conduct, the court granted the defendants' motion for summary judgment. Wilcox v. United States, 509 F.Supp. 381, 387.

D.D.C.1980. Cit. in sup. The plaintiff was the general counsel to a government agency and was reassigned by the chairman of the agency to another position. The plaintiff sued the chairman and the commissioners of the agency in their official capacities, seeking only the equitable relief of reinstatement to his former position. He did not seek money damages. The trial court held that the transfer of the plaintiff amounted to a termination which failed to comply with statutory procedures and ordered that the plaintiff be reinstated to the position of general counsel. The plaintiff then sued in this court, suing the chairman in his individual capacity for allegedly wrongful behavior in procuring the plaintiff's transfer. The plaintiff brought common law tort claims and constitutional tort claims. The court held that the plaintiff's causes of action were barred by res judicata, stating that simply because the plaintiff had sought only equitable relief in his previous suit and here sought only monetary relief was not a sufficient distinction to warrant the conclusion that the two cases involved separate causes of action. All of the plaintiff's claims arose from the same course of conduct and the plaintiff could have brought all of the claims in the same action. The doctrine of res judicata applies not only to all matters which were actually determined but to all matters which could have been determined. Therefore because there were no new facts or circumstances in this suit, the plaintiff must suffer the consequences of not bringing all of his claims for relief in one action. The court also rejected the plaintiff's claim that his suit here was not barred by res judicata because a different defendant was involved because the chairman here was sued in his individual and not in his official capacity. The general rule states that where a judgment is rendered against a person in a representative capacity and later is sued in his individual capacity, the rule of res judicata does not apply. The court, however, distinguished the rule from this case, stating that the rule applies where there is a danger of the sued party having to take inconsistent positions whereas, here, the barring of the plaintiff's suit did not run the risk of binding a party to any position inconsistent with his present one. Also, the rule applies where the party to be barred did not enjoy a realistic opportunity to litigate the question in the first action. Here, however, the plaintiff was free to raise the issues herein in his original complaint. The court stated, inter alia, that the plaintiff had not stated a prima facie case of intentional infliction of emotional distress because the tortfeasor's conduct had not been wanton, extremely outrageous or especially calculated to cause serious mental distress which was required for recovery. Shewmaker v. Minchew, 504 F.Supp. 156, 163.

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M.D.Fla.

M.D.Fla.2023. Com. (d) quot. in case quot. in sup. Former employee who was raped by her former supervisor filed a claim for intentional infliction of emotional distress against former employer, alleging that employer threatened to fire her if she talked about the rape or filed a complaint with human resources, actually fired her after she sought psychological treatment and talked about her rape during the treatment, withheld her final paycheck after she refused to sign a settlement and confidentiality agreement, and badgered her to take down private social-media posts about her rape. This court granted employer's motion to dismiss employee's claim for intentional infliction of emotional distress, holding that employer's alleged conduct did not rise to the high level of outrageousness required to state such a claim under Florida law and Restatement Second of Torts § 46. Treminio v. Crowley Maritime Corporation, 649 F.Supp.3d 1223, 1242.

M.D.Fla.2019. Com. (e) cit. in sup., cit. in case quot. in sup.; com. (f) quot. in sup., cit. in case cit. in sup. Daughter, individually and as successor of father's estate, sued credit-reporting agency, alleging that it refused to correct father's credit report, which incorrectly showed that he was deceased and delinquent on a large mortgage, such that he was prevented from obtaining loans he needed to renovate his home to accommodate his and his wife's health needs and eventually from paying for his wife's funeral. This court granted agency's motion to dismiss, holding that daughter failed to state a claim for intentional infliction of emotional distress. The court reasoned, in part, that, even accepting daughter's allegations as true, agency's conduct was not objectively outrageous as a matter of law, as required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. Malverty v. Equifax Information Services, LLC, 407 F.Supp.3d 1257, 1263, 1264.

M.D.Fla.2017. Com. (d) quot. in case quot. in sup. Mortgage borrower filed, inter alia, an intentional-infliction-of-emotional-distress (IIED) claim against lender, alleging that, after defendant assigned its interest in the mortgage to an assignee, which accepted a deed in lieu of foreclosure from plaintiff and forgave plaintiff's debt, defendant continued to attempt to collect the forgiven debt from plaintiff. This court granted defendant's motion to dismiss plaintiff's IIED claim, holding that defendant's conduct was not outrageous as a matter of law. The court explained that, under Florida law and Restatement Second of Torts § 46, a defendant's conduct had to be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society, in order to state an IIED claim. Owens-Benniefield v. Nationstar Mortgage LLC, 258 F.Supp.3d 1300, 1322.

M.D.Fla.2016. Com. (d) quot. in case quot. in sup. African American employee brought claims for, among other things, intentional infliction of emotional distress (IIED) against water-and-sewer district and its executive director, after defendants terminated his employment. This court granted defendants' motion to dismiss, holding that plaintiff's allegations—that defendants subjected him to a discriminatorily applied pay policy, issued unfounded discriminatory actions against him,

limited his job duties, and falsely accused him of watching pornography on his work computer and ordered him to seek treatment for doing so—failed to state such a claim under Florida law or Restatement Second of Torts § 46; while defendants' alleged conduct was clearly offensive, it did not rise to the level of extreme and outrageous conduct required to recover for IIED. Short v. Immokalee Water & Sewer District, 165 F.Supp.3d 1129, 1152.

M.D.Fla.2015. Com. (d) quot. in case quot. in sup. Minor filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against county deputy sheriffs, after defendants responded to a call that described plaintiff as a "suspicious person" and a "slow kid" who lived in the caller's neighborhood, attempted a takedown procedure when plaintiff retreated from them, tasered and hit plaintiff with their flashlights and fists, and handcuffed and arrested plaintiff. This court granted defendants' motion to dismiss the claim against defendants in their official capacity, and denied defendants' motion to dismiss the claim against them in their individual capacities. The court cited Restatement Second of Torts § 46, Comment *d*, for the standard for determining whether defendants' conduct was sufficiently outrageous, and explained that county could not be liable for the willful and wanton acts of its employees but that the alleged facts were sufficient to state a plausible IIED claim against defendants in their individual capacities. C.P. by and through Perez v. Collier County, 145 F.Supp.3d 1085, 1096.

M.D.Fla.2011. Quot. in case quot. in sup., com. (j) quot. in sup. Arrestee brought § 1983 action against police officer and sheriff's department, alleging false arrest, warrantless entry into her home, and intentional infliction of emotional distress (IIED). Granting in part defendants' motion for summary judgment, this court held that plaintiff had not established her IIED claim, because she had not shown that officer's conduct was "beyond all possible bounds of decency" or that she suffered "severe distress." While being subject to false arrest was embarrassing, it was not sufficiently extreme and outrageous absent some other grievous conduct, and, while plaintiff pointed out that she was wearing only a towel at the time of arrest, the court noted that she was sitting outside wearing only a towel prior to officer's arrival. Frias v. Demings, 823 F.Supp.2d 1279, 1288, 1289.

M.D.Fla.2010. Com. (d) quot. in case quot. in sup. Insured brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against insurer, alleging that defendant failed to pay him benefits under his homeowner's insurance policy. Granting defendant's motion to dismiss the IIED claim, this court held that, even accepting as true plaintiff's allegations that defendant delayed and denied plaintiff's insurance claim, and even if defendant's four offers over a three-year period to settle plaintiff's claim were either inadequate or designed to force plaintiff to discount the full value of his claim, defendant's conduct failed to qualify as outrageous for purposes of stating a claim for IIED. Delfrate v. Liberty Mutual Fire Ins. Co., 727 F.Supp.2d 1307, 1309.

M.D.Fla.2010. Com. (d) quot. in case quot. in sup. Guardian ad litem, on behalf of two minor children and a proposed class of children who were in the legal custody of the state department of children and families and who had been placed in foster care, sued department, corporation that operated the state foster care system pursuant to a contract with department, and others,

alleging intentional infliction of emotional distress and other claims. Granting without prejudice defendants' motion to dismiss, this court held, inter alia, that plaintiffs did not allege the requisite outrageous conduct to support a claim for intentional infliction of emotional distress under Florida law. The court noted that, while plaintiffs might, by amending, be able to plead a cause of action for outrage if they confined themselves to allegations that met the threshold for outrageousness, plaintiffs' allegations of various actions and inactions, including claims of negligence and inaction, mitigated against a determination that defendants' conduct was sufficiently outrageous to support such a cause of action. Smith v. Rainey, 747 F.Supp.2d 1327, 1342.

M.D.Fla.2009. Com. (d) adopted in case quot. in sup. Operator of dance hall sued county, county sheriff's office, and others for intentional infliction of emotional distress, inter alia, alleging that defendants pressured his landlord to evict the dance hall, harassed the hall's employees and patrons, repeatedly arrested him for violating certain ordinances, and conducted an aggressive late-night search of his home in connection with one of the arrests. Granting in part defendants' motion to dismiss, this court held that plaintiff's allegations concerning defendants' actions did not rise to the level of outrageousness necessary to state a claim for intentional infliction of emotional distress under Florida law. Abusaid v. Hillsborough County Bd. of County Com'rs, 637 F.Supp.2d 1002, 1027.

M.D.Fla.2006. Cit. in case cit. in disc.; com. (d) quot. in cases quot. in disc. (cit. as § 46). Hispanic independent-contractor truck drivers brought suit for intentional infliction of emotional distress, among other claims, against owner of asphalt-production facility, alleging that they were subjected to harassment and racial slurs by facility's plant operator. Granting in part defendant's motion for summary judgment, this court held, inter alia, that plaintiffs' allegations that plant operator, who had no authority to fire or demote plaintiffs, repeatedly used racial slurs and delayed and inconvenienced plaintiffs while they delivered materials to the facility did not assert conduct that was sufficiently extreme and outrageous to establish a prima facie case of intentional infliction of emotional distress. Martinez v. Pavex Corp., 422 F.Supp.2d 1284, 1296.

M.D.Fla.2002. Com. (d) quot. in case quot. in disc. Former client sued law firm that had stopped representing him in a slip-and-fall case, alleging, in part, intentional infliction of emotional distress. Granting defendant's motion for judgment on the pleadings, the court held, inter alia, that defendant's withdrawal from plaintiff's underlying personal-injury case did not rise to the level of outrageous conduct necessary to support a claim for intentional infliction of emotional distress, where defendant had the right to withdraw pursuant to the retainer agreement, and three years remained until expiration of the statute of limitations. Jones v. Law Firm of Hill and Ponton, 223 F.Supp.2d 1284, 1288.

M.D.Fla.2002. Quot. in case quot. in sup., com. (d) quot. in sup. Cruise-ship passenger sued cruise line for damages stemming from sexual assault and battery committed by ship's head waiter. Denying in part cruise line's motion to dismiss, district court held that passenger's allegations sufficiently stated claim for negligent hiring and retention, and, since cruise line was vicariously

liable for intentional torts of employees, passenger's allegations stated claim for intentional infliction of emotional distress. Stires v. Carnival Corp., 243 F.Supp.2d 1313, 1319.

M.D.Fla.1999. Quot. in case quot. in disc. Employee sued employer for intentional infliction of emotional distress, among other claims. Plaintiff alleged that defendant store manager rubbed his penis and his hand across plaintiff's buttocks, that he tried to enter a locked room while plaintiff was breast-feeding her child and commented that he wanted plaintiff to "feed him," and that he told plaintiff that he would like to see plaintiff and a female co-worker together in a sexual act. This court granted in part employer's motion to dismiss, holding, inter alia, that, while defendant's alleged acts were offensive, they were not outrageous. Ball v. Heilig-Meyers Furniture Company, 35 F.Supp.2d 1371, 1376.

M.D.Fla.1998. Com. (d) quot. in case quot. generally in ftn. After being fired, a Hispanic employee sued her employer for, among other claims, intentional infliction of emotional distress. Plaintiff alleged that she heard that a supervisor had made a comment against ethnic people, saying he preferred the front desk to be manned by nonethnics. This comment, combined with a fight in the office of another supervisor, purportedly reduced plaintiff to tears. This court, among other dispositions, dismissed the emotional-distress claim, holding, inter alia, that the employer acted with propriety considering the at-will status of the relationship, and that the treatment by the supervisors was not so egregious as to entitle plaintiff to damages. Weld v. Southeastern Companies, Inc., 10 F.Supp.2d 1318, 1323.

M.D.Fla.1997. Quot. in case quot. in disc. An employee sued her employer and a coemployee, alleging sexual harassment, assault, battery, and intentional infliction of emotional distress. This court granted in part and denied in part defendants' motion to dismiss, holding, inter alia, that plaintiff failed to state a claim for intentional infliction of emotional distress. The court noted that within the context of employment discrimination, Florida courts have recognized claims for intentional infliction of emotional distress where the complaint alleges repeated and relentless physical and verbal abuse. Sparks v. Jay's A.C. & Refrigeration, Inc., 971 F.Supp. 1433, 1440-1441.

M.D.Fla.1996. Quot. in case quot. in sup. Former employee of airline sued airline for intentional infliction of emotional distress, inter alia, alleging that defendant created an extraordinarily hostile, sexually poisoned work atmosphere for plaintiff and that defendant purposely exposed plaintiff to vile acts of depravity, rather than take simple and cost-effective measures to stop the harassment. Granting in part defendant's motion to dismiss, the court held that, under Florida law, the male co-workers' conduct in using bad language in front of plaintiff and repeatedly placing pornographic photographs on her desk did not reach the level of outrageousness necessary to support a claim for intentional infliction of emotional distress in the employment context. Pucci v. USAir, 940 F.Supp. 305, 309.

M.D.Fla.1995. Quot. in case cit. in disc., com. (g) cit. in headnote and quot. in disc. Female dancers for a theme park's entertainment show who were spied upon and videotaped in various

stages of undress and while using the restroom sued the theme park for, among other claims, intentional infliction of emotional distress and invasion of privacy. This court granted in part and denied in part defendant's motion for summary judgment, holding, inter alia, that defendant failed to establish that the use of the female dancers as bait to catch the peeping tom was a permissible way of pursuing its legal rights of investigation. Defendant may have exceeded the bounds of propriety in using the dancers as bait in the sting operation without their prior knowledge or consent, particularly in consideration of the contractual agreement between several of the plaintiffs and defendant regarding a secure dressing environment. It also held that a fact issue existed as to whether defendant's conduct was extreme and outrageous. Liberti v. Walt Disney World Co., 912 F.Supp. 1494, 1505, 1506.

N.D.Fla.

N.D.Fla.1988. Cit. in disc. An American flyer was shot down during the Vietnam conflict. The United States government subsequently misidentified the remains of the flyer, persisted in that misidentification, and issued a letter to his wife stating that if she did not accept the remains and bury them, the government would do so. The government also continued to carry the flyer's name as "accounted for" even after the Armed Services Graves Registration Board rescinded the identification of the flyer. The flyer's wife sued the United States for intentional infliction of emotional distress. Granting the plaintiff's motion for summary judgment, the court held that the government's conduct was outrageous as a matter of law. Hart v. U.S., 681 F.Supp. 1518, 1522, judgment reversed 894 F.2d 1539 (11th Cir.1990). See above case.

N.D.Fla.1980. Quot. in sup. (Erron. cit. as Torts.) During a previous litigation where the plaintiffs attempted to recover under an insurance policy issued by the defendant, the plaintiffs became displeased with activities of the defendants and filed a suit alleging libel, slander, and intentional outrageous conduct resulting in emotional distress to the plaintiffs. After dismissing the libel and slander complaints, the court held that the complaint for emotional distress could not be sustained because, although the defendants' conduct may have been reprehensible, defendants' overtures were not directed to the plaintiffs or any member of their immediate family who was present at the time. Dyer v. Florida Farm Bureau Mut. Ins. Co., 496 F.Supp. 695, 697.

S.D.Fla.

S.D.Fla.2022. Com. (d) quot. in sup.; com. (e) quot. in ftn. and cit. in case quot. in sup.; com. (f) quot. in sup. Former employee who was physically and sexually assaulted by a patient while working as a medical assistant brought a claim for intentional infliction of emotional distress against former employer, alleging that it sent her back to work to finish her shift after the assault without giving her the chance to be examined by a doctor or report the assault to police, that it blamed her for the assault and made inappropriate verbal comments, and that it intentionally disseminated information about the attack to others. This court denied employer's motion to dismiss, holding that a lower standard of outrageousness was appropriate under Restatement

Second of Torts § 46, given employer's knowledge of employee's susceptibility to distress from the situation she had just experienced, and that its alleged conduct was sufficiently outrageous under that standard, because an average member of the community would consider it to be atrocious, and utterly intolerable in a civilized community. Cooper v. Empower U, Inc., 603 F.Supp.3d 1317, 1322, 1323.

S.D.Fla.2022. Cit. in case quot. in sup. Passenger who was onboard a cruise ship during an outbreak of an infectious pandemic disease, individually and on behalf of her husband who died of the disease, sued operator of the ship for, among other things, intentional infliction of emotional distress, alleging that it failed to screen passengers before allowing them to board, failed to enforce physical distance requirements, and misrepresented to passengers that everyone onboard remained healthy and happy when several guests had displayed symptoms consistent with the disease. This court granted in part operator's motion to dismiss, holding that passenger's allegations were insufficient to show that operator's actions were sufficiently extreme and outrageous to support a claim for intentional infliction of emotional distress under maritime law, which looked to the standards set forth in Restatement Second of Torts § 46. Dome v. Celebrity Cruises Inc., 595 F.Supp.3d 1212, 1225.

S.D.Fla.2022. Com. (d) cit. and quot. in case cit. and quot. in sup. Customer filed a claim for intentional infliction of emotional distress against provider of an internet-connected home-alarm system that included indoor and outdoor camera surveillance, after provider's technician added himself to her account as authorized user and repeatedly accessed her account without her permission. This court granted in part provider's motion for summary judgment, holding that customer failed to establish that provider engaged in outrageous and extreme conduct, as required for it to be liable for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court pointed out that, while provider knew that its technicians had access to its customers' accounts, that access was limited to vetted employees who were instructed on the limitations of that access. Doty v. ADT, LLC, 594 F.Supp.3d 1319, 1338.

S.D.Fla.2020. Cit. and quot. in cases quot. in sup.; com. (d) quot. in case quot. in sup. Passengers of a cruise ship filed a class action against cruise line, seeking to recover damages after the ship experienced a contagious-disease outbreak in which at least 45 people became infected and at least two people died. This court granted in part cruise line's motion to dismiss, holding that passengers failed to state a claim for intentional infliction of emotional distress against cruise line under Florida law and Restatement Second of Torts § 46. The court reasoned that passengers' allegations that cruise line lied, concealed, and misrepresented to passengers that everybody on board the cruise ship was healthy when it knew that was false failed to rise to the level of outrageousness required to state such a claim. Kantrow v. Celebrity Cruises, Inc., 510 F.Supp.3d 1311, 1318, 1324, 1325.

S.D.Fla.2019. Cit. in sup. Wife and children of cruise-ship passenger filed a wrongful-death action against cruise-ship operator, alleging that passenger suffered a heart attack while the ship was in port and eventually died of cardiac arrest in the ship's medical center after defendant refused

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to allow him to disembark. This court denied defendant's motion to dismiss plaintiffs' claim for intentional infliction of emotional distress, holding, among other things, that plaintiffs' complaint adequately pleaded the extreme and outrageous conduct required to state such a claim under Florida law and Restatement Second of Torts § 46. The court pointed to plaintiffs' allegations that defendant refused to let passenger or plaintiffs off the ship while it was docked despite statements by the ship's physician that passenger needed to be flown to Miami to undergo possible heart surgery and that time was of the essence, and that the ship left the port with passenger and plaintiffs confined onboard against their will. Eisenman v. Carnival Corporation, 424 F.Supp.3d 1303, 1308.

S.D.Fla.2019. Com. (d) quot. in case quot. in sup. Tenant brought, inter alia, a claim for intentional infliction of emotional distress against landlord, alleging that defendant engaged in pervasive sexual harassment of plaintiff, including making unwanted sexual propositions, conducting physical trespasses and stalking-related behaviors, and threatening plaintiff that he would not allow her to renew her lease or recover her security deposit if she refused to be his girlfriend. This court granted in part defendant's motion to dismiss, holding that defendant's actions—which amounted to unwelcome sexual advances without making physical contact—did not constitute extreme and outrageous conduct as defined by Restatement Second of Torts § 46, Comment *d*. Noah v. Assor, 379 F.Supp.3d 1284, 1300.

S.D.Fla.2018. Com. (j) quot. in case quot. in sup. After being stopped for allegedly throwing bottles out of his car window by police, arrestee brought a lawsuit against county and detectives, alleging that detectives falsely arrested him and used excessive force when they slammed him onto the hood of his car, punched him, and cursed at him, despite his cooperation with them. This court granted defendants' motion to dismiss, holding, inter alia, that plaintiff failed to allege enough facts to sustain his claim of intentional infliction of emotional distress (IIED) against detectives. The court cited Restatement Second of Torts § 46, Comment *j*, in explaining that detectives' conduct did not rise to the level of severity required under Florida law to meet the elements of an IIED claim. Casado v. Miami-Dade County, 340 F.Supp.3d 1320, 1332.

S.D.Fla.2017. Cit. in case quot. in sup.; com. (d) quot. in case quot. in sup. Surviving spouse of cruise-ship passenger who fell overboard while intoxicated and presumably drowned brought a wrongful-death action under the Death on the High Seas Act against cruise-line operator, alleging, inter alia, a claim for intentional infliction of emotional distress (IIED) arising from defendant's negligence in over-serving alcohol to decedent and failing to timely detect and report her fall and initiate a prompt search-and-rescue attempt. This court denied defendant's motion to dismiss, holding, inter alia, that development of the record was necessary to determine whether defendant's conduct was sufficiently extreme and outrageous to support an IIED claim. The court explained that, in admiralty cases, courts relied on the standard set forth in Restatement Second of Torts § 46 for evaluating IIED claims. Broberg v. Carnival Corporation, 303 F.Supp.3d 1313, 1317.

S.D.Fla.2017. Cit. in sup., adopted in case cit. in sup.; com. (d) quot. in case quot. in sup. Former college student brought a claim for intentional infliction of emotional distress against instructor of his composition class, alleging that instructor asked him to read aloud to the class on multiple

occasions despite knowing that he suffered from a visual disability that prevented him from being able to do so, such that he was forced to disclose his disability to his classmates. This court granted instructor's motion to dismiss student's claim for intentional infliction of emotional distress, holding that the conduct alleged by student was not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and thus did not rise to the level necessary to support such a claim under Florida law and Restatement Second of Torts § 46. Leach v. District Board of Trustees of Palm Beach, 244 F.Supp.3d 1334, 1337, 1338.

S.D.Fla.2016. Com. (d) quot. in case quot. in sup. Cruise-ship passenger sued ship's owner and its medical personnel for, among other things, intentional infliction of emotional distress, following an incident in which one of her children drowned and another one of her children nearly drowned in the ship's pool. This court granted in part defendants' motion to dismiss, holding that passenger's allegations—that owner failed to employ lifeguards while advertising itself as family friendly and kid friendly, that owner failed to keep lifesaving equipment on the pool deck, that owner failed to have staff stationed on the pool deck who were prepared for a medical-drowning emergency, and that the ship's medical personnel took a long time to arrive after the children were pulled from the pool—were not sufficient to show that defendants engaged in extreme and outrageous conduct within the meaning of Restatement Second of Torts § 46. Blair v. NCL (Bahamas) Ltd., 212 F.Supp.3d 1264, 1270.

S.D.Fla.2013. Illus. 1 quot. in sup. Mother of an intoxicated cruise-ship passenger who climbed over a railing, fell overboard, and presumably drowned sued operator of the cruise ship, alleging, among other things, intentional infliction of emotional distress based on the fact that the captain or someone in a similar uniform told her that her son had committed suicide. Granting defendant's motion to dismiss plaintiff's emotional-distress claim, this court held that her allegations were insufficient to state such a claim, because the alleged conduct was not so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. The court reasoned that this was not a situation in which the captain, with no justification or factual predicate, decided to play a joke on plaintiff by falsely informing her of her son's death; the reality was that her son had in fact climbed a railing and fallen overboard, and there was no indication, nor any reason to infer, that the captain knew of plaintiff's religious faith and characterized her son's death as a suicide with the intention of causing her extra emotional suffering. Tello v. Royal Caribbean Cruises, Ltd., 939 F.Supp.2d 1269, 1278.

S.D.Fla.2012. Quot. in sup., adopted in case cit. in sup., com. (d) quot. in sup. Concert producer/promoter and its president/majority shareholder brought contract and tort claims against performer, his record company, his booking agent, and agent's president, after defendants issued a press release canceling a series of 10 concerts that plaintiffs had agreed to produce and promote. Granting in part defendants' motion to dismiss, this court held that plaintiffs failed to state a claim for intentional infliction of emotional distress against booking agent's president; while president's alleged conduct in seeking additional bargaining leverage, threatening to breach the parties' contract, and encouraging third parties to disparage plaintiffs could be aptly described as unprofessional or irresponsible, it was not, as a matter of law, so atrocious or utterly intolerable

as to rise to the level of outrageousness required to state such a claim under Florida law. Five for Entertainment S.A. v. Rodriguez, 877 F.Supp.2d 1231, 1329.

S.D.Fla.2009. Com. (d) quot. and adopted in case quot. in sup. Same-sex partner and children of deceased female patient sued hospital, social worker, and physicians, alleging that defendants denied them certain visitation rights and refused to timely acknowledge partner's power of attorney or consult with her about patient's medical history, wishes, and treatment. Granting defendants' motion to dismiss, this court held, inter alia, that plaintiffs failed to allege conduct on defendants' part that was sufficiently outrageous to state a claim for intentional infliction of emotional distress; while defendants might not have allowed plaintiffs as much visitation as medically permitted or warranted, they did permit plaintiffs to see patient at certain times before she died, and defendants eventually accepted partner as patient's health-care surrogate and consulted with her as to patient's treatment. Langbehn v. Public Health Trust of Miami-Dade County, 661 F.Supp.2d 1326, 1344.

S.D.Fla.2009. Cit. in ftn., adopted in case cit. in ftn. Mother sued the Republic of Cuba and others in connection with the arrest, prolonged detention, and torture of her son in Cuba, alleging intentional infliction of emotional distress (IIED), inter alia. Entering a default judgment against defendant on the IIED claim, and awarding compensatory and punitive damages to plaintiff, this court held that plaintiff had stated a claim for IIED, and such a claim was authorized under the Foreign Sovereign Immunities Act. The court noted that some courts analyzed tort claims against foreign states by looking to the standards of federal common law, and courts that had applied federal common law looked to Restatement Second of Torts § 46, which was expressly adopted as the basis for an IIED claim in Florida. Saludes v. Republica De Cuba, 655 F.Supp.2d 1290, 1295.

S.D.Fla.2000. Cit. in disc. Blind former employee sued former employer for discrimination under the Americans with Disabilities Act and state law, claiming intentional infliction of emotional distress, and negligent hiring, supervision, and retention. Granting in part employer's motion to dismiss, this court held, inter alia, that employer's conduct was not sufficiently outrageous to support claim of intentional infliction of emotional distress. Gillis v. Sports Authority, Inc., 123 F.Supp.2d 611, 616.

S.D.Fla.1998. Com. (d) quot. in case quot. in sup. and cit. in headnotes. A parcel-service company's driver sued the company for intentional infliction of emotional distress, among other claims, alleging that he had been subject to racial epithets, racial violence, racially discriminatory actions, and retaliation for opposing race discrimination. Plaintiff alleged that defendant fabricated a reckless driving charge in an attempt to fire him; that defendant's business manager told a false story about plaintiff to another employee and referred to plaintiff as a “nigger” in Spanish; and that he was unjustifiably suspended and demoted. This court granted in part and denied in part defendant's motion to dismiss, holding, inter alia, that defendant's actions did not rise to the level of relentless physical and verbal harassment necessary to state an emotional-distress claim. Vamper v. United Parcel Service, Inc., 14 F.Supp.2d 1301, 1302, 1306.

S.D.Fla.1996. Cit. in sup. (Cit. as Restatement of Torts). Employee sued former employer and employer's president for, inter alia, intentional infliction of emotional distress. Plaintiff alleged that she was terminated when she complained about president's unwelcome sexual advances, which included hugging her and making sexually explicit jokes and suggestive comments. Defendants moved to dismiss. Granting in part and denying in part the motion, the court held that, while the conduct complained of was unacceptable, it did not rise to the level of outrageousness required to sustain a claim of intentional infliction of emotional distress. Blount v. Sterling Healthcare Group, Inc., 934 F.Supp. 1365, 1370.

S.D.Fla.1996. Cit. in headnotes, com. (d) quot. in case quot. in disc. A receptionist for a medical-services center sued the center, her supervisor, and a doctor at the center for, among other claims, intentional infliction of emotional distress in light of the doctor's repeated acts of sexual harassment targeted at the receptionist. This court granted in part and denied in part the doctor's motion to dismiss, holding, inter alia, that plaintiff stated a viable emotional-distress claim. Plaintiff alleged a pattern of persistent verbal and physical abuse that culminated in her constructive discharge, and, if established to be true, the doctor's conduct constituted outrageous behavior. Vernon v. Medical Management Associates of Margate, 912 F.Supp. 1549, 1551, 1557, 1559.

S.D.Fla.1995. Cit. in case quot. in sup. Employee sued employer for gender-based employment discrimination and intentional infliction of emotional distress. Granting in part defendant's motion for partial summary judgment, the court held, inter alia, that defendant's alleged failures to pay compensation and benefits, to promote plaintiff or post job openings, and to treat plaintiff in a professional manner did not constitute behavior that was so outrageous and extreme as to sustain plaintiff's intentional infliction of emotional distress claim. Henderson v. Hovnanian Enterprises, Inc., 884 F.Supp. 499, 503.

S.D.Fla.1994. Cit. in headnote, cit. generally in disc., com. (d) quot. in disc. Alleging that their harassing and discriminatory acts forced her to resign her position, a former cash register salesperson sued her former supervisors for, inter alia, intentional infliction of emotional distress. Denying defendants' motion for summary judgment on this count of plaintiff's complaint, the court held that, at this point in the proceedings, the record was insufficiently developed to ascertain whether defendants' conduct was so extreme and offensive as to support plaintiff's demand for relief. Albert v. National Cash Register Co., 874 F.Supp. 1328, 1328, 1331.

S.D.Fla.1993. Cit. in case cit. in sup., quot. in case quot. in sup. Employees sued their employer, asserting Title VII civil rights claims and Florida tort law claims, including one for intentional infliction of emotional distress. This court granted in part the defendants' motion to dismiss, holding, inter alia, that allegations regarding verbal harassment by a co-worker and improper transfer from one state to another did not assert an emotional distress claim under Florida law. Watson v. Bally Mfg. Corp., 844 F.Supp. 1533, 1536.

S.D.Fla.1992. Cit. in sup., subsec. (1) and com. (f) quot. in sup. A county employee sued the county commissioners, alleging intentional infliction of emotional distress. The court denied defendants'

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motion for judgment on the pleadings, holding that employee stated a claim for emotional distress where she alleged that employee's supervisor knew of her mental handicap, harassed employee for absences caused by the handicap and for tardiness resulting from necessary treatment, and maliciously pestered employee with questions about the nature and extent of the handicap. Doe v. Board of County Com'rs of Palm Beach County, Fla., 815 F.Supp. 1448, 1450.

S.D.Fla.1991. Cit. in case cit. in disc., com. (d) quot. in case quot. in disc. Alleging intentional infliction of emotional distress, conspiracy, and loss of consortium, the occupants of a car illegally stopped by the police and their spouses sued the police officers in a civil rights action. This court denied the police officers' motion to dismiss, holding, inter alia, that the car occupants had alleged conduct sufficiently outrageous to support a claim for intentional infliction of emotional distress. The court stated that the acts the police officers were accused of, physically and sexually abusing an elderly deaf woman, forcing two of the other occupants to stand in an area infested with red ants while handcuffed and unable to protect themselves from the painful bites, and forcing three other occupants to sit in the patrol car with the windows closed and the heater running on a hot day constituted outrageous conduct by the officers. McCray v. Holt, 777 F.Supp. 945, 946, 947.

S.D.Fla.1986. Quot. in sup., coms. (d) and (h) quot. in sup. A group of airplane passengers sued the airline after the airplane suffered an engine failure and was forced to return to the airport. The passengers alleged breach of contract, negligence, and entire want of care under state law, and violation of the Warsaw convention under federal law. The court granted, in part, the airline's motion for judgment on the pleadings. The court held that the entire want of care claim could not withstand a motion to dismiss for failure to state a cause of action unless the airline were guilty of another recognized intentional tort. The court rejected the passengers' argument that the airline was guilty of intentional infliction of emotional distress, because there were no facts to support the claim that the airline had acted recklessly or intentionally. In re Eastern Airlines, Inc., Engine Failure, 629 F.Supp. 307, 311, 312, judgment reversed 872 F.2d 1462 (11th Cir.1989), cert. granted 496 U.S. 904, 110 S.Ct. 2585, 110 L.Ed.2d 266 (1990).

M.D.Ga.

M.D.Ga.2012. Cit. in sup. (general cite). Home mortgage borrowers brought conversion and other claims against mortgage lender, seeking punitive damages and damages for emotional distress stemming from lender's failure to properly credit two mortgage payments to their account before eventually correcting the error a year and a half later. Denying in part lender's motion for summary judgment, this court held, among other things, that borrowers could potentially recover emotional-distress damages proximately caused by lender's intentional conversion of their money. The court explained that, under Georgia law, a plaintiff who sought emotional-distress damages without proof of a physical injury was not required to prove all of the elements of the separate tort of intentional infliction of emotional distress if the plaintiff could prove the essential elements of a well-recognized intentional tort and prove that the intentionally tortious conduct

proximately caused the emotional-distress damages. Blackburn v. BAC Home Loans Servicing, LP, 914 F.Supp.2d 1316, 1329.

M.D.Ga.1999. Coms. (d) and (j) quot. in case quot. in sup. Former employee who allegedly was forced to take maternity leave sued former employer for, in part, intentional infliction of emotional distress. Granting defendant's motion for summary judgment, the court held, inter alia, that alleged conduct of defendant's co-owner in forcing plaintiff, when she was eight and one-half months pregnant, to file papers while sitting on the floor, asking her what she would do if her baby were born black, and telling her that she was a liability to the company and was stealing from him when she went to the doctor did not rise to the requisite level of outrageousness and egregiousness to state a viable claim of intentional infliction of emotional distress; furthermore, plaintiff failed to show that she suffered severe emotional distress. Allen v. Commercial Pest Control, Inc., 78 F.Supp.2d 1371, 1380.

M.D.Ga.1991. Com. (d) cit. in case quot. in disc., com. (e) quot. in sup. A vehicle operated by the defendant insurance company's insured collided with the plaintiff's parked car. In the course of having his car repaired, the plaintiff twice contacted the insurance company's claims adjuster, who, on both occasions, allegedly used abusive language and called the plaintiff obscene and insulting names. After one such occasion, the plaintiff suffered a blackout and was hospitalized. The plaintiff sued the insurance company and the claims adjuster for intentional infliction of emotional distress, inter alia. The court denied the defendants' motion for summary judgment, holding that, given that the claims adjuster was in a position to affect the plaintiff's interests, a jury could find that the adjuster's conduct was sufficiently outrageous to support a cause of action for intentional infliction of emotional distress. Brown v. Manning, 764 F.Supp. 183, 187.

N.D.Ga.

N.D.Ga.2017. Com. (d) quot. in case quot. in sup. Insured owner of a home that was destroyed in a fire filed a pro se action against insurer and servicer of the mortgage on her home, alleging that defendants reduced the amount of coverage on her homeowner's insurance policy without her knowledge or consent. This court granted defendants' motion to dismiss plaintiff's claim for intentional infliction of emotional distress, holding that defendants' alleged conduct in lowering or not increasing plaintiff's insurance coverage did not rise to the requisite level of outrageousness as a matter of law. The court explained that, under Restatement Second of Torts § 46, for a party's conduct to be considered outrageous, the conduct had to have been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Griggs v. USAA Casualty Insurance Company, 263 F.Supp.3d 1375, 1381.

N.D.Ga.2009. Subsec. (1) quot. in case quot. in sup., com. (d) quot. in sup. Professor brought various claims against university and its officials in connection with their investigation of his alleged sexual harassment of a university employee. Granting defendant's motion for summary

judgment on plaintiff's claim for intentional infliction of emotional distress, this court held that, while plaintiff alleged that defendants' findings against him caused him intense feelings of embarrassment and humiliation, defendants' actions were not "extreme and outrageous" given the high bar set by Georgia case law, and that, even if defendants' actions could be considered extreme and outrageous, plaintiff failed to point to evidence supporting a crucial element of his claim, namely, that he suffered severe emotional distress as a result. Soloski v. Adams, 600 F.Supp.2d 1276, 1371.

N.D.Ga.2006. Com. (d) quot. in sup. Former employee sued former employer and co-workers for, in part, intentional infliction of emotional distress. This court adopted the magistrate's report and recommendation that defendants be granted summary judgment on grounds that plaintiff failed to demonstrate that defendants engaged in extreme or outrageous conduct; plaintiff's allegations that one of his co-workers verbally abused him on numerous occasions and physically threatened him on at least two occasions, and that another co-worker ratified that conduct by failing to intervene after he complained about the alleged conduct and harassment, were insufficient to create a disputed issue of fact as to whether defendants subjected him to conduct that exceeded all possible bounds of decency. Bozeman v. Per-Se Technologies, Inc., 456 F.Supp.2d 1282, 1363.

N.D.Ga.2005. Subsec. (1) and com. (d) quot. in case quot. in sup. Former employee brought Title VII claims against former employer and its principal, alleging, among other things, sexual harassment by principal. This court, adopting the magistrate judge's report and recommendation, inter alia, granted defendants' motion for summary judgment as to plaintiff's pendent state-law claim for intentional infliction of emotional distress. The court held that plaintiff's allegations of unwanted attention, comments, and contact by principal did not rise to the requisite level of outrageousness and egregiousness to support a claim of intentional infliction of emotional distress under Georgia law, noting that defendants' actions must have been so terrifying as naturally to humiliate, embarrass, or frighten plaintiff. Kimsey v. Akstein, 408 F.Supp.2d 1281, 1306.

N.D.Ga.2005. Com. (d) quot. in disc. After being terminated for violating her employer's expense-reporting policies, employee sued employer, alleging various instances of age and gender-based discrimination and harassment. Granting defendant summary judgment, this court held, inter alia, that plaintiff failed to show that her supervisor's conduct in criticizing her work and rejecting her expense reports met the requisite level of outrageousness or engendered feelings of embarrassment, fright, or outrage so as to support plaintiff's state-law claim for intentional infliction of emotional distress. Additionally, plaintiff's testimony that she experienced anxiety, depression, and stress following her firing was insufficient as a matter of law to show that her emotional distress was severe, since she did not seek medical attention or counseling for any distress. Pierri v. Cingular Wireless, LLC, 397 F.Supp.2d 1364, 1381.

N.D.Ga.2005. Subsec. (1) and com. (d) quot. in case quot. in sup. Former employee brought Title VII claims against former employer and its principal, alleging, among other things, sexual harassment by principal. This court, adopting the magistrate judge's report and recommendation, inter alia, granted defendants' motion for summary judgment as to plaintiff's pendent state-law

claim for intentional infliction of emotional distress. The court held that plaintiff's allegations of unwanted attention, comments, and contact by principal did not rise to the requisite level of outrageousness and egregiousness to support a claim of intentional infliction of emotional distress under Georgia law, noting that defendants' actions must have been so terrifying as naturally to humiliate, embarrass, or frighten plaintiff. Smith v. Akstein, 408 F.Supp.2d 1309, 1335.

N.D.Ga.2002. Subsec. (1) quot. in case quot. in sup., com. (d) quot. in case quot. in sup. Former high school student sued school district, principal, and teacher, alleging that teacher committed sexual misconduct and asserting claims for, inter alia, intentional infliction of emotional distress. Parties cross-moved for summary judgment. Denying in part plaintiff's motion, this court held, inter alia, that, while teacher's conduct in inducing teenagers in participating in fake "experiments" for a "scholarship program" was clearly outrageous, issues of fact remained as to whether student established that he suffered severe emotional distress as a direct result. Hackett v. Fulton County School District, 238 F.Supp.2d 1330, 1371.

N.D.Ga.1998. Subsec. (1), com. (j) quot. in case quot. in disc. Paper-mill employee sued mill for intentional infliction of emotional distress and violations of the Americans with Disabilities Act (ADA), alleging that defendant refused to make certain employment opportunities available to him because of a heart condition. Defendant moved for summary judgment. Granting the motion in part and denying it in part, the court held that, in Georgia, disadvantageous employment actions could not form the basis of a claim for intentional infliction of emotional distress; however, because material factual issues existed as to whether plaintiff could be considered a qualified individual with a disability, summary judgment on the ADA claim was inappropriate. Wilson v. Georgia-Pacific Corp., 4 F.Supp.2d 1164, 1168.

N.D.Ga.1995. Subsec. (1) cit. in case quot. in disc. (Erron. cit. as § 461.) Inmates at a federal penitentiary sued several correctional officers for claims of excessive force, cruel and unusual punishment, failure to provide medical care, assault and battery, and intentional infliction of emotional distress. This court granted in part and denied in part defendants' motion for summary judgment, holding, inter alia, that plaintiffs failed to present any evidence to sustain a claim for intentional infliction of emotional distress, because they provided no evidence that they suffered emotional distress that rose to the requisite level of severity in that they failed to show that they were humiliated, embarrassed, frightened, or outraged by defendants' alleged conduct. Ruble v. King, 911 F.Supp. 1544, 1559.

N.D.Ga.1994. Subsec. (1) cit. in case quot. in disc. (Erron. cit. as § 461). A pregnant Nigerian immigrant who was refused medical treatment because she declined to consent to HIV testing sued the obstetrics and gynecological clinic for, among other claims, intentional infliction of emotional distress. This court, among other dispositions, denied plaintiff's motion for summary judgment on the emotional-distress claim, holding, inter alia, that plaintiff failed to point to any intentional or reckless conduct by any individual defendant that rose to the requisite level of outrageousness or egregiousness. Even if defendants' termination of treatment as a result of plaintiff's refusal to follow defendants' medical advice were deemed to violate Title VI or the Americans with Disabilities Act,

there was no indication that it was done out of any desire to humiliate, frighten or anger plaintiff. Atakpa v. Perimeter Ob-Gyn Associates, P.C., 912 F.Supp. 1566, 1577.

N.D.Ga.1994. Cit. in case quot. in sup. Former manager for janitorial-services provider sued employer for, inter alia, intentional infliction of emotional distress, alleging that she was fired because of her sex and her pregnancy. This court, among other orders, denied plaintiff's motion for summary judgment on her emotional-distress claim, holding that issues of fact existed as to this claim. It reasoned that plaintiff was pregnant, and therefore, arguably, in a particularly susceptible emotional and physical condition; that her division president occupied a position of control over her; that defendant intentionally eliminated her position, subjected her to discriminatory treatment and inferior working conditions, isolated her, and closed her out of meetings; and that she suffered severe emotional distress to the extent that her marriage was ruined, she needed intensive psychological counseling, and she was taking antidepressant medication. Shepherd v. ISS Intern. Service System, Inc., 873 F.Supp. 1550, 1558.

N.D.Ga.1987. Subsec. (1), com. (j) quot. in case quot. in disc. An employee sued her employer in federal court, asserting a federal claim of age discrimination and a pendent state claim for intentional infliction of emotional distress based on allegations that agents and representatives of the employer embarrassed and humiliated her for her failure to receive a promotion. This court granted in part and denied in part the employer's motion for summary judgment, holding that the evidence was insufficient to support a claim of intentional infliction of emotional distress. The court stated that the plaintiff failed to show that her alleged emotional distress was so extreme, severe, and outrageous as to support her claim. Gaston v. Southern Bell Tel. and Tel. Co., 674 F.Supp. 347, 353.

S.D.Ga.

S.D.Ga.2014. Com. (d) quot. in cases quot. in sup. (general cite). Parents and their daughter, who were passengers of airline, brought a claim for intentional infliction of emotional distress (IIED), inter alia, against airline, alleging that defendant's employee publicly attacked them in an airport by suggesting that they could not speak English, that he intentionally or recklessly failed communicate to parents that he had put daughter on standby for two days, and that he forced them to purchase a new ticket for daughter although she already had a valid ticket. Granting in part defendant's motion to dismiss, this court held that plaintiffs failed to state a plausible IIED claim, because defendant's actions were not “extreme and outrageous” under the standards set out in Restatement Second of Torts § 46 and Restatement Third of Torts: Liability for Physical and Emotional Harm § 46. The court explained that the complaint alleged mere insults and failures to perform under an existing contract, which were not sufficient to sustain an IIED claim. Benjamin v. American Airlines, Inc., 32 F.Supp.3d 1309, 1322.

S.D.Ga.1995. Com. (d) quot. in disc., com. (f) cit. in disc. Accident victim's husband brought suit for intentional infliction of emotional distress against insurer, arising from claims adjuster's

statement that plaintiff was a "liar." Granting defendant's motion for a directed verdict, the court held that adjuster's conduct was not tortious as a matter of law, in spite of the facts that plaintiff and adjuster had a "special relationship" by virtue of adjuster's power to damage plaintiff's interests and that adjuster had "special knowledge" of plaintiff's heart condition. The court said that the two factors had little weight and did not lead, ipso facto, to liability, since plaintiff and adjuster had no longstanding relationship of trust, the amount of money at issue was not large, and adjuster was clearly willing to repair plaintiff's truck. Price v. State Farm Mut. Auto. Ins. Co., 878 F.Supp. 1567, 1569, 1573.

S.D.Ga.1995. Cit. in headnote, com. (d) cit. but dist., com. (j) quot. in case quot. in disc. Job applicant who alleged she was rejected three times for the same position sued prospective employer for, inter alia, intentional infliction of emotional distress. Applicant maintained that she was discriminated against because she was prone to epileptic seizures. Employer moved for summary judgment. Granting the motion, the court held that the decision to withhold an offer of employment, even if withheld for improper reasons, was not the type of extreme, outrageous, or egregious conduct that could serve as the basis for a claim of intentional infliction of emotional distress. Moreover, the court did not believe that a reasonable person would suffer extreme emotional distress as a result of the encounters applicant described. Ward v. Papa's Pizza To Go, Inc., 907 F.Supp. 1535, 1536, 1540, 1541.

S.D.Ga.1994. Com. (j) quot. in case quot. in sup. An oil-company employee and her husband sued employer for civil-rights violations and intentional infliction of emotional distress arising from persistent sexual harassment by co-workers. This court granted in part and denied in part employer's motion for summary judgment, holding, inter alia, that plaintiff had no cause of action for emotional distress against employer because the alleged sexual harassment was not committed in furtherance of employer's business, as it occurred outside the scope of plaintiff's coemployees' jobs. The court, therefore, did not need to resolve whether plaintiffs' allegations, which included obscene language, sexual gestures, crank calls, and the presence of pornographic magazines, rose to the requisite level of severity. Mills v. Amoco Performance Products, Inc., 872 F.Supp. 975, 991.

D.Hawaii

D.Hawaii, 2020. Cit. in case cit. in ftn. (general cite). In former employee's claim for conversion against employer's corporate parent and its officers, who allegedly used his credit-card information without authorization for business expenses, this court denied in part defendants' motion to dismiss, holding that plaintiff stated a claim for conversion under Restatement Second of Torts § 242. The court noted that the Hawaii Supreme Court frequently turned to the Restatement Second of Torts for guidance, citing by way of example a case in which it looked to Restatement Second of Torts § 46 in discussing intentional infliction of emotional distress. Jass v. CherryRoad Technologies, Inc., 472 F.Supp.3d 787, 796.

D.Hawaii,

D.Hawaii, 2017. Coms. (e) and (g) quot. in case quot. in sup. Recipient of Medicare and Medicaid, who used a personal-mobility device due to his medical conditions, sued providers of benefits under plaintiff's Medicare and Medicaid plans, alleging that defendants committed the tort of bad faith by withholding approval of his request for a new personal-mobility device and intentionally inflicted emotional distress on him through their litigation tactics. This court granted summary judgment for defendants, holding that, while Restatement Second of Torts § 46 provided that a plaintiff could state a claim for intentional infliction of emotional distress based on an opposing party's litigation tactics in a prior lawsuit, plaintiff's allegations regarding defendants' conduct involved third parties and were not based on defendants' direct interactions with plaintiff; in addition, plaintiff's claim did not concern a previous lawsuit in which plaintiff was successful. Quinones v. UnitedHealth Group Incorporated, 250 F.Supp.3d 692, 707.

D.Hawaii, 2013. Adopted in case quot. in sup., com. (d) quot. in case quot. in sup. Terminated 59-year-old male employee sued former employer, alleging violations of state discrimination laws based on age and gender, and intentional infliction of emotional distress, after his position was eliminated and a younger female co-worker was selected for the newly created position that replaced his position. Granting summary judgment for employer on employee's claim for intentional infliction of emotional distress, this court held, among other things, that, even when viewed in the light most favorable to employee, the evidence did not demonstrate that employer's alleged conduct—in wrongly failing to select him for the newly created position based on discriminatory conduct—was outrageous or beyond all bounds of decency, as required to state such a claim. Hollister v. Mrs. Gooch's Natural Food Markets, Inc., 919 F.Supp.2d 1101, 1110, 1111.

D.Hawaii

D.Hawaii, 2010. Adopted in case quot. in sup., com. (d) quot. in sup., quot. in case quot. in sup. Former security guard/bellman at hotel brought discrimination action against hotel and others, as well as a claim for intentional infliction of emotional distress (IIED) in connection with hotel's handling of an alleged altercation with co-worker. Denying summary judgment for hotel on the IIED claim, this court held that plaintiff raised a genuine issue of material fact that hotel's conduct was outrageous, in light of his allegations that hotel's general manager, who, unlike plaintiff, was not Caucasian, responded to plaintiff's question of, “Why don't you like me?,” by asking, “How many white people do you see on my staff?” The court noted that, while, under Hawaii law, an IIED claim could not be sustained by threats, annoyances, petty oppressions, or other trivialities, sexually harassing behavior, racial slurs, and accusations of criminal conduct could all possibly be considered outrageous conduct. Hughes v. Mayoral, 721 F.Supp.2d 947, 964, 965.

D.Hawaii, 2009. Adopted in case quot. in sup., com. (i) quot. in sup. Parents of child who was either stillborn or died shortly after birth sued hospital after it misplaced child's remains, which were never found. Denying summary judgment for hospital on plaintiffs' claim for intentional

infliction of emotional distress, this court held, inter alia, that a reasonable person could find that hospital's actions were reckless and outrageous; hospital delayed issuing birth and death certificates over six months after child's death even though it knew bodies could not be removed from the morgue without a death certificate and the morgue could not accommodate bodies for a long period of time, and hospital's own expert hypothesized that someone with access to the locked morgue might have "inadvertently" discarded the remains. Ritchie v. Wahiawa General Hosp., 597 F.Supp.2d 1100, 1110, 1112.

D.Hawaii, 2006. Com. (d) quot. in sup. Union member sued union employee for, among other things, allegedly filing a false police report accusing plaintiff of assaulting and robbing defendant at an illegal cockfight and repeating those accusations at a general union meeting. This court denied defendant's motion to dismiss plaintiff's claim for intentional infliction of emotional distress, holding, inter alia, that a finder of fact could reasonably determine that defendant's actions constituted outrageous and reckless conduct. The court noted that where reasonable persons differed as to whether the acts alleged were sufficiently outrageous to form the basis for a claim of intentional infliction of emotional distress, the question should be left to a jury. Machado v. International Ass'n of Heat & Frost Insulators & Asbestos Workers, 454 F.Supp.2d 1056, 1063.

D.Hawaii, 2005. Com. (d) quot. in sup. Former employee sued employer, supervisor, and others for, inter alia, intentional infliction of emotional distress, alleging that he was terminated and otherwise retaliated against after he made an anonymous complaint about employer on employer's confidential compliance hotline. Denying employer's motion for summary judgment as to the claim for emotional distress, this court held that questions of material fact remained as to whether the acts were in retaliation for employee's protected activity, and that the alleged conduct, including supervisor's refusal to respond to employee's inquiries, her public scolding of employee, and her reassignment of projects in such a manner as to impact his pay and employment evaluation, when viewed in the light most favorable to employee, could be found to constitute outrageous behavior. Lopes v. Kapiolani Medical Center for Women & Children, 410 F.Supp.2d 939, 957.

D.Hawaii, 2005. Adopted in case quot. in sup. Special-education tutor brought civil-rights action against state education department and its officials, asserting various state and federal claims based on alleged racial and sexual discrimination. The court granted judgment on the pleadings for one official sued in her individual capacity judgment for intentional infliction of emotional distress, holding, as a matter of law, that official's implementation of a policy prohibiting male teachers from tutoring female students did not constitute objectively-outrageous conduct, since, inter alia, it applied to all teachers and did not single out plaintiff; additionally, plaintiff alleged, at most, embarrassment, not emotional distress, from receiving fewer tutoring assignments. Sherez v. State of Hawai'i Dept. of Educ., 396 F.Supp.2d 1138, 1148.

D.Hawaii, 2005. Com. (d) cit. in case quot. in sup. After employer hotel failed to accommodate his request for light duty, hotel bartender on workers' compensation leave sued employer for violating Americans with Disabilities Act, alleging negligent and intentional infliction of emotional distress because employer's agent told union president that plaintiff was not welcome to return to

employer's hotel. This court granted employer summary judgment, holding, inter alia, that plaintiff failed to state claim for intentional infliction of emotional distress, since agent's conduct was not outrageous or unreasonable. The court determined that telling a union representative who would ultimately relay to employee that employee was terminated—and even going so far as to tell representative that employee could not return to employer's premises—did not go beyond all bounds of decency. Soone v. Kyo-Ya Co., Ltd., 353 F.Supp.2d 1107, 1116-1117.

D.Hawaii, 2004. Cit. in sup., coms. (d) and (f) quot. in sup. Nonprofit corporation and three African-American representatives sued parks employee and city, which had issued permit that did not allow vending as money-raising activity at corporation event and failed to clean park in advance of event, alleging, in part, that employee's racial slurs and discriminatory acts constituted intentional infliction of emotional distress. Granting in part defendants' motion for summary judgment, this court held, inter alia, that plaintiffs did not produce evidence concerning emotional distress suffered as a result of employee's racial slurs and acts of discrimination. Epileptic Foundation v. City and County of Maui, 300 F.Supp.2d 1003, 1014, 1015.

D.Hawaii, 2004. Com. (d) quot. in sup. Employer fired employee who gave urine sample pursuant to employer's drug-testing policy after diagnostic laboratory erroneously reported that sample was inconsistent with human urine. Laboratory did not inform employer of its mistake for two years. Employee sued laboratory for intentional infliction of emotional distress. This court denied defendant's motion for summary judgment, holding that, regarding the emotional-distress claim, issues of material fact existed as to whether defendant's delay in disclosure rose to requisite level of outrageous conduct, since reasonable juror could find that defendant's failure to provide information about urine test to plaintiff in a timely manner, which resulted in the loss of his job for two years and caused his depression, was extreme and outrageous conduct. Nagata v. Quest Diagnostics Inc., 303 F.Supp.2d 1121, 1127.

D.Hawaii, 2001. Cit. in case cit. in sup., quot. in ftn. Worker whose employment was terminated after he suffered a back injury on the job sued former employer for, in part, intentional infliction of emotional distress. The court denied defendant's motion for summary judgment on plaintiff's claim to the extent that plaintiff sought to recover under general maritime law for intentional infliction of emotional distress relating to defendant's allegedly wrongful reduction of maintenance payments to plaintiff, stating that a genuine issue of material fact existed as to whether the reduction constituted extreme and outrageous conduct or unconscionable abuse. Fawkner v. Atlantis Submarines, Inc., 135 F.Supp.2d 1127, 1135, 1136.

D.Hawaii, 2001. Com, (h) cit. in case quot. in sup. Hawaii resident claiming to be daughter of deceased movie star sued New York magazine for libel per se, defamation, tortious infliction of emotional distress, tortious interference with contractual relations, unjust enrichment, and punitive damages in connection with magazine article. Granting magazine's motion for judgment on the pleadings, or in the alternative, summary judgment, this court held, inter alia, that plaintiff did not establish an intentional tort to sustain claim for intentional infliction of emotional distress. Miracle v. New Yorker Magazine, 190 F.Supp.2d 1192, 1202.

D.Hawaii, 2000. Com. (d) quot. in disc. Owner of a lumber business sued police department, police chief, police officers, and others for violations of 42 U.S.C. § 1983 and several state law torts, including intentional and negligent infliction of emotional distress. This court denied the summary-judgment motions of the police department and the county police officer on the emotional-distress claim, holding, inter alia, that fact issues existed as to whether defendants' actions of yelling at plaintiff, arresting him, dragging him across the floor, and tossing him into a police car because he protested the wrongful taking of various pieces of property were unreasonable, and whether officer should have recognized that his actions were likely to result in plaintiff's depression and suicidal thoughts. Pourny v. Maui Police Dept., County of Maui, 127 F.Supp.2d 1129, 1147.

D.Hawaii, 1999. Com. (d) quot. in case quot. in sup. African-American employee who claimed that he had suffered racial harassment, discrimination, and retaliation sued employer for, in part, intentional infliction of emotional distress. Denying in part defendant's motion for summary judgment, this court held, inter alia, that genuine issues of material fact existed as to whether defendant's failure to promote plaintiff to several positions, suspension of plaintiff, and alleged racial insults rose to the level of outrageous conduct necessary to maintain a claim for intentional infliction of emotional distress. Lesane v. Hawaiian Airlines, 75 F.Supp.2d 1113, 1121.

D.Hawaii, 1998. Com. (d) quot. in case quot. in sup. and cit. generally in headnote. Employee sued former employer for intentional infliction of emotional distress, among other claims, after his employment relationship was abruptly ended when he failed to provide medical certification for his illness. In violation of its employee manual, defendant failed to give two weeks' notice of termination, and it violated the law when it told the disability insurer that plaintiff had received unemployment and disability payments at the same time. This court denied in part defendant's motion for summary judgment, holding, inter alia, that fact issues existed as to whether a reasonable man could suffer severe distress under these circumstances. UEMA v. Nippon Exp. Hawai'i, Inc., 26 F.Supp.2d 1241, 1244, 1250.

D.Hawaii, 1996. Com. (d) quot. in case cit. in ftn. Former airline employee who alleged that he was discharged because of a psychological disability sued the airline and his former supervisor for intentional infliction of emotional distress, inter alia. Granting defendants' motion for summary judgment, the court held, in part, that plaintiff's claim against former supervisor individually for intentional infliction of emotional distress was barred by Hawaii's two-year statute of limitations. Alternatively, the court found that the allegations in plaintiff's affidavit concerning his alleged harassment at work raised no genuine issue of outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Ellison v. Northwest Airlines, Inc., 938 F.Supp. 1503, 1516.

D.Hawaii, 1995. Cit. in sup., com. (d) quot. in sup. An insured and his beneficiary sued a life insurer and its agent who sold him a universal life policy, alleging, among other things, that defendants marketed and sold the policy as part of a plan of deliberately and fraudulently selling such policies during a period of high interest rates. Plaintiffs alleged that defendants'

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extrinsic representations induced them to switch from "whole" to "universal" life, that defendants later wrongfully failed to provide them with information, and that defendants' actions resulted in emotional distress to the beneficiary. This court dismissed in part, holding, inter alia, that defendants' conduct was not outrageous. Keiter v. Penn Mut. Ins. Co., 900 F.Supp. 1339, 1348.

D.Hawaii, 1995. Cit. in case quot. in disc., subsec. (1) quot. in ftn., com. (d) quot. in ftn. and cit. in case quot. in disc. Former crew member sued owner of cargo container ship for, inter alia, intentional infliction of emotional distress under the Jones Act, alleging that he collapsed due to stress and excessive abuse by his superior officer. Granting in part defendant's motion for partial summary judgment, the court held that, even assuming that plaintiff suffered severe emotional injury, he was not subjected to the unconscionable abuse or extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Yballa v. Sea-Land Services, Inc., 919 F.Supp. 1428, 1437.

D.Hawaii, 1994. Com. (d) quot. in part in case cit. in sup. Former employee sued former employer and former supervisor for intentional infliction of emotional distress, among other claims, contending that former supervisor interrupted her when she spoke, yelled at her, changed his instructions to her, told her she could quit if she was unhappy, gave her conflicting work instructions, and told her not to question his actions. The court granted defendants summary judgment, holding, inter alia, that former supervisor's comments, while distasteful, did not rise to level of outrageousness needed to maintain claim. Bragalone v. Kona Coast Resort Joint Venture, 866 F.Supp. 1285, 1294.

D.Hawaii, 1988. Cit. in disc., com. (h) quot. in case cit. in disc. An employee who alleged that a co-worker physically assaulted her by grabbing her breast and buttock was moved into a newly created position and then fired for poor job performance after less than two weeks. The employee sued her employer and coemployees, alleging, inter alia, intentional infliction of emotional distress arising out of her discharge. The court denied the defendants' motion for partial summary judgment, holding that the conduct of the defendant who physically assaulted the plaintiff was sufficiently outrageous to support a claim for emotional distress and that it was a question of fact as to whether the conduct of the other defendants in participating in, encouraging, or condoning those actions also rose to the required level of outrageousness. Lapinad v. Pacific Oldsmobile-GMC, Inc., 679 F.Supp. 991, 995, 996.

D.Idaho

D.Idaho, 1988. Com. (j) quot. in sup. A man sued his insurer for intentional infliction of emotional distress, inter alia, alleging that the insurer, which failed to make timely payment of two monthly benefits on his disability insurance, knew or should have known that the delayed payments would cause him financial and emotional injury. The court granted the defendant's motion to dismiss, holding that as a legal certainty the claim did not exceed the jurisdictional amount of $10,000, since the plaintiff's affidavit in support of the jurisdictional amount did not reveal the severe emotional

distress required to warrant recovery of damages. Windsor v. Guarantee Trust Life Ins. Co., 684 F.Supp. 630, 632.

D.Idaho Bkrtcy.Ct.

D.Idaho Bkrtcy.Ct.2001. Com. (j) cit. in case quot. in sup. Chapter 13 debtor and trustee of his bankruptcy estate brought an adversary proceeding against company that purchased at a discounted present value debtor's annuity payments from a structured personal-injury settlement, claiming damages for, in part, intentional infliction of emotional distress. Entering judgment for plaintiffs on other grounds, the court held, inter alia, that, although defendant's pursuit of the transaction with debtor despite its knowledge of debtor's brain injury from a car accident, lack of employment, and living arrangements with his parents was extreme and outrageous, debtor and his family failed to show that they suffered the requisite level of severely disabling emotional distress to support their claim. In re Wiggins, 273 B.R. 839, 879.

C.D.Ill.

C.D.Ill.2010. Com. (j) quot. in case quot. in sup. Female first-grade students, through their parents, sued school administrators, among others, asserting a common-law claim for intentional infliction of emotional distress (IIED) as part of their suit for sexual harassment, sexual discrimination, and sexual abuse by a teacher in violation of state and federal statutes. Denying defendants' motion to dismiss the claim, this court held that plaintiffs sufficiently alleged behavior on administrators' part that rose to the level of extreme and outrageous conduct, when viewed as a whole and in light of plaintiffs' tender age when the abuse occurred; plaintiffs alleged that administrators knew that teacher was making extensive use of his work computer to view pornography on the Internet and was sequestering plaintiffs in a locked classroom at least weekly for over six months, and that administrators concealed their knowledge in order to protect themselves, knowing that doing so would allow teacher to continue his abuse. Doe 20 v. Board of Educ. of Community Unit School Dist. No. 5, 680 F.Supp.2d 957, 984.

C.D.Ill.2009. Com. (j) quot. in case quot. in sup. Minor students and their parents sued students' former first grade teacher, alleging that teacher sexually harassed students, sexually groomed them for the purpose of introducing sexual abuse, and/or sexually abused them. Denying defendant's motion to dismiss plaintiffs' claim for intentional infliction of emotional distress, this court held, inter alia, that plaintiffs sufficiently pled the elements of such a claim under Illinois law; it was obvious from plaintiffs' allegations that defendant engaged in “truly extreme and outrageous conduct” and that he intended to inflict severe emotional distress on students, and the alleged conduct allowed a plausible inference that students had suffered severe emotional distress. Doe ex rel. Doe v. White, 627 F.Supp.2d 905, 912.

C.D.Ill.1997. Cit. in headnotes, com. (d) quot. in case quot. in disc. Individual who was arrested in connection with the beating of a gas station attendant sued arresting officers for, inter alia, false

arrest, false imprisonment, and intentional infliction of emotional distress. Arrestee's wife and sister, who were questioned over a four-day period, also asserted claims for false imprisonment and intentional infliction of emotional distress. Officers moved for judgment as a matter of law. Granting the motion, the court held, in part, that officers had probable cause to arrest arrestee; that defendants could not be found liable for false imprisonment where arrestee was held in jail over the weekend as the result of an agreement between his attorney and officers, and where wife and sister were free to terminate their questioning at any time; and that officers' conduct was not so outrageous and extreme as to go beyond all possible bounds of decency in a civilized society. Cornish v. Papis, 962 F.Supp. 1103, 1105, 1111.

C.D.Ill.1997. Com. (d) cit. in case quot. in disc. Employees of state Department of Children and Family Services sued state for, inter alia, intentional infliction of emotional distress in connection with the manner in which they were terminated. Granting defendants' motion for judgment as a matter of law, the court held, in part, that plaintiffs were unable to show that they suffered severe emotional distress as a result of the alleged wrongdoing. Ryan v. Ill. Dept. of Children & Family Services, 963 F.Supp. 1490, 1512, reversed 185 F.3d 751 (7th Cir.1999).

N.D.Ill.

N.D.Ill.2023. Cit. in case cit. in sup.; com. (e) cit. in case cit. in sup.; com. (j) quot. in case quot. in sup. and quot. in case quot. in ftn. Battery suspect sued, among others, police officer who responded to an altercation between suspect's group of friends and owner and bouncers of nearby bar, alleging that officer's use of force when arriving on scene and false testimony at suspect's criminal trial for battery to cover up officer's misconduct caused suspect extreme emotional distress. This court denied officer's motion for summary judgment, holding that there was a genuine issue of material fact as to whether officer's conduct was extreme and outrageous under Restatement Second of Torts § 46. The court noted that § 46 identified police officers as an example of a person with authority over others and whose degree of power or authority could impact whether the at-issue conduct was deemed outrageous. Bedford v. Dewitt, 662 F.Supp.3d 856, 879-881, 887-888.

N.D.Ill.2021. Coms. (d) and (j) quot. in case quot. in sup. Pretrial detainees at a county juvenile detention center filed a class action against, among others, county, center's superintendent, and television network, alleging that superintendent's decision to allow network to film portions of a television show at the center caused detainees to experience increased confinement and interruptions to school and recreation. This court granted summary judgment for county and superintendent on detainees' claims for intentional infliction of emotional distress, holding that detainees failed to show that their harm was sufficiently severe to support such a claim under Restatement Second of Torts § 46. The court pointed out that detainees had not submitted evidence that they suffered any emotional distress beyond mere annoyance, frustration, or stress, which did not supply a basis for a claim for intentional infliction of emotional distress under Illinois law. T.S. v. Twentieth Century Fox Television, 548 F.Supp.3d 749, 783, 784.

N.D.Ill.2020. Com. (d) quot. in case quot. in sup.; com. (j) quot. in case cit. and quot. in sup. Former fiancée and her parents filed a claim for, among other things, intentional infliction of emotional distress against former fiancé and his parents in connection with allegations that defendants surreptitiously listened to and recorded a private conversation between fiancée and her parents and later disseminated the recorded conversation to others. This court granted defendants' motion to dismiss plaintiffs' emotional-distress claim, holding, among other things, that plaintiffs had not alleged sufficiently extreme and outrageous conduct, nor did their allegations plausibly suggest that defendants intended to cause distress so severe that no reasonable person could be expected to endure it, or were aware of a high probability that their actions would cause such distress, as required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. Gross v. Chapman, 475 F.Supp.3d 858, 864, 865.

N.D.Ill.2019. Coms. (d) and (j) quot. in case quot. in sup. Female city police officer, who had refused to date male state trooper, sued state trooper and his co-worker, alleging that co-worker, at state trooper's request, handcuffed her and locked her in the back of his cruiser for six hours, drove her around the city and at one point pretended to let her go, all while taunting her and showing her embarrassing videos of herself. This court denied defendants' motions to dismiss, holding that plaintiff stated a claim against them for intentional infliction of emotional distress under Illinois law and Restatement Second of Torts § 46. The court reasoned that plaintiff adequately pleaded that co-worker's conduct was extreme and outrageous, as evidenced in part by the fact that he disabled his dashboard camera, and that she suffered severe emotional distress requiring psychological treatment as a result of the ordeal. Molina v. Latronico, 430 F.Supp.3d 420, 441.

N.D.Ill.2017. Com. (d) cit. in case quot. in sup. Male student brought claims for, among other things, intentional infliction of emotional distress against college and female classmate, alleging that college wrongfully suspended him after classmate falsely accused him of sexually assaulting her while she was incapacitated by alcohol. This court granted college's motion to dismiss student's claim for intentional infliction of emotional distress, holding that, even if college's resolution of classmate's sexual-assault complaint against student was unfair or unreasonable, student did not allege conduct that constituted the type of extreme, targeted, and malicious conduct required for an intentional infliction of emotional distress claim under Restatement Second of Torts § 46. Doe v. Columbia College Chicago, 299 F.Supp.3d 939, 964.

N.D.Ill.2015. Com. (d) cit. in case quot. in sup. Former prisoner who was incarcerated for 20 years for a rape and battery before DNA evidence eliminated him as a source of the semen found on the victim brought claims for malicious prosecution and intentional infliction of emotional distress (IIED) against forensic serologist who failed to exclude him as a source of the semen found on the victim and against dentists who testified that he had left bite marks on the victim. This court granted in part defendants' motion for summary judgment, holding that prisoner failed to identify evidence sufficient to maintain his malicious-prosecution claim against serologist or dentists, and that he therefore could not maintain his IIED claim against them. The court noted that, under Illinois law, which followed Restatement Second of Torts § 46, the hurdle for an IIED claim was

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even higher than for a malicious-prosecution claim, where, as here, the safe offending conduct formed the basis of both claims. Starks v. City of Waukegan, 123 F.Supp.3d 1036, 1063.

N.D.Ill.2014. Com. (d) quot. in case quot. in sup. Widow, as administrator of the estate of pretrial detainee who experienced a seizure and died while he was in custody at a county jail, sued correctional officers at the jail, alleging, among other things, intentional infliction of emotional distress (IIED). This court denied defendants' motion for summary judgment on the IIED claim, holding that there were questions of fact as to whether defendants knew that decedent was suffering seizures and ignored his suffering. The court explained that a reasonable jury could find that ignoring a patently severe medical condition such as a seizure was extreme and outrageous conduct under Restatement Second of Torts § 46, especially because defendants had complete authority over decedent during his incarceration. Awalt v. Marketti, 74 F.Supp.3d 909, 941-942.

N.D.Ill.2013. Com. (d) quot. in case quot. in sup. Arrestee brought, inter alia, a claim for intentional infliction of emotional distress against city police officers, after defendants arrested him for drug offenses without probable cause, transported him around town, and brought him to jail, where he stayed for eight months. Denying defendants' motion for summary judgment as to this claim, this court held that the evidence showed that defendants engaged in extreme and outrageous conduct, especially given that they were abusing their power if they did indeed engage in the alleged acts. The court further held that there was sufficient evidence that arrestee actually suffered severe emotional distress, because his alleged anxiety, depression, helplessness, frustration, impatience and sadness, together with physical symptoms such as panic attacks and "rushes" as a result of his distress, constituted a degree of distress that no reasonable person should be expected to withstand. Padilla v. City of Chicago, 932 F.Supp.2d 907, 930.

N.D.Ill.2011. Com. (d) quot. in case quot. in sup. Doctor brought claim for intentional infliction of emotional distress (IIED), inter alia, against medical center and former supervisor, alleging that defendants' course of conduct throughout his residency at medical center caused him extreme emotional distress. Granting defendants' motion to dismiss the IIED claim, this court held that plaintiff's allegations that he was, among other things, placed on academic probation without being accused of specific deficiencies and reprimanded undeservedly and hypercritically would, if proven, demonstrate that he was subjected to an unfair work environment, but would not be so extreme and outrageous as to exceed all bounds of human decency, as required to state a claim for IIED under Arizona law. Chi v. Loyola University Medical Center, 787 F.Supp.2d 797, 807.

N.D.Ill.2011. Com. (d) quot. in disc. Pregnant former airline employee sued airline for intentional infliction of emotional distress (IIED), inter alia, alleging that she suffered severe distress as a result of termination from her job, which she believed was motivated by gender discrimination, among other things. This court granted summary judgment for defendant on the IIED claim because, in order to prove IIED under the Restatement and Illinois law, a plaintiff had to show that a defendant's conduct was so extreme as to go beyond all possible bounds of decency, and plaintiff did not challenge summary judgment on this issue. Mashal v. Royal Jordanian Airlines, 837 F.Supp.2d 884, 891.

N.D.Ill.2011. Com. (j) quot. in sup. After condominium owner suffered a serious head injury and was prescribed an emotional support dog, condominium association, which had a no-pets policy, imposed limitations on where in the building owner could bring her dog; owner and her husband sued association and others for intentional infliction of emotional distress (IIED), inter alia, alleging that defendants repeatedly harassed and humiliated them, tracked their movements, imposed unreasonable demands and restrictions, and made them feel unsafe and unwelcome in their own home. Granting defendants' motion to dismiss the IIED claim, this court held that plaintiffs' allegations were insufficient because defendants' conduct was neither extreme nor outrageous. The court reasoned, among other things, that plaintiffs' allegations amounted to a dispute over whether defendants went far enough in accommodating a disability, an issue that would be decided in plaintiff's separate federal statutory failure-to-accommodate claim. Stevens v. Hollywood Towers and Condominium Ass'n, 836 F.Supp.2d 800, 812.

N.D.Ill.2009. Com. (d) quot. in case quot. in sup. Former employee sued former employer and supervisor, alleging, inter alia, that defendants wrongfully caused her to suffer "mental stress." Granting defendants' motion to dismiss, this court held that defendants' alleged conduct in terminating plaintiff in violation of the Age Discrimination in Employment Act, as well as "publicly scolding" her and "shouting venomously" at her, was not enough to constitute extreme and outrageous conduct so as to be actionable as intentional infliction of emotional distress. The court pointed out that the complaint was devoid of any factual material to support plaintiff's conclusory allegation that she "reasonably found the behavior to be more than petty or mere insults." Curran v. JP Morgan Chase, N.A., 633 F.Supp.2d 639, 643.

N.D.Ill.2004. Com. (d) quot. in ftn. and quot. in case quot. in ftn. Former county jail corrections officers sued fellow officers, supervisors, and county, alleging harassment and retaliation for plaintiffs' expressed willingness to disclose instances of excessive force used against inmates. Denying in part defendants' motion to dismiss, this court held, inter alia, that plaintiffs stated claim for intentional infliction of emotional distress where they alleged a death threat and deliberate acts, such as not providing backup when requested and not investigating a prisoner attack, all of which, in prison context, put officers in harm's way. Fairley v. Andrews, 300 F.Supp.2d 660, 667.

N.D.Ill.2004. Com. (d) quot. in case quot. in disc. City resident who allegedly was threatened by her sister brought federal and state-law claims against police officers and city after officers failed to investigate resident's allegations or arrest resident's sister. Granting officers' motion for summary judgment, the court held that, as to resident's intentional-infliction-of-emotional-distress claim, resident failed to allege any conduct by officers that was so extreme or outrageous as to go beyond all possible bounds of decency, nor did she identify any severe emotional distress suffered as a result of officers' unactionable laughter and inappropriate comments. Farrar v. Bracamondes, 332 F.Supp.2d 1126, 1131.

N.D.Ill.2003. Com. (d) quot. in sup. and quot. in case quot. in sup. Police officer for public railroad corporation sued corporation and supervisor, among others, for, in part, intentional

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infliction of emotional distress, after he was exonerated of charges of robbery and possession of a controlled substance. Denying in part defendants' motion to dismiss, the court held, inter alia, that plaintiff's allegations that supervisor made false statements to city police officers, withheld exculpatory evidence, and testified falsely at plaintiff's criminal trial stated a claim for intentional infliction of emotional distress against supervisor and vicariously against corporation. Bergstrom v. McSweeney, 294 F.Supp.2d 961, 969.

N.D.Ill.2003. Com. (d) quot. in case quot. in disc. African-American plaintiff sued city and police officers for, in part, intentional infliction of emotional distress, after officers refused to investigate and arrest plaintiff's sister, who had threatened plaintiff with bodily harm, and laughed at a threatening voicemail message left by plaintiff's sister. Denying in part defendants' motion to dismiss, the court held, inter alia, that, although the facts that plaintiff alleged did not qualify as extreme or outrageous, as required to support a claim for intentional infliction of emotional distress, federal notice-pleading standards did not require her to allege all facts in support of her claim. Farrar v. City of Chicago, 291 F.Supp.2d 747, 754.

N.D.Ill.2002. Coms. (d) and (j) quot. in cases quot. in disc. Former employee sued former employer and its parent company, asserting federal-law claims for discrimination based on sex and disability, and state-law claims in tort and contract. Denying in part defendant's motion to dismiss, the court held, inter alia, that plaintiff's allegations that, despite numerous complaints, she was subjected to a repeated pattern of sexual harassment for almost six years sufficed to state a claim of intentional infliction of emotional distress in a notice-pleading regime. Arnold v. Janssen Pharmaceutica, Inc., 215 F.Supp.2d 951, 961.

N.D.Ill.2002. Com. (d) quot. in case quot. in sup., com. (e) cit. in sup. Female employees sued former employer and supervisor for intentional infliction of emotional distress, inter alia, alleging sexual harassment and hostile work environment. This court denied defendants' motion to dismiss the emotional-distress claim, holding, inter alia, that the misconduct alleged by plaintiffs might rise to the requisite level of outrageousness. Plaintiffs sufficiently alleged inappropriate and offensive sexual comments, unwelcome and unwanted sexual advances, and numerous occasions of harmful and offensive touching by their superior. Plaintiffs further alleged that employer knew of the sexual harassment and discrimination and, in response to complaints, retaliated by raising performance standards or directly discharging each plaintiff. Spahn v. International Quality & Productivity Center, 211 F.Supp.2d 1072, 1076.

N.D.Ill.2002. Com. (d) quot. in disc. Employee sued former employer and supervisor for, in part, intentional infliction of emotional distress, alleging that she was sexually harassed by supervisor, and that employer retaliated against her for complaining about sexual harassment by changing her working conditions and then firing her. This court granted in part employer's motion for summary judgment, holding, inter alia, that since plaintiff's only theory of recovery on emotional-distress claim sounded in retaliation, it was not independent of Illinois Human Rights Act, and was preempted. The court noted that although supervisor's assault was boorish, offensive, and inappropriate, and changes in plaintiff's work environment that followed were unpleasant, those

actions alone were not outrageous; however, a jury could have found that changes in work environment were retaliatory, and therefore extreme and outrageous. Thomas v. Habitat Co., 213 F.Supp.2d 887, 898.

N.D.Ill.2000. Com. (d) quot. in case quot. in disc. A man who was prosecuted for the murder of his wife and acquitted by a jury sued a police officer, the sheriff, and the county coroner for intentional infliction of emotional distress, among other claims. This court granted defendants summary judgment, holding, inter alia, that defendants' conduct did not rise to the level required for intentional infliction of emotional distress, because plaintiff did not allege that he was framed in the sense that evidence was planted, material perjury occurred, or exculpatory evidence was withheld from the prosecutors who ultimately made the decision to bring the case to the grand jury. Nugent v. Hayes, 88 F.Supp.2d 862, 869.

N.D.Ill.1999. Com. (d) quot. in case quot. in ftn. College athlete sued her former basketball coach, the university, and its board of trustees for sexual harassment and intentional infliction of emotional distress, among other claims. This court dismissed plaintiff's complaint, holding, inter alia, that plaintiff's emotional-distress claim was barred by the statute of limitations. The court noted that plaintiff's complaint did not include allegations of the kind of extreme and outrageous conduct that was required for this claim. Turner v. McQuarter, 79 F.Supp.2d 911, 918.

N.D.Ill.1998. Com. (j) quot. in case quot. in disc. A tenant who was evicted from her apartment sued the apartment owner and manager for, among other claims, intentional infliction of emotional distress, age discrimination, and sexual discrimination and harassment. This court granted defendants summary judgment, holding, inter alia, that defendants' conduct was not outrageous because, at the very most, plaintiff was subject to a few insults and the disfavor of building management. In addition, plaintiff failed to provide evidence of severe emotional distress. Despite plaintiff's claims of suffering anxiety, sleepless nights, nightmares, and a tarnished reputation, she did not provide evidence that she suffered distress so severe that no reasonable person could endure it. Cavalieri-Conway v. L. Butterman & Assoc., 992 F.Supp. 995, 1011, judgment affirmed 172 F.3d 52 (7th Cir.1999).

N.D.Ill.1997. Cit. in headnote, com. (d) cit. in case quot. in disc., com. (j) quot. in case quot. in disc. Individual who planned to write a book detailing his alleged drug use with nationally syndicated television talk-show host sued host for, inter alia, intentional infliction of emotional distress after defendant was quoted in tabloid newspaper as stating that plaintiff was a liar who could not be trusted or believed, and denying any prior relationship with him. Defendant moved to dismiss. Granting the motion, the court held, in part, that defendant's conduct was not sufficiently outrageous, nor was plaintiff's mental distress sufficiently severe, to give rise to an action for intentional infliction of emotional distress. Cook v. Winfrey, 975 F.Supp. 1045, 1048, 1054, 1055, affirmed in part, reversed in part 141 F.3d 322 (7th Cir.1998). See above case.

N.D.Ill.1996. Cit. in headnote, coms. (d) and (j) quot. in case quot. in disc. Former employee sued former supervisor and employer for, inter alia, intentional infliction of emotional distress,

after supervisor rated his performance as poor and placed him on a "performance action plan." Defendants moved to dismiss. Granting the motion, the court held that defendants' conduct was not so outrageous as to be considered intolerable or extreme, nor could plaintiff's alleged emotional distress be deemed unendurable. Lewis v. Cotton, 932 F.Supp. 1116, 1116, 1118.

N.D.Ill.1995. Com. (d) quot. in case quot. in sup., illus. 1 quot. in sup. A female employee and her child sued her employer and her supervisor for, among other claims, intentional infliction of emotional distress, alleging that the supervisor's harassment caused employee to suffer severe stress, mental anguish, sleeplessness, embarrassment, and humiliation, which proximately caused the premature birth of her son. This court, among other dispositions, granted defendants' motion to dismiss the child's emotional-distress claim, holding, inter alia, that a fetus could not have suffered emotional distress. However, the court refused to dismiss the mother's emotional-distress claim, holding that to subject an expectant mother to repeated harassment of the type alleged at the workplace, at home, and at the hospital immediately prior to labor—including chastising her for missing work when she had gone into premature labor—could indeed be extreme and outrageous conduct. Patterson v. Xerox Corp., 901 F.Supp. 274, 278, 279.

N.D.Ill.1995. Com. (d) cit. in case quot. in sup. Woman sued town and individual police officers for, inter alia, intentional infliction of emotional distress after officers conducted a warrantless search of her home, attempted to elicit a bribe from her, and provided false testimony in order to have her indicted and tried for intimidation. Defendants moved to dismiss on the ground that the allegations were insufficient. Granting in part and denying in part the motion, the court held that defendants abused their positions of power when they unsuccessfully demanded a bribe from plaintiff, then tapped her phone and fabricated testimony in order to secure the indictment, conduct the court believed would lead an average community member to become aroused and cry, "Outrageous!" Treece v. Village of Naperville, 903 F.Supp. 1251, 1260.

N.D.Ill.1994. Com. (d) quot. in case quot. in disc. Former employee sued her former employer, asserting civil rights and other claims, including intentional infliction of emotional distress, allegedly arising from her work environment. Granting in part employer's motion to dismiss, the court held, inter alia, that, under Illinois law, allegations that employee was discriminated against for taking pregnancy leaves, was exposed to a work atmosphere of offensive and tasteless humor of a sexual nature, was given demeaning work assignments, was sexually harassed and discriminated against in promotions and transfers, and was forced to endure retribution and harassment designed to prevent women from obtaining the status of partner in the company were insufficient to support an emotional distress claim. Piech v. Arthur Andersen & Co., S.C., 841 F.Supp. 825, 831.

N.D.Ill.1994. Com. (d) quot. in case quot. in sup. In employment-discrimination case, former employee asserted a pendent state tort claim against former employer for intentional infliction of emotional distress. Granting defendant's motion to dismiss, the court held, inter alia, that plaintiff did not state a claim for intentional infliction of emotional distress, since plaintiff's allegations of disparate treatment by her former supervisor, albeit unpleasant and humiliating, were not extreme enough to constitute outrageous conduct; moreover, plaintiff failed to allege that supervisor either

specifically intended to cause or knew that her oppressive behavior had a high probability of causing plaintiff emotional distress, and plaintiff failed to plead actionable emotional distress. Whitehead v. AM Intern., Inc., 860 F.Supp. 1280, 1291.

N.D.Ill.1993. Com. (d) quot. in part in case quot. in sup. The former director of human services for a nonprofit library organization sued the organization for race and sex-based employment discrimination and also asserted a claim for intentional infliction of emotional distress. This court granted the organization partial summary judgment, holding, inter alia, that, under Illinois law, even if the plaintiff had been the subject of intentional racial discrimination, her allegations against the organization of inadequate notice to prepare for meetings, denial of secretarial support, failure to take action on anonymous racially insulting messages directed at her, and various personal affronts failed to show conduct so outrageous or extreme as to support an emotional distress claim. Gibson v. American Library Ass'n, 846 F.Supp. 1330, 1340.

N.D.Ill.1993. Com. (g) quot. in case quot. in disc. Former employee sued former employers and several individual employees and officers for intentional infliction of emotional distress, among other claims, due to alleged sex discrimination and retaliatory discharge. In determining whether plaintiff's claim was preempted by § 301 of the National Labor Relations Act, the court said that the claim was preempted only if application of state law required interpreting a collective bargaining agreement. Denying in part defendants' joint motion for summary judgment, the court said that plaintiff was not alleging that defendants' "extreme and outrageous" conduct derived from their abuse of procedures established under the collective bargaining agreement, but that it stemmed from their alleged concoction of theft allegations against her for the purpose of firing her; therefore, the court found that the claim was not preempted by the Act. Pelech v. Klaff-Joss, LP, 828 F.Supp. 525, 532.

N.D.Ill.1990. Com. (d) quot. in sup. and quot. in case quot. in sup. A female worker sued her former employer and a supervisor for sexual harassment, retaliatory discharge, and intentional infliction of emotional distress. This court denied the defendants' motion for summary judgment, holding, inter alia, that the supervisor's lewd remarks and comments, while vulgar and unprofessional, were not so outrageous and extreme as to give rise to intentional infliction of emotional distress, on their own, but that his alleged subsequent pattern of retaliatory conduct against the plaintiff for her complaint about his prior conduct was outrageous; therefore, facts were alleged that could support recovery for this tort. The court stated that it would be reasonable to find that the defendant's alleged retaliatory conduct of undermining the plaintiff's authority within the office and generally making it more difficult to do her job facilitated the plaintiff's termination by the company. Class v. New Jersey Life Ins. Co., 746 F.Supp. 776, 778.

N.D.Ill.1988. Com. (d) quot. in case cit. in disc. A female employee brought a lawsuit alleging claims of intentional infliction of emotional distress against her supervisor and her employer, and a Title VII sexual discrimination count against her employer. She alleged that her supervisor had subjected her to a hostile and abusive work environment by repeatedly requesting and proposing sexual relations with her, using sexual innuendoes, subjecting her to unwelcome sexual advances,

and exposing himself to her. The defendants' motion to strike and dismiss the three counts was denied in part and granted in part by this court. The court, inter alia, did not dismiss the plaintiff's complaint on the pleadings as to the emotional distress count against the supervisor, reasoning that it could not conclude at that point of the lawsuit that the alleged course of sexual harassment was not extreme and outrageous. However, it dismissed the emotional distress count against the employer, determining that it was a respondeat superior claim preempted by the Illinois Workers' Compensation Act. Bailey v. Unocal Corp., 700 F.Supp. 396, 399.

N.D.Ill.1988. Coms. (d) and (j) quot. in case quot. in disc. Parents and their daughters sued the school district and four employees alleging a violation of their civil rights and intentional infliction of emotional distress after both girls were questioned and one was subjected to a physical examination during an investigation into possible child abuse. Denying in part the defendants' motion to dismiss, this court held, inter alia, that the nude physical examination of the younger child might constitute sufficiently outrageous conduct to give rise to a claim for emotional distress. Landstrom v. Illinois Dept. of Child. & Fam. Serv., 699 F.Supp. 1270, 1281, decision affirmed 892 F.2d 670 (7th Cir.1990).

N.D.Ill.1988. Com. (e) cit. in disc. Plaintiff sued several city and county police officers, the city, and the county alleging a violation of his civil rights and various tort claims, including intentional infliction of emotional distress, resulting from his arrest, detainment, and beating by the officers. The court granted in part and denied in part the defendants' motions to dismiss, holding, inter alia, that plaintiff had not pleaded all of the elements of intentional infliction of emotional distress under Illinois law. Although he pleaded intentional conduct that could be deemed extreme and outrageous, his bare allegation that he suffered “severe emotional distress” was insufficient to plead that element of the claim. Valliere v. Kaplan, 694 F.Supp. 517, 523.

N.D.Ill.1987. Com. (d) cit. in disc. The landlord of a low-income apartment building with mostly black tenants sued the city government for civil rights violations and intentional infliction of emotional distress. This court granted in part and denied in part the defendant's motion to dismiss, holding, inter alia, that evidence of the defendant's racially motivated conduct, which included threats, harassment, abuse of power, and ultimately, termination of the plaintiff's business, was sufficiently outrageous and extreme in degree to go beyond all bounds of decency and to support a claim for intentional infliction of emotional distress. Dale v. City of Chicago Heights, 672 F.Supp. 330, 333.

N.D.Ill.1987. Cit. in disc., com. (j) quot. in case cit. in disc. The maternal grandparents of a child who resided at their home in Illinois induced a family to adopt the child without obtaining the consent of the child's legal father. The father sued the maternal grandparents for intentional infliction of emotional distress. The court denied the defendant's motion to dismiss and held that the intensity and duration of the distress caused by the grandparents' behavior was sufficient to maintain an action for intentional infliction of emotional distress. The court said that, even though the plaintiff resided in Maryland, Illinois had the most significant relationship to the issues in

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dispute; therefore, the court applied the law of Illinois to test the claims stated in the complaint. Kunz v. Deitch, 660 F.Supp. 679, 684.

N.D.Ill.1987. Com. (d) quot. in sup., com. (g) quot. in case quot. in disc. The beneficiaries of life insurance policies sued the life insurance companies for intentional infliction of mental distress after the companies refused to pay death benefits based on their finding that the insured committed suicide. The beneficiaries, the mother and sister of the insured, alleged that the insurance investigator called the insured impotent, psychotic, a liar, and mentally ill. This court granted the insurance companies' motion for summary judgment, reasoning that the defendants' conduct was not so outrageous in character, or so extreme in degree, as to go beyond all possible bounds of decency where the companies had a legitimate reason for pressing the plaintiffs about the circumstances surrounding the insured's death even though such conduct was certain to cause emotional distress. Zakarian v. Prudential Ins. Co. of America, 652 F.Supp. 1126, 1138.

N.D.Ill.1985. Com. (d) quot. in sup. Husband and wife insureds sued to recover medical expenses for which their health insurer failed to compensate them. Their complaint alleged, inter alia, that the insurer intentionally inflicted emotional distress upon them by causing an outrageous delay in settling the insurance claim. The district court granted the insurer's motion to dismiss three counts of the complaint, holding, inter alia, that Illinois case law interpreting an insurance statute barred the insureds from bringing an intentional infliction of emotional distress claim. The court noted that even in the absence of such precedent, the claim would not succeed because the insureds failed to show that the delay in settling the claim constituted such conduct as could be considered outrageous beyond decency. Langendorf v. Travelers State Ins. Co., 625 F.Supp. 1103, 1107.

N.D.Ill.1984. Com. (d) quot. in sup., com. (e) cit. in sup. A black employee resigned his position as a cook when his employer and owner of the restaurant said that the employee was a “nigger” and “not a human being.” The employee subsequently brought a civil rights action against his former employer. The court denied the defendant's motion to dismiss, holding that whether the employee was confronted with an aggravated situation beyond ordinary discrimination and therefore acted reasonably in resigning his position before having sought legal redress was a question of fact. The court discussed in detail the impact of changing social conditions and the resulting judicial decisions affording relief for victims of ethnic slurs. Bailey v. Binyon, 583 F.Supp. 923, 931, 932.

N.D.Ill.1983. Com. (d) quot. in part in sup. and com. (j) cit. in disc. The employee of the defendant corporation brought this action to recover damages for intentional infliction of emotional distress. The court held that the employer's refusal to reinstate the plaintiff despite an arbitration award in his favor did not constitute extreme and outrageous conduct. The court also found that the employer's act of giving the plaintiff's name to the FBI as part of their investigation of the “Tylenol Murders” did not constitute extreme and outrageous conduct. Nor was it extreme and outrageous conduct to send the plaintiff a written notification of his termination, detailing the underlying reasons. Because the plaintiff's allegations were insufficient to state a claim under the law of Illinois, the defendant's motion for summary judgment was granted. Balark v. Ethicon, Inc., 575 F.Supp. 1227, 1231.

N.D.Ill.1983. Coms. (d), (f) and (j) quot. in part in case quot. in disc. A motion picture studio moved to dismiss a pro se complaint alleging the improper inclusion of ethnic jokes in a motion picture. Searching for a viable claim, the court considered, inter alia, whether an action would lie for intentional infliction of emotional distress. It concluded that the requisite outrageous conduct could not be imputed to the defendant and that the requisite severe distress had not been suffered by the plaintiff. Since no legal theory could be found to support the complaint, the defendant's motion was granted. Pawelek v. Paramount Studios Corp., 571 F.Supp. 1082, 1085.

N.D.Ill.1982. Com. (d) quot. in disc. The plaintiff sued the defendant to recover under a life insurance policy. In Count I the plaintiff alleged that the defendant unreasonably refused to pay the insurance proceeds, and in Count II she alleged breach of the duty of good faith and intentional infliction of emotional distress. This court granted the defendant's motion for partial summary judgment as to Count I, holding that the insured had no claim for vexatious and unreasonable refusal to pay the claim. The defendant acted in good faith when it rejected the plaintiff's claim because of the omission of medical information which the defendant viewed as a material misrepresentation. There was no indication that the defendant's agent knew of the specific medical condition which the defendant claimed constituted the misrepresentation; hence, the defendant was not estopped from refusing to pay the claim. The court granted the defendant's motion for summary judgment as to Count II, holding that a statute which provided for attorneys' fees and other costs preempted the field of extracontractual damages arising out of the defendant's alleged bad faith refusal to settle a claim. The plaintiff did not state a claim for intentional infliction of emotional distress, as the undisputed facts clearly demonstrated as a matter of law that the defendant's conduct fell far short of being so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. The plaintiff's allegation of malice or evil motive was not by itself sufficient to show the requisite degree of outrageousness. Smith v. Metropolitan Life Ins. Co., 550 F.Supp. 896, 901.

N.D.Ill.1980. Com. (e) cit. in sup. The plaintiff brought this action against his employer and the employer's health insurance company seeking compensatory and punitive damages based upon, inter alia, intentional infliction of emotional harm. The plaintiff had been covered by the insurer's medical policy during his employment. The plaintiff had become totally disabled while working and was eventually forced to stop working. The insurer incorrectly told the plaintiff that he was ineligible to continue receiving any more medical benefits because his employment had been terminated. The insurer also failed to investigate the merits of the plaintiff's claim that he had been terminated because of his total disability. The insurance company moved to dismiss the claim. The court cited the Restatement in holding that the insurance company's misrepresentation of the plaintiff's insurance coverage and failure to investigate the merits of the plaintiff's claim constituted precisely the type of abusive behavior that gives rise to the element of extreme and outrageous conduct necessary for a finding of intentional infliction of emotional harm. The court also found that the plaintiff suffered severe emotional harm which had been caused by the insurance company's conduct and that the conduct was reckless in nature. Thus, the court denied the dismissal of that claim. Strader v. Union Hall, Inc., 486 F.Supp. 159, 163.

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S.D.Ill.

S.D.Ill.2015. Com. (d) quot. in cases quot. in sup. Registered nurse who formerly worked for hospital brought claims for violations of the Illinois Human Rights Act (IHRA) and intentional infliction of emotional distress (IIED) against hospital and former supervisor, alleging that supervisor sexually harassed her by sending her inappropriate text messages and by retaliating against her when she requested that such texts cease. This court granted in part defendants' motion to dismiss, holding that plaintiff's common-law IIED claim was preempted by the IHRA, because it was intricately linked to her sexual-harassment claims under the IHRA. The court noted that, under Illinois law, which followed Restatement Second of Torts § 46, an IIED claim required more than mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities; the defendant's conduct had to be such that the recitation of the facts to an average person in the community would arouse resentment against the actor and lead the person to exclaim "Outrageous!" Carwyle v. Anna Hospital Corporation, 102 F.Supp.3d 1024, 1035.

S.D.Ill.2006. Com. (e) cit. in sup., com. (j) quot. in case quot. in sup. Mother who refused to allow her children to attend certain school activities on the basis that they offended her religious beliefs brought civil-rights suit against school district and superintendent, after superintendent allegedly reported plaintiff to the state child-services department as an “unfit” parent, and told department staffers that her children were “in danger.” This court denied superintendent's motion to dismiss plaintiff's additional state-law claim for intentional infliction of emotional distress, rejecting as unsupported superintendent's argument that plaintiff pled nothing more than insults and indignities, rather than the requisite extreme and outrageous conduct. The court observed that a key factor in the “extreme and outrageous” calculus was the degree of authority that a defendant held in relation to a plaintiff, noting that superintendent's position vis-à-vis child services and plaintiff bore consideration. Stanley v. Carrier Mills-Stonefront School Dist. No. 2, 459 F.Supp.2d 766, 779.

S.D.Ill.2005. Com. (d) quot. in case quot. in disc. After former restaurant employee who had been injured on the job and sought medical treatment asserted his rights under the Illinois Workers' Compensation Act, he sued employer and his supervisor for harassment, retaliatory discharge, and intentional infliction of emotional distress, alleging that supervisor's conduct was intended to subject plaintiff to work-related stress and pressure, and eventually his termination. This court dismissed the claims against the supervisor, holding, inter alia, that supervisor's conduct was not extreme and outrageous, since it was such workplace conduct that Illinois courts consistently found insufficient to support a claim for intentional infliction of emotional distress. Plaintiff also failed to allege that his distress was severe. Rosas v. BB Holdings Partnership, 362 F.Supp.2d 986, 991.

N.D.Ind.

N.D.Ind.2016. Com. (d) quot. in case quot. in sup. (general cite). Truck driver brought a claim for intentional infliction of emotional distress against trucking company and teacher of a driver-orientation program at company's facility, following an incident in which teacher allegedly pushed

him in the chest with enough force to cause him to move backwards. This court granted defendant's motion for partial summary judgment, holding that plaintiff failed to state a claim for intentional infliction of emotional distress. The court reasoned that teacher's alleged conduct was not extreme or outrageous, and that plaintiff failed to present sufficient evidence that the conduct caused him severe emotional distress, as required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. Jimenez v. CRST Specialized Transportation Management, Inc., 213 F.Supp.3d 1058, 1064.

N.D.Ind.2013. Com. (d) cit. in sup., quot. and adopted in cases cit. and quot. in sup. Homeowners brought a claim for intentional infliction of emotional distress (IIED), inter alia, against, among others, bank that was the assignee of title to a property adjacent to homeowners' property, which the assignor had acquired through foreclosure, alleging that bank, despite knowing that it never had any interest in homeowners' property, ordered its agents to break into homeowners' property when they were out of town, remove their belongings, and otherwise ransack the home. Denying defendant's motion to dismiss, this court held that plaintiffs stated a claim for IIED, because the facts sufficiently alleged that defendant knew that severe emotional distress was certain, or substantially certain, to result from its conduct. The court pointed to evidence that, based on recorded property records, defendant knew that it had no legal interest in the property, but nevertheless ordered contractors to break into the house, change the locks, confiscate most of plaintiffs' personal property, trash the home, leave the door standing open such that debris and dead animals were later found inside, and list the home for sale with a realtor. Gordon v. Bank of New York Mellon Corp., 964 F.Supp.2d 937, 945-947.

N.D.Ind.2010. Quot. in case quot. in sup. University student brought various claims against newspaper in connection with its publication of an article, in print and on an interactive website, regarding criminal charges that were pending against him for falsely reporting that he had been assaulted. Granting defendant's motion for judgment on the pleadings as to plaintiff's claim for intentional infliction of emotional distress, this court held, among other things, that plaintiff neglected to demonstrate that publishing the article was comparable to other acts found to be extreme and outrageous by Indiana courts; moreover, inviting readers' comments about the article and publishing them on the website did not constitute the outrageous conduct element necessary for such a claim, because, even if the comments could be considered outrageous, defendant's actions in that regard were not. Collins v. Purdue University, 703 F.Supp.2d 862, 871.

N.D.Ind.2010. Cit. in case cit. in sup., com. (d) quot. and adopted in cases cit. in sup. Insured who claimed to have entered into a whole life insurance policy with insurer providing that she would no longer need to pay premiums if she became totally disabled brought various claims against insurer, alleging that, although she submitted proof of her total disability, insurer refused to waive her premiums. Granting insurer's motion to dismiss insured's claim for intentional infliction of emotional distress, this court held that insured failed to show that insurer's conduct in, among other things, contacting her and requesting additional medical proof of her disability exceeded all possible bounds of decency so as to satisfy the claim's element of extreme and outrageous conduct. Skinner v. Metropolitan Life Ins. Co., 829 F.Supp.2d 669, 684, 685.

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N.D.Ind.2006. Cit. in sup., com. (d) quot. in cases quot. in sup. (cit. as § 46), com. (i) cit. in case cit. in sup. Parent and high-school student sued school, school's principal, and teacher for, in part, intentional infliction of emotional distress, alleging that teacher engaged in improper Internet communications with student. Denying summary judgment for teacher and granting summary judgment for school and principal, this court held that a fact question existed as to whether teacher's conduct was extreme and outrageous, and that a reasonable factfinder could conclude that teacher's inappropriate communications caused student great distress, to the point where she left her school and talked of suicide; the court found, however, that the response of school and principal, including contacting law enforcement and reprimanding teacher, did not exceed all possible bounds of decency. Chivers v. Central Noble Community Schools, 423 F.Supp.2d 835, 857.

N.D.Ind.1997. Com. (d) quot. in case quot. in disc. Former grocery-store manager brought Title VII action against her former employer and supervisor, alleging that she was demoted to a cashier position because of her gender. Plaintiff also asserted a claim for intentional infliction of emotional distress. Defendants moved for summary judgment. Granting the motion in part and denying it in part, the court held that material factual issues existed as to whether defendants' demotion decision was motivated by gender bias; however, the claim for intentional infliction of emotional distress failed because the conduct complained of, which included withholding pertinent information from plaintiff and scheduling her workday in such a way as to prevent her from fulfilling her managerial duties, was not so extreme or outrageous as to be considered intolerable in civilized society. King v. Wiseway Super Center, Inc., 954 F.Supp. 1289, 1295.

N.D.Ind.1995. Cit. in headnote, quot. in case quot. in sup. Seventh-grade female students who were strip-searched by teacher and others after gym class in an effort to recover a sum of $4.50 that was missing sued the school board, principal, superintendent, and teachers, asserting claims based on violations of their constitutional rights, as well as state law claims. Granting in part defendants' motion for summary judgment, the court held, inter alia, that plaintiffs' claim for intentional infliction of emotional distress failed, because plaintiffs presented no evidence that defendants intended to cause emotional distress. Oliver by Hines v. McClung, 919 F.Supp. 1206, 1210, 1221.

N.D.Ind.1994. Quot. in case quot. in sup. High school teacher sued the school and others, asserting state and federal claims arising from various incidents occurring during the course of his employment, including a claim for intentional infliction of emotional distress. Granting summary judgment for defendants on the emotional-distress claim, the court held, inter alia, that, under Indiana law, the claim was barred by the Workers' Compensation Act, as plaintiff had been subjected to numerous incidents of alleged harassment that were, for the purpose of the Act, “by accident,” and found that the alleged tortious conduct failed to satisfy the standard of extreme and outrageous conduct intended to cause severe emotional distress. Eggleston v. South Bend Community School Corp., 858 F.Supp. 841, 859.

N.D.Ind.1993. Quot. and cit. in case quot. in sup. Female employee of poultry farm sued her co-workers, supervisors, and employer for sexual harassment, discrimination, and other civil rights claims and asserted pendent Indiana state law claims for intentional infliction of emotional distress and invasion of privacy. Denying defendants' motion to dismiss for, among other things, failure to state a claim under Indiana law, the court held, inter alia, that the allegation by plaintiff that she was the victim of sexual harassment and discrimination asserted under Indiana law extreme and outrageous conduct sufficient to support an emotional distress claim even without proof of a "host tort" in connection with the claim. Garus v. Rose Acre Farms, Inc., 839 F.Supp. 563, 569.

S.D.Ind.

S.D.Ind.2014. Com. (d) cit. and quot. in sup., coms. (e) and (f) cit. in case cit. in sup. Party attendee brought a state-law claim for intentional infliction of emotional distress (IIED), inter alia, against city police department and police detective who investigated her allegations that she was gang-raped at the party, alleging that detective inflicted emotional distress upon her when he insinuated that she had "asked for" the sexual assault, used expletives to refer to her parents in her presence, and failed to engage in a proper investigation. Granting defendants' motion to dismiss plaintiff's IIED claim, this court held that, while plaintiff successfully pled the element of "extreme and outrageous" conduct against detective, and adequately pled that his course of conduct caused her severe emotional distress, recovery against him and his employer was barred by law-enforcement immunity. The court noted that, in defining the type of extreme and outrageous conduct necessary to give rise to liability, Indiana courts had turned for guidance to Restatement Second of Torts § 46, Comment *d*. Snyder v. Smith, 7 F.Supp.3d 842, 872, 873.

S.D.Ind.2013. Com. (d) quot. in cases quot. in sup. Caucasian former employee of county public library, along with her African-American boyfriend, brought a pendent state-law claim for intentional infliction of emotional distress (IIED), inter alia, against library, employee's former supervisor, and library director in connection with allegations of discriminatory treatment by supervisor. This court granted defendants' motion to dismiss plaintiffs' IIED claim against library director, holding that, because plaintiffs failed to allege any discriminatory animus on the part of director, director's decision to terminate employee for failing to follow orders and for unprofessional conduct could not be deemed extreme and outrageous conduct under Indiana law, as required to state a claim for IIED. The court, however, denied defendants' motion to dismiss the IIED claim as to library, holding that library was potentially liable under a theory of respondeat superior, because supervisor's actions—in criticizing employee's job performance for the first time after she became aware of employee's intimate relationship with her boyfriend, disapproving of that relationship because "white women should not date African American men," and informing employee that boyfriend was no longer allowed to enter the library when employee was working—could rise to the level of extreme and outrageous conduct. Rihm v. Hancock County Public Library, 954 F.Supp.2d 840, 858.

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S.D.Ind.2009. Com. (d) quot. in case quot. in sup. As part of their suit alleging gender-based discrimination, male former employees of mental-health facility operated by state brought a pendent state-law claim for intentional infliction of emotional distress (IIED) against state and state's family and social services administration. Granting defendants' motion for summary judgment, this court held that defendants' alleged actions in prohibiting plaintiffs from wearing shorts to work, restricting them from playing cards while on duty, stopping them from using their own electronic appliances, like coffee makers, at work, and requiring them to respond to "Code Green" emergencies more frequently than other employees fell far short of the outrageous conduct required to support plaintiffs' IIED claim. Keller v. Indiana Family and Social Services Admin., 639 F.Supp.2d 928, 946.

S.D.Ind.2007. Adopted in case cit. in disc.; com. (d) quot. in sup. (cit. as § 46). Parents brought various claims individually and on behalf of their eighth-grade son and his sister against public-school corporation, alleging defendant's lack of response to bullying of the children by schoolmates over a two-year period. Granting defendant's motion for summary judgment on plaintiffs' claim of intentional infliction of emotional distress, this court found that there had been no evidence presented to support a reasonable inference that defendant or its employees intended to inflict emotional distress upon the children; additionally, the court held that, regardless of how negligent defendant's alleged conduct might have been, none of it rose to the level required under Indiana law of being atrocious and utterly intolerable in a civilized society. Seiwert v. Spencer-Owen Community School Corp., 497 F.Supp.2d 942, 957.

S.D.Ind.2006. Subsec. (1) and com. (d) quot. in part in cases quot. in sup. (general cites). Former employee sued employer, claiming, in addition to his federal discrimination claims, that employer committed the tort of intentional infliction of emotional distress under Indiana law when it unlawfully terminated his employment within days of his wife's suicide attempt. Granting summary judgment for defendant, this court held that there was no evidence that the termination caused plaintiff the requisite severe emotional distress contemplated by this theory of liability or that defendant intended to inflict severe emotional distress on plaintiff, and the court declined to find outrageous and extreme an employer's decision to terminate its business relationship with an employee it believed did not meet its standards. Tracy v. Financial Ins. Management Corp., 458 F.Supp.2d 734, 747.

S.D.Ind.2000. Quot. in case quot. in disc. Former sixth-grade students who had been subjected to a strip-search by their teacher sued the teacher and the superintendent and trustees of the county school corporation for, in part, intentional infliction of emotional distress. Granting in part defendants' motion for summary judgment, the court held, inter alia, that the claim failed because plaintiffs produced no evidence that defendant teacher intended to inflict emotional distress upon them. Higginbottom ex rel. Davis v. Keithley, 103 F.Supp.2d 1075, 1089.

S.D.Ind.1999. Quot. in case quot. in disc. Participant at public meeting of county master plan steering committee sued committee cochairs for violations of 42 U.S.C. § 1983, alleging that defendants violated her rights under the First Amendment when they dissolved the meeting as

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she was speaking. Plaintiff also asserted a state-law claim for intentional infliction of emotional distress. Granting in part and denying in part defendants' motions to dismiss, the court held, inter alia, that plaintiff's allegation of an abridgement of her right to free speech survived the motions to dismiss; however, plaintiff had failed to establish that defendants acted in an extreme and outrageous manner, or that they intended to cause her severe emotional distress. Thompson v. Huntington, 69 F.Supp.2d 1071, 1077.

S.D.Ind.1996. Quot. in case quot. in sup. Female former employees sued their former employer and former supervisor for sexual harassment in violation of Title VII and brought state-law claims against them for invasion of privacy and intentional infliction of emotional distress. Denying defendant supervisor's motion for summary judgment on plaintiffs' claim for intentional infliction of emotional distress, the court held, inter alia, that a reasonable trier of fact could conclude that defendant's conduct in persistently commenting on plaintiffs' physical appearance and on how their physical appearance impacted on their sex lives was outrageous. Van Jelgerhuis v. Mercury Finance Co., 940 F.Supp. 1344, 1369.

S.D.Ind.1992. Cit. in case cit. in disc. An emotionally handicapped student and his legal guardians sued various school corporations and their employees and officials for, among other claims, intentional infliction of emotional distress, after defendants allegedly improperly attempted, via administrative and criminal proceedings, to remove the student from his guardians and force him from the school system in retaliation for plaintiffs' lawful attempts to force defendants to provide a proper education. Entering summary judgment for defendants, this court held, inter alia, that although Indiana law recognized a claim for intentional infliction of emotional distress, plaintiffs' allegations either did not support such a claim or supported a claim barred by the Indiana Tort Claims Act. The court stated that defendants' acts, allegedly constituting malicious prosecution and abuse of process, could not constitute the requisite intentional wrongdoing for a viable claim since defendants were immune from all tort liability arising from those kinds of acts under the Tort Claims Act. Norris by Norris v. Board of Educ., 797 F.Supp. 1452, 1461.

S.D.Ind.1982. Cit. in disc. The plaintiff was discharged from his employment by the defendant. The plaintiff brought an action to recover, among other things, for wrongful discharge and intentional infliction of emotional distress. The defendant moved to dismiss each of the claims for failure to state a claim upon which relief could be granted. The court denied the motion to dismiss on the wrongful discharge claim because the plaintiff's claim was an exception to the employment at will doctrine, as the plaintiff alleged that he was discharged for refusing to continue his participation in an anticompetitive scheme. With respect to the claim of intentional infliction of mental distress, the court concluded that if the plaintiff was the victim of retaliatory discharge resulting in emotional distress, he should include that element in his measure of damages for wrongful discharge. Accordingly, the court concluded that the emotional distress claim was surplusage and it was dismissed. Perry v. Hartz Mountain Corp., 537 F.Supp. 1387, 1390.

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N.D.Iowa,

N.D.Iowa, 2021. Cit. in case quot. in ftn.; com. (e) quot. in case quot. in sup. Brazilian students filed claims for, among other things, intentional infliction of emotional distress against public community college, alleging that it misrepresented that students, as participants in its J-1 visa program, would complete internships related to their field of study and that they would work no more than 32 hours per week. This court granted without prejudice college's motion to dismiss students' emotional-distress claim, holding that students' allegations in support of that claim were nothing more than a formulaic recitation of the elements of such a claim. In making its decision, the court noted that, while Iowa courts referred to the tort as "intentional infliction of emotional distress," neither Restatement Second of Torts § 46 nor Iowa case law required proof of an intentional act; a reckless disregard of the probability of causing emotional distress was sufficient. Bucco v. Western Iowa Tech Community College, 555 F.Supp.3d 628, 661, 662.

N.D.Iowa, 2016. Com. (d) quot. in cases cit. and quot. in sup. Former employee sued former employer and other unknown defendants for, among other things, intentional infliction of emotional distress (IIED) in connection with his termination, alleging that an unknown defendant, with the intention of having employee fired, falsely reported to employer that employee made a racial slur at work. This court granted employer's motion for partial summary judgment, holding that employer could not be said to have engaged in a course of conduct exceeding all bounds of decency, as required to state such a claim under Iowa law and Restatement Second of Torts § 46. The court pointed out that, although employee initially claimed that the report was false, he later admitted to having used the racial slur at work. Newkirk v. GKN Armstrong Wheels, Inc., 168 F.Supp.3d 1174, 1199.

N.D.Iowa

N.D.Iowa, 2010. Com. (d) quot. in case quot. in sup. While divorce proceedings were pending, husband brought a pro se complaint asserting, inter alia, a claim for intentional infliction of emotional distress (IIED) against wife and others, alleging that defendants conspired to slander, libel, and defame him for the purpose of wrongfully denying him custody of his son, severely limiting his visitation with his son, and/or driving him from town. Denying defendants' motion to dismiss, this court held that plaintiff's allegations of defendants' outrageous conduct—e.g., that they sent out to 300 patrons of wife's dance school e-mails accusing plaintiff of being an abusive husband, and made a false report to the state agency of child protective services that husband had sexually abused son—were sufficient to support his IIED claim. McFarland v. McFarland, 684 F.Supp.2d 1073, 1090.

N.D.Iowa, 2002. Com. (d) quot. in case quot. in sup., com. (f) quot. in case quot. in sup. Former employee sued employer and supervisors, alleging race discrimination, retaliation, assault, and intentional infliction of emotional distress. Granting in part defendants' motions for summary judgment, this court held, inter alia, that alleged “strip search” by employer to determine if

employee was wearing recording device did not rise to level of outrageousness sufficient to support claim for intentional infliction of emotional distress. Weems v. Federated Mutual Ins. Co., 220 F.Supp.2d 979, 996.

N.D.Iowa, 1999. Coms. (d) and (f) quot. in disc., com. (f) quot. in disc. A parishioner sued a priest and other church officials, alleging sexual abuse, tortious infliction of emotional distress, and assault and battery, among other claims, after the priest allegedly fondled and kissed her. This court granted in part and denied in part defendants' motion to dismiss, holding, inter alia, that plaintiff did not state a viable claim for tortious infliction of severe emotional distress, because an unsolicited kiss from a purportedly celibate priest did not constitute outrageous conduct. Doe v. Hartz, 52 F.Supp.2d 1027, 1069.

N.D.Iowa, 1996. Com. (d) quot. in case quot. in disc. A high school sophomore told her parents the names and addresses of high school students who attended a party at her parents' farmhouse and caused over $1,500 in damage to the property. During the next three years, the school's students launched a host of verbal and physical assaults against the student, many of which took on a sexual nature. The student and her parents sued the school district, the principal, and the superintendent, alleging, among other claims, intentional infliction of emotional distress arising from defendants' inaction as to the peer sexual harassment. This court granted defendants partial summary judgment, holding, inter alia, that defendants' inaction in failing to protect the student from the harassment of her peers did not rise to the requisite level of outrageousness. Burrow By and Through Burrow v. Postville Comm., 929 F.Supp. 1193, 1210.

N.D.Iowa, 1995. Cit. in headnotes, cit. generally in disc., com. (d) quot. in case cit. in disc., quot. in case quot. in sup., com. (f) quot. in case quot. in sup. Employee who injured his back at work and who claimed he was discharged in retaliation for his intention to seek workers' compensation benefits sued his former employer for, inter alia, intentional infliction of emotional distress. Denying defendant's motion for summary judgment on the ground that its conduct was not outrageous, the court held that defendant's requirement that plaintiff submit to repeated medical examinations by a doctor of defendant's choice while it prepared not to pay the bills was sufficiently extreme that an average member of the community, upon learning of it, would exclaim, “Outrageous!” The court believed that a factfinder could find such behavior to be mean-spirited and petty in that it was likely to inflict financial hardship while simultaneously terminating plaintiff's employment and denying him workers' compensation benefits. Reedy v. White Consol. Industries, Inc., 890 F.Supp. 1417, 1421, 1441, 1441-1442, 1442.

N.D.Iowa, 1994. Cit. in headnotes, com. (d) quot. in cases cit. and quot. in disc., coms. (f) and (j) quot. in cases cit. in disc. Former assistant director of juvenile detention center sued center and its supervisor, alleging sexual harassment, wrongful discharge, and intentional infliction of emotional distress. Granting defendants' motion for summary judgment, the court held, inter alia, that, although plaintiff could make a sufficient showing of the elements for recovery on the tort of intentional infliction of emotional distress, plaintiff's claim was preempted by the Iowa Civil Rights Act (Act), because her allegations of outrageous conduct for the common law tort were

cognizable as sexual discrimination, for which the exclusive remedy was found in the Act. Chester v. N.W. Iowa Youth Emergency Serv. Center, 869 F.Supp. 700, 701, 709-711.

N.D.Iowa, 1994. Coms. (d), (f), and (j) cit. generally in headnotes and quot. in cases cit. and quot. in sup. Former marketing executive for a television station sued the station following his discharge, asserting a pendent state law claim for intentional infliction of emotional distress, inter alia. Granting defendant's motion for summary judgment, the court held, in part, that, even if plaintiff's claim was not preempted by the Iowa Civil Rights Act, plaintiff failed to allege any sufficiently outrageous conduct to support his claim; at most, his allegations were that he was demoted abruptly, his position was assumed by the associate who had recommended his demotion, and he was fired after failing to meet new performance guidelines. The court also concluded that plaintiff's evidence of emotional distress was insufficient as a matter of law, since he merely asserted that it was the most trying time of his life, he could not sleep, his wife had blood-pressure problems, and he was emotionally stressed. O'Bryan v. KTIV Television, 868 F.Supp. 1146, 1148, 1164, 1165, affirmed in part, reversed in part 64 F.3d 1188 (8th Cir.1995).

N.D.Iowa, 1994. Com. (d) quot. in cases cit. in sup., coms. (f) and (j) quot. in part in cases quot. in sup. Former bank officer sued bank and chairman of its board of directors for intentional infliction of emotional distress, among other claims, after he was terminated following on-site audit by federal examiners that resulted in bank's reduced rating. The court granted defendants summary judgment, holding, inter alia, that, whether or not the court agreed with defendants' business decision to fire plaintiff, allocating to him a good share of blame for bank's problems, such basis for discharging at-will employee in responsible position was not outrageous; moreover, the court held that plaintiff's high blood pressure and anxiety and the destruction of his career and reputation were not severe enough to support the claim. Rouse v. Farmers State Bank of Jewell, Iowa, 866 F.Supp. 1191, 1216-1218.

N.D.Iowa, 1994. Coms. (d) and (f) cit. in headnotes and quot. in cases quot. in sup. Rehabilitation technician formerly employed at substance-abuse treatment and rehabilitation center brought constructive discharge, race discrimination, and pendent state-law claims against the center, managerial personnel, and the center's corporate parent. Granting defendants' motion for summary judgment, the court held, inter alia, that defendants' investigation of the accusations of plaintiff's cocaine use and their suggestion that plaintiff apply for another position at the center did not amount to the outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Thomas v. St. Luke's Health Systems, Inc., 869 F.Supp. 1413, 1419, 1440, affirmed 61 F.3d 908 (8th Cir.1995).

N.D.Iowa, 1994. Coms. (d) and (f) quot. in case quot. in sup. After being fired, female deli manager sued former employer for, among other claims, sexual discrimination, wrongful discharge, and intentional infliction of emotional distress. This court granted in part and denied in part defendant's motion for summary judgment, holding, in part, that defendant's alleged conduct was sufficiently outrageous to support an emotional distress claim. The court stated that if plaintiff could prove that she was terminated because she sought insurance benefits she believed had been promised her

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by her employer and for which deductions were made to her paycheck, or for threatening to get a lawyer to vindicate her right to insurance coverage, such conduct could be considered outrageous because it could be perceived to be calculated to intimidate plaintiff and other employees into foregoing benefits for which they believed they had paid. Thompto v. Coborn's Inc., 871 F.Supp. 1097, 1122, 1123.

N.D.Iowa, 1985. Com. (j) quot. in disc. The plaintiff, who was demoted and relocated twice during his six-month probationary period as a restaurant general manager trainee for the defendant corporation, resigned after claiming he had completed the training period, and sued the corporation for, inter alia, intentional infliction of emotional distress. The district court granted the defendant's motion for summary judgment on this claim, holding that there was insufficient evidence of severe distress when all the plaintiff could demonstrate was that he became depressed as a result of his employment with the defendant, that his depression led to temporary marital discord, that he allegedly developed a mistrust of people, especially employers, and that he lost his enthusiasm for the restaurant business. Polito v. Perkins Restaurants, Inc., 617 F.Supp. 380, 382.

S.D.Iowa

S.D.Iowa 2020. Com. (j) quot. in case quot. in sup. After obtaining a judgment against farm owner, motorist and son brought, among other things, a claim for intentional infliction of emotional distress (IIED) against farm owner's legal professionals and banking professionals in state court, alleging that defendants caused emotional distress to plaintiffs when they knowingly assisted farm owner's efforts to evade collection on plaintiff's judgment. Following removal, this court granted in part defendants' motion to dismiss, holding that plaintiff failed to state a claim for IIED. Citing Restatement Second of Torts § 46, Comment *j*, the court explained that plaintiff failed to allege that defendants' conduct was extreme or outrageous beyond making conclusory assertions that plaintiff suffered extreme emotional distress. Kruse v. Repp, 611 F.Supp.3d 666, 723.

S.D.Iowa

S.D.Iowa, 2006. Cit. in disc. Employee brought various claims against bank that employed her, alleging, among other things, that it refused to provide reasonable accommodations for her panic attacks, denied her a promotion, and refused to allow her to exercise her religion freely. This court granted bank's partial motion to dismiss, holding, inter alia, that employee's claim for intentional infliction of emotional distress, which relied on no factual assertion unchained by the prerequisite of proof of discrimination, was preempted by her claim under the Iowa Civil Rights Act (ICRA). The court specified that its holding did not prevent employee from seeking damages for emotional distress under other theories, noting that the ICRA permitted recovery of such damages in some circumstances without proof of outrageous conduct, severe distress, or physical injury. Cole v. Wells Fargo Bank, N.A., 437 F.Supp.2d 974, 982.

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S.D.Iowa, 2006. Subsec. (1) cit. in sup., coms. (d) and (e) quot. in cases quot. in sup., com. (f) cit. in sup. Employee who was terminated after allegedly suffering workplace injuries brought claims for disability discrimination and intentional infliction of emotional distress against his hotel employer. This court granted defendant's motion for summary judgment and dismissed the action. The court held, inter alia, that even if information in an accident report that purportedly showed plaintiff was not being honest about the accident was both false and manufactured by defendant's employees, and hotel's general manager was aware of that fact but terminated plaintiff anyway, that conduct was not sufficiently outrageous to generate a fact question on the emotional-distress claim under Iowa law. Napreljac v. John Q. Hammons Hotels, Inc., 461 F.Supp.2d 981, 1040, 1041.

S.D.Iowa, 2005. Com. (d) quot. in case quot. in disc. Insureds filed class-action suit against insurance company that proffered low first payment proposals to customers who had prior insurance claims. Plaintiffs raised several causes of action and requested compensatory, consequential, and punitive damages. The court granted plaintiffs' motion to remand case to state court and held, inter alia, that damages for intentional infliction of emotional distress could not be recovered since plaintiffs did not claim to have suffered any emotional distress from defendant's actions. Furthermore, defendant's conduct did not rise to the level of outrageousness required to maintain an action for intentional infliction of emotional distress. Varboncoeur v. State Farm Fire and Cas. Co., 356 F.Supp.2d 935, 946.

S.D.Iowa, 1997. Com. (d) quot. in case quot. in disc. Male former employee sued former employer for, inter alia, hostile work environment sexual harassment in violation of Title VII and the Iowa Civil Rights Act. Plaintiff also asserted a common law claim for intentional infliction of emotional distress. Defendant moved for summary judgment. Granting the motion, the court held, in part, that the tasteless jokes, name calling, and general ridicule of which plaintiff was one of many targets did not constitute harassment based on sex, nor was it sufficiently severe or pervasive as to alter a term, condition, or privilege of employment. Similarly, the conduct complained of was not so extreme and outrageous as to support a claim for intentional infliction of emotional distress. Noble v. Monsanto Co., 973 F.Supp. 849, 860.

S.D.Iowa, 1992. Com. (d) quot. in case quot. in sup. Terminated employee who had been named as a party in a co-worker's sex discrimination complaint sued his former employer for intentional infliction of emotional distress, inter alia. Granting defendant's motion for summary judgment, the court held that plaintiff was unable to establish the "outrageous conduct" element of his cause of action, because neither defendant's explanation to plaintiff that he was laid off in a consolidation effort nor defendant's unwillingness to meet the co-worker's settlement demands amounted to outrageous conduct. Nielsen v. Crane Co. Inc., 809 F.Supp. 699, 704.

D.Kan.

D.Kan.2018. Com. (j) quot. in sup. Former member of religious group brought, inter alia, a claim for intentional infliction of emotional distress against religious group leader and leader's

business entities, alleging that defendants isolated plaintiff from society, forced her to work long hours without any compensation, malnourished her, and committed various other wrongdoings, including human trafficking. This court entered default judgment against defendants, holding that plaintiff alleged facts establishing a claim for intentional infliction of emotional distress. The court explained that plaintiff alleged facts establishing that defendants' conduct constituted an intentional, reckless disregard for plaintiff's personal freedoms that was extreme and outrageous and inflicted extreme and severe mental distress upon plaintiff, and noted, citing Restatement Second of Torts § 46, Comment *j*, that, in some cases, extreme and outrageous conduct by a defendant could itself be evidence that the plaintiff was extremely and severely distressed. Ross v. Jenkins, 325 F.Supp.3d 1141, 1171.

D.Kan.2006. Cit. in pleadings cit. in disc. (general cite). Terminated sales employee of consulting business brought claims of malicious prosecution and the tort of outrage against business after business filed a state-court action against employee alleging, among other things, that employee had refused to return a laptop containing confidential information to business. This court denied defendant's motion to dismiss, holding, inter alia, that plaintiff stated a prima facie case for the tort of outrage based on evidence that she attempted to return the laptop but was instead faced with a lawsuit. The court found that dismissal was premature because there was a basis to conclude that defendant's conduct was extreme and outrageous and that plaintiff suffered some emotional distress because of defendant's decision to file the suit. Mohr v. Margolis, Ainsworth & Kinlaw Consulting, Inc., 434 F.Supp.2d 1051, 1057.

D.Kan.2003. Subsec. (1) cit. in disc., coms. (j) and (k) quot. in sup. African-American passengers sued airline for violation of § 1981 and negligent and intentional infliction of emotional distress after flight attendant commented over the intercom, “Eenie, meenie, minie, moe, pick a seat, we gotta go.” Granting in part defendant's motion for summary judgment, the court held that whether flight attendant's remark was made with discriminatory intent was question for jury; however, remark was not so outrageous as to support claim for intentional infliction of emotional distress, since it was not expressly racist and recent generations were increasingly unaware of racist nursery rhyme in which phrase originated. Sawyer v. Southwest Airlines Co., 243 F.Supp.2d 1257, 1275-1276.

D.Kan.2000. Quot. but dist. City employee sued city for, inter alia, intentional infliction of emotional distress in connection with his termination, which came after two female co-workers accused him of sexual harassment. Entering summary judgment for defendant, the court held, in part, that the conduct complained of, which included defendant's alleged breach of plaintiff's employment contract and certain actions of the female co-workers, could not be characterized as atrocious or utterly intolerable in civilized society. Wood v. City of Topeka, Kan., Topeka Housing Auth., 90 F.Supp.2d 1173, 1194, amended 96 F.Supp.2d 1194 (D.Kan.2000).

D.Kan.1999. Cit. in sup., adopted in case quot. in sup. Landlords sued municipal defendants charged with enforcing the housing code, asserting a claim for outrage, inter alia. Granting defendants' motion for summary judgment, this court held, in part, that defendants' conduct in

issuing numerous housing-code citations against plaintiffs, placarding plaintiffs' property, entering plaintiffs' property without their authorization, and forcing plaintiffs to appear in court numerous times on housing-code violations was not sufficiently extreme and outrageous to permit recovery for a claim of outrage under Kansas law. Green v. City of Wichita, Kansas, 47 F.Supp.2d 1273, 1280.

D.Kan.1998. Com. (e) cit. in disc. and cit. in case cit. in disc., com. (f) quot. in disc. In action brought pursuant to Age Discrimination in Employment Act, employee asserted state law claims against supervisor for, inter alia, intentional infliction of emotional distress and battery. Entering summary judgment for supervisor, the court held, in part, that the conduct complained of, which included directing employee to terminate co-workers based on age, was not so extreme and outrageous as to go beyond all bounds of decency and be considered intolerable in civilized society, and that supervisor did not commit battery when he patted employee on the back, since such contact would not be deemed offensive by a reasonable person. Holdren v. General Motors Corp., 31 F.Supp.2d 1279, 1283, 1284.

D.Kan.1998. Subsec. (1) and com. (f) cit. in disc. A Nigerian male sued a grocery store for intentional infliction of emotional distress, among other claims, after he was detained by a store manager and accused of being the person who previously robbed the store. Plaintiff argued that the important factors to remember in assessing plaintiff's outrage claim was plaintiff's background and familiarity with the United States legal system. This court granted in part and denied in part defendant's motion to dismiss, holding, inter alia, that plaintiff's emotional-distress claim failed, because he did not allege facts sufficient to establish that he suffered severe emotional distress. The court stated that it did not judge plaintiff's outrage claim on plaintiff's unknown emotional frailties, and that plaintiff did not allege any facts as to defendant's knowledge of plaintiff's background or understanding of the United States legal system. Nwakpuda v. Falley's, Inc., 14 F.Supp.2d 1213, 1219.

D.Kan.1997. Subsec. (1) quot. in case quot. in disc. Mexican-American former bank employee sued bank for, inter alia, discrimination based on national origin, retaliatory discharge, and intentional infliction of emotional distress. Defendant moved for summary judgment. Sustaining the motion in part and overruling it in part, the court held that plaintiff had not established that defendant's alleged nondiscriminatory reason for failing to promote or award her a salary raise was pretextual; that material factual issues existed as to whether plaintiff was eventually terminated because of her national origin or because of her decision to file a charge of discrimination with the EEOC; and that defendant's alleged wrongful conduct was not so extreme or outrageous as to support recovery under a theory of intentional infliction of emotional distress. Garcia-Harding v. Bank Midwest, N.A., 964 F.Supp. 1492, 1512.

D.Kan.1995. Coms. (d)-(f) quot. in sup. and cit. in headnote. A deceased patient's family members sued a hospital for breach of contract and intentional infliction of emotional distress, among other claims, after the hospital allegedly removed the decedent's eyes and major bones after the family members consented only to removal of corneas and bone marrow. This court granted hospital

summary judgment on plaintiffs' breach of contract claim but denied summary judgment on the other claims. The court held, inter alia, that fact issues existed as to the emotional-distress claim, because a reasonable person looking at this situation could exclaim, "Outrageous," as the nurse's conduct of intentionally misleading plaintiffs into consenting to a tissue donation that exceeded their expressed wishes could be said to have exploited a position of trust and respect gained from an emotionally vulnerable family. Perry v. Saint Francis Hosp. & Medical Center, 886 F.Supp. 1551, 1552, 1560-1561.

D.Kan.1995. Subsec. (1) cit. in headnote and sup. A housekeeper at a hospital sued the hospital for civil-rights violations and intentional infliction of emotional distress, alleging that throughout her employment she was constantly sexually harassed by her supervisor. This court granted in part and denied in part hospital's motion for summary judgment, holding, inter alia, that plaintiff did not demonstrate that former employer's failure to act in response to plaintiff's complaints of sexual harassment constituted the tort of outrage. Wilkerson v. P.I.A. Topeka, Inc., 900 F.Supp. 1418, 1418, 1423.

D.Kan.1994. Cit. generally in case quot. in sup., subsec. (1) cit. in disc. Restaurant employee sued restaurant owner for, among other claims, intentional infliction of emotional distress, alleging that a co-worker made repeated and unwanted physical and verbal sexual advances. This court granted in part and denied in part defendant's motion for summary judgment, holding, inter alia, that, although co-worker's conduct was rude, abrasive, and unprofessional, it could not conclude that his conduct was so extreme or outrageous so as to permit recovery. Beam v. Concord Hospitality, Inc., 873 F.Supp. 491, 501, 502.

D.Kan.1994. Cit. generally in case cit. in sup. Former employee sued insurance agent for whom she worked and insurance company for whom supervisor worked for outrage, among other claims. The court granted defendants summary judgment, holding, inter alia, that agent's sexual harassment and other conduct, while rude and unprofessional, was not of such an abusive nature or constancy as to permit recovery for outrage. Thomason v. Prudential Ins. Co. of America, 866 F.Supp. 1329, 1337.

D.Kan.1992. Com. (f) quot. in sup. and cit. in case quot. in sup., illus. 9-12 cit. generally in disc. and in ftn. Former employee, subjected to longtime abusive behavior by supervisor, sued supervisor and employer for outrage and negligent retention. After verdict for the employee, defendants moved for new trial, inter alia. In denying the motion, the court rejected defendants' argument that the court erred by failing to instruct the jury that there could be no liability under tort of outrage for emotional distress resulting from employee's peculiar sensitivity, which was unknown to her supervisor. The court stated that the jury was sufficiently informed of this, having been instructed that the employee could not recover unless the emotional distress was reasonably foreseeable to her supervisor as a consequence of his conduct. Laughinghouse v. Risser, 786 F.Supp. 920, 923.

D.Kan.1986. Com. (j) cit. in case quot. in disc. A former city employee sued the city and its director of personnel for intentional infliction of emotional distress and outrage, inter alia, alleging that she was terminated in retaliation for her objections to the defendants' sexually discriminatory employment practices. The court held that those torts were the same cause of action and granted summary judgment for the defendant on those counts, since the defendants' conduct failed to meet the stringent standards for the tort of outrage. The court reasoned that, to have sent the case to the jury, it must have been convinced that reasonable factfinders might differ over whether the defendants' conduct was so extreme and outrageous as to permit recovery and whether the emotional distress suffered by the plaintiff was so severe that no reasonable person should be expected to endure it. Polson v. Davis, 635 F.Supp. 1130, 1151.

D.Kan.1984. Subsec. (1) quot. in sup., com. (j) cit. in case cit. in sup. Discharged employee sued her supervisor and employer alleging violation of a federal age discrimination statute. Plaintiff also asserted state claims for the tort of outrage, tortious interference with a business relationship, and breach of implied warranties of good faith and job security. Defendants moved for summary judgment on all the state claims. The court granted summary judgment on all but the implied covenant of job security. Regarding the tort of outrage, the court noted that termination of an employee, whatever the motive, rarely met the requirement of extreme and outrageous conduct, and that the pain of losing a job was part of the price of living in society. Fletcher v. Wesley Medical Center, 585 F.Supp. 1260, 1261, 1262.

D.Kan.1982. Cit. in disc. The plaintiff employee brought suit against her employer, a Missouri corporation, under the Equal Pay Act, alleging that the defendant paid her a lower wage than that received by male employees doing the same work. The plaintiff sought a retroactive increase in pay, back pay, lost wages and benefits, liquidated damages, attorney's fees, and interest. The plaintiff also sought recovery under the tort theory of outrage, contending that the failure of the defendant to provide female employees with equal pay constituted tortious conduct. The defendant filed a motion to dismiss the tort theory of outrage. This court granted the defendant's motion to dismiss. The court stated that unequal pay for equal work was not conduct so extreme and atrocious as to subject an employer to liability in tort as well as under the federal Equal Pay Act. The court also refused to exercise pendent jurisdiction over the plaintiff's tort claim when the claim for the violation of the federal Equal Pay Act was also asserted, because it found no common nucleus of operative fact between the claims. The court noted that jury confusion might result because the tort claim would entitle the plaintiff to jury instructions and punitive damages while the federal claim would not. Elliot v. Employers Reinsurance Corp., 534 F.Supp. 690, 691.

D.Kan.1982. Subsec. (1) quot. in disc., com. (d) cit. in disc. The plaintiff brought an action for injunctive relief and damages against his employer as a result of the employer's policy to randomly search vehicles prior to their exit from the employer's property. Both parties moved for summary judgment. The court found that the plaintiff had failed to state a cause of action for the invasion of his right to privacy because the plaintiff refused to allow his car to be inspected; therefore no actual intrusion occurred. The court further concluded that the plaintiff's claim that the defendant's conduct was outrageous, resulting in severe emotional distress, was without merit. Accordingly

the defendant's motion for summary judgment was granted. Gretencord v. Ford Motor Co., 538 F.Supp. 331, 334.

E.D.Ky.

E.D.Ky.2019. Com. (h) quot. in case quot. in sup. Former employee brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against former employer, alleging that coworkers failed to intervene during an incident where plaintiff was verbally harassed by a customer, plaintiff did not receive employment coaching sessions, plaintiff's manager acted indifferently towards her, and plaintiff was subject to harassment and humiliation regarding her hysterectomy. This court granted defendant's motion for summary judgment, holding that, under Restatement Second of Torts § 46, Comment *h*, defendant's actions could not reasonably constitute the level of extreme and outrageous conduct required for a successful IIED claim. Vonderhaar v. AT&T Mobility Services, LLC, 372 F.Supp.3d 497, 513.

E.D.Ky.2015. Subsec. (1) quot. and adopted in case quot. in sup. (general cite). Students who had enrolled in the inaugural class of university's graduate clinical-psychology program filed a claim for intentional infliction of emotional distress (IIED) against university in connection with changes it made to the program's curriculum after their enrollment. This court granted summary judgment for university on students' IIED claim, holding that, even if students' allegations were all proven to be true, university's actions were insufficiently outrageous to cross the high threshold required to state such a claim under Restatement Second of Torts § 46. The court concluded that there was no genuine issue of material fact as to whether university behaved in a way that deviated from all bounds of decency or that was utterly intolerable in a civilized community. Suhail v. University of the Cumberlands, 107 F.Supp.3d 748, 760.

E.D.Ky.2013. Subsec. (1) adopted and quot. in case quot. in sup., com. (d) quot. in case quot. in sup. Two former employees brought claims for, among other things, age and gender discrimination and intentional infliction of emotional distress (IIED) against former employer in connection with their termination. Granting employer's motion to dismiss employees' IIED claims, this court held that, even considered collectively, none of employees' allegations—that one employee was disliked by her supervisor, demoted, forced to work longer weeks, and terminated, and that the other employee was reprimanded on false grounds, not promoted, demoted, asked to perform duties beyond her medical limitations, and terminated—rose to the level of outrageousness required to state such a claim. Bargo v. Goodwill Industries of Kentucky, Inc., 969 F.Supp.2d 819, 826, 827.

E.D.Ky.2013. Com. (d) cit. in case cit. in sup. Mortgagor brought, inter alia, a state-law claim of outrage against mortgagee of his personal residence, alleging that defendant harmed his credit rating and his personal reputation when it misapplied his mortgage payments and inappropriately reported a deficiency to credit-rating agencies. Granting defendant's motion to dismiss, this court held that plaintiff's outrage claim was preempted by the Fair Credit Reporting Act, but that, even if it were not preempted, plaintiff's allegation that defendant inaccurately reported his delinquency,

adversely affecting his credit score, stated conduct that, while certainly not desirable, did not deviate from all reasonable bounds of decency, and thus was not sufficiently outrageous to state a claim for the tort of outrage under Kentucky law. Morgan v. HSBC Mortg. Services, Inc., 930 F.Supp.2d 833, 840.

E.D.Ky.2012. Com. (d) cit. in case quot. in sup. Husband and wife sued, among others, school district for elementary school where they both formerly taught and where their daughter was formerly a student, alleging that defendants intentionally discriminated against daughter, who had Type 1 diabetes, on the basis of her disability, and that defendants terminated plaintiffs in retaliation for their attempts to protect daughter's rights. Granting in part defendants' motion for summary judgment, this court held, among other things, that husband failed to state a claim for intentional infliction of emotional distress as a matter of law, because nothing in the record came close to approaching the level of outrageous behavior necessary to support such a claim under established Kentucky law. The court noted that an employee's termination, even if based upon discrimination, did not rise to the required level of extreme and outrageous conduct, without proof of something more. Nixon v. Greenup County School Dist., 890 F.Supp.2d 753, 760-761.

E.D.Ky.2012. Subsec. (1) adopted in case quot. in sup. After a grand jury refused to indict school counselor who was arrested by police detective for alleged sexual abuse of a minor, counselor sued detective, alleging, inter alia, violation of his Fourth Amendment right to be free from unlawful arrest, retaliatory arrest for exercising his First Amendment right to challenge a social worker's substantiated-abuse finding, and the tort of outrage. This court dismissed plaintiff's outrage claim on the basis that plaintiff failed to state a claim for which relief could be granted. The court explained that the gravamen of plaintiff's complaint was the violation of his First and Fourth Amendment rights, and, since emotional-distress damages were available for each of those claims, plaintiff's outrage claim, which was a "gap-filler" tort under Kentucky law, was not actionable, because plaintiff did not allege that defendant acted solely to inflict emotional distress upon him. Wesley v. Rigny, 913 F.Supp.2d 313, 330-331.

E.D.Ky.2011. Com. (d) quot. in case quot. in sup. Female former sales associate brought, inter alia, a pendent state-law claim for intentional infliction of emotional distress (IIED) against co-worker, among others, claiming that, throughout her time with employer, she was subjected to unwelcome, crude, and offensive sexual comments and advances by co-worker. Granting defendant's motion to dismiss this claim, this court held that, while plaintiff alleged that defendant engaged in "clearly offensive and repetitive sexual remarks and pressure," as well as "physical threats and intimidation," such conduct was not sufficiently outrageous and intolerable to support an IIED claim under Kentucky law. Temple v. Pflugner, 866 F.Supp.2d 735, 745.

E.D.Ky.2002. Adopted in case cit. in disc., cit. generally in sup. Former county jail inmate who alleged that she had been denied her previously prescribed medication for epilepsy, asthma, and spinal nerve damage during her 10-day incarceration brought a claim for, in part, outrageous conduct against nurse and jail employees in their individual capacities. Granting defendants' motion for summary judgment, the court held, inter alia, that defendants did not commit outrageous

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conduct by allegedly failing to provide proper medication and medical treatment before and after plaintiff's seizure. Plaintiff left her seizure medication at home so that jail staff had to await its arrival to dispense it, and, following her seizure, she continued to receive medical care at her request. Smith v. Franklin County, 227 F.Supp.2d 667, 683.

E.D.Ky.2000. Cit. in ftn., subsec. (1) and com. (d) cit. in disc., subsec. (2) quot. in disc. Woman whose son killed his girlfriend and then committed suicide sued talk-show host and related entities for "false light" invasion of privacy and intentional infliction of emotional distress after defendants caused the broadcast of a program in which host and a guest suggested that decedent was also responsible for the murder of another woman. Entering summary judgment for defendants, the court held that, with the exception of the tort of appropriation of name or likeness, actions for the violation of the right of privacy did not survive the allegedly invaded party's death, and that plaintiff could not maintain an action for outrage in her capacity as a third party. Mineer v. Williams, 82 F.Supp.2d 702, 706, 707.

E.D.Ky.1997. Cit. in disc., com. (d) cit. and quot. in disc., com. (h) cit. in disc. Former employees alleged that they were ordered to work "off the clock" and then were terminated for doing so; they sued former employer for, inter alia, intentional infliction of emotional distress. Granting defendant's motion for summary judgment, the court held, in part, that the conduct complained of was not so extreme and outrageous as to give rise to a claim for intentional infliction of emotional distress; to the contrary, discharging workers for their known violations of company policy was a good and reasonable business decision. Bevins v. Dollar General Corp., 952 F.Supp. 504, 510, 511.

E.D.Ky.1997. Cit. in disc., com. (d) quot. in disc. and quot. in case quot. in disc., com. (h) quot. in disc. Discharged assistant county attorney who alleged that she was terminated because she was a woman sued county attorney and county officials for, inter alia, intentional infliction of emotional distress. Defendants moved for summary judgment. Granting the motion in part and denying it in part, the court held that a gender-based discharge, while illegal and reprehensible, did not constitute conduct that was sufficiently outrageous or extreme for purposes of the tort of intentional infliction of emotional distress. Lococo v. Barger, 958 F.Supp. 290, 297, 298, affirmed in part, reversed in part 234 F.3d 1268 (6th Cir.2000).

E.D.Ky.1996. Cit. in headnote, quot. in sup. Insured whose disability benefits were terminated brought a claim for outrage, inter alia, against insurer. Granting defendant's motion for partial summary judgment, the court held that plaintiff presented no evidence that defendant's investigation and decision to terminate plaintiff's benefits amounted to the extreme and outrageous conduct necessary to maintain a claim for outrage under Kentucky law. Sculimbrene v. Paul Revere Ins. Co., 925 F.Supp. 505, 505, 509.

E.D.Ky.1993. Cit. and quot. in sup., coms. (d) and (h) quot. in sup. A male employee who had been demoted sued his employer for reverse discrimination on the basis of sex and intentional infliction of emotional distress. Granting the employer's motion for summary judgment, this court held, inter alia, that under Kentucky law the employer's conduct in investigating allegations of

sexual harassment against the employee and hastily demoting him in a rude and callous manner was not so outrageous as to support an emotional distress claim. The court stated that plaintiffs' supervisors' insulting statements during the investigation that plaintiff might as well have been a "murderer, rapist, or child molester, that it wouldn't be any worse," constituted a mere indignity. Pierce v. Commonwealth Life Ins. Co., 825 F.Supp. 783, 788, 789, judgment affirmed 40 F.3d 796 (6th Cir.1994).

E.D.Ky.1988. Coms. cit. in case quot. in disc. A corporation had a long-standing policy that prevented former employees from working in any capacity on its property. A former employee challenged the policy, claiming, inter alia, outrageous conduct causing severe emotional distress. The district court held that the plaintiff had submitted no evidence or even a reasonable inference that the defendant's conduct was extreme and outrageous, and granted the defendant's motion for summary judgment. Burchett v. General Telephone Co. of the South, 699 F.Supp. 114, 117.

W.D.Ky.

W.D.Ky.2022. Com. (d) quot. in case quot. in sup. African American former employees of a trucking company sued employer, its owner, and owner's wife for, among other things, intentional infliction of emotional distress, alleging that plaintiffs were terminated or left employment because of discrimination and a hostile work environment. This court granted in part defendants' motion to dismiss, finding that plaintiffs' complaint failed to sufficiently allege claims of intentional infliction of emotional distress against defendants. The court noted that, under Kentucky law and Restatement Second of Torts § 46, termination from employment, even for discriminatory reasons, did not constitute outrageous conduct sufficient to support a claim for intentional infliction of emotional distress. Robards v. BLK Out Transport, 623 F.Supp.3d 810, 825.

W.D.Ky.2019. Cit., quot., and adopted in cases cit. and quot. in disc. Minors who were participants in city's career-education program brought, inter alia, claims for intentional infliction of emotional distress (IIED) against program sponsors and staff, alleging that defendants sexually abused plaintiffs, subjected plaintiffs to severe verbal interrogation after confronting plaintiffs about the sexual abuse, and fraudulently concealed evidence of the sexual abuse. After the cases were consolidated, this court denied in part defendants' motion to dismiss, holding that, as required for a successful IIED claim under Restatement Second of Torts § 46, plaintiffs alleged sufficient facts that defendants acted with reckless indifference to plaintiffs' well-being and committed outrageous and extreme actions through harsh verbal interrogation and concealing evidence of sexual abuse. B.L. v. Schuhmann, 380 F.Supp.3d 614, 649.

W.D.Ky.2016. Cit. in sup.; com. (d) quot. in sup.; com. (j) quot. in case quot. in sup. Female college-basketball official sued athletic conference, alleging, among other things, that conference negligently supervised its coordinator of basketball officials, who committed the tort of intentional infliction of emotional distress by commenting on her appearance, ogling her, propositioning her, becoming upset when she refused to share a hotel room with him, and by sending her explicit text

messages, including one in which he offered to pay her for sex. This court denied conference's motion to dismiss official's claim for negligent supervision, holding that official stated a plausible claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court reasoned that official's factual allegations indicated that coordinator's conduct was extreme and outrageous, and that his behavior caused official to suffer severe emotional distress. Dukes v. Mid-Eastern Athletic Conference, 213 F.Supp.3d 887, 893, 894.

W.D.Ky.2016. Cit. in sup.; com. (d) quot. in sup.; com. (j) quot. in case quot. in sup. Female college-basketball official sued coordinator of basketball officials, alleging, among other things, that coordinator committed the tort of intentional infliction of emotional distress (IIED) by commenting on her appearance, ogling her, propositioning her, becoming upset when she refused to share a hotel room with him, and by sending her explicit text messages, including one in which he offered to pay her for sex. This court denied in part coordinator's motion for judgment on the pleadings, holding that official stated a plausible claim for IIED under Restatement Second of Torts § 46. The court reasoned that official's factual allegations indicated that coordinator's conduct was extreme and outrageous, and that his behavior caused official to suffer severe emotional distress. Dukes v. Mid-Eastern Athletic Conference, 213 F.Supp.3d 878, 886.

W.D.Ky.2015. Com. (d) quot. in case quot. in sup. Former employees sued former employer, alleging retaliation in violation of the Family and Medical Leave Act, third-party retaliation in violation of the Act, and intentional infliction of emotional distress (IIED). Granting in part employer's motion to dismiss, this court held that employees' IIED claim was preempted by their FMLA claim, because any level of outrageousness in employer's conduct stemmed from its alleged FMLA violations. While employer fired both employees, and the firings were unpleasant and poorly timed, the mere termination of employment and the resulting embarrassment did not rise to the level of outrageous conduct and resulting severe emotional distress necessary to support an IIED claim under Restatement Second of Torts § 46. Kastor v. Cash Exp. of Tennessee, LLC, 77 F.Supp.3d 605, 615.

W.D.Ky.2006. Com. (d) quot. in case quot. in sup. Former university athletic director sued university and others, alleging, among other things, that university president invaded his privacy by gaining access to his personal computer and removing personal notes and effects from his office, and made defamatory statements about him to university's board prior to his transfer to another position within the university. Granting summary judgment for defendants as to plaintiff's claim for intentional infliction of emotional distress, this court held that an average member of the community would not be outraged by plaintiff's transfer, that the alleged invasion of privacy was not so truly outrageous and intolerable as to rise to the level of conduct required for such a claim, and that any remarks defendants made concerning plaintiff were not so outrageous as to offend generally accepted standards of decency and morality. Dennison v. Murray State University, 465 F.Supp.2d 733, 757.

W.D.Ky.2004. Adopted and quot. in case quot. in disc., coms. (d), (i), and (j) quot. in sup. Owners of property located within 10 miles of a uranium-enrichment facility sued government contractors

pursuant to the Price-Anderson Act to recover damages for the alleged diminution in market value of their properties due to soil and groundwater contamination caused by the facility, asserting, in part, a claim for the tort of outrage. Granting defendants' motion for summary judgment, the court held, inter alia, that plaintiffs' outrage claim failed because plaintiffs did not offer any evidence that defendants' conduct was intentional or reckless, or that the emotional distress they allegedly suffered was severe. Smith v. Carbide and Chemicals Corp., 298 F.Supp.2d 561, 573, 574.

W.D.Ky.2003. Quot. in case quot. in disc. Female employees of a shipping company sued employer and their supervisor for sexual harassment and outrageous conduct. Supervisor had told inappropriate sexual jokes, touched plaintiffs inappropriately, showed them sexually suggestive e-mails, and placed a vibrating pager between one of the plaintiff's legs. This court granted defendant summary judgment, holding, inter alia, that supervisor's behavior towards plaintiffs, while insulting and derogatory, did not constitute extreme and outrageous conduct. Clark v. United Parcel Service, Inc., 286 F.Supp.2d 819, 831.

W.D.Ky.2003. Com. (d) quot. in case quot. in sup. Former attorney for a bankrupt restaurant sued creditors for, inter alia, outrageous conduct arising from defendants' action in filing false proofs of claim and making false statements under oath during restaurant's bankruptcy proceeding. This court granted defendants' motion to dismiss, holding, inter alia, that plaintiff failed to state a claim for outrageous conduct. The court stated that filing false claims in a bankruptcy proceeding and offering false testimony were arguably bad acts, and potentially criminal as well, but they did not rise to the level of going beyond all possible bounds of decency, nor were they behaviors considered utterly intolerable in a civilized community. Heavrin v. Boeing Capital Corp., 246 F.Supp.2d 728, 733, affirmed 384 F.3d 199 (6th Cir.2004).

W.D.Ky.2001. Adopted in case cit. in sup. Employee brought diversity action against employer for, inter alia, sexual discrimination, intentional infliction of emotional distress, and negligent supervision. Denying in part employer's motion to dismiss, this court held, inter alia, that employee's broad allegation of employer's inappropriate and intentional misconduct sufficiently stated claim for intentional infliction of emotional distress. Grego v. Meijer, Inc., 187 F.Supp.2d 689, 694.

W.D.Ky.2001. Com. (d) quot. in case quot. in sup. Occupants of a private residence sued police officer for the tort of outrageous conduct, alleging that defendant illegally entered their home without a warrant and arrested a visitor. Sustaining defendant's motion for summary judgment, the court held, inter alia, that defendant was not liable, since his conduct was neither outrageous in character nor extreme in degree. Hickey v. Hayse, 188 F.Supp.2d 722, 730.

W.D.Ky.2000. Cit. in sup. Employee brought state-court tort action against employer and supervisor. Employer removed the action to this court and moved for judgment on the pleadings, arguing that supervisor was fraudulently joined in order to defeat diversity jurisdiction. Remanding the action, the court held that it lacked subject-matter jurisdiction in this case, since plaintiff's

allegations were sufficient to state a claim against supervisor for intentional infliction of emotional distress. Sprowls v. Oakwood Mobile Homes, Inc., 119 F.Supp.2d 694, 697.

W.D.Ky.1999. Cit. in disc., cit. in case quot. in disc., com. (g) quot. in disc., com. (i) cit. and quot. in disc. and cit. in ftn., com. (j) cit. in ftn. Widow of individual who died from chronic pulmonary disease caused by extensive smoking brought strict-products-liability action against tobacco company. Defendant moved for summary judgment, arguing that the "common knowledge" doctrine barred plaintiff's claim. Denying the motion, the court held, in part, that the "common knowledge" doctrine, also known as the "consumer expectation test," was not an absolute defense to strict liability for defective design; however, public knowledge of the risks associated with smoking was relevant to a determination of the extent of defendant's duty to warn. Hill v. R.J. Reynolds Tobacco Co., 44 F.Supp.2d 837, 840-842, 844, 845.

W.D.Ky.1997. Com. (d) quot. in case quot. in disc. Former employee brought state court action against former supervisor and employer, alleging that she was sexually harassed, discriminated against, and retaliated against in violation of the Kentucky Civil Rights Act. Plaintiff also asserted a claim for intentional infliction of emotional distress. After removing the case to this court on the basis of diversity jurisdiction, defendants moved for summary judgment. Granting the motion, the court held, in part, that the Act did not impose individual liability for discriminatory conduct, and that supervisor's behavior, while inappropriate for the workplace, did not rise to the level needed to support a claim for intentional infliction of emotional distress. Effinger v. Philip Morris, Inc., 984 F.Supp. 1043, 1046.

W.D.Ky.1997. Cit. in headnote, com. (d) quot. in case quot. in disc. Package driver sued employer and union for, inter alia, assault and intentional infliction of emotional distress. Entering summary judgment for defendants, the court held, in part, that employer's actions in replacing driver's modified gearshift with a shorter gearshift, which allegedly caused driver pain, did not constitute assault, as driver failed to prove harmful or offensive contact or the imminent apprehension of such, and that any adverse employment actions defendants took against driver did not rise to the level required to sustain an action for intentional infliction of emotional distress. Humphress v. United Parcel Service, Inc., 31 F.Supp.2d 1004, 1006, 1015, judgment affirmed 172 F.3d 48 (6th Cir.1998).

W.D.Ky.1995. Cit. but dist. Clothing designer who was photographed wearing one of her creations sued publisher of magazine that ran photo and tee shirt manufacturer that subsequently used the photo on its shirts for invasion of privacy. The court granted defendants' motion to dismiss inasmuch as the complaint stated claims for intrusion upon seclusion, giving unreasonable publicity to plaintiff's private life, and placing her in a false light but denied their motion to the extent that plaintiff alleged unauthorized appropriation of her likeness, holding that if she could prove a property interest in her likeness because of its commercial value and her intent to profit from it, she could recover. The court explained that while the cause of action was not limited to celebrities, the amount of damages would vary depending on the extent of the plaintiff's fame. Finally, the court denied plaintiff's request to add a claim for intentional infliction

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of emotional distress on the ground that defendants' behavior was not outrageous. Cheatham v. Paisano Publications, Inc., 891 F.Supp. 381, 387.

W.D.Ky.1995. Adopted in case cit. in disc., cit. in sup., subsec. (1) quot. in ftn. Boat passenger who allegedly was injured when the intoxicated driver ran the boat aground in a narrow channel sued the driver for the tort of outrageous conduct causing severe emotional distress. On remand, this court held that plaintiff did not state a cause of action for the tort of outrageous conduct under Kentucky law, since plaintiff's personal injuries, rather than her emotional distress, were the essence of her claim, and defendant's conduct, while reckless and irresponsible, was not the kind of indecent and immoral behavior that would engender the ire, rather than the mere disapproval, of a civilized community. Lynch v. McFarland, 893 F.Supp. 707, 708, reversed 111 F.3d 131 (6th Cir.1997).

W.D.Ky.1989. Cit. in sup., com. (g) cit. in disc. An employee who was discharged after fighting with a co-worker on the employer's premises sued the employer and the union for intentional infliction of emotional distress, inter alia. Dismissing the complaint, the court held that the conduct of the defendants was legally permissible and was not the extreme and outrageous behavior necessary to sustain the plaintiff's claim. The court said that the plaintiff committed a dischargeable offense and the union, in the exercise of its duties of fair representation, decided not to take the plaintiff's termination to arbitration. Hayes v. Bakery Confectionery & Tobacco Wkrs., 753 F.Supp. 209, 215, affirmed 914 F.2d 256 (6th Cir.1990).

W.D.Ky.1988. Cit. in case quot. in sup., com. (h) cit. in disc. and quot. in ftn. Several convenience store employees were fired after failing a polygraph test. The test was a condition of employment and was taken by all employees on a regular basis. The discharged employees sued the employer and the company that administered the test for intentional infliction of emotional distress, invasion of privacy, and defamation. This court granted the defendants summary judgment on all counts. On the emotional distress count, the court said that, even if polygraph testing was not a reliable indicator of the subject's truthfulness, its use and administration were regulated by state statute and thus, as a matter of law, polygraph testing did not rise to the level of extreme and outrageous behavior necessary to support the plaintiffs' claim. Stewart v. Pantry, Inc., 715 F.Supp. 1361, 1365.

W.D.Ky.1986. Cit. in case cit. in disc. An employee sued his former employer, an insurance company, for wrongful discharge and intentional infliction of emotional distress due to his termination in violation of public policy as retaliation for his refusal to participate in an allegedly criminal act. This court granted the employer's motion for summary judgment, holding, inter alia, that the claim for outrageous conduct failed where the evidence showed only that the plaintiff's workplace was stressful and that there was friction between the employee and his supervisor, and where there was insufficient evidence that the plaintiff's discharge was in contravention of a well-defined and fundamental public policy. Webster v. Allstate Ins. Co., 689 F.Supp. 689, 692.

W.D.Ky.1973. Cit. in sup. In this action by school teachers and principals against a board of education, complaining of unlawful discharges and demotions, in retaliation for union activities, the court, after holding that some of the teachers and principals actually had been unlawfully

discharged or demoted, held that they were not entitled to punitive damages because the board's action was not motivated by evil intent or malice toward the individual teachers and principals. Dause v. Bates, 369 F.Supp. 139, 150, rev'd. 502 F.2d 865 (6thCir.1974).

E.D.La.

E.D.La.2014. Adopted in case quot. in sup., com. (d) quot. in case quot. in sup. (general cite). Corporate jet pilot brought claims for, among other things, intentional infliction of emotional distress (IIED) against former employer, alleging that, in retaliation for her stance on aviation safety, it launched a sham independent investigation against her and contrived a mental-health issue that left her permanently grounded. This court denied in part defendant's motion for summary judgment, holding that genuine questions of material fact remained as to the outrageous nature of defendant's alleged conduct, because plaintiff's allegations that defendant concocted a plan to destroy her career could be deemed sufficiently severe and outrageous as to allow recovery for IIED. The court noted that Louisiana courts had adopted a cause of action for IIED generally in accord with the legal precepts set forth in Restatement Second of Torts § 46. Currier v. Entergy Services, Inc., 73 F.Supp.3d 673, 678.

E.D.La.2014. Cit. in case quot. in sup., com. (d) quot. in case quot. in sup. Adult daughters who owned or were beneficiaries of an insurance policy on their father's life brought, inter alia, a state-law claim for intentional infliction of emotional distress against father, after defendant obtained loans under the policy by forging their names without their knowledge or authorization and then deposited the proceeds into his personal checking account. Granting summary judgment for defendant as to this claim, this court cited Restatement Second of Torts § 46 in holding that, even if defendant forged plaintiffs' signatures on the loan requests, the evidence did not support a conclusion that he did so with the intent to cause plaintiffs severe emotional distress, or even with the knowledge that such a result was certain to occur; rather, the evidence showed that defendant used funds from two family businesses to pay the premiums for the policy and that he took the loans out on the policy for the purpose of obtaining money for the businesses or for his own personal needs, not in order to cause severe emotional distress. Richardson v. Cella, 1 F.Supp.3d 484, 493.

M.D.La.

M.D.La.2015. Com. (d) quot. in case quot. in sup. (erron. cit. as § 12); com. (g) quot. in case quot. in sup. Former employee brought claims for, among other things, intentional infliction of emotional distress (IIED) against former employer, alleging that employer discriminated against her due to her pregnancy by firing her soon after she gave birth. This court granted defendant's motion for summary judgment on plaintiff's IIED claim under Restatement Second of Torts § 46, holding that courts had declined to find conduct akin to employer's as outrageous even where the employer fired the employee just before or on the day of delivery of a child, and that, even assuming employer's conduct was outrageous and extreme, employee failed to produce any evidence that she suffered

severe emotional distress as a result of employer's actions. Martin v. Winn-Dixie Louisiana, Inc., 132 F.Supp.3d 794, 811, 824.

W.D.La.

W.D.La.2020. Cit. in case quot. in sup. Former suspect, who was investigated and charged with a series of property crimes—including tire spikings, arson, and damage by gunfire—before the actual perpetrator was discovered, filed a claim for intentional infliction of emotional distress against district attorney and others, alleging that district attorney knew that police officers had placed posters near plaintiff's property with Bible verses written on them in the same style as letters mailed by the perpetrator, but failed to inform suspect despite knowing that the posters caused him and his family to be fearful. This court granted partial summary judgment for district attorney, holding that suspect failed to raise a genuine issue of material fact as to whether district attorney's actions or inactions rose to the level of extreme and outrageous conduct required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. Phillips v. Whittington, 497 F.Supp.3d 122, 166.

W.D.La.1997. Com. (d) quot. in case quot. in disc. After being fired, a former district executive of the Boy Scouts sued the organization for intentional infliction of emotional distress. Plaintiff alleged that her supervisor told her (1) that he had heard a rumor that plaintiff was having an extramarital affair with a previous scout executive; (2) that an area director was attracted to her and that she was sending out sexual "vibes"; (3) that she was a "very sexual person"; (4) that she was being placed next to a donor at a table because the donor was attracted to her and might give more money; and (5) that he did not want a woman in the position she held. This court granted defendants summary judgment, holding, inter alia, that defendants' conduct was not extreme and outrageous, because employees must be hardened to occasional acts of rough language and inconsiderate and unkind treatment. Here, defendants' conduct amounted to no more than a peccadillo. Glenn v. Boy Scouts of America, 977 F.Supp. 786, 789.

W.D.La.1996. Com. (d) quot. in case quot. in sup. A black employee sued his employer and his supervisor for violations of Title VII and intentional infliction of emotional distress, among other claims. The supervisor had described certain employees as "cotton patch niggers," and two coemployees had also used phrases containing the word "nigger." This court denied plaintiff's claim for intentional infliction of emotional distress, holding, inter alia, that, although use of the term "nigger" was truly offensive, the three statements made in plaintiff's presence did not constitute extreme and outrageous conduct. Grant v. UOP, Inc., 972 F.Supp. 1042, 1052.

W.D.La.1992. Cit. generally in case quot. in sup., cit. in ftn., com. (d) quot. in case quot. in sup., com. (g) cit. in case quot. in sup. A former insurance salesman sued his former employer for, inter alia, intentional infliction of emotional distress after the following allegedly tortious conduct on defendant's part: unfair evaluation of plaintiff, an argument between plaintiff and his supervisor, potential competition from independent sales agents, inadequate clerical and telephone answering

staffs, inability to advertise, and omission of the office's telephone number from the telephone book one year. Granting defendant's motion for judgment as a matter of law dismissing plaintiff's claim, this court held that none of the alleged acts were so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and that none of them could be regarded as atrocious and utterly intolerable in a civilized community; they were either petty annoyances or trivialities. Deus v. Allstate Ins. Co., 800 F.Supp. 420, 424, 426, 428, affirmed 15 F.3d 506 (5th Cir.1994). See above case. Cert. denied___ U.S. ___, 115 S.Ct. 573, 130 L.Ed.2d 49 (1994).

D.Me.

D.Me.2020. Com. (d) quot. in case quot. in sup. Ex-wife, who had previously obtained a judgment of divorce from ex-husband in state court, sued ex-husband for, among other things, negligent infliction of emotional distress based on allegations that he fraudulently induced her to leave her career and home in South Africa by promising to marry her and provide her with certain benefits. This court granted summary judgment for ex-husband on ex-wife's claim for negligent infliction of emotional distress, holding that, while former spouses could collect on harms resulting from the intentionally tortious conduct of their ex-spouses under Restatement Second of Torts § 46, post-divorce interspousal claims for negligent infliction of emotional distress had to be understood to be resolved via the divorce proceedings. Jones v. Porter, 438 F.Supp.3d 101, 105.

D.Me.2010. Cit. in case cit. in disc. Army reserve officer employed as a subcontractor in Afghanistan sued contractor for allegedly failing to honor an oral extension of his subcontractor agreement. Granting defendant's motion to dismiss plaintiff's claim for intentional infliction of emotional distress, this court held, among other things, that defendant's temporary refusal to pay for plaintiff's flight back to the United States, which stranded him in a foreign airbase until the involvement of another of defendant's managers led to the release of funds for his ticket, was an inconvenience, not conduct that exceeded all bounds of decency. The court noted that any refusal to pay for plaintiff's flight was retracted and that issues resolving his ticket were resolved within a matter of hours. Berry v. WorldWide Language Resources, Inc., 716 F.Supp.2d 34, 54.

D.Me.2003. Com. (h) quot. in case quot. in sup. Former employee, who had heart condition, sued former employer, alleging disability discrimination and intentional infliction of emotional distress. On cross-motions for summary judgment, this court held, inter alia, that employer's failure to assign employee to day shift or facilitate her transfer to different facility did not amount to extreme or outrageous conduct sufficient to sustain claim for intentional infliction of emotional distress. Leavitt v. Wal-Mart Stores, Inc., 238 F.Supp.2d 313, 317, affirmed in part, vacated in part, remanded 74 Fed.Appx. 66 (1st Cir.2003).

D.Me.2000. Com. (d) and coms. (i)-(k) cit. in case cit. in ftn. A temporary federal employee who was the victim of retaliatory threats and harassment sued her co-workers and supervisors for federal RICO violations and several state and common law claims. This court granted defendants' motion to dismiss, holding, inter alia, that the Civil Service Reform Act's administrative scheme

preempted plaintiff's state and common-law claims against the individual defendants. The court noted that if plaintiff were able to establish harassment that was not related to personnel actions, she might be able to state a claim for intentional infliction of emotional distress. However, plaintiff had alleged only humiliation and embarrassment, and not objective symptomatology or severe emotional distress. Ferris v. American Federation of Government Employees, 98 F.Supp.2d 64, 68.

D.Me.2000. Com. (h) quot. in case quot. in disc. Former student sued former elementary school teacher, alleging sexual molestation and asserting due-process claims and state-law claims for assault and intentional and negligent infliction of emotional distress. Denying defendant's motion for partial summary judgment, this court held, inter alia, that material issue of fact existed because reasonable persons could differ as to whether defendant's conduct was sufficiently extreme and outrageous to result in liability for intentional infliction of emotional distress. Hinkley v. Baker, 122 F.Supp.2d 57, 61.

D.Me.1999. Com. (d) quot. in disc. Elementary school teacher sued school district, superintendent, and principal for, inter alia, intentional infliction of emotional distress in connection with defendants' refusal to recommend her for tenure once her probationary period ended. Entering summary judgment for defendants on this count, the court held, in part, that even if defendants' actions were motivated by impermissible considerations, an adverse employment decision was insufficient to give rise to an action for intentional infliction of emotional distress. Green v. Maine School Administrative Dist. No. 77, 52 F.Supp.2d 98, 114.

D.Me.1999. Quot. in case quot. in sup. Insured sued insurer for, inter alia, fraud and intentional infliction of emotional distress after his request for benefits was denied. Plaintiff also attempted to assert a claim for equitable estoppel. Dismissing the complaint in part, the court held, among other things, that plaintiff's allegations of misrepresentations both when defendant sold him the policy and also when he became disabled with a brain tumor had been pleaded with enough particularity to withstand the motion to dismiss, and that the court could not say as a matter of law that accusing plaintiff of malingering and engaging in an unethical attempt to obtain benefits was not outrageous; however, plaintiff could not maintain an action for equitable estoppel, since equitable estoppel was a defense. Weaver v. New England Mut. Life Ins. Co., 52 F.Supp.2d 127, 131.

D.Me.1996. Com. (d) quot. in case quot. in sup. Vacation-cottage lessors brought, in part, a claim of intentional infliction of emotional distress against lessee who, following an altercation with lessors about the condition of the cottage, had sent a letter to the Maine Land Use Regulation Commission complaining about lessors' activities and challenging their request for an advisory ruling regarding potential modifications to their property. Granting in part defendant's motion for summary judgment, the court held, inter alia, that defendant's conduct in sending the letter, while possibly rude, belligerent, uncivil, and vindictive, did not rise to the level of outrageous conduct necessary to state a claim for intentional infliction of emotional distress under Maine law. Baker v. Charles, 919 F.Supp. 41, 42, 46.

D.Me.1995. Cit. in case cit. in disc. Terminated hospital financial officer sued hospital and its subsidiary for sexual discrimination, retaliation, and defamation, among other claims. Plaintiff's defamation claim stemmed from his termination and the fact that he had been forced to explain to potential future employers and other third parties the reason for his termination. This court granted in part and denied in part defendants' motion to dismiss, holding, inter alia, based on Maine's position of negligent publication, coupled with Restatement authority, that the Maine Supreme Court would recognize defamation under the compelled self-publication theory. The court declined plaintiff's invitation to recognize a new and distinct cause of action for compelled self-publication, but noted that in particular circumstances compelled self-publication folds neatly within the publication prong of defamation. Maine's treatment of negligent publication mirrored the foreseeability analysis used by sister states recognizing defamation based on compelled self-publication. Carey v. Mt. Desert Island Hosp., 910 F.Supp. 7, 13.

D.Me.1994. Cit. in headnote, quot. in case quot. in sup., com. (h) cit. in case quot. in sup. Employee who was discharged sued former employer and former supervisor for intentional infliction of emotional distress, inter alia. Granting in part defendants' motion for partial summary judgment, the court held that plaintiff failed to establish any of the necessary elements of the tort; plaintiff failed to show that defendants' conduct rose to the level of extreme and outrageous conduct warranting recovery or that he suffered severe emotional distress as a result of defendants' actions. Burr v. Melville Corp., 868 F.Supp. 359, 361, 367.

D.Me.1993. Com. (e) quot. in part and cit. in sup., coms. (g) and (h) cit. in case cit. in disc., illus. 7 cit. in sup. The FDIC sued to recover on promissory notes against a corporate borrower and its owners, and the defendants asserted a counterclaim for intentional infliction of emotional distress and a third-party claim for defamation against the bank where the notes originated and the bank's subsidiary that engaged in debt collection. This court, granting in part and denying in part all parties' motions to dismiss claims against them, held, inter alia, that, under Maine law, allegations that the FDIC structured its complaint to humiliate and harass the owners and engaged in unconventional and ill-conceived settlement negotiations was not outrageous conduct that would support the emotional distress claim, but allegations that the debtors were threatened with terrible consequences, including federal criminal charges, if a settlement demand was not accepted did state such a claim. F.D.I.C. v. S. Prawer & Co., 829 F.Supp. 439, 450, 452.

D.Me.1992. Cit. in ftn. Several persons sued a shipping company alleging, among other claims, negligent infliction of emotional distress under the general maritime law. The jury returned a verdict in plaintiffs' favor. Granting in part defendant's motion for judgment as a matter of law, this court held that plaintiffs' emotional distress claim must fail because plaintiffs presented no evidence of accompanying physical injury or physical impact, which was necessary to state a claim for negligent infliction of emotional distress under general maritime law. The court noted that loss of sleep, loss of appetite, and similar complaints were clearly not the kinds of physical injury required. It also noted that elimination of the physical injury requirement for this tort would essentially eliminate the need for the separate tort of intentional infliction of emotional distress.

Ellenwood v. Exxon Shipping Co., 795 F.Supp. 31, 34, affirmed 984 F.2d 1270 (1st Cir.1993). See above case. Cert. denied___ U.S. ___, 113 S.Ct. 2987, 125 L.Ed.2d 682 (1993).

D.Me.1988. Cit. in case cit. in sup., com. (h) cit. in case cit. in disc. After two tabloid magazines published accounts of an airline pilot's harrowing escape from injury, the pilot sued their publishers for invasion of privacy and intentional and negligent infliction of emotional distress. The district court granted one publisher's motion to dismiss; the pilot then brought motions to amend his complaint and to reconsider the dismissal. This court denied both motions. It determined, inter alia, that the pilot's proposed count against the publisher for intentional infliction of emotional distress failed to state a claim upon which relief could be granted. The court reasoned that the publisher's conduct was not so extreme and outrageous as to exceed all possible bounds of decency, because the alleged misrepresentations in its article would not be highly objectionable to a reasonable person. Dempsey v. National Enquirer, 702 F.Supp. 927, 930.

D.Me.1987. Quot. in case quot. in disc., cit. in disc., com. (f) quot. in sup., com. (k) cit. in case cit. in sup. A cruise passenger asked the ship photographers not to take her picture, but they repeatedly harassed her, making lewd remarks and causing her to spend several hours of the trip in her cabin to avoid their approaches. The passenger sued the ship for intentional infliction of emotional distress and for invasion of privacy. The court awarded damages to the plaintiff for intentional infliction of emotional distress. The court reasoned that the extreme and outrageous character of the defendant's conduct arose from the photographers' knowledge that the plaintiff was sensitive about having her picture taken and that severe emotional distress was inferred from the extreme and outrageous nature of that conduct. However, the court found no merit in the plaintiff's invasion of privacy claim since the taking of a photograph of someone who was in public was not an intrusion into a physical realm that was uniquely the plaintiff's. Muratore v. M/S Scotia Prince, 656 F.Supp. 471, 480, 481.

D.Me.1986. Cit. in disc. Workers who had been exposed to asbestos sued various defendants for damages for emotional distress, alleging that the defendants were responsible for the plaintiffs' exposure to asbestos and that such exposure had created anxiety that they would contract cancer in the future. The court denied the defendants' motion in limine to exclude from opening statements any discussion of fear or increased risk of cancer, holding that, under Maine law, fear of cancer was a recoverable element of damages in the instant actions. The court cautioned, however, that most courts have been reluctant to award damages under an independent cause of action for emotional distress in the absence of some accompanying physical manifestation of injury, with the exception of anxiety caused by “outrageous” conduct. In re Moorenovich, 634 F.Supp. 634, 637.

D.Md.

D.Md.2020. Com. (e) quot. in sup. Former inmates, who were wrongfully convicted of conspiracy to commit murder, received life sentences, and were imprisoned for approximately 24 years before the convictions were ultimately vacated, filed claims for, among other things, intentional infliction

of emotional distress against city police detectives who were involved in securing the wrongful convictions, alleging that detectives used their authority as law-enforcement officers to falsify evidence of plaintiffs' participation in the murders, resulting in decades of wrongful imprisonment and attendant emotional distress. The court cited Restatement Second of Torts § 46 in reasoning that detectives' position as officers enhanced the extreme and outrageous character of their conduct. McPherson v. Baltimore Police Department, 494 F.Supp.3d 269, 286.

D.Md.2016. Com. (d) quot. in case quot. in sup. African American social worker filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against employer and former supervisor, alleging that supervisor refused to provide an annual evaluation and to sign a form plaintiff needed for his social-worker license, retaliated against him for filing a report with the Equal Employment Opportunity Office, refused to give him assignments, told other employees to stay away from him, and attempted to have him suspended for missing work for jury duty. This court granted defendants' motion for summary judgment, holding that plaintiff did not allege conduct that was sufficiently extreme and outrageous to support an IIED claim. The court cited Restatement Second of Torts § 46, Comment *d*, in explaining that an IIED claim required conduct that was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. Booth v. County Executive, 186 F.Supp.3d 479, 488.

D.Md.2015. Coms. (d) and (f) quot. in case quot. in sup. Former employee of city's department of public works sued mayor and city council, alleging employment discrimination based on her gender and perceived national origin, retaliation, and intentional infliction of emotional distress (IIED). This court denied in part defendants' motion to dismiss, holding that plaintiff's allegations that the department's management knew of her emotional sensitivity yet continued to engage in discriminatory, retaliatory, and hostile behavior toward her were adequate to state a claim for IIED. The court reasoned that, under Restatement Second of Torts § 46, Comment *f*, the extreme and outrageous character of the conduct could arise from the actor's knowledge that the other was peculiarly susceptible to emotional distress, and noted plaintiff's allegations that her psychiatrist had communicated with the department's management several times to make management aware of plaintiff's mental distress attributable to her treatment at work. Arsham v. Mayor & City Council of Baltimore, 85 F.Supp.3d 841, 850.

D.Md.2014. Com. (e) cit. in case quot. in sup. Former employee sued former employer and employer's CEO, alleging intentional infliction of emotional distress (IIED) and other claims in connection with allegations that CEO publicly and privately yelled at him, humiliated and demeaned him, and unnecessarily placed him in stressful and confrontational situations. This court denied in part defendants' motion to dismiss, holding that plaintiff stated an IIED claim under Maryland law and Restatement Second of Torts § 46. The court pointed to plaintiff's allegations that CEO was in a position of actual authority over plaintiff, that CEO's behavior worsened after plaintiff asked employer's human resources department to shield him from confrontational situations, that CEO flatly refused to stop his abusive behavior when plaintiff directly asked him to do so, and that CEO violently approached plaintiff at a business meeting, yelled curse words in

his face, poked him in the chest, backed him up against a wall, and loudly fired him. Rubino v. New Acton Mobile Industries, LLC, 44 F.Supp.3d 616, 624.

D.Md.2012. Com. (d) cit. in sup., quot. in case quot. in sup. Estate of former resident of a nursing/rehabilitation center brought a claim for, inter alia, intentional infliction of emotional distress against center and others, alleging, among other things, that defendants had made inappropriate attempts to obtain information about resident's bank account, and later transferred her to an assisted living facility without her consent. Granting defendants' motion for summary judgment on plaintiff's claim for intentional infliction of emotional distress, this court held that defendants' alleged conduct, while certainly suspicious and problematic, was not sufficiently "extreme in degree" to state a such a claim. In addition, although resident's friends found her to be confused and not her usual self at the new facility, no evidence reasonably supported an inference that she suffered "severe" emotional distress or that defendants intentionally caused her pain and suffering that would shock the conscience. Estate of Jones v. NMS Health Care of Hyattsville, LLC, 903 F.Supp.2d 323, 329.

D.Md.2011. Com. (e) cit. in case quot. in sup. Resident of housing cooperative, who was disabled by kidney disease and respiratory and immune system disorders, sued cooperative, alleging that it first recklessly exposed her to chemical poisoning by using pesticides near her unit without advance warning, despite her repeated admonitions that doing so would cause serious potential harm to her health, and then refused to alleviate or remedy the situation in any way. Denying defendant's motion to dismiss plaintiff's claim for intentional infliction of emotional distress, this court held that plaintiff sufficiently pled outrageous or extreme conduct to survive a motion to dismiss. The court rejected defendant's argument that it was only made aware of potential risks of physical, not emotional, harm to plaintiff, reasoning that plaintiff's conduct and fervor in protesting defendant's proposed use of the chemicals should have conveyed to defendant her deep emotional investment in the issue. Brengle v. Greenbelt Homes Inc., 804 F.Supp.2d 447, 453.

D.Md.2011. Com. (g) quot. in case quot. in sup. Estate of insured brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against workers' compensation insurers, alleging that insured committed suicide because defendants refused to authorize the 24-hour supervised care that she needed as a result of numerous psychiatric conditions from which she suffered following a physical and sexual assault at work. This court dismissed the complaint without prejudice, holding that defendants' failure to authorize the care, which was not requested by a treating physician, did not amount to the kind of extreme and outrageous conduct necessary to constitute the tort of IIED. The court noted, moreover, that a party was never liable where he had done no more than to insist upon his legal rights in a permissible way, even though he was well aware that such insistence was certain to cause emotional distress, especially where, as here, there was no allegation that defendants' sole purpose in refusing insured's request was to harass her into abandoning her claim or into committing suicide. Respess v. Travelers Cas. & Sur. Co. of America, 770 F.Supp.2d 751, 761.

D.Md.2008. Cit. in case quot. in sup. Father of soldier who was killed in the line of duty in Iraq brought privacy and emotional-distress claims against fundamentalist church, its pastor, and two of its members for, among other things, picketing son's funeral while carrying signs that publicized their antihomosexual message and publishing related statements concerning son on church's website despite never having met son or his family. This court entered judgment on a jury verdict in favor of plaintiff. Denying defendants' motion for judgment as a matter of law and for judgment n.o.v. as to plaintiff's claim for intentional infliction of emotional distress, the court held that there was sufficient evidence in the record for a reasonable jury to conclude that defendants' conduct was so extreme and outrageous as to cause severe injury to plaintiff through its significant emotional impact exacerbating his depression and diabetes. Snyder v. Phelps, 533 F.Supp.2d 567, 580.

D.Md.2006. Com. (d) quot. in case quot. in sup. Homeowner and his family sued neighbor, county police officer, and county, alleging, among other things, that, as a result of complaints lodged against family by neighbor, police officer harassed them by illegally searching their home while only their minor children were present, illegally searching their vehicle, and issuing them more than 60 parking and traffic citations. Granting defendants' motion for summary judgment as to plaintiffs' claim for intentional infliction of emotional distress, this court held, inter alia, that the alleged acts in this case simply did not rise to the level of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress. Kashaka v. Baltimore County, Maryland, 450 F.Supp.2d 610, 620.

D.Md.2005. Cit. in case quot. in sup., com. (d) quot. in case quot. in sup. Wife of former employee of cable-television company brought several claims against the company after it allegedly failed to hire her to produce and host a program on its cable system, despite seemingly promising to do so when it recruited her husband for a position with the company. Granting defendant's motion for summary judgment, this court held, inter alia, that defendant's alleged conduct in inducing plaintiff's husband to accept the job under the false pretense of giving her a show did not come close to the level of extremeness and outrageousness required to support plaintiff's claim for intentional infliction of emotional distress under Maryland law, despite defendant's position of power in relation to her. McKenzie v. Comcast Cable Communications, Inc., 393 F.Supp.2d 362, 378, 379.

D.Md.2003. Com. (d) quot. in case quot. in ftn., com. (j) quot. in case quot. in disc. African-American correctional officer sued state correctional institution and other officers for racial harassment that led to his termination, alleging, inter alia, intentional infliction of emotional distress. Plaintiff alleged that after being harassed he had suffered anxiety attacks and low self-esteem, had trouble sleeping and eating, and had been forced to seek counseling. This court granted defendants' motion to dismiss, holding that plaintiff failed to state a claim for intentional infliction of emotional distress, because he had not alleged that harassment had disrupted his ability to function on a daily basis. Since plaintiff failed to allege severe emotional distress, the court did not need to determine whether he alleged outrageous conduct. Clark v. Maryland Dept. of Public Safety & Correctional Services, 247 F.Supp.2d 773, 778.

D.Md.2003. Com. (d) quot. in case quot. in ftn., com. (j) quot. in case quot. in disc. Correctional officers sued state division of corrections, two wardens, and prison official for racial harassment and discrimination and intentional infliction of emotional distress. This court granted in part defendants' motions to dismiss, holding that plaintiffs' claim for intentional infliction of emotional distress failed because they did not allege severe emotional distress. Although plaintiffs contended that harassment at work had resulted in chronic low self-esteem and stress, they had not alleged that harassment had disrupted their ability to function on a daily basis. Because plaintiffs failed to allege severe emotional distress, the court found it unnecessary to determine whether plaintiffs had alleged outrageous conduct. Hejirika v. Maryland Div. of Correction, 264 F.Supp.2d 341, 348.

D.Md.2003. Com. (d) quot. in case quot. in sup. Secretary for school principal sued school board and principal for hostile work environment, sex discrimination, and intentional infliction of emotional distress, inter alia, after principal hid in her home, listened to her conversation with a guest, and confronted her while she was in the shower, and touched her without consent on two other occasions. This court denied principal's motion for summary judgment, holding that plaintiff stated viable claim for emotional distress, since no one in civilized community would find that sneaking into someone's home, waiting for her to take a shower, and then flinging open shower curtain while having a garment over his arm as if to conceal a gun was tolerable behavior within possible bounds of decency. Posey v. Calvert County Bd. of Educ., 262 F.Supp.2d 598, 601.

D.Md.2001. Com. (d) quot. in sup. Female former employee sued former employer for employment discrimination and intentional infliction of emotional distress, among other things, in connection with alleged sexual harassment. Granting in part employer's motion for summary judgment, this court held, inter alia, that supervisor's conduct was not sufficiently outrageous to support claim for intentional infliction of emotional distress where plaintiff laughed at supervisor's inappropriate comments and there was no evidence that supervisor acted with malice or intent to cause distress. Green v. The Wills Group, Inc., 161 F.Supp.2d 618, 624.

D.Md.1996. Com. (d) quot. in case quot. in sup., com. (e) cit. in case cit. in sup., com. (j) quot. in case quot. but dist. Hearing-impaired employee sued employer and its president for violations of Title VII and the Americans with Disabilities Act, and for intentional infliction of emotional distress and negligent selection, supervision, and retention. All parties moved for partial summary judgment. Denying plaintiff's motion and granting in part and denying in part that of defendants, the court held that material factual issues existed as to defendants' statutory liability; president's sexual advances, if proven, constituted outrageous and extreme conduct, but plaintiff failed to show that her resulting emotional distress was severe or that his behavior was such that no reasonable person could be expected to endure it; employer could not be found liable for negligent selection, supervision, and retention based on statutory violations, and, to the extent plaintiff sought to impose liability on employer because of a battery committed by president, summary judgment was appropriate where employer was unaware of president's alleged history of sexual harassment. Bryant v. Better Bus. Bureau of Greater Maryland, 923 F.Supp. 720, 747-749.

D.Md.1996. Com. (d) quot. in case quot. in disc. Former hospital employee who claimed, among other things, that she was sexually harassed by her former supervisor brought Title VII action against supervisor and hospital. Employee also alleged that hospital committed the tort of intentional infliction of emotional distress when, knowing of the harassment, it nevertheless assigned her to work with supervisor. Defendants moved to dismiss. Granting the motion in part and denying it in part, the court held, inter alia, that employee could not sustain her Title VII action against supervisor, as she failed to name him in her charge, nor could she maintain an action for intentional infliction of emotional distress, since the conduct complained of was not so outrageous as to be regarded as utterly intolerable in a civilized society. Crosten v. Kamauf, 932 F.Supp. 676, 685.

D.Md.1996. Com. (d) quot. in case quot. in sup. Employee sued employer and former supervisor for intentional infliction of emotional distress, inter alia. Dismissing the claim with prejudice, the court held that the alleged conduct of former supervisor, following plaintiff's filing of a grievance against him, of standing near plaintiff and saying "Boo-hoo-hoo, we all have problems," glaring at plaintiff, and walking toward plaintiff with a look of rage on his face did not rise to the degree of outrageousness necessary for a claim of intentional infliction of emotional distress. Lee v. Pfeifer, 916 F.Supp. 501, 507.

D.Md.1990. Cit. in disc. A retail store instituted a policy requiring its office clerks to work on Saturdays and Sundays, then offered them the choice of reassignment to jobs that would not require Sunday work. A clerk who quit, rather than accept a reassignment, sued the store for wrongful discharge and intentional infliction of emotional distress. Granting the employer's motion for summary judgment, this court held that a Maryland statute providing that wholesalers and retailers allow a day of rest to any employee on Sunday or on "his Sabbath" was constitutional, that the employee did not make out a case for constructive discharge, and that the employer's conduct was not so atrocious and extreme as to support a claim of intentional infliction of emotional distress. The court stated that the store simply made a legitimate business decision, even though it was obviously personally distasteful and even hurtful to the plaintiff because of her sincere desire to honor the sabbath day. Poyer v. Sears Roebuck Co., Inc., 741 F.Supp. 98, 101.

D.Md.1989. Com. (g) quot. generally in case cit. in disc. An employee sued her former employer for intentional infliction of emotional distress, inter alia, after the defendant sent a letter, charging the plaintiff with falsifying a workers' compensation claim, to the local union that represented her for collective bargaining. The court held that the employee's claims were preempted by the Labor Management Relations Act. The court stated that whether the notice of the plaintiff's termination for dishonesty was reckless, extreme, or outrageous depended on whether the plaintiff's conduct was in violation of the collective bargaining agreement. The court also said that whether the defendant's sending of the letter was a permissible exercise of its termination rights under the collective-bargaining agreement would require the court to interpret the agreement to determine whether the defendant had the legal rights it claimed. Barbe v. Great Atlantic & Pacific Tea Co., Inc., 722 F.Supp. 1257, 1262, judgment affirmed 940 F.2d 651 (4th Cir.1991), cert. denied 502 U.S. 1059, 112 S.Ct. 939, 117 L.Ed.2d 109 (1992).

D.Md.1989. Com. (d) cit. in case quot. in disc. The widow and daughter of a government employee at a chemical and biological testing center who accidentally contracted anthrax while on the job in 1955 and died 30 years later of cardiac arrest brought wrongful death and survivor actions against the government under the Federal Tort Claims Act, alleging intentional infliction of emotional distress, inter alia. Granting the defendant's motion for summary judgment, the court held that the record failed to support the presence of any facts to establish outrageous intentional conduct by the defendant and severe emotional distress. The court stated that the only intentional conduct that could have been gleaned from the affidavits was the directive to the decedent by government personnel to hide his exposure to the anthrax bacteria and to maintain the "top secret" anthrax studies, and that instruction could not have been characterized as so outrageous as to go beyond all bounds of decency. Metz v. U.S., 723 F.Supp. 1133, 1137.

D.Md.1985. Com. (d) cit. in case quot. in disc. (Erron. cit. as com. I.) A former employee sued her employer and a co-worker alleging employment discrimination, retaliatory discharge, false light invasion of privacy, and intentional infliction of emotional distress. Plaintiff asserted that the co-worker on numerous occasions made racially derogatory remarks to her supervisor, and that despite notice of the harassment, her employer did nothing to terminate the co-worker's conduct. The defendants moved for dismissal, or in the alternative, for summary judgment on all claims. This court held that all of plaintiff's claims could be maintained except for the claim of false light invasion of privacy, which was barred by the statute of limitations. The court stated that it would not rule as a matter of law that the complaint lacked sufficient allegations to establish the requisite extreme and outrageous conduct necessary for the tort of intentional infliction of emotional distress, and ordered a stay of the action pending resolution by the Maryland Commission on Human Relations. Robinson v. Vitro Corp., 620 F.Supp. 1066, 1071.

D.Mass.

D.Mass.2023. Com. (d) quot. in case quot. in sup. Special-education teacher who suffered from asthma and generalized anxiety disorder sued city, public-school district, superintendent, and assistant superintendent for intentional infliction of emotional distress, alleging, among other things, that defendants treated her adversely because she requested workplace accommodations for her disabilities and because of her advocacy on behalf of disabled children. This court granted in part defendants' motion to dismiss, holding that plaintiff failed to state a claim for intentional infliction of emotional distress. The court reasoned that, while plaintiff's allegations suggested possible mistakes, neglect, and insensitivity by defendants, those allegations did not amount to a plausible claim of extreme or outrageous misconduct sufficient to establish a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46, Comment *d*. Connolly v. Woburn Public Schools, 659 F.Supp.3d 92, 117.

D.Mass.2023. Cit. in sup., com. (d) quot. in case quot. in sup. Former police detective sued deputy chief and other officer for, among other things, intentional infliction of emotional distress based

on allegations that deputy chief promoted the other officer from the patrol unit to the detective unit during plaintiff's absence and demoted plaintiff to the patrol unit after he returned to work several years later. This court granted summary judgment for defendants on plaintiff's claim for intentional infliction of emotional distress, holding that defendants' alleged conduct did not rise to the level of atrocious behavior required to support a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. Jakuttis v. Town of Dracut, Massachusetts, 656 F.Supp.3d 302, 339.

D.Mass.2023. Cit. in sup. Owners of seasonal beach home sued neighbors and local real estate broker related to neighbor for intentional infliction of emotional distress (IIED), alleging, among other things, that neighbors and broker threatened owners and encouraged others to obstruct owners' private right of way to their home, following a dispute over two pear trees on the border between the parties' properties. This court denied defendants' motion for summary judgment on plaintiffs' IIED claim, holding that there was a genuine issue of material fact as to whether owners experienced severe emotional distress, as would allow recovery under Restatement Second of Torts § 46. The court reasoned that a trier of fact could conclude that defendants' repeated threats, such as broker claiming that he would run plaintiffs out of town and to use his influence with local authorities to take out no-trespass orders against plaintiffs rose beyond insults and annoyances to conduct that was beyond all bounds of decency. Kaiser v. Kirchick, 662 F.Supp.3d 76, 102.

D.Mass.2021. Com. (d) quot. in case quot. in sup. Mother of decedent sued decedent's former domestic partner, who was still named as the beneficiary of decedent's life-insurance policy and a joint owner of his bank account at the time of his death, alleging intentional infliction of emotional distress after defendant claimed the proceeds of the policy and withdrew all the money from the account without informing plaintiff. This court granted in part defendant's motion for summary judgment, holding that a reasonable jury could not find that defendant engaged in any intentional acts sufficiently extreme and outrageous to meet the high standard for a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46, which required a high order of reckless ruthlessness or deliberate malevolence that was simply intolerable. McCormick v. Lischynsky, 539 F.Supp.3d 225, 244.

D.Mass.2019. Com. (h) quot. in sup. Conservatee brought, inter alia, a claim for intentional infliction of emotional distress against attorney, alleging that defendant abused his conservator position to conceal the fact that a third party gave plaintiff's dog away to others without his permission. This court granted in part defendant's motion to dismiss, holding that plaintiff failed to allege sufficient facts establishing a successful IIED claim. The court explained that, under Restatement Second of Torts § 46, Comment *h*, the court could determine as a matter of law whether defendant's conduct arose to the level of being sufficiently extreme and outrageous so as to permit recovery, and that, according to state caselaw, loss of animal companionship was not a cognizable injury to sustain a claim under § 46. Hayes v. Mirick, 378 F.Supp.3d 109, 117.

D.Mass.2018. Com. (c) quot. in case quot. in sup. Former police chief who was terminated for conduct unbecoming and successfully appealed his termination before an arbitrator brought an

action against city and mayor, alleging that defendants terminated him without procedural and substantive due process and that their malicious misconduct was sufficient to support a claim for intentional infliction of emotional distress (IIED). This court granted summary judgment for defendants, holding, inter alia, that defendants' conduct was not sufficiently extreme and outrageous to support an IIED claim. This court quoted Restatement Second of Torts § 46, Comment *d*, in explaining that an IIED claim required conduct so egregious that an average member of the community would consider it outrageous, and that defendants' conduct, including mayor's decision to hold a press conference about plaintiff's termination and to appeal the arbitration determination, did not rise to this level. Cummings v. City of Newton, 298 F.Supp.3d 279, 291.

D.Mass.2018. Com. (d) quot. in case quot. in disc. Arrestee who was charged with driving under the influence brought a claim for intentional infliction of emotional distress (IIED) against city and city officials, alleging that, after her arrest, defendants provided her an advice-of-rights form that incorrectly stated her legal rights and resulted in plaintiff making a constitutionally-invalid guilty plea. This court denied in part defendants' motion to dismiss, holding, inter alia, that knowingly providing an arrestee with an erroneous advice-of-rights form could potentially constitute profoundly shocking conduct necessary for an IIED claim. The court cited Restatement Second of Torts § 46, Comment *d*, in explaining that an IIED claim required defendants to have engaged in outrageous conduct beyond all possible bounds of decency, and acted in a manner beyond mere insults, threats, or even merely tortious or criminal conduct. Pimentel v. City of Methuen, 323 F.Supp.3d 255, 274.

D.Mass.2018. Subsec. (d) quot. in case quot. in sup. Police officer who was fired following an internal investigation but later reinstated brought claims for, among other things, intentional infliction of emotional distress (IIED) against town manager, alleging that defendant wrongfully concluded that the evidence supported the decision to terminate plaintiff. This court granted summary judgment for defendant, holding that plaintiff failed to state an IIED claim under Restatement Second of Torts § 46. The court reasoned, in part, that while defendant might have wanted plaintiff gone and might have encouraged the investigator who was hired to conduct the investigation to dig deep for facts against plaintiff, his actions were not illegal or otherwise gratuitously harmful; on the contrary, defendant followed all relevant rules, explained his decision, and allowed plaintiff to respond to the charges against him. Thomas v. Town of Salisbury, 284 F.Supp.3d 66, 79.

D.Mass.2017. Com. (d) quot. in case quot. in sup. Inmate at a correctional center filed a civil-rights action against correctional officers and nurse who worked at the center, alleging that several officers severely injured him in an attack, that other officers failed to intervene or attempted to cover up the incident, and that nurse refused to provide him with medical treatment. This court granted inmate's motion to amend the complaint to substitute the true name of nurse, except as to inmate's proposed claim against nurse for intentional infliction of emotional distress, holding that inmate failed to allege conduct by nurse that was sufficiently extreme and outrageous to meet the requisite standard under Restatement Second of Torts § 46. The court reasoned, based on the

allegations of the proposed amended complaint, that, at worst, nurse could have been callously indifferent toward inmate's suffering, and that such indifference was not the type of targeted, deliberate, and malicious conduct required to state a claim for intentional infliction of emotional distress. Abernathy v. Dewey, 277 F.Supp.3d 129, 140.

D.Mass.2017. Com. (d) quot. in case quot. in sup. Scientist brought a claim for, among other things, intentional infliction of emotional distress against website operator and employees of operator in connection with allegations that defendants defamed him by publishing a series of 14 articles on the website that disagreed with his claim that he was the inventor of email. This court granted defendants' motion to dismiss, holding that plaintiff's complaint failed to plausibly state a claim for intentional infliction of emotional distress. The court reasoned, in part, that, under Restatement Second of Torts § 46, defamatory statements could not, as a matter of law, satisfy the "extreme and outrageous conduct" requirement to state such a claim. Ayyadurai v. Floor64, Inc., 270 F.Supp.3d 343, 370.

D.Mass.2017. Com. (d) quot. in case quot. in sup. Former student brought claims sounding in, among other things, intentional infliction of emotional distress (IIED) against university and university employees, seeking damages and equitable relief in connection with his two-year suspension from university for sexual misconduct. This court adopted the report and recommendation of a magistrate judge and granted defendants' motion to dismiss plaintiff's IIED claim. The magistrate judge quoted Restatement Second of Torts § 46, Comment *d*, in setting forth the criteria for conduct that was "extreme and outrageous" and explaining that defendants' actions, as pleaded, did not rise to the level of atrocity necessary to support an IIED claim. Doe v. Western New England University, 228 F.Supp.3d 154, 186.

D.Mass.2017. Quot. in case quot. in sup.; com. (j) quot. in case quot. in sup. (erron. cit. as § 145). Neurosurgeon of Indian descent filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against former employer and supervisors who had post-employment communication with her potential employers, alleging that defendants provided negative information and references because of her gender and ethnicity. This court granted defendants' motion to dismiss as to plaintiff's IIED claim, holding, inter alia, that the facts as pleaded did not demonstrate that defendants' conduct rose to the exceptionally high standard necessary to qualify as extreme and outrageous or that plaintiff had suffered severe emotional distress. Quoting Restatement Second of Torts § 46 and cases relying on this section, the court explained that liability for IIED had been found only where conduct was so outrageous in character and extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in civilized community. Soni v. Wespiser, 239 F.Supp.3d 373, 390.

D.Mass.2016. Com. (d) quot. in case quot. in sup. Former undergraduate student filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against private university that had sanctioned him based on his former boyfriend's claims that plaintiff engaged in sexual misconduct during their relationship, alleging that defendant effectively labeled plaintiff a "sexual predator" by employing a process in which a special examiner acted as an investigator, prosecutor, and judge.

This court granted in part defendant's motion to dismiss, holding that plaintiff failed to state a claim for which relief could be granted. The court explained that plaintiff's complaint did not allege conduct by defendant that was "so outrageous in character, and so extreme in degree" to meet the standard of conduct necessary for an IIED claim as described in Restatement Second of Torts § 46, Comment *d*. Doe v. Brandeis University, 177 F.Supp.3d 561, 617.

D.Mass.2016. Cit. in sup.; subsec. (1) quot. in sup.; com. (j) quot. in sup. (erron. cit. as § 145). Decedent's daughter and daughter's husband sued decedent's companion of many years prior to his death, alleging, among other things, that defendant intentionally caused emotional harm to plaintiffs by interfering with their relationship with decedent during the last years of his life and by failing to inform plaintiffs of decedent's death, such that they missed the funeral. Granting summary judgment for defendant, this court held that plaintiffs failed to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court pointed out that plaintiffs failed to present any actual evidence that their distress was severe, and that the only definitive evidence provided of any observable symptoms was plaintiffs' sister-in-law's testimony that daughter had some sleepless nights. Torosian v. Garabedian, 206 F.Supp.3d 679, 683.

D.Mass.2015. Com. (d) quot. in case quot. in sup., com. (h) quot. in case quot. in ftn. Student at a public high school brought claims for, among other things, intentional infliction of emotional distress (IIED) against school officials in their official and individual capacities, alleging that defendants failed to adequately respond to a pattern of bullying and threats she suffered at the hands of other students at the school. This court granted defendants' motion for summary judgment, holding that defendants' actions were not, as a matter of law, sufficiently extreme and outrageous as to state a claim for IIED under Restatement Second of Torts § 46. The court reasoned that, even if a jury could find that defendants' actions were ineffective, unreasonable, and demonstrated indifference, no reasonable jury could find that defendants' conduct went beyond all possible bounds of decency and was utterly intolerable in a civilized society. Hankey v. Town of Concord-Carlisle, 136 F.Supp.3d 52, 74.

D.Mass.2015. Com. (d) quot. in case quot. in sup. Town police officer brought a claim for intentional infliction of emotional distress (IIED) against town manager and town police chief, alleging that defendants engaged in a prolonged and multifaceted plan to force plaintiff out of his job. This court denied defendants' motion to dismiss, holding that plaintiff's allegations were sufficient to state an IIED claim under Restatement Second of Torts § 46. The court reasoned that, while town manager's conduct in retaining police chief to conduct an investigation of plaintiff, without more, did not constitute conduct that was utterly intolerable, a fair reading of plaintiff's complaint depicted an ongoing effort on the part of town manager to have plaintiff removed from the police force, and a question of fact remained as to whether such conduct could reasonably be found to be so extreme and outrageous as to permit recovery. Thomas v. Town of Salisbury, 134 F.Supp.3d 633, 652.

D.Mass.2014. Coms. (d), (*i*), and (j) quot. in cases quot. in sup. Aunt who was arrested while babysitting her two-year-old nephew at his residence brought a state-law claim for intentional

infliction of emotional distress against police officer who arrived at the residence to assist the Department of Children and Families in removing the child after she refused to hand the child over. This court denied defendant's motion to dismiss this claim, holding that the question of whether defendant's actions—physically shoving, yanking, and jerking plaintiff—were extreme and outrageous, pursuant to Restatement Second of Torts § 46, Comments *d, i*,and *j*, had to be determined by a jury. The court noted that plaintiff alleged far more than a simple claim of negligence; she asserted that she endured unwarranted physical abuse by defendant while her nephew was in her care after his mother had died and his father was out making funeral arrangements. Lloyd v. Burt, 997 F.Supp.2d 71, 83.

D.Mass.2013. Com. (d) quot. in case quot. in sup. Parents of two daughters who were arrested in parents' home brought an action for, among other things, intentional infliction of emotional distress (IIED) against the arresting officers. Denying in part defendants' motion for summary judgment, this court held that there was sufficient evidence of conduct that would support a finding of IIED. The court reasoned that plaintiffs could recover for IIED even where, as here, no bodily harm resulted; moreover, even if there had been probable cause to arrest daughters, the conduct complained of—including the use of excessive force, abusive language, and deliberate indifference to obvious medical needs—would, if accepted by the jury, go beyond the bounds of acceptable conduct. Barbosa v. Conlon, 962 F.Supp.2d 316, 334.

D.Mass.2011. Com. (d) quot. in case quot. in sup. Property owners sued neighbors, town, and construction company in connection with a land dispute. This court granted construction company's motion to dismiss plaintiffs' claim for intentional infliction of emotional distress, holding that the conduct complained of—that construction company disposed of waste on neighbors' property in violation of state and local environmental regulations, that its dumping caused a stream to overflow and resulted in flooding of plaintiffs' basement, and that it was advised of the flooding but did not cease its conduct—did not, as a matter of law, amount to extreme and outrageous behavior, and plaintiffs had not alleged tortious intent, much less criminal intent or malice. Gable v. Borges Const., Inc., 792 F.Supp.2d 117, 126.

D.Mass.2010. Cit. in case cit. in sup. Arrestee brought a civil-rights action against police officer, city, and hospital, after doctor who worked at hospital, at officers' request, conducted a body cavity search of arrestee for drugs. Denying summary judgment for officers on plaintiff's claim for intentional infliction of emotional distress, this court held that a reasonable jury could find that officers' actions in effectuating an x-ray search of plaintiff's abdomen were extreme and outrageous, given that prior visual and digital searches of his "anal cavity" had turned up negative, that officers knew there was no evidence to suggest than an x-ray search would result in any incriminating evidence, and that plaintiff repeatedly told the nurses and officers that he did not want to have the x-ray performed on him and that he wanted to speak to his lawyer. Spencer v. Roche, 755 F.Supp.2d 250, 269.

D.Mass.2007. Com. (d) quot. in case quot. in disc. Husband and wife sued town and 29 law-enforcement officers, alleging a pattern of harassment and civil-rights violations over the course

of 15 years. This court, inter alia, denied one officer's motion for summary judgment on plaintiffs' claim for intentional infliction of emotional distress, since there was sufficient evidence of alleged outrageous conduct by that officer within the statute of limitations to support the claim, including taunting husband with epithets and challenging him to a fight; searching plaintiffs' 11-year-old son in his classroom; and refusing to take any action after responding to an assault on husband by three men with a gun and bricks. Kennedy v. Town of Billerica, 502 F.Supp.2d 150, 159.

D.Mass.2007. Subsec. (2) cit. in sup. After pharmacies sued healthcare consulting firm, a limited-liability sole proprietorship, over an audit performed by firm for pharmacies, firm brought various counterclaims. Following firm's principal's suicide, his wife was added as counterclaim plaintiff, individually, as executor of husband's estate, and as guardian of the couple's daughter. This court, inter alia, denied summary judgment for counterclaim defendants on wife's claim that she and her daughter were subjected to intentional infliction of emotional distress by defendants. The court held that it was a jury question under Massachusetts' law whether defendants acted recklessly, indifferent to the likely effect of their alleged outrageous conduct against principal, e.g., attempts to destroy principal's reputation and business prospects, on family members who would be apt in time to learn of such conduct. North Shore Pharmacy Services, Inc. v. Breslin Associates Consulting LLC, 491 F.Supp.2d 111, 134.

D.Mass.2004. Subsec. (2) cit. in disc., adopted in case cit. in disc., and quot. in ftn.; com. (1) and caveat 1 quot. in ftn. Two former prisoners and families of two deceased prisoners sued the federal government and law-enforcement officers pursuant to the Federal Tort Claims Act, after prisoners were exonerated following the disclosure of evidence that prisoners had been framed at the time of their murder convictions 30 years previously. Denying federal government's motion to dismiss one plaintiff's intentional-infliction-of-emotional-distress claim, the court held that plaintiff established he had "substantially contemporaneous" knowledge of his father's wrongful conviction and imprisonment arising out of defendants' outrageous conduct that went beyond standards of a civilized society. Limone v. U.S., 336 F.Supp.2d 18, 44.

D.Mass.2003. Com. (d) quot. in sup. After husband was arrested when he tried to enter condominium that he owned with his estranged wife as tenants by the entirety, he sued wife, man who lived in condominium, and arresting police officers. The man counterclaimed for intentional infliction of emotional distress, inter alia. This court granted husband's motion to dismiss emotional-distress counterclaim, holding that the man failed to allege any conduct by husband that was extreme and outrageous. Husband's demand that the man leave and husband's attempt to enter his own condominium, given the fact that wife's second temporary restraining order had not been served on him, could not be characterized as anything more than a mere annoyance at best, or a single instance of criminal conduct at worse. Gouin v. Gouin, 249 F.Supp.2d 62, 77, 78.

D.Mass.2002. Com. (d) quot. in case quot. in sup. Former employee brought suit for, in part, intentional infliction of emotional distress against former employer and security guards, after he was acquitted of criminal charges of assault and battery stemming from a physical altercation with

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the security guards. Denying in part defendants' motion for summary judgment, the court held, inter alia, that genuine issues of material fact existed as to whether security guards' conduct in allegedly fabricating the story of events leading to plaintiff's arrest to cover up their loss of control and use of excessive force, and in perjuring themselves at his trials rose to the level of outrageous conduct necessary to support plaintiff's claim for intentional infliction of emotional distress. Grant v. John Hancock Mut. Life Ins. Co., 183 F.Supp.2d 344, 368.

D.Mass.2002. Com. (g) quot. in case quot. in sup. Postal employees sued the United States Postal Service and a coemployee for injuries arising out of coemployee's alleged sexual harassment. Coemployee counterclaimed for intentional infliction of emotional distress, among other claims. This court adopted magistrate's report, which recommended that summary judgment be granted to plaintiffs as to the emotional-distress counterclaim. Plaintiffs' actions were not extreme and outrageous, as they were simply asserting their legal rights, if not obligations, in a permissible way by making complaints to their supervisors and the Postal Service's equal employment officer. Kibbe v. Potter, 196 F.Supp.2d 48, 74.

D.Mass.2000. Coms. (d) and (j) cit. in ftn. Shopper sued store for, inter alia, intentional infliction of emotional distress and false imprisonment in connection with her detention for a bag-and-receipt check. Granting in part and denying in part defendant's motion for summary judgment, the court held that the check did not rise to the level of outrageousness necessary to support a claim for intentional infliction of emotional distress, but that a reasonable juror could conclude that plaintiff was prevented from exiting until defendant's employee had completed his inspection, and therefore that plaintiff was subject to a false imprisonment. Ball v. Wal-Mart, Inc., 102 F.Supp.2d 44, 53.

D.Mass.1999. Com. (d) quot. in disc. Homeowner brought a class action against a corporation for negligence, strict liability, infliction of emotional distress, and nuisance. Plaintiff alleged that because of the presence of PCB contamination in her neighborhood, a result of defendant's long-time practice of dumping contaminated soil, she was unable to sell her home and suffered anxiety about the risk to her children. This court denied in part defendant's motion to dismiss, holding, inter alia, that plaintiff stated a viable public nuisance claim, because she alleged that defendant's contamination of the surrounding area constituted an interference with public health and environment. Plaintiff's inability to sell her property represented special injury. Lewis v. General Electric Company, 37 F.Supp.2d 55, 60.

D.Mass.1998. Com. (e) cit. in disc. Former followers of yoga guru sued guru for, inter alia, intentional infliction of emotional distress and breach of contract, alleging damages incurred upon learning that defendant was a fraud who failed to live by the principles he advocated. Defendant moved to dismiss. Granting the motion in part and denying it in part, the court held that plaintiffs could not recover damages for the shock and disillusionment they felt when they discovered that defendant had misrepresented himself as a true and authentic guru and lied about his celibate lifestyle, since those actions were not as a matter of law extreme and outrageous; that defendant's actions did not become outrageous simply by virtue of the fact that he occupied a position of power vis-à-vis plaintiffs; and that, while plaintiffs were intended third-party beneficiaries of a contract

between defendant and the yoga community, they could not maintain an action for breach of contract based on defendant's alleged failure to provide the services of an authentic guru. Dushkin v. Desai, 18 F.Supp.2d 117, 121.

D.Mass.1998. Coms. (d) and (j) quot. in cases quot. in disc. Former employee of parcel-delivery service sued service for, inter alia, invasion of privacy and reckless infliction of emotional distress in connection with defendant's insistence that plaintiff disclose details of an off-hours drinking incident that occurred at plaintiff's home. Defendant moved for summary judgment. Granting the motion, the court held, in part, that the event in question, which involved three other employees of defendant, was not a private affair of plaintiff alone, and that defendant's conduct was not so outrageous and extreme as to support a claim for reckless infliction of emotional distress. French v. United Parcel Service, Inc., 2 F.Supp.2d 128, 132.

D.Mass.1998. Com. (d) quot. in case quot. in disc. Woman sued former employer and various individual co-workers for, inter alia, violations of the Americans with Disabilities Act (ADA), alleging that defendants engaged in a concerted effort to discriminate and retaliate against her because she opposed employer's plan to move its headquarters from a handicapped-accessible location to an inaccessible location in a neighboring town. Plaintiff also asserted a common law claim for intentional infliction of emotional distress. Defendants moved for judgment on the pleadings. Granting the motion in part and denying it in part, the court held, among other things, that, to the extent plaintiff alleged retaliation, she stated a viable claim under Title V of the ADA; however, defendants' actions did not rise to the level of outrageousness necessary to support a claim for intentional infliction of emotional distress. LaManque v. Mass. Dept. of Employment & Training, 3 F.Supp.2d 83, 94.

D.Mass.1997. Cit. in disc., com. (f) quot. in case quot. in disc. Estate of individual who allegedly committed suicide because of his homophobic work environment sued decedent's employers and co-workers for discrimination and intentional infliction of emotional distress. Defendants moved for summary judgment. Granting the motion, the court held, in part, that the conduct complained of, which included two comments made by decedent's co-workers, was not sufficiently extreme and outrageous to give rise to a cause of action for intentional infliction of emotional distress. Bogdahn v. Hamilton Standard, 973 F.Supp. 52, 58, 59.

D.Mass.1997. Com. (d) quot. in case cit. in disc. Learning-disabled university students sued university, among others, for, inter alia, breach of contract and intentional infliction of emotional distress, alleging that defendants failed to provide reasonable accommodations for their learning disabilities. Plaintiffs also asserted that defendants' actions resulted in the creation of a hostile learning environment. Defendants moved to dismiss. Granting the motion in part and denying it in part, the court held that plaintiffs, who maintained that they made the decision to attend this particular university based on brochures and catalogues purporting to demonstrate university's commitment to the learning disabled, had stated a claim for breach of contract; however, defendants' conduct was not sufficiently extreme or outrageous to support a claim for intentional infliction of emotional distress. Guckenberger v. Boston University, 957 F.Supp. 306, 318.

D.Mass.1995. Cit. in case quot. in sup. Trucking company and its principal brought a civil racketeering action against toy manufacturer, certain of its executives, and others, and asserted various pendent state law claims, including one for intentional infliction of emotional distress, arguing that plaintiff company was driven out of business by defendants' alleged extortion. Dismissing in part, the court held that plaintiff, failed to state a claim for intentional infliction of emotional distress against manufacturer's vice president's assistant and another trucking concern, since the conduct complained of did not as a matter of law amount to extreme and outrageous behavior and plaintiffs failed to plead severe distress of a nature that no reasonable person could be expected to endure it. Doyle v. Hasbro, Inc., 884 F.Supp. 35, 40, affirmed 103 F.3d 186 (1st Cir.1996).

D.Mass.1995. Subsec. (1) quot. in sup. and cit. in headnote. A detained man sued a city under 42 U.S.C. § 1983 and state law, claiming that the police violated his rights while he was in civil protective custody because of incapacitation due to substance abuse. He had been detained for 24 hours and was not given food or water, and the delay in treatment exacerbated the condition and hindered treatment. This court, among other rulings, granted the city summary judgment. The court held, inter alia, that the city was not liable for intentional infliction of emotional distress, since a municipality is not liable for the intentional torts of its employees under Massachusetts law. The court stated that there was no evidence that the officers' conduct was extreme and outrageous. Ringuette v. City of Fall River, 888 F.Supp. 258, 264.

D.Mass.1993. Cit. in case cit. in disc. After a town police officer allegedly took various actions, some unintentional, disclosing to a number of people that a woman was HIV-positive and suffering from AIDS, the woman sued the officer and town, alleging civil rights claims and intentional infliction of emotional distress. This court, denying in part defendants' motion for summary judgment, held, inter alia, that a fact question existed over whether the officer's unnecessarily coercing the plaintiff to reveal to him that she was HIV-positive and advising her that he had discussed her medication with various nurses and doctors constituted extreme and outrageous conduct that would support the emotional distress claim. Doe v. Town of Plymouth, 825 F.Supp. 1102, 1110.

D.Mass.1987. Com. (d) cit. in sup. A bankruptcy trustee sued the guarantor on a bankrupt construction contractor's payment bond alleging that its failure to settle the bankrupt's contract suit and to promptly pay an executed judgment in that suit constituted outrageous conduct. The court granted the defendant's motion for summary judgment, finding that the defendant's failure to settle or pay the judgment did not constitute the extreme behavior necessary to establish an outrageous conduct claim. The court concluded that the bankruptcy estate was incapable of sustaining damages based on an emotional distress claim because an estate could not experience any emotional distress whatsoever. Kerlinsky v. Fidelity & Deposit Co. of Maryland, 690 F.Supp. 1112, 1121, decision affirmed 843 F.2d 1383 (1st Cir.1988).

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D.Mass.1985. Com. (d) quot. in case quot. in disc. After a magazine used plaintiff's picture to illustrate an article on organized crime in wholesale fish markets, plaintiff sued the magazine for defamation, invasion of privacy, appropriation of his picture for commercial purposes, and intentional infliction of emotional distress. The court found that the existence of material issues of fact precluded summary judgment on plaintiff's claims for defamation and invasion of privacy, but that the magazine was entitled to summary judgment on the claims of unlawful appropriation and emotional distress, as publication of plaintiff's photograph was not for commercial purposes, and plaintiff did not allege that the magazine's actions amount to the extreme and outrageous conduct necessary to prove intentional infliction of emotional distress. Morrell v. Forbes, Inc., 603 F.Supp. 1305, 1307.

D.Mass.1982. Coms. (d), (i), and (j) cit. in sup. A former church member brought an action against the churches of a particular ideology, the founder, and the second-ranking person in the church hierarchy, alleging fraud, intentional infliction of emotional distress, breach of contract, violation of the Fair Labor Standards Act, and a class action for treble damages under the civil remedy provision of the Racketeer Influenced and Corrupt Organization Act. The defendants moved to dismiss the plaintiff's action, claiming, that the court lacked jurisdiction over the defendants, that service had been insufficient, that venue was improper, that the First Amendment barred inquiry into the subject-matter of the plaintiff's complaint, that the complaint failed to state a claim upon which relief could be granted, that the plaintiff's pleadings were defective, and that the various parties were improperly named or joined. The court held, inter alia, that the complaint did not state a claim upon which relief could be granted with respect to certain allegations of intentional infliction of emotional distress. The court found that although the plaintiff had alleged that the disclosure of her auditing file with the church caused her emotional distress, she alleged no specific disclosures. The court also found that the church doctrine of "disconnect," i.e., to sever family and marital ties and to depend solely on the church for emotional support, did not constitute the type of extreme and outrageous conduct needed to support a claim for intentional infliction of emotional distress. Van Schaick v. Church of Scientology of Cal., Inc., 535 F.Supp. 1125, 1139.

D.Mass.1969. Cit. in sup. This was an action by a schoolteacher under the Civil Rights Act, seeking injunctive relief and damages for an alleged improper dismissal by a town school committee. Plaintiff was dismissed particularly for wearing a beard, and after such dismissal suffered a weight loss and reaggravation of an ulcer. The court held that in view of good faith reliance by the members of the school committee upon relevant statutes with respect to plaintiff's dismissal, no award would be made for emotional distress of the improperly dismissed teacher, nor of punitive damages. Lucia v. Duggan, 303 F.Supp. 112, 119.

E.D.Mich.

E.D.Mich.2020. Cit. in case cit. in sup. Borrower sued lender, alleging that it violated the Fair Credit Reporting Act by reporting to credit-reporting agencies that she owed a scheduled monthly payment amount on her car loan in addition to, rather than instead of, the entire remaining balance,

which became due when she defaulted on the loan and lender accelerated the debt. This court granted lender's motion to dismiss, holding, among other things, that borrower did not suffer any loss of credit or other financial harm as a result of lender's alleged negligent and willful violation of the Act, and that she failed to submit any evidence in support of her allegations that she sustained stress, frustration, anxiety, or other forms of emotional distress as a result of lender's failure to correct her credit file. The court cited Restatement Second of Torts § 46 for the proposition that the possible liability for emotional harm was defined narrowly to exclude mere anxiety. Thompson v. Equifax Information Services, LLC, 441 F.Supp.3d 533, 543.

E.D.Mich.2019. Com. (d) quot. in sup.; com. (j) quot. in case quot. in sup. Homeowner brought claims for, among other things, intentional infliction of emotional distress against city and city police officers who executed a narcotics raid at her home, alleging that one officer ordered her door to be rammed open despite having seen her behind the door, such that it hit her face and caused a cut that required stitches, and that the same officer later took her into a room alone and threatened her in an effort to prevent her from reporting the cut. This court granted summary judgment for defendants, holding that plaintiff did not allege that she suffered severe emotional distress as a result of the officer's actions, nor did she assert that his actions met the very high burden of extreme and outrageous conduct required to state a claim for intentional infliction of emotional distress under Michigan law and Restatement Second of Torts § 46. James v. City of Detroit, 430 F.Supp.3d 285, 295.

E.D.Mich.2018. Cit. in sup.; coms. (d) and (j) quot. in sup. Homeowner brought claims for, among other things, intentional infliction of emotional distress against police department and officers who executed a warrant to search her home for evidence of drug trafficking, alleging that officers illegally broke down the front door of her home, slammed her to the ground, handcuffed her, ridiculed her weight, and seized her belongings. This court granted summary judgment for defendants on plaintiff's emotional-distress claim, holding that plaintiff failed to show that officers' conduct was extreme or outrageous under Restatement Second of Torts § 46. The court pointed out that officers were acting pursuant to a valid search warrant, that plaintiff did not allege that they made her suffer any physical abuse beyond excessively tight handcuffing, and that damages for emotional injuries could not be recovered as a consequence of property damage; in addition, although the handcuffing officer made certain statements to plaintiff that were reprehensible—including that she "shouldn't be so fat," that she was a "bitch," and that he could blow her head off and nothing could be done—those statements did not rise to the level of extreme and outrageous conduct. McGrew v. Duncan, 333 F.Supp.3d 730, 742.

E.D.Mich.2016. Com. (*l*) quot. in disc.; cit. in cases cit. in disc. Relatives of employee who died after being shot by a drunk coworker while on a military compound in Iraq filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against employer, compound's project manager, and others, alleging that project manager cleared the scene of evidence of alcohol, instructed witnesses to downplay the role of alcohol in the shooting, and told his second-in-command, who then informed employee's family, that the wound that killed employee appeared to be self-inflicted. This court denied in part defendants' motion for summary judgment, holding that

there were genuine issues of material fact regarding project manager's conduct. The court noted that defendants cited Restatement Second of Torts § 46 to argue that the claims regarding conduct for which plaintiffs were not present were subject to summary judgment, and relied on Restatement Third of Torts: Liability for Physical and Emotional Harm § 46 in making its decision. Salser v. Dyncorp Intl. Inc., 170 F.Supp.3d 999, 1005, 1006.

E.D.Mich.2015. Cit. and quot. in cases cit. and quot. in sup. (general cite). Former employee brought a claim for intentional infliction of emotional distress (IIED) against former employer and former supervisor, alleging that, after she returned to her janitorial position following double knee surgery, defendants violated state and federal laws by changing her work assignment, denying her training, and otherwise harassing her. This court granted summary judgment for defendants on that claim, holding that defendants' reassignment of plaintiff—to clean a 20,000 square foot facility that was dirty and pest-infested, lacked windows or fans, and had a reputation as a punishment assignment—did not rise to the level of extreme and outrageous conduct required to state an IIED claim under Restatement Second of Torts § 46. Gibbs v. Voith Indus. Services, Inc., 60 F.Supp.3d 780, 802.

E.D.Mich.2015. Com. (j) quot. in case quot. in sup. Complainant filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against individuals, alleging that defendants made numerous communications to plaintiff and his family members that included demands for money, accusations of crimes, and threats of arrest and imprisonment of plaintiff, and interfered with plaintiff's custodial and visitation rights. This court denied defendants' motion to dismiss, holding that plaintiff sufficiently pled an IIED claim. The court explained, citing Restatement Second of Torts § 46, Comment *j*, that plaintiff's allegation that he suffered physical symptoms including rapid heartbeat, dizziness, unsteadiness, fainting, palpitating heartbeat, irregular heartbeat, night sweats, insomnia, and nightmares was sufficient to establish emotional distress, an element of an IIED claim. Gilliam v. Ordiway, 147 F.Supp.3d 664, 670.

E.D.Mich.2012. Com. (d) quot. in case quot. in sup. Son and mother brought various claims against city and police officers, alleging, among other things, that officers used excessive force to restrain and arrest son at plaintiffs' residence while investigating a report that son had left a threatening telephone message on a neighbor's answering machine. Denying in part defendants' motion for summary judgment, this court held that, if plaintiffs' testimony was believed, a jury might find defendants' misconduct sufficiently outrageous to constitute intentional infliction of emotional distress. The court cited evidence that officers used an electroshock weapon on son twice, punched him while he was on the ground and slammed his head into the tile floor, and dragged him to a police car and threw him into the back seat even though there was no indication that he was attempting to flee and no reason to believe that he had committed a crime before he was arrested. Saad v. City of Dearborn Heights, 876 F.Supp.2d 925, 944.

E.D.Mich.2011. Com. (j) quot. in case quot. in sup. Two former employees of a microbiology laboratory sued former employer, alleging that they were unlawfully fired or disciplined for blowing the whistle on employer's condonation of the use of expired media by doctors to transport

specimens collected from patients to the laboratory for testing. Granting summary judgment for employer on employees' claim for intentional infliction of emotional distress, this court held that employees had not shown that they suffered the *severe* emotional distress required by this claim as a result of employer's actions in firing one employee and allegedly chasing her down the halls of the laboratory, shouting and yelling; bruised feelings alone were not compensable emotional injuries. Hilden v. Hurley Medical, 831 F.Supp.2d 1024, 1046, 1047.

E.D.Mich.2010. Cit. in case cit. in sup. Former middle-school teacher who, as a result of undergoing several surgeries for a brain tumor, suffered a paralyzed vocal cord, which made it difficult for her to speak at a normal volume for extended periods of time, sued school district, asserting a pendent state-court claim for intentional infliction of emotional distress (IIED) based on defendant's failure to make reasonable accommodations to her teaching schedule. Dismissing the IIED claim, this court held that plaintiff's complaints about the type and amount of courses that she was required by defendant to teach and about what she perceived to be insufficient reasonable accommodations for her disabilities did not allege the kind of extreme and outrageous conduct causing severe emotional distress that was necessary to sustain an IIED claim. Chavez v. Waterford School Dist., 720 F.Supp.2d 845, 859.

E.D.Mich.2009. Cit. in case quot. in sup., com. (d) quot. in case quot. in sup., coms. (j) and (k) quot. in case quot. in sup. Mortgage borrower sued mortgage lender, alleging that defendant falsely reported to credit reporting agencies that she had filed for bankruptcy. Granting defendant's motion for summary judgment as to plaintiff's claim for intentional infliction of emotional distress, this court held, inter alia, that defendant's allegedly erroneous report of plaintiff's bankruptcy to credit reporting agencies did not qualify as “extreme and outrageous behavior” as a matter of Michigan law, and that plaintiff also failed to establish that she suffered the level of severe emotional distress required to sustain the claim. The court noted that. Lynk v. Chase Home Finance, LLC, 644 F.Supp.2d 868, 883, 884.

E.D.Mich.2008. Com. (d) quot. in case quot. in sup. As part of his § 1983 action, father sued detective, city, and nonprofit agency and its employee, alleging intentional infliction of emotional distress (IIED) arising from defendants' investigation of accusations that plaintiff sexually abused one of his children. Granting defendants' motion to dismiss, this court held that, while the Michigan Supreme Court had never adopted the tort of IIED into Michigan jurisprudence, according to standards described by that court for satisfaction of an IIED claim, defendants' actions were not sufficiently extreme and outrageous for plaintiff to establish his claim. Molnar v. Care House, 574 F.Supp.2d 772, 801.

E.D.Mich.2006. Com. (d) quot. in case quot. in sup. Mother, on behalf of her son, brought excessive-force suit against city and four of its police officers, including a claim for intentional infliction of emotional distress, after son became violent when asked by his school principal to relinquish his hand-held video game and suffered minor injuries upon being subdued with the aid of a stun gun by officers. This court granted defendants' motion for summary judgment and dismissed all claims. Noting that Michigan had never adopted the tort of intentional infliction of

emotional distress, the court nonetheless concluded that the evidence did not show that defendants' conduct was sufficiently outrageous so as to allow plaintiff to recover under this theory. Johnson v. City of Lincoln Park, 434 F.Supp.2d 467, 482.

E.D.Mich.2006. Com. (d) quot. in case quot. in sup. Mother brought § 1983 unlawful-arrest/ excessive-force action on behalf of her minor daughter against three city police officers in state court for injuries allegedly sustained by daughter during an arrest. Upon removal, this court granted summary judgment for defendants, dismissing all of plaintiff's claims, including a state-law claim for intentional infliction of emotional distress. The court, while noting that the Michigan Supreme Court had never adopted this tort but had nonetheless described its standard of proof, held that the evidence did not show that defendants' conduct was so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Sterling-Ward ex rel. Sterling v. Tujaka, 414 F.Supp.2d 727, 743.

E.D.Mich.2005. Adopted in case cit. in sup., com. (d) quot. in sup. Developer sued township and township's planning consultant for, among other things, intentional infliction of emotional distress in connection with the rezoning of developer's property. This court, inter alia, granted summary judgment for defendants on the emotional-distress claim, holding that the complaint failed to allege sufficient facts to establish extreme and outrageous conduct. Noting that plaintiff's claim of emotional distress relied primarily on the assertion that defendants conspired to deny him of his property rights, the court pointed out that plaintiff did not have a protected property interest in the original zoning classification. Bauss v. Plymouth Tp., 408 F.Supp.2d 363, 370, affirmed 233 Fed.Appx. 490 (6th Cir.2007).

E.D.Mich.2005. Com. (d) quot. in case quot. in sup. Employees sued employer and others for, inter alia, intentional infliction of emotional distress in connection with denial of their claims for workers' compensation. This court granted defendants' motion to dismiss the emotional-distress claim, holding that plaintiffs failed to allege any facts in support of their allegations that defendants engaged in a continuous pattern of harassment, abuse, and unethical conduct. Noting that plaintiffs themselves appeared to concede that the alleged fraudulent denial of benefits was the only factual allegation supporting the claim, the court concluded that such conduct simply could not be characterized as outrageous or atrocious. Brown v. Cassens Transport Co., 409 F.Supp.2d 793, 814.

E.D.Mich.2005. Com. (d) adopted in case quot. in sup. Employee brought, in part, a claim for intentional infliction of emotional distress against employer, workers' compensation insurer, adjuster, and physician, alleging that defendants improperly denied him workers' compensation by conspiring to create false reports. Granting defendants' motion to dismiss, this court held, inter alia, that although the Michigan Supreme Court had not formally recognized the tort of intentional infliction of emotional distress, it had adopted the standards of Restatement Second of Torts § 46 relating to extreme and outrageous conduct. Even when construed in plaintiff's favor, defendants' fraudulent conduct did not rise to the level of harassment, abuse, and immorality that could be actionable under Michigan law. Moon v. Harrison Piping Supply, 375 F.Supp.2d 577, 610, affirmed

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in part, reversed in part and remanded by 465 F.3d 719 (6th Cir.2006), certiorari denied 549 U.S. 1279, 127 S.Ct. 1832, 167 L.Ed.2d 319 (2007).

E.D.Mich.2002. Com. (d) quot. in case quot. in disc. (erron. cit. as com. (g)). Former custodian for school district sued district, district officials, and his union for violation of due process and intentional infliction of emotional distress, inter alia, arising from his termination of employment and his subsequent unsuccessful union grievance. Plaintiff alleged that school district fired him to avoid making workers' compensation payments, and that union did not adequately represent him in his grievance. This court granted defendants summary judgment on the emotional-distress claim, holding, inter alia, that defendants' actions did not rise to level of extreme and outrageous conduct, because this case merely involved a run-of-the-mill wrongful-discharge/unfair-representation lawsuit. Chisolm v. Michigan AFSCME Council 25, 218 F.Supp.2d 855, 875.

E.D.Mich.2002. Com. (h) cit. in case quot. in disc. High-school senior brought, in part, a claim for intentional infliction of emotional distress against principal, assistant principal, yearbook adviser, and others, alleging that defendants undertook an investigation into plaintiff's private sexual life after a picture of his genitals was published in the school yearbook. Granting in part defendants' motion for summary judgment, the court held, inter alia, that plaintiff failed to prove that defendants' conduct was intentional or reckless, or that he suffered severe emotional distress as a result of defendants' conduct. Granger v. Klein, 197 F.Supp.2d 851, 872.

E.D.Mich.2000. Com. (d) quot. in case quot. in sup. African-American teenage passenger who was reprimanded for unruly behavior by flight attendant during airline flight sued airline and flight attendant for racial discrimination, asserting, as well, a claim for intentional infliction of emotional distress under Michigan law. Granting defendants' motion for summary judgment, the court held, inter alia, that plaintiff failed to make out a prima facie case of intentional infliction of emotional distress, since flight attendant's conduct in telling plaintiff to “shut up” during preflight instructions, asking plaintiff to stop throwing gum wrappers, and glaring at plaintiff was not extreme and outrageous, and plaintiff had no evidence of severe emotional distress. Sanders v. Southwest Airlines Co., 86 F.Supp.2d 739, 746.

E.D.Mich.2000. Cit. in case cit. in disc. Former employee and his wife filed various claims against employer, including intentional infliction of emotional distress. Employee also moved for leave to file a second amended complaint to add, among other things, a claim for trespass to chattel. Granting in part employer's motion for summary judgment, this court held, inter alia, that employee's emotional distress claim failed because employer's actions did not amount to extreme and outrageous conduct. Denying plaintiff's motion for leave to file an amended complaint, this court held, inter alia, that employee's trespass-to-chattels claim based on employer's refusal to pay moving company, thereby resulting in moving company's lien against employee's personal property, failed because employee did not make direct or inferential allegations that employee, not the moving company, was entitled to immediate possession of employee's household goods. Willis v. New World Van Lines, Inc., 123 F.Supp.2d 380, 392.

E.D.Mich.1998. Cit. in headnote, com. (d) quot. in case quot. in disc. African-American employee sued former employer for, inter alia, race discrimination in violation of Title VII. Plaintiff also asserted a claim for intentional infliction of emotional distress. Defendant moved for summary judgment. Granting the motion in part and denying it in part, the court held, among other things, that plaintiff had established a prima facie case of race discrimination and had presented evidence showing that defendant's stated reasons for her discharge were pretextual; however, defendant's actions, which allegedly included promoting white males instead of plaintiff and concentrating minorities in her department, were not so extreme and outrageous as to support a cause of action for infliction of emotional distress. Hall v. State Farm Ins. Co., 18 F.Supp.2d 751, 753, 770, affirmed 1 Fed.Appx. 438 (6th Cir.2001).

E.D.Mich.1998. Cit. and quot. in sup., com. (d) quot. in sup. A black airline employee who was fired from his job sued the airline for, among other claims, intentional infliction of emotional distress. The employee's co-worker had accused plaintiff of sleeping on the job and told him that he was going to take him back to Africa. This court granted defendant summary judgment, holding, inter alia, that no reasonable juror could find the airline's conduct extreme and outrageous as a matter of law. The airline's manager of customer service had received a complaint by the co-worker, accusing plaintiff of sleeping on the job, and thereafter conducted an investigation into the matter. During the investigation, the manager gave plaintiff an adequate opportunity to reveal his version of the facts, and specifically provided plaintiff the chance to make known to the manager the co-worker's allegedly discriminatory remarks, but at no time did plaintiff do so. Although there may have been a fact issue as to whether the co-worker's conduct was extreme and outrageous, the airline was not liable for the co-worker's conduct, because the co-worker was not acting within the scope of his employment when he allegedly discriminated against plaintiff. Odigbo v. Northwest Airlines, Inc., 8 F.Supp.2d 660, 666, 667.

E.D.Mich.1997. Com. (d) quot. in sup. The estate of a Chinese national who committed suicide after being detained and questioned for shoplifting sued the store operator for, in part, intentional infliction of emotional distress. Granting defendant's motion for summary judgment, the court held, inter alia, that defendant's employee's warning that he would handcuff decedent if she did not remain seated while he was questioning her and another employee's statement that decedent was trying to bribe her did not rise to the level of extreme and outrageous conduct and thus did not support a claim for intentional infliction of emotional distress. Estate of Ko by Hill v. Sears Roebuck and Co., 982 F.Supp. 471, 478, affirmed 173 F.3d 855 (6th Cir.1999).

E.D.Mich.1996. Cit. generally in disc., com. (g) quot. in disc. Department-store employee who was detained by store security and subsequently terminated for theft brought state court action against store for, inter alia, false imprisonment and intentional infliction of emotional distress. Store removed the action to federal court on the ground that the Labor Management Relations Act (LMRA) preempted employee's claims, then moved for summary judgment. Employee moved to remand the case to state court. Granting in part and denying in part employee's motion, and granting in part that of store, the court held that, with the exception of the false-imprisonment claim, the resolution of which did not require interpretation of the parties' collective-bargaining

agreement for a determination of store's legal rights, employee's claims were all preempted by, and untimely under, the LMRA. Weatherholt v. Meijer Inc., 922 F.Supp. 1227, 1232, 1233.

E.D.Mich.1995. Com. (d) cit. in case quot. in sup. (Erron. cit. as § 76.) An insurance broker brought tort claims against an insured bank, and the insured counterclaimed for breach of contract and conversion, and joined additional third parties on tort and conspiracy claims. The claims arose out of a dispute concerning property insurance for a condominium development in which the insured had a mortgagee's interest. This court granted in part and denied in part the insured's motion for summary judgment, holding, inter alia, that broker failed to state a claim for intentional infliction of emotional distress, because insured was relying on its legal rights when it threatened to sue broker if it did not return its unearned premium and to report its activities to regulatory authorities. Insured's threats that the legal proceedings would financially ruin broker were not sufficiently extreme and outrageous to sustain an emotional-distress claim. Various Markets, Inc. v. Chase Manhattan Bank, N.A., 908 F.Supp. 459, 469.

E.D.Mich.1994. Quot. in case quot. in sup., com. (j) quot. in case quot. in sup. Former employee sued former employer for intentional infliction of emotional distress, among other claims, alleging that defendant deducted money from his paychecks, allowing him to believe that he had health insurance; he discovered truth, only after he was in hospital and about to lose his eye, that he was uninsured and owed thousands of dollars in medical bills. The court dismissed, holding that not only did defendant's conduct fall short of being extreme and outrageous, plaintiff also had failed to plead facts supporting his allegation that he suffered severe emotional distress. Holloway v. Doug Fisher, Inc., 865 F.Supp. 412, 423.

E.D.Mich.1994. Cit. in headnote, cit. in sup., com. (g) quot. in sup. A widow whose husband died of cardiac arrest, allegedly the result of complications caused by a fracture of a prosthetic heart valve, sued the valve's manufacturers for breach of warranty. During negotiations, defendants refused to admit that the valve was defective and that it fractured; as a result, the widow exhumed her husband's body for an autopsy to determine the cause of death. Because of the exhumation, the widow sought damages for intentional infliction of emotional distress and fraud. The court granted defendants summary judgment, holding, inter alia, that defendants' refusal to admit that the valve was defective, that it fractured, and that it caused the husband's death was not extreme and outrageous conduct. The court stated that defendants were privileged in their refusal to admit a disputed fact in the course of litigation, and that refusals to settle claims did not constitute intentional infliction of emotional distress. Kemp v. Pfizer, Inc., 851 F.Supp. 269, 270, 275.

E.D.Mich.1993. Cit. in case quot. in sup., com. (j) quot. in case quot. in sup. A person detained for two hours in the custody of various state and federal law enforcement agents sued to recover on state tort and federal constitutional and civil rights claims arising out of the detention. Granting in part defendants' motions to dismiss, this court held, inter alia, that plaintiff's allegations of unpleasant reactions to her detention did not rise to the level of extreme emotional distress necessary to support a claim for intentional infliction of emotional distress, but she would be permitted to amend her complaint to allege additional facts regarding her alleged emotional

distress. Fluellen v. U.S. Dept. of Justice Drug Enforcement Admin., 816 F.Supp. 1206, 1216, 1217.

E.D.Mich.1992. Cit. in case quot. in disc., com. (g) quot. generally in case quot. in disc. A terminated black female airline employee sued her former employer and former supervisor for race discrimination under Michigan law, alleging that employer's attendance policy was applied discriminatorily. Defendants removed the case to federal district court, asserting that this court had original federal question jurisdiction because plaintiff's claim was preempted by the federal Railway Labor Act (RLA). Granting plaintiff's motion to remand the action to state court, this court held that plaintiff's race discrimination claim was not preempted by the RLA because her claim did not represent a "minor dispute" under the federal statute. The court reasoned that resolution of plaintiff's state claim did not require construing the collective bargaining agreement's provisions. It distinguished a prior case involving intentional infliction of emotional distress in which a determination of the legal rights insisted upon required reference to the bargaining agreement's provisions. Spears v. Northwest Airlines, Inc., 798 F.Supp. 436, 439.

E.D.Mich.1990. Com. (d) quot. in case quot. in disc. The CEO of a debtor corporation and a related corporation sued bankruptcy court-appointed members of the Chapter 11 committee alleging RICO violations, malicious prosecution, and intentional infliction of emotional distress based upon allegedly malicious litigation against the CEO. This court granted the defendants' motions for summary judgment, holding that the plaintiffs had not established elements of malicious prosecution, that they had not alleged with necessary particularity predicate acts of a RICO violation, and that there was no evidence that the defendants committed extreme and outrageous acts necessary to establish the tort of intentional infliction of emotional distress. The court stated that there could be no claim for tortious infliction of emotional distress where the defendants' alleged misconduct consisted of actions taken in a legal proceeding, because statements connected with legal proceedings are privileged. Further, the CEO admitted at his deposition that he had suffered no emotional illness. Delorean v. Cork Gully, 118 B.R. 932, 947.

E.D.Mich.1990. Com. (d) quot. in disc. A woman sued a city and two police officers, on behalf of herself, her teenage daughter, and her granddaughter, for civil rights violations after she was arrested for driving with a suspended license and transported to the police station, leaving the two children alone in a parking lot. Denying in part the defendants' motions for summary judgment, this court held, inter alia, that since the officer effectuated the traffic stop to cite the plaintiff for violating Michigan's child restraint law, which required that enforcement could only take place following the occurrence of a "primary action" such as a moving violation, the plaintiff had stated causes of action for unlawful stop, excessive force, and invasion of privacy. The court also determined that genuine issues of material fact existed as to whether the officers' conduct was so outrageous as to give rise to intentional infliction of emotional distress. A question of fact remained as to whether the officers knew or should have known that the minor children would suffer a physical or an emotional upheaval as a result of being left alone. Walton v. City of Southfield, 748 F.Supp. 1214, 1221, affirmed in part, reversed in part 995 F.2d 1331 (6th Cir.1993).

E.D.Mich.1990. Com. (j) quot. generally in sup., com. (d) cit. in case quot. in sup. and cit. generally in ftn. A manufacturer's representative procured a contract for his employer, a group of manufacturing services companies, to provide door parts to an automobile manufacturer. The contract specified that payment would be in United States dollars, but after a change in the exchange rates, the companies sought payment in German deutsche marks and the owner of the companies instructed the representative to withhold the door parts until the manufacturer agreed to modify the contract. The representative was terminated when he refused to comply and subsequently sued the owner for, inter alia, intentional infliction of emotional distress. This court denied the defendant's motion to dismiss, finding that the plaintiff had properly pled severe emotional distress since his complaint alleged that the defendant's conduct had caused him embarrassment, humiliation, and mental and emotional anguish. The court also concluded that the defendant's abuse of his position of authority over the plaintiff, coupled with his criminal behavior in attempting to obtain money under false pretenses by forcing a contract modification, supported a finding of extreme and outrageous conduct. Wilson v. Kiss, 751 F.Supp. 1249, 1252-1254.

E.D.Mich.1989. Com. (d) cit. in case cit. in disc. A terminated employee sued her former employer for intentional infliction of emotional distress, inter alia, alleging that she was given inadequate training and then placed in a position with inadequate guidance. The court granted the defendant's motion for summary judgment, holding that the defendant's conduct amounted to mere negligence and was not so outrageous in character and so extreme in degree as to go beyond all bounds of decency. Merriweather v. International Business Machines, 712 F.Supp. 556, 565, affirmed 908 F.2d 973 (6th Cir.1990), certiorari denied 499 U.S. 906, 111 S.Ct. 1106, 113 L.Ed.2d 216 (1991).

E.D.Mich.1988. Coms. (d) and (j) quot. in cases cit. in sup. An employee sued her employer for intentional infliction of emotional distress and tortious interference with a contractual relationship, based on the employer's racial discrimination in allegedly paying the plaintiff less than similarly situated white employees for performing the same work. The court dismissed both claims. First, the court explained that the discriminatory acts did not constitute the extreme and outrageous conduct necessary to sustain an intentional infliction of emotional distress claim, and that the plaintiff offered no proof of such conduct or that she suffered severe emotional distress. Second, the court found that the interference with a contractual relationship claim could not be sustained since no third party interfered with the plaintiff's employment contract with the defendant. Postell-Russell v. Inmont Corp., 691 F.Supp. 1, 3, 4.

E.D.Mich.1987. Com. (d) quot. generally in case quot. in sup. A physician who was being sued for malpractice sued another physician who had provided reports and deposition testimony for the malpractice litigation, alleging negligence, fraudulent misrepresentation, defamation, and intentional infliction of emotional distress. This court found for the defendant, holding that the defendant was not negligent because, as a consultant and potential expert witness, he owed no legal duty to the plaintiff, an adverse litigant. The court concluded that there was no fraudulent misrepresentation because the plaintiff had not relied on any statement in the defendant's prelitigation report and in any event the statements were opinions, and therefore not actionable; that the plaintiff's innocent misrepresentation claim failed because he did not establish reliance;

that since the defendant's report was limited to statements of opinion that were used for trial preparation, there was no basis for the defamation suit; and that the defendant's actions did not satisfy the extreme and outrageous conduct standard to support an intentional infliction of emotional distress claim. Kahn v. Burman, 673 F.Supp. 210, 217, judgment affirmed 878 F.2d 1436 (6th Cir.1989).

E.D.Mich.1986. Quot. in sup. After a fired police officer was cleared of sexual harassment and rape charges, he sued several township officials for intentional infliction of emotional distress, inter alia, alleging that the defendants had conspired to have several women file false charges against him. The court dismissed the emotional distress claim, stating that, although the defendants probably felt malice toward the plaintiff because he had charged them with corruption, the evidence was insufficient to show that they had by extreme and outrageous conduct intentionally or recklessly caused the plaintiff severe emotional distress. Solomon v. Royal Oak Tp., 656 F.Supp. 1254, 1265, decision affirmed in part, reversed in part 842 F.2d 862 (6th Cir.1988).

E.D.Mich.1984. Com. (c) quot. in sup. A former employee sued her former employer for breach of her employment contract, defamation, retaliatory discharge, and infliction of emotional distress. The employer moved to dismiss. The opinion did not discuss the underlying facts, but with regard to the emotional distress claim, the court held that the employee had failed to allege extreme and outrageous conduct. The request for dismissal was granted. Smith v. Teledyne Industries, Inc., 578 F.Supp. 353, 355.

E.D.Mich.1983. Coms. (d), (g), and (h) quot. in case quot. in sup. An employee brought an action against her former employer alleging both termination of employment without cause and intentional infliction of emotional distress. The employer filed a motion for summary judgment. The court held that the provision in the employment application permitting termination of employees with or without cause constituted part of the employment contract. Because the employer had expressed no intention that employees be discharged for cause only, the doctrine of at will employment applied. On the plaintiff's emotional distress claim, the court found that the employer did no more than exercise its legal rights in a permissible way. Also, its conduct was not so outrageous as to go beyond all possible bounds of decency. Summary judgment granted. Batchelor v. Sears, Roebuck & Co., 574 F.Supp. 1480, 1488, 1489.

E.D.Mich.1980. Cit. in sup., coms. (g), (d), (h), (j) quot. in sup. A former employee brought an action against his former employer for wrongful discharge and intentional infliction of emotional distress. The court dismissed the wrongful discharge claim, stating that the employee had no right to just cause determination because his employment application clearly stated that employment was terminable at will and without notice. The court also dismissed the plaintiff's claim of emotional distress, concluding that any distress suffered by the plaintiff was not extreme or outrageous, and that even if the plaintiff suffered such distress, because the defendant was exercising its legal right to terminate the plaintiff's employment, the defendant's conduct was privileged. Novosel v. Sears, Roebuck & Co., 495 F.Supp. 344, 346, 347.

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W.D.Mich.

W.D.Mich.2014. Com. (d) quot. in case quot. in sup. As part of a wider action, U.S. citizen who had a Hispanic physical appearance brought a claim for, among other things, intentional infliction of emotional distress (IIED) against the United States under the Federal Tort Claims Act, based, in part, on federal immigration officers' alleged comments about plaintiff's presumed illegal status during a raid in which plaintiff was arrested and later released. This court granted summary judgment for defendant, holding that, while the comments in question were unprofessional, no reasonable jury could find that the comments constituted "extreme and outrageous" conduct, as required to state a claim for IIED under Restatement Second of Torts § 46. Valdez v. U.S., 58 F.Supp.3d 795, 831.

W.D.Mich.2012. Com. (g) quot. in case quot. in sup. Personal representatives of arrestee's estate brought various claims against county and others, after arrestee, while being transferred from county jail to hospital, died of a lacerated liver that allegedly resulted from his collision with a dumpster during his flight from police just prior to his arrest. Granting summary judgment for defendants on plaintiff's claim for intentional infliction of emotional distress, this court held that defendants' failure to immediately send arrestee to a hospital could not be characterized as outrageous, nor could defendants be fairly charged with intent or recklessness in causing emotional distress, because there was no evidence that defendants had prior knowledge of arrestee's serious medical condition. Jackson v. Wilkins, 852 F.Supp.2d 890, 899.

W.D.Mich.1997. Cit. in headnote, subsec. (1) cit. in disc. Male former employee sued former employer for violations of Title VII, and for various common law torts, including the intentional infliction of emotional distress. Defendant moved for summary judgment. Granting the motion, the court held, in part, that plaintiff's Title VII claim was barred because he failed to file a timely complaint with the EEOC, that Michigan did not recognize intentional infliction of emotional distress as a valid cause of action in wrongful-discharge cases, and that, even if such a cause of action was allowed, the conduct complained of here was not sufficiently extreme and outrageous to support recovery. Cole v. Knoll, Inc., 984 F.Supp. 1117, 1120, 1135.

W.D.Mich.1993. Quot. in disc. A woman infected with the human immunodeficiency virus and her child sued a former sex partner alleging wrongful transmission of the virus. Granting in part and denying in part defendant's motion to dismiss, this court held that the claims for negligent and fraudulent transmission of HIV could be maintained to the extent that defendant knew he was infected with the virus, was suffering symptoms associated with it, or knew of a prior sex partner who had been diagnosed as having the virus, and that the complaint sufficiently stated a battery claim; however, legal claims could not be stated for wrongful transmission of HIV on negligence or fraud theories on the sole basis that defendant had engaged in "high risk" activity, and sexual activity was not an inherently or abnormally dangerous activity for strict liability purposes. The court denied defendant's motion to dismiss the count for intentional infliction of emotional distress as to plaintiff child, but ordered plaintiffs to supply a more definite statement regarding their

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allegations that defendant's actions were directed with intent to harm the child. Doe v. Johnson, 817 F.Supp. 1382, 1399.

W.D.Mich.1993. Quot. in sup., com. (i), illus. 15 quot. but dist. The infant daughter of a woman who alleged that she had unknowingly been infected with HIV from sexual conduct with a man prior to her pregnancy sued the man for intentional infliction of emotional distress. This court, granting the defendant's motion to dismiss as to this claim, held that the daughter had not been a "bystander," as required for recovery by third parties on this theory in Michigan, at the time the HIV was allegedly transmitted. The court stated that the daughter was not physically present when defendant's alleged conduct occurred, and her after-the-fact discovery of defendant's alleged outrageous conduct directed toward her mother would not suffice to state a claim. Moore v. Johnson, 826 F.Supp. 1106, 1108-1109.

W.D.Mich.1983. Cit. in disc. com. (d) quot. in case cit. in disc., com. (g) cit. in disc. The plaintiffs brought an action for defamation and intentional infliction of emotional distress against a newspaper. This court stated that Michigan recognized this tort as defined in the Restatement. The conduct had to be extreme and outrageous; liability did not extend to mere insults. This court denied summary judgment on this count since the nature of the conduct depended upon factual issues; it also denied summary judgment on the basis of privilege, noting that extreme conduct could be privileged under some circumstances. In this case, the contested issue of malice, if proven, would override the newspaper's qualified privilege. Apostle v. Booth Newspapers, Inc., 572 F.Supp. 897, 906-908, opinion supplemented 577 F.Supp. 962 (W.D.Mich.1984).

W.D.Mich.1983. Cit. in disc., com. (d) quot. in case quot. in disc. The plaintiff brought an action for intentional infliction of emotional distress against a newspaper after she appeared in a photograph accompanying an article on prostitution. This court stated that Michigan recognized this tort where the conduct was beyond mere insult and was extreme or outrageous. The court denied the motions for summary judgment since the nature of the conduct depended upon disputed facts. Summary judgment was also denied to defendants on the basis of privilege. The second Restatement did not use the language of the prior Restatement referring to privilege in the definition of the tort, but the defendant relied on the general definition of the common law privilege. In this case the applicability of a qualified privilege could not be determined because of factual issues. Similarly, the plaintiff's claim of invasion of privacy by placing her in a false light presented factual issues. Conditional privileges applicable to publishing defamatory matter applied equally to matter constituting an invasion of privacy. Parnell v. Booth Newspapers, Inc., 572 F.Supp. 909, 919-921.

W.D.Mich.Bkrtcy.Ct.

W.D.Mich.Bkrtcy.Ct.2011. Com. (d) quot. in case quot. in sup. Creditor brought an adversary proceeding against Chapter 7 debtor, seeking a determination that debt arising from a state-court default judgment against debtor was nondischargeable as one for a willful and malicious

injury. Granting summary judgment for creditor, this court held that the judgment was entitled to preclusive effect, specifically, that the findings supporting the judgment for her claim of intentional infliction of emotional distress compelled the conclusion that debtor's conduct was willful and malicious; among other things, the state court's finding that debtor's conduct was "extreme and outrageous" under Michigan law also established that debtor's actions toward plaintiff were malicious under the Bankruptcy Code. In re Strozewski, 458 B.R. 397, 407-408.

W.D.Mich.Bkrtcy.Ct.1994. Subsec. (1) quot. in sup. Chapter 11 debtor's former employee who brought a claim against debtor for emotional-distress damages, inter alia, alleging that he was wrongfully discharged on account of his race, moved to transfer determination of his cause of action from bankruptcy court to district court on the ground that his claim was a "personal injury tort," which must be tried in district court. Denying claimant's motion to transfer, the court held that claimant did not allege emotional suffering so severe as to state a claim for emotional distress that would qualify as a personal injury tort in the traditional sense, such as psychiatric impairment beyond mere shame and humiliation. The court stated that claimant's allegations of emotional distress did not transform his racial-discrimination claim into a personal-injury tort. In re Atron Inc. of Michigan, 172 B.R. 541, 544.

D.Minn.

D.Minn.2020. Com. (j) cit. in case cit. in sup. Arrestee brought, among other things, claims for intentional infliction of emotional distress against attorney and victims of plaintiff's harassment, alleging that attorney republished false statements on social media that plaintiff sexually assaulted a woman, and victims published sexual advertisements in plaintiff's name without his consent. This court granted defendants' motion for summary judgment, holding that plaintiff failed to raise a genuine dispute of material fact as to whether defendants' conduct was outrageous or caused plaintiff emotional harm. Citing Restatement Second of Torts § 46, Comment *j*, the court explained that attorney republished her statements with good-faith belief that the allegations against plaintiff were true, plaintiff failed to set forth evidence that victims actually published the advertisements, and the record did not indicate that plaintiff suffered severe emotional distress. Fredin v. Middlecamp, 500 F.Supp.3d 752, 785.

D.Minn.2015. Subsec. (1) cit. in case cit. in sup. Home-mortgage borrower brought claims for, among other things, intentional infliction of emotional distress against lender, alleging that lender breached the parties' mortgage agreement by failing to arrange a face-to-face meeting before foreclosing on his mortgage. This court granted summary judgment for lender on borrower's IIED claim, holding that borrower produced no evidence that what lender did was intentional and utterly intolerable, or that he suffered the severity of emotional distress required to make out such a claim under Restatement Second of Torts § 46. The court pointed out that there was no evidence that borrower was harmed by lender's failure to hold a face-to-face meeting, and, while borrower's mental-health records showed that he suffered from depression and anxiety, there was no evidence

of any nexus between lender's alleged conduct and his mental conditions, all of which predated lender's conduct. Njema v. Wells Fargo Bank, N.A., 124 F.Supp.3d 852, 875.

D.Minn.2012. Subsec. (1) cit. in case cit. in sup. Employee sued employer, alleging, among other things, discrimination based on her disability and her gender in violation of state law. This court granted employer's motion to dismiss employee's claim for intentional infliction of emotional distress, holding that employee's allegations—that her supervisor was generally disrespectful toward her and threw a ruler at her, and that employer's in-house physician transported her, following a consultation with her personal physician, to a hospital where she was involuntarily committed and subjected to a strip search—were insufficient to support such a claim under Minnesota law. The court noted that, while supervisor's alleged actions were unprofessional and objectionable, they did not satisfy the requirement of extreme and outrageous conduct, and that plaintiff did not allege that employer's physician actually admitted her to the hospital, that he was the one who searched her, or that the hospital misdiagnosed her as a threat to herself or others. Radcliffe v. Securian Financial Group, Inc., 906 F.Supp.2d 874, 895.

D.Minn.2012. Com. (e) quot. in sup. Twelve-year-old middle-school student and her mother brought various claims against school district and others, alleging that defendants wrongfully disciplined student for messages that she posted on an Internet social-networking website, forced her to surrender her passwords for the website and for her email, and searched her account on the website. Granting defendants' motion to dismiss plaintiffs' claim for intentional infliction of emotional distress, this court held that, while defendants' alleged behavior arguably constituted a callous, intrusive, and insensitive abuse of power, a reasonable fact-finder could not conclude that the behavior was "particularly egregious" or "utterly intolerable" to the civilized community, as required to state such a claim. The court noted that school authorities could be held liable for emotional distress arising from abuses of their position, but not for mere indignities that were not extreme or outrageous. R.S. ex rel. S.S. v. Minnewaska Area School Dist. No. 2149, 894 F.Supp.2d 1128, 1146.

D.Minn.2009. Com. (d) quot. in case quot. in sup. Professor of African descent brought discrimination suit against university and others, and asserted a claim for intentional infliction of emotional distress (IIED). Granting defendants' motion for partial dismissal, this court, while acknowledging that plaintiff's allegations portrayed an unfriendly and contentious workplace, held that, under Minnesota law, the IIED claim nonetheless could not be sustained, because a work environment in which co-workers or supervisors criticized, taunted, or harassed another employee did not present the egregious conduct required for an IIED claim; additionally, negative comments concerning plaintiff's work performance, or the delay of a promotion, were not sufficient to establish IIED. Onyiah v. St. Cloud State University, 655 F.Supp.2d 948, 971.

D.Minn.2001. Com. (d) cit. in case quot. in sup. Railroad employee sued his union under the Railway Labor Act, alleging that union breached duty of fair representation when it refused to represent him in his grievance with employer railroad. Plaintiff also sued for intentional infliction of emotional distress. This court granted defendant summary judgment, holding, inter alia, that

plaintiff's emotional-distress claim failed, because defendant's actions were not extreme and outrageous. Baird v. Burlington Northern and Santa Fe R.R. Co., 169 F.Supp.2d 1019, 1026, judgment affirmed 24 Fed.Appx. 629 (8th Cir.2004).

D.Minn.2000. Com. (j) quot. in case quot. in disc. Food-service director for an assisted-living facility for seniors sued express-delivery company for negligent infliction of emotional distress, among other claims, after delivery truck driver sexually assaulted her. This court granted in part defendant's motion for summary judgment, holding, inter alia, that plaintiff failed to show that she suffered severe emotional distress with accompanying physical symptoms. Plaintiff's evidence that she was afraid to go out in public, had difficulty sleeping, and suffered anxiety, lightheadedness, and shortness of breath was insufficient to establish her claim. Longen v. Federal Express Corp., 113 F.Supp.2d 1367, 1374.

D.Minn.1993. Com. (j) quot. in part in case cit. in sup. A discharged employee sued her employer and supervisor, among others, alleging age discrimination, defamation, intentional and negligent infliction of emotional distress, and other claims. This court, granting nearly all of the defendants' motions for summary judgment and dismissal, held, inter alia, that the employer's conduct in engaging in extensive workplace surveillance of the employee in order to determine the extent of her overtime did not rise to the egregious level required to prevail on a claim for intentional infliction of emotional distress. Schibursky v. International Business Machines Corp., 820 F.Supp. 1169, 1183.

D.Minn.1992. Com. (h) cit. in disc. Fire chief sued newspaper for intentional infliction of emotional distress, among other claims, seeking damages arising from newspaper's alleged false statements. The court granted newspaper's motion for partial summary judgment, holding that newspaper's accurate reporting on public matters was not, as a matter of law, sufficiently outrageous to support an intentional tort claim. Conroy v. Kilzer, 789 F.Supp. 1457, 1467.

D.Minn.1992. Com. (j) quot. in sup. and quot. in case cit. in sup. Discharged restaurant employee sued her former employer for intentional infliction of emotional distress, inter alia. Granting in part defendant's motion for summary judgment, the court held, inter alia, that defendant's agents' actions, while harassing, were not so atrocious as to be outside the boundaries of decency and that the emotional distress that plaintiff suffered, which was not materially different from that suffered by other individuals who were terminated from their employment under adverse conditions, was not sufficiently severe to state a claim for intentional infliction of emotional distress. O'Brien v. A.B.P. Midwest, Inc., 814 F.Supp. 766, 777.

D.Minn.1991. Cit. generally in sup., subsec. (1) cit. in sup., com. (d) cit. in case cit. in sup., com. (e) cit. in case quot. in sup. and quot. in sup. A group of former division managers of a company sued the company for violations of the Age Discrimination in Employment Act and for various state law claims, including intentional infliction of emotional distress, alleging that they were subjected to the company's intentional pattern of conduct aimed at reducing the average age of the company's middle-level management. Granting the defendant's motion for summary judgment on

the intentional infliction of emotional distress claim, this court held, inter alia, that while much of the company's conduct was reprehensible, none of it could be fairly characterized as extreme or outrageous to satisfy the first requirement of an intentional infliction of emotional distress claim under Minnesota law. Glass v. IDS Financial Services, Inc., 778 F.Supp. 1029, 1073-1074.

D.Minn.1990. Quot. in case quot. but dist. A former counselor sued a nonprofit corporation operating a chemical dependency treatment center, for intentional infliction of emotional distress, inter alia, regarding her termination following a former patient's allegations that she had entered into a social and sexual relationship with him immediately after his discharge from the treatment center and after the defendant conducted an investigation concluding that sexual conduct did occur. This court granted the defendant's motion to dismiss, stating that the conduct directed toward the plaintiff during the investigation was not extreme, outrageous, or ill-motivated. Under state law, the defendant was obligated to conduct an investigation regarding the allegations, and the court noted that the investigation was a temperate reaction to serious allegations and was carried out within the parameters of the employment contract existing between the plaintiff and the defendant. Meleen v. Hazelden Foundation, 740 F.Supp. 687, 693, affirmed 928 F.2d 795 (8th Cir.1991).

D.Minn.1986. Subsec. (1) cit. in case quot. in disc. A trial attorney, formerly employed as general counsel by the defendant bank management organization and discharged after a restructuring of the defendant's legal department, brought suit alleging, among other counts, age discrimination, breach of a permanent employment contract, slander, and intentional infliction of emotional distress. The district court granted defendant's motion for partial summary judgment, holding that the plaintiff failed to demonstrate either that he had had a permanent employment contract or that coemployees had made defamatory statements about the reasons for his discharge. The court held that the defendant's act of firing the plaintiff without warning, although distasteful, could not meet the high threshold of extreme and outrageous behavior necessary to recover for intentional infliction of emotional distress, since no verbal abuse or threats occurred, and there was no evidence that the plaintiff was under surveillance or was being harassed. Corum v. Farm Credit Services, 628 F.Supp. 707, 718.

D.Minn.1986. Com. (d) quot. in case cit. in disc., com. (h) cit. in disc. An employee sued his employer for, inter alia, intentional and negligent infliction of emotional distress after he was fired for allegedly stealing gasoline from the employer. This court granted the employer's motion to dismiss this claim, holding that the employee had failed to identify the extreme and outrageous tortious conduct necessary for the claim to stand, where the plaintiff merely alleged that the defendant had harassed him by giving him the choice of resigning, being fired, or taking a polygraph test, and that the firing itself was further harassment. Jeffers v. Convoy Co., 636 F.Supp. 1337, 1343.

D.Minn.1985. Coms. (d) and (h) cit. in sup. The plaintiff, an FBI agent, sued the writer, the contributor, and the publisher of a book about the role of the FBI in the events at the South Dakota Pine Ridge Reservation in the early 1970s, alleging that they knowingly or recklessly published falsehoods about the plaintiff's involvement in several murders, and seeking recovery for

defamation, intentional infliction of emotional distress, false-light invasion of privacy, and prima facie tort. Defendants moved to dismiss. After taking into account the full language and context of the statements, the district court concluded that, since it could not precisely determine whether the statements indicated fact or mere opinion to the average reader, the plaintiff was not foreclosed from proceeding with his cause of action. The court dismissed the claim for intentional infliction of emotional distress, holding that the statements were not so utterly intolerable as to permit recovery. The court dismissed the prima facie tort action, since the plaintiff could pursue and recover under a defamation cause of action instead. Price v. Viking Press, Inc., 625 F.Supp. 641, 650.

D.Minn.1978. Cit. in disc. An insurance company issued a certificate of hospital indemnity insurance to the plaintiff. The plaintiff was hospitalized subsequent to the issuance of the policy, and, after she was released, the plaintiff filed a timely and proper claim for benefits allegedly due pursuant to the terms of the policy. During an investigation of the plaintiff's claims, the plaintiff alleged that an agent of the insurance company intimidated the hospital personnel who treated the plaintiff and that, as a result of that intimidation, the plaintiff encountered difficulty in obtaining medical records and other information which was sought in order to document her claim. The plaintiff's complaint alleged: breach of the hospital indemnity insurance contract; tortious interference with the physician-patient relationship; interference with legal process; intentional infliction of emotional distress and breach of the plaintiff's right of privacy. The defendant moved for partial summary judgment. The court held that the complaint did not state a cause of action for interference with the physician-patient relationship, for interference with legal process, for malicious bad-faith settlement techniques, for interference with the insured's policy rights, nor for invasion of privacy since the court found that the Minnesota Supreme Court would not recognize such causes of action. The court held that where the claim for breach of contract sought only $4,900 and where all other claims had been dismissed for failure to state a claim upon which relief could be granted, since jurisdiction was premised on diversity of citizenship and a $10,000 minimal amount was required, the action would be remanded to state court from which it was removed. Wilson v. Colonial Penn Life Ins. Co., 454 F.Supp. 1208, 1212.

N.D.Miss.

N.D.Miss.2013. Com. (d) quot. in case quot. in sup. Former resident of county restitution center, who contracted mycobacterium tuberculosis while fulfilling the terms of his restitution at a chicken-processing plant, brought claims for, among other things, intentional infliction of emotional distress (IIED) against owner of the plant. This court granted in part defendant's motion to dismiss, holding that plaintiff failed to state a viable claim for IIED. While plaintiff's allegations —that defendant placed him in an unsanitary work environment alongside employees who might have had tuberculosis and denied his request to see a medical professional for his physical ailments —were potentially sufficient to state a claim for negligence or even gross negligence, they did not rise to the level of extremity and outrageousness required to sustain a claim for IIED under Mississippi law. Jones v. Tyson Foods, Inc., 971 F.Supp.2d 632, 642.

N.D.Miss.1997. Cit. generally in case quot. in sup., com. (d) quot. in sup. Plaintiff sued the owner of a dialysis facility for, in part, intentional infliction of emotional distress. Dismissing the claim, the court held, inter alia, that plaintiff could not maintain a claim for intentional infliction of emotional distress, since defendant's conduct in having plaintiff arrested for trespass while he was escorting his wife into the facility, after he was warned that he was forbidden to come upon defendant's property, was not so extreme or outrageous as to go beyond all possible bounds of decency and to be regarded as utterly intolerable in a civilized community. Tyus v. Kidney Care, Inc., 982 F.Supp. 422, 425.

N.D.Miss.1996. Com. (d) quot. in sup. An employee sued her former employer for violations of the Americans with Disabilities Act and for wrongful discharge and negligent and intentional infliction of emotional distress. Plaintiff had suffered from carpal tunnel syndrome, and her doctor failed to notify defendant of his decision to relieve plaintiff of her work duties. Defendant's termination letter advised plaintiff that it was the duty of the employee, not the doctor, to contact the company about medical leave. This court granted defendant summary judgment, holding, inter alia, that plaintiff failed to state a cause of action for intentional infliction of emotional distress, because defendant's actions in terminating plaintiff were neither extreme nor outrageous, but fell within the realm of an ordinary employment dispute. Pegues v. Emerson Electric Co., 913 F.Supp. 976, 982.

N.D.Miss.1995. Cit. in headnotes, com. (d) quot. in sup. Former paint-store manager and his wife sued the store for, among other claims, intentional infliction of emotional distress, invasion of privacy, wrongful termination, and violations of the Age Discrimination in Employment Act (ADEA). Defendant had suspended plaintiff while it investigated allegations of sexual harassment and assault made against plaintiff. Plaintiff denied the allegations, and when he refused to resign, he was terminated. This court granted defendant summary judgment, holding, inter alia, that defendant's actions in terminating plaintiff were neither extreme nor outrageous but rather fell within the realm of an ordinary employment dispute. Glasgow v. Sherwin-Williams Co., 901 F.Supp. 1185, 1187, 1191.

N.D.Miss.1995. Com. (d) quot. in sup. and cit. in case quot. in sup. A box printer at a meatpacking plant sued his employer for intentional infliction of emotional distress and for a violation of the Mississippi actionable words statute in connection with an incident during which plaintiff was cursed by a managerial employee in the presence of a supervisor. This court granted defendant summary judgment, holding, inter alia, that plaintiff's intentional infliction of emotional distress claim failed because purchasing manager's spontaneous and brief outburst, while improper, was not extreme or outrageous. Plaintiff and purchasing manager did not have an ongoing combative relationship sufficient to take this case outside the perimeters of an ordinary employment dispute. Lawson v. Heidelberg Eastern, 872 F.Supp. 335, 338.

N.D.Miss.1993. Com. (d) quot. in sup. and quot. in cases quot. in sup. A municipal employee sued her supervisor for sexual harassment under federal law and for intentional infliction of emotional distress in a pendent state claim after defendant repeatedly made sexual advances toward plaintiff and gave plaintiff poor job evaluations, demanding that plaintiff quit, after plaintiff

rejected defendant's advances. The court granted defendant summary judgment on all issues. Regarding the claim for intentional infliction of emotional distress the court held that plaintiff's employment disputes with defendant did not rise to the level of extreme and outrageous conduct when defendant's actions were merely improper and upsetting. Jenkins v. City of Grenada, Miss., 813 F.Supp. 443, 446, 447.

S.D.Miss.

S.D.Miss.1998. Com. (d) quot. in case quot. in sup. and cit. in case cit. in sup. African-American former oil-rig employee sued employer for intentional infliction of emotional distress and civil-rights violations, after two white crew members put a rope tied into a noose in his locker. This court granted the employer summary judgment, holding, inter alia, that the employer did not act in an outrageous manner designed to inflict emotional suffering. The employer responded to plaintiff and to the incident in a reasonable manner, disciplined the individuals involved, counseled supervisory personnel, declared the episode reprehensible, and offered either to accommodate plaintiff satisfactorily on the oil rig or, at his choice, to transfer him elsewhere. Miller v. Rowan Companies, Inc., 55 F.Supp.2d 568, 574.

S.D.Miss.1998. Com. (d) quot. in disc. Wife of debtor who committed suicide sued casino for negligence and intentional infliction of emotional distress, alleging that defendant's attempt to collect the debt caused her husband to take his life. Entering summary judgment for defendant, the court held, in part, that the suicide did not result from an irresistible impulse caused by conduct on the part of defendant, such that defendant could be found liable for the harm sustained, and that defendant's decision to turn to the office of the district attorney in an attempt to recover the debt was neither extreme nor outrageous. Shamburger v. Grand Casino of Mississippi, Inc., 84 F.Supp.2d 794, 801.

S.D.Miss.1996. Com. (d) quot. in case quot. in disc. Noninjured owners of used sport utility vehicles sued manufacturer under theories of negligence, strict liability and breach of warranty, alleging that the vehicles were defective because their fiberglass roofs failed to comply with manufacturer's specifications for strength and crashworthiness. Plaintiffs also asserted claims for intentional infliction of emotional distress. Granting defendant's motion to dismiss, the court held that plaintiffs could not recover under theories of negligence and strict liability where they alleged economic damages only; that plaintiffs failed to state a claim for breach of warranty, and that defendant's conduct was not so extreme or outrageous as to support plaintiffs' claims for intentional infliction of emotional distress. Lee v. General Motors, Corp., 950 F.Supp. 170, 175.

S.D.Miss.1992. Com. (d) cit. in case quot. in disc. An employee sued his former employer for wrongful termination of employment after he was terminated for violating the company's antifraternization policy by engaging in a sexual relationship with a coemployee. Plaintiff sought to recover damages on several theories, including tortious invasion of privacy and intentional infliction of mental and emotional distress. Granting defendant's motion for summary judgment,

this court held, inter alia, that plaintiff's claim for intentional infliction of mental and emotional distress had no merit because plaintiff failed to establish that defendant's actions were so extreme, outrageous, or revulsive as to warrant the imposition of liability. The court noted that plaintiff knew of defendant's policy when he began the prohibited conduct and plaintiff was that aware his conduct, deemed offensive to defendant, could result in his departure. Watkins v. United Parcel Service, Inc., 797 F.Supp. 1349, 1361.

S.D.Miss.1988. Com. (d) quot. in case quot. in disc. A woman's autobiography claimed that she was forced to marry a 45-year-old abusive man when she was only 11, and that the man's sister had helped her prepare for the wedding. The book described the sister as drab, gray, and unpleasant, and allegedly implied that she was participating in a “slave auction.” The sister sued the woman, her coauthor and her publisher in diversity for, inter alia, intentional infliction of emotional distress. This court granted the defendants' motion to dismiss for failure to state a claim. It determined that the defendants' conduct was not outrageous and that an average member of the community could not reasonably resent the defendants' publication of the statements because the language used was not capable of being understood in a defamatory manner or as an accusation of criminal conduct. Mitchell v. Random House, Inc., 703 F.Supp. 1250, 1260, judgment affirmed 865 F.2d 664 (5th Cir.1989). See above case.

S.D.Miss.1985. Subsec. (1) quot. in sup., coms. (j) and (k) quot. in sup. The plaintiff sued an insurer for breach of contract and tortious breach of contract. The jury awarded the plaintiff $50,000 compensatory and $40,000 punitive damages, and the insurer moved for a judgment n.o.v., alteration or amendment of the judgment, and remittitur. The trial court set aside the award of compensatory damages, stating that the damages for emotional distress sought by the plaintiff were not supported by competent evidence, either under a contract or tort construction. However, the court stated further that the plaintiff had established sufficient actual damages to predicate an award of punitive damages, and that the punitive damages awarded by the jury were reasonable. Jones v. Benefit Trust Life Ins. Co., 617 F.Supp. 1542, 1549, judgment affirmed in part, reversed in part 800 F.2d 1397 (5th Cir.1986).

S.D.Miss.1982. Quot. in part in sup., com. (d) quot. in part in sup. The plaintiff, a business telephone customer, brought an action against the local telephone company and one of its employees alleging the wrongful change of a telephone number, intentional infliction of emotional distress, and invasion of privacy. The telephone company had replaced the plaintiff's earlier issued telephone number and credit card with different ones. The telephone company employee had called the plaintiff to explain the change of service and to obtain billing information for charges previously registered to the old telephone number. The plaintiff alleged that the employee was abusive and defamatory during the conversation, and that the changed telephone number had adversely affected the plaintiff's business resulting in lost sales. This court granted summary judgment for the defendants on all issues. Citing state statutory law, this court found that the plaintiff had no rights whatsoever to an issued telephone number. According to statute, the assignment of telephone numbers was an act solely at the discretion of the telephone company to suit its service requirements. This court also found that the telephone company employee's conduct

during the single telephone call she made to the plaintiff was not sufficiently outrageous to permit recovery for intentional infliction of mental distress. The employee did not use vulgar language, nor did she threaten immediate criminal prosecution for disputed calls charged to the previous telephone number. Absent such conduct, no recovery could be had for mental distress. Referring to the Restatement, this court also stated there was no invasion of privacy in this case. Repeated telephone calls were necessary to maintain such an action. Here, there was only one, and it was insufficient to permit recovery. Burris v. South Central Bell Tel. Co., 540 F.Supp. 905, 909.

E.D.Mo.

E.D.Mo.1985. Quot. in sup. A former employee sued his employer for intentional infliction of emotional distress and tortious interference with a contract. The court granted the employer's motion to dismiss, holding that the employer's actions could not be deemed outrageous, which was a requirement for an intentional infliction of emotional distress claim, and that no third party had interfered with any contract, which was a requirement for a tortious interference claim; therefore, the plaintiff's claims failed. Evans v. Six Flags Over Mid America, 613 F.Supp. 219, 220.

E.D.Mo.1985. Com. (d) quot. in sup. After three alleged incidents of sexual harassment from a fellow employee, a college employee sued her employer for intentional infliction of emotional distress. This court denied the defendant's original motion for summary judgment, holding that it could not be said as a matter of law that such harassment was not sufficiently outrageous in character and extreme in degree as to be intolerable in a civilized society and thus sufficient to state a cause of action for intentional infliction of emotional distress. However, based on other grounds, this court granted the defendant's second motion for summary judgment on this count. Miller v. Lindenwood Female College, 616 F.Supp. 860, 861.

E.D.Mo.1981. Quot. in part in case cit. in sup. Former wife brought an action against former husband alleging breach of contract and intentional infliction of emotional distress. The court stated that a defendant's acts must be so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community in order to recover for intentional infliction of emotional distress under Missouri law. The court held, inter alia, that the former husband's breach of the support provisions of the divorce agreement, which was caused by his financial difficulties, could not be characterized as outrageous conduct sufficient to constitute a tortious intentional infliction of emotional distress under Missouri law. Deibel v. Deibel, 512 F.Supp. 135, 139.

E.D.Mo.1980. (op. on punitive damages, 1981). Cit. in disc. The plaintiff, a former air traffic controller, sued the air traffic controllers' union seeking to recover damages for alleged outrageous conduct. The plaintiff moved for partial summary judgment on his claim, citing an administrative decision on the issue finding for the plaintiff. The court, agreeing with the prior administrative decision, found that the defendant had engaged in acts designed either to coerce the plaintiff to cooperate with the union or to punish him for his refusal to do so. Summary judgment was

granted in favor of the plaintiff on the ground that the defendant should be subject to liability for the emotional distress caused by the defendant's intentional outrageous conduct. Anthan v. Professional Air Traffic Controllers, 521 F.Supp. 1, 4, judgment vacated 672 F.2d 706 (8th Cir.1982).

E.D.Mo.1978. Cit. and fol. Automobile buyer brought an action against a finance company to recover damages for, inter alia, alleged oppressive collection tactics which allegedly caused buyer to suffer severe mental anguish, embarrassment, and humiliation. According to the complaint, defendant's agents had telephoned plaintiffs, humiliated them to their children, and bullied and harassed them for the collection of the indebtedness. However, the court held that the plaintiffs' version of the conduct of the defendant's representatives did not meet the test of extreme and outrageous conduct undertaken intentionally, recklessly, and with malice which was necessary to sustain an action for emotional distress. The court found, moreover, that the "facts" relied upon by the plaintiffs were so stated in vague generalities and couched in conclusory words that they failed to illustrate conduct so outrageous in character as to go beyond all possible bounds of decency. Wade v. Ford Motor Credit Co., 455 F.Supp. 147, 152.

W.D.Mo.

W.D.Mo.1989. Coms. (d) and (e) quot. in case cit. in disc. A female store manager sued her former employer and others for intentional infliction of emotional distress, inter alia, alleging that her immediate supervisor subjected her to sexual harassment and discrimination. After the court granted the defendants summary judgment on the intentional infliction of emotional distress claim, stating that the plaintiff failed to offer evidence of mental distress that was medically diagnosable and severe enough to be medically significant, it granted the plaintiff's motion for reconsideration, based on unpresented evidence from which the court found that the plaintiff raised an issue of fact as to whether she suffered medically significant emotional distress caused by the defendants. The court added that, by introducing evidence of subtle forms of discrimination, the plaintiff raised an issue of fact as to whether the defendants' conduct was extreme and outrageous. Beeman v. Safeway Stores, Inc., 724 F.Supp. 674, 680.

D.Mont.

D.Mont.2007. Cit. in case cit. in disc. Corporation and its principal sued limited liability company for, among other things, intentional infliction of emotional distress arising from a prior lawsuit in which corporation sued and recovered damages from company after a jury trial. The district court adopted the magistrate's findings and recommendations in their entirety and granted summary judgment for defendant, holding, inter alia, that plaintiffs, who pointed only to defendant's failure to settle and its disputed "motion tactics" in the underlying action, failed to allege any intentional, wrongful conduct. The court explained that, although the Montana Supreme Court had chosen not to adopt the "outrageous" conduct standard of the Restatement Second of Torts § 46, some

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intentional, wrongful conduct was still required. DuBray Land Services, Inc. v. Schroder Ventures U.S., 488 F.Supp.2d 1109, 1117.

D.Mont.1999. Quot. generally in disc., com. (j) cit. in disc. Worker was killed when employer-owned truck in which he was riding as a passenger rolled over; his parents brought survivorship and wrongful-death action against employer. Parents also asserted a claim for negligent infliction of emotional distress. Employer moved for summary judgment. Granting the motion in part and denying it in part, the court held that, to the extent that parents' claims were derivative of decedent's, they were barred by the exclusivity provision of the Montana Workers' Compensation Act; however, parents' claim for negligent infliction of emotional distress was an independent claim that belonged to them as the injured parties. Nelson v. Hawkins, 45 F.Supp.2d 1015, 1020, 1021.

D.Mont.1991. Com. (d) quot. in case quot. in sup. Alleging negligence, breach of express and implied warranties, nuisance, strict products liability, and intentional infliction of emotional distress, the owner and principal stockholder of a wood-treating facility sued the manufacturers of the wood preservative used during the treating process seeking indemnification for cleanup costs and compensatory damages arising when waste preservative contaminated the facility site. Granting the manufacturers' motion for summary judgment in part and denying it in part, this court held, inter alia, that the owner failed to state a claim for intentional infliction of emotional distress. The court stated that the manufacturer's action in selling its product was not sufficiently outrageous to justify imposing liability on the manufacturer. Montana Pole & Treating Plant v. I.F. Laucks, 775 F.Supp. 1339, 1348, affirmed 993 F.2d 676 (9th Cir.1993).

D.Neb.

D.Neb.2003. Com. (h) cit. in case cit. in sup. Disabled man who was confined to a wheelchair sued owners and lessee of restaurant for violation of the Americans with Disabilities Act (ADA) and intentional infliction of emotional distress, inter alia. Plaintiff alleged that defendants' property had architectural barriers related to handicapped parking spaces and the restroom. This court dismissed in part, holding, inter alia, that defendants' alleged failure to adhere to the ADA's accessibility guidelines did not amount to extreme and outrageous conduct. Hobleman v. Kentucky Fried Chicken, 260 F.Supp.2d 801, 807.

D.Neb.1996. Com. (d) cit. generally in headnote and cit. in case quot. in sup. Former employee who alleged that she was fired as a direct and proximate result of her complaint to management of sexual harassment by a co-worker brought, in part, a claim for intentional infliction of emotional distress against employer, among others. Denying in part defendant's motion to dismiss, the court held, inter alia, that, although defendant could not be held liable for intentional infliction of emotional distress under a direct liability theory because the corporate conduct alleged by plaintiff, specifically, the lack of response to her complaints and her subsequent termination, did not constitute extreme and outrageous conduct under Nebraska law, plaintiff's allegations that a master-servant relationship

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existed between defendant and the co-worker and that the offensive conduct of the co-worker took place while he was acting within the scope of his employment stated a valid claim for relief under a derivative liability theory. Karstens v. International Gamco, Inc., 939 F.Supp. 1430, 1433, 1442.

D.Neb.1995. Com. (d) quot. but dist., com. (e) quot. but dist. Manager of telephone company sued Federal Bureau of Investigation agents alleging Fourth Amendment violations in connection with defendants' investigation into possible wiretapping by plaintiff and for intentional infliction of emotional distress. Granting defendants' motion for summary judgment, the court held that their attempts to pressure plaintiff into submitting to a polygraph test and their later threat to press charges were not so intolerable as to support a claim for damages. Specifically, the court explained that the presence of plaintiff's attorney during the polygraph discussion was sufficient protection against any unduly offensive harassment on the part of defendants. Similarly, during the conversation regarding possible criminal charges, the presence of an impartial third party allowed defendants little, if any, opportunity to abuse their position of power. Cole v. U.S., 874 F.Supp. 1011, 1045, 1046.

D.Nev.

D.Nev.2019. Com. (e) quot. in disc. Estate of shooting victim and victim's family brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against city, city police department, and police officer, alleging, inter alia, that police officer shot and killed victim during an investigation of victim's home at a New Year's Eve celebration, despite having minimal basis for conducting the investigation. This court denied in part defendants' motion for summary judgment, holding that plaintiffs sufficiently alleged that officer's conduct was extreme and outrageous to state a claim for IIED. The court rejected defendants' assertion that, under Restatement Second of Torts § 46, Comment *e*, defendants could only be liable if plaintiffs demonstrated that defendants committed extreme abuse of their position, because Nevada caselaw did not indicate that extreme abuse was a requirement for an IIED claim. Estate of Sauceda v. City of North Las Vegas, 380 F.Supp.3d 1068, 1087.

D.Nev.2011. Com. (d) quot. in sup. Terminated university pharmacy professor sued university, dean of university's pharmacy college, and university's director of human resources, alleging, inter alia, that defendants' treatment of her after she was diagnosed with bladder cancer constituted intentional infliction of emotional distress (IIED). This court dismissed plaintiff's IIED claims, holding that the alleged intentional acts asserted by plaintiff fell short of extreme and outrageous conduct, because the acts fell under normal employment relations; plaintiff's claims that defendants sent her letters of reprimand, papered her file, barred her from campus, and required her to complete a remediation plan all concerned actions that were properly categorized as personnel management, and, to the extent that plaintiff's termination or other adverse employment actions were due to a discriminatory policy, a legal remedy might be available in her discrimination claims not addressed here. Welder v. University of Southern Nevada, 833 F.Supp.2d 1240, 1246.

D.Nev.2009. Cit. in sup., cit. in ftn., coms. (d)-(f) quot. in sup., com. (h) cit. in sup. German citizen who was detained by federal officials after arriving at a Nevada airport and was later transferred to a city jail as a result of the erroneous inclusion of his name on a watch list sued the United States for intentional infliction of emotional distress (IIED), inter alia. This court granted defendant's motion to dismiss based on the discretionary-function exception to the Federal Tort Claims Act, but without prejudice so that plaintiff could amend his complaint, concluding that plaintiff's IIED claim stated a claim upon which relief could be granted; although the federal officials' request that plaintiff spy for them was not outside the bounds of decency, their control over his movements and their alleged knowledge that he had a heart condition and would be subject to a strip search created fact issues as to whether their conduct was extreme and outrageous and whether they knew that he was peculiarly susceptible to emotional distress. Chehade Refai v. Lazaro, 614 F.Supp.2d 1103, 1121, 1122.

D.Nev.2001. Com. (d) quot. in case quot. in sup. Fry cook for casino café brought claims against casino and male co-workers for sexual harassment and retaliation under Title VII, intentional infliction of emotional distress, assault, battery, defamation, and sexual harassment under state's antidiscrimination statute. Defendants moved for summary judgment. Denying the motion in part, this court held, inter alia, that whether defendants' sexual remarks and offensive physical contact rose to level of "extreme or outrageous" so as to sustain claim for intentional infliction of emotional distress was jury question. Burns v. Mayer, 175 F.Supp.2d 1259, 1268.

D.Nev.2001. Com. (d) quot. in case quot. in sup. Female casino employee sued employer and co-workers, alleging, among other things, sexual harassment and intentional infliction of emotional distress. Denying in part coworkers' motions for summary judgment, this court held, inter alia, that genuine issue of material fact existed as to whether co-workers' sexual remarks and offensive physical contact constituted extreme and outrageous conduct. Switzer v. Rivera, 174 F.Supp.2d 1097, 1108.

D.Nev.1994. Com. (d) cit. in case cit. in sup. A former ticket agent for an airline sued an airline customer for libel, intentional infliction of emotional distress, and tortious interference with a contractual relationship arising from a letter the customer wrote to the airline complaining about the agent's inappropriate behavior. This court granted defendant's motion to dismiss, holding, inter alia, that plaintiff failed to state an emotional-distress claim because she failed to allege conduct that rose to the level of outrageousness and further failed to allege a sufficiently severe level of distress. Defendant's conduct of sending the letter, in which he expressed his dissatisfaction with the level of service he received from an airline employee and indicated the reasons for his decision to stop patronizing the airline, was a common occurrence and could hardly be classified as extreme or outrageous. Churchill v. Barach, 863 F.Supp. 1266, 1275.

D.Nev.1993. Coms. (d), (h), and (j) cit. in disc. Former casino employees sued the casino owners and management employees, seeking reinstatement and alleging race and sex discrimination and various pendent Nevada state law claims, including intentional infliction of emotional distress. Granting the defendants' motions for summary judgment, the district court held, inter alia, that the

employees' feelings of inferiority, headaches, irritability and, in one employee's case, weight loss, were not "severe emotional distress" sufficient to sustain their claim of intentional infliction of emotional distress in connection with denial of their requests for transfer to a preferred location. Alam v. Reno Hilton Corp., 819 F.Supp. 905, 911.

D.Nev.1992. Cit. in case quot. in sup., coms. cit. generally in case quot. in sup. (Erron. cit. as § 41.) Blackjack dealer sued former employer, asserting civil rights claims arising out of alleged sexual harassment by other employees and seeking damages for, inter alia, intentional infliction of emotional distress. Granting in part defendant's motion for summary judgment, the court held, inter alia, that, under Nevada law, defendant's conduct in failing to respond in ways requested by plaintiff in response to episodes of customer harassment was not extreme and outrageous conduct that would support an emotional distress claim. Powell v. Las Vegas Hilton Corp., 841 F.Supp. 1024, 1031.

D.Nev.1990. Cit. in sup. (erron. cit. as § 41), coms. (d), (e), and (f) quot. in sup. A woman sued her employer for, inter alia, intentional infliction of emotional distress, alleging that she had been subjected to poor treatment after complaining about preferential treatment being given to a younger woman who allegedly had or was having an affair with her supervisors. The woman argued that pervasive sexual harassment creating a hostile work environment constituted extreme and outrageous conduct, especially since in this case the supervisors were acting in retaliation for her complaints, abused their positions of authority, and knew that the woman was susceptible to work-related stress. The actions complained of included demoting the woman, involuntarily transferring her, denying her overtime work, and taking away her key to the main building. This court, having found no evidence of sexual harassment or hostile work environment, granted summary judgment for the employer, holding that, although the woman's evidence might establish abuse of position by the supervisors and awareness that she was subject to depression resulting from work-related stress, the conduct complained of was not so extreme and outrageous as to establish a claim for intentional infliction of emotional distress. Candelore v. Clark County Sanitation Dist., 752 F.Supp. 956, 962, affirmed 975 F.2d 588 (9th Cir. 1992). See above case.

D.Nev.1986. Cit. in disc., coms. (d) and (h) quot. in sup. The plaintiff, who was employed by the defendant as a warehouse supervisor for 12 years, alleged that the defendant initiated a drug investigation of him despite its knowledge that he had not committed any offense. The plaintiff sought damages for, inter alia, intentional infliction of emotional distress. After noting that Nevada recognized this tort, the district court held that the allegations raised a genuine issue as to whether initiating a drug investigation was sufficiently outrageous conduct as to permit recovery. The court concluded that reasonable persons could differ on that question and denied the defendant's motion for summary judgment on that claim. Norman v. General Motors Corp., 628 F.Supp. 702, 703-705.

D.N.H.

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D.N.H.2022. Cit. in sup., cit. in case cit. in sup.; com. (d) quot. in sup. and cit. in case quot. in sup.; com. (*i*) cit. and quot. in sup.; com. (j) quot. in case cit. in sup. Child victims of sexual assault and abuse while working at a marina sued, among others, owners of the marina, alleging that owners were liable for intentional infliction of emotional distress (IIED) because they permitted the perpetrator, who had a history of abuse, to supervise them. This court denied owners' motions to dismiss, holding, as a matter of first impression, that victims sufficiently alleged that owners recklessly caused them emotional harm because they knew about the abuse and made no effort to stop it. The court rejected owners' argument that only an individual that directly harassed, abused, or assaulted a victim could be liable for IIED under Restatement Second of Torts § 46. Doe v. West Alton Marina, LLC, 646 F.Supp.3d 315, 321-323, 326-328.

D.N.H.2013. Com. (d) quot. in case quot. in sup. Parents and their daughter brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against employees of the New Hampshire Department of Children, Youth, and Families, school district employees, and law enforcement officers, after parents were arrested for interference with custody, and ultimately lost custody of daughter as a result of defendants' initiation and prosecution of neglect and guardianship proceedings against them. Granting defendants' motion to dismiss, this court held that plaintiffs failed to state a claim for IIED because they did not allege any grossly illegal or unconstitutional behavior on the part of any defendant; at the absolute worst, plaintiffs alleged a few instances of conduct that were arguably unconstitutional, but not "grossly" so. The court noted that to state a claim for IIED, it was not enough that defendants acted with an intent that was tortious or even criminal, nor, for that matter, that their conduct had been characterized by malice. Katz v. McVeigh, 931 F.Supp.2d 311, 357.

D.N.H.2012. Quot. in case quot. in sup. Journalist whose attempts to attend four political events on private property were curtailed brought federal civil-rights claims against certain political and police defendants, as well as state-law claims for battery, negligence, and intentional infliction of emotional distress (IIED) against the police defendants, including city police department and its chief of police. This court granted defendants' motion to dismiss all claims, holding that plaintiff's claim for IIED failed because, while he alleged that "officers of the political defendants" approached him threateningly and put their hands on him while he was trying to record video of events, and repeatedly threatened to arrest him, he did not set forth who did what or the resultant harm. King v. Friends of Kelly Ayotte, 860 F.Supp.2d 118, 130.

D.N.H.2011. Com. (d) quot. in case quot. in sup. Former employee of medical center sued medical center and physician who owned medical center and treated her, alleging, among other things, intentional infliction of emotional distress (IIED). Denying defendants' motion to dismiss plaintiff's IIED claim, this court held that the extreme and outrageous character of conduct required to state such a claim could arise from the abuse of a position of authority of the type claimed by plaintiff. The court pointed to plaintiff's allegations that defendant repeatedly threatened to terminate her employment and "kick her out of the house" where they lived together if she did not meet his personal demands (including engaging in sex), that he subjected her to sexually suggestive

behavior at work, and that center failed to maintain the confidentiality of her medical records. Hudson v. Dr. Michael J. O'Connell's Pain Care Center, Inc., 2011 DNH 160, 822 F.Supp.2d 84, 98.

D.N.H.2009. Coms. (d) and (e) quot. in case quot. in sup., com. (h) cit. in sup. High school student and her parents sued school district, high school principal, and former high school teacher in connection with certain offensive comments that teacher made to student about her buttocks. Granting summary judgment for defendants on plaintiffs' claim for intentional infliction of emotional distress, this court held, inter alia, that defendants' conduct was insufficiently extreme and outrageous as a matter of law. The court reasoned that, while teacher's comments to student were unquestionably unprofessional, and arguably reprehensible, they were not beyond "all possible bounds of decency," even for an older man in a position of authority as a teacher to adolescent girls. Brodeur v. Claremont School Dist., 2009 DNH 082, 626 F.Supp.2d 195, 224, 225-226.

D.N.H.2009. Com. (d) quot. in case quot. in sup. Mother of private-school student sued school, alleging, among other things, intentional infliction of emotional distress (IIED) arising from school's dismissal of student because of her eating disorder. Granting in part defendant's motion to dismiss, this court held that plaintiff failed to state a claim for IIED by alleging that school discharged daughter either in violation of its own statements and policies or upon the mistaken belief that she was a danger to herself or others, because such conduct failed to rise to the level of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Franchi v. New Hampton School, 656 F.Supp.2d 252, 267.

D.N.H.2009. Com. (d) quot. in case quot. in sup. After criminal charges against limited-liability company under state's "spillage" statute were dismissed, member of limited-liability company sued police officers who subjected him to booking procedures in connection with the charges. Granting summary judgment for defendants, this court held, inter alia, that plaintiff could not prevail on his claim for intentional infliction of emotional distress. The court reasoned that defendants' conduct in initiating an investigation prompted by a citizen complaint, attempting to resolve the complaint informally with a call to limited-liability company, seeking the advice of a county prosecutor, and booking plaintiff as contemplated by the warrant was at a considerable remove from the extreme and outrageous behavior necessary to impose liability for such a claim. Gidley v. Oliveri, 2009 DNH 094, 641 F.Supp.2d 92, 107.

D.N.H.2009. Coms. (d) and (j) quot. in cases quot. in sup. Borrower brought a claim for intentional infliction of emotional distress (IIED), inter alia, against private lender that decided not to extend additional financing to her after she defaulted on lender's original loan. Granting lender's motion for summary judgment, this court held, inter alia, that, although plaintiff alleged that she suffered as a result of the stress lender caused her due to the "looming foreclosure" of her property, there was no evidence in the record that lender ever filed or threatened foreclosure. Further, the court concluded that lender's conduct, even with the ill will attributed by plaintiff, did not constitute the type of extreme and outrageous conduct necessary to impose liability for IIED.; the conduct

alleged failed to rise to the standard of being so severe that no reasonable person could be expected to endure it. Gilroy v. Kasper, 654 F.Supp.2d 44, 49.

D.N.H.2002. Cit. in case cit. in sup., com. (d) quot. in sup. Insured sued insurer, seeking a declaratory judgment that she was entitled to coverage under her home health-care policy, and alleging claims for intentional infliction of emotional distress, breach of contract, and consumer fraud. This court denied in part insurer's motion to dismiss, holding, inter alia, that insured's allegations that insurer took advantage of an elderly woman, and then treated her with utter disregard and actively avoided her when she fell ill and needed assistance understanding her policy and filing a claim stated a cause of action for intentional infliction of emotional distress. Insurer and its agents had assured insured that insurer would be approachable and easy to work with if she ever had a claim. Lister v. Bankers Life and Cas. Co., 218 F.Supp.2d 49, 52.

D.N.H.1997. Cit. in headnote, quot. in sup. A town clerk and tax collector sued the town and town officials for intentional infliction of emotional distress, among other claims. Plaintiff alleged that town officials committed an unlawful search and seizure by placing a police guard in her office to watch over her on her last day of service. This court granted in part defendants' motion for summary judgment, holding, inter alia, that recitation of the fact of defendants' conduct would not constitute outrageous behavior to the average member of the community. Rossi v. Town of Pelham, 35 F.Supp.2d 58, 61, 75.

D.N.H.1997. Cit. in headnotes, quot. in case quot. in sup., com. (d) quot. in sup. Former part-time police officer sued town and police sergeant for sexual discrimination, sexual harassment, and retaliation in violation of Title VII, alleging, among other things, that she was terminated and replaced with a less qualified male officer after she rejected sergeant's unwanted sexual advances. Plaintiff also asserted state law claims for assault and intentional infliction of emotional distress. Denying defendants' motion to dismiss, the court held that plaintiff's allegations were sufficient to state a claim for violations of Title VII; that sergeant's conduct, which included harassing plaintiff, making vulgar remarks, and touching her without her consent, went beyond mere annoyances and could be considered atrocious and intolerable in a civilized society; and that plaintiff had stated a claim for assault where she alleged that sergeant forced her to take an unannounced written exam at gunpoint. Yale v. Town of Allenstown, 969 F.Supp. 798, 799, 800-801.

D.N.H.1995. Cit. in headnotes, cit. in case cit. in sup., com. (d) quot. in sup., com. (h) quot. in disc. Former employee who alleged she was denied a promotion and eventually terminated because of her parental obligations to her disabled son sued employer and individual supervisors for, inter alia, intentional infliction of emotional distress. Plaintiff maintained that supervisors routinely made comments to her questioning the propriety of women in the workplace and, specifically, plaintiff's commitment to her job. Defendants moved to dismiss. Granting the motion as to defendant employer but denying as to individual supervisors, the court held that material factual questions existed as to the frequency and regularity of supervisors' comments and whether they rose to the level of outrageousness required to sustain plaintiff's claim. Miller v. CBC Companies, Inc., 908 F.Supp. 1054, 1057, 1067.

D.N.H.1993. Quot. in case quot. in sup., com. (j) quot. in case quot. in sup. Former state employee sued the state treasury department, among others, for intentional infliction of emotional distress, inter alia. Denying in part defendant's motion for summary judgment, the court held that plaintiff presented evidence, which showed a pattern of deliberate harassment by plaintiff's superiors in retaliation for her exercise of protected expression resulting in her constructive discharge, that was sufficient for a reasonable jury to find that defendant intentionally inflicted severe emotional distress upon her. Soltani v. Smith, 812 F.Supp. 1280, 1296.

D.N.H.1992. Quot. in case quot. in disc., com. (d) quot. in disc. and cit. in case cit. in disc., com. (h) cit. in case quot. in disc., com. (j) quot. in case quot. in sup. Female employee alleged that two male coemployees engaged in inappropriate and sexually harassing behavior. The female employee sued the two male employees, their supervisor, and the employer for various counts, including intentional infliction of emotional distress. This court granted the supervisor's motion to dismiss the emotional distress claim because the specific factual allegations in that count did not apply to him. The court denied the two employees' motions to dismiss, holding, inter alia, that the plaintiff sufficiently alleged severe emotional distress caused by conduct that could reasonably have been regarded as outrageous enough to permit recovery. The allegations included anxiety, depression, and gastritis caused by continuous sexually suggestive and demeaning behavior and comments. Godfrey v. Perkin-Elmer Corp., 794 F.Supp. 1179, 1188-1189.

D.N.H.1991. Cit. in disc. and in ftn., coms. (i), (d), and (j) quot. in sup. A franchisee of a martial arts studio sued the franchisor for alleged breach of a licensing agreement, negligent infliction of emotional distress, intentional infliction of emotional distress, and recovery for emotional distress on his contract claim. The alleged breach caused the studio's closure, resulting in lost profits and lost business opportunity as well as humiliation and the loss of good will. This court dismissed the plaintiff's tort claims for emotional distress, finding no physical impact or physical consequences flowing from defendant's alleged negligent conduct, or any extreme, outrageous, or atrocious conduct by the defendant. The court also found no support in the applicable state law to support recovery for emotional distress on a contract claim, which left only the contract claim to be decided. Orono Karate v. F. Villari Studio of Self Defense, 776 F.Supp. 47, 51.

D.N.H.1990. Quot. in disc., subsec. (1), com. (d) quot. in disc. A former town employee brought a civil rights action against the town and two of its selectmen, among others, for unlawful termination, alleging, inter alia, that they knew of his preexisting heart condition and intentionally caused him severe emotional distress through their continued harassment of him. Granting in part the defendants' motion for summary judgment, the court concluded that the plaintiff failed as a matter of law to allege conduct that could support recovery for a claim of intentional infliction of emotional distress. The court said that, while the defendants' conduct in staring at the plaintiff and his wife and igniting a firecracker in the vicinity of the plaintiff's work may have been personally offensive to the plaintiff, the defendants' acts were not so outrageous as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society. Bourque v. Town of Bow, 736 F.Supp. 398, 404.

D.N.H.1988. Subsec. (1) quot. in disc., coms. (e) and (h) cit. in disc. After a Veterans Administration psychologist was misquoted in a newspaper as having made derogatory comments about Vietnam veterans, several agency employees released confidential information from his personnel file to the press. He sued them under the Federal Tort Claims Act for intentional infliction of emotional distress, inter alia. The court rejected the defendants' motion to dismiss, holding that it was for a jury to decide whether the abuse of a position of authority in this case was conduct sufficiently extreme and outrageous as to result in liability. Kassel v. U.S. Veterans Admin., 682 F.Supp. 646, 659, order amended and clarified 709 F.Supp. 1194 (D.N.H.1989).

D.N.H.1986. Cit. in sup., subsec. (1) and coms. (d) and (h) quot. in sup. An employee sued his former employer for wrongful discharge and intentional infliction of emotional distress for not allowing the employee to return to work due to medical problems and then dismissing the employee. The court granted the defendant's motion to dismiss the claim for intentional infliction of emotional distress on the ground that recovery for that tort can only be permitted when there was extreme and outrageous conduct that exceeded the bounds of decency, which was not evidenced by the employer's failure to investigate the cause of the employee's contact dermatitis or to provide the employee's physician with chemical samples. Brewer v. K.W. Thompson Tool Co., Inc., 647 F.Supp. 1562, 1567.

D.N.H.1986. Cit. in disc., coms. (h) and (k) quot. in disc. A former police officer sued town officials for intentional infliction of emotional distress and slander. This court denied the defendants' motion for summary judgment. The court held that, although the plaintiff did not manifest distress by physical injury or bodily harm, it was for the jury to decide if the defendants' conduct in harassing the plaintiff while she was on duty was sufficiently extreme and outrageous as to result in liability. After noting that written defamation was libel rather than slander, the court also held that the essential issue of whether a defamatory letter sent to the plaintiff with copies to the police chief and her personnel file could be considered to have been published remained to be determined by a jury. Brown v. Town of Allentown, 648 F.Supp. 831, 839, 840.

D.N.H.1986. Cit. in disc., subsec. (1) quot. in ftn., com. (d) quot. in sup., com. (h) cit. in sup. and quot. in ftn. A hospital's agent prepared and published an evaluation that questioned the competency of a physician and a nurse. The physician and nurse sued the hospital and its agent for defamation, wrongful infliction of emotional distress, and loss of ability to enjoy life. This court granted the defendants' motions to dismiss the last two counts, holding that New Hampshire did not recognize a cause of action for loss of ability to enjoy life, nor a separate cause of action for wrongful infliction of emotional distress where the factual predicate sounded in defamation. The court noted that negligent infliction of emotional distress was a cause of action confined to the context of the observation of an accident, and that the defendant's conduct failed as a matter of law to constitute the extreme and outrageous conduct necessary to support the tort of intentional infliction of emotional distress. DeMeo v. Goodall, 640 F.Supp. 1115, 1117.

D.N.H.1985. Cit. in case quot. in disc., cit. in sup., quot. in ftn. A former employee brought a wrongful termination action against her employer, alleging that her termination was based on her refusal to accept his sexual advances. The counts included defamation, based on statements from her employer to his attorney suggesting that she stole company property, and intentional infliction of emotional distress. The district court denied the employer's motion for summary judgment on the intentional infliction of emotional distress claim, holding, inter alia, that genuine factual issues existed as to the employer's intent, as well as the degree of outrageousness of his conduct. The court granted summary judgment to the employer on the defamation claim, holding that the employer's statements were privileged because they were made to an attorney in the course of litigation. The court noted that special damages were not required in libel actions, nor in slander actions where the statements imputed criminal activity. The court stated that the employee showed impairment of her reputation sufficient to prove actual damages. Chamberlin v. 101 Realty, Inc., 626 F.Supp. 865, 868, 869.

D.N.J.

D.N.J.2019. Com. (d) quot. in case quot. in sup. and in ftn.; com. (j) quot. in case quot. in sup. High-school student and his family filed claims for, among other things, intentional infliction of emotional distress against school district and others, alleging that defendants suspended student for starting a fire and having weapons on a school bus, reported him for drawing an apparent weapon in his private sketchbook, and attempted to move him to an alternative educational placement following the dismissal of criminal charges against him. This court granted summary judgment for defendants on plaintiffs' claim for intentional infliction of emotional distress, holding that defendants' actions were not so outrageous as to meet the high threshold of a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. K.J. v. Greater Egg Harbor Regional High School District Board of Education, 431 F.Supp.3d 488, 516.

D.N.J.2016. Com. (d) quot. in case quot. in sup. Social worker for the board of education filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against board, alleging that her coworkers were verbally abusive, and that defendant released unredacted minutes from a meeting where defendant mandated that plaintiff undergo a psychiatric evaluation. This court denied in part defendant's motion for summary judgment, holding that plaintiff failed to state an IIED claim, except to the portion of the claim that related to the publication of the meeting minutes. Citing Restatement Second of Torts § 46, Comment *d*, the court explained that the coworkers' behaviors did not rise to the level of extreme and outrageous conduct required for the claim, but determined that there was a genuine issue of material fact as to whether the release of the unredacted minutes was intentional or reckless in deliberate disregard of a high degree of probability that emotional distress would follow. Edmond v. Plainfield Board of Education, 171 F.Supp.3d 293, 316.

D.N.J.2016. Com. (d) quot. in case quot. in sup. Former union employee who was suspended and later terminated from his position as a flight attendant after he failed a breathalyzer test brought a claim for, among other things, intentional infliction of emotional distress (IIED) against

former employer, alleging that employer interfered with the requirements of the union's collective-bargaining agreement, made misrepresentations to third parties, and required him to pay for treatment that he could not afford. This court granted employer's motion to dismiss employee's IIED claim without prejudice, holding that employee's generic and conclusory allegations of emotional distress were inadequate to meet the severity requirement for an emotional-distress claim under Restatement Second of Torts § 46. Kennedy v. American Airlines Inc., 195 F.Supp.3d 646, 658.

D.N.J.2008. Com. (d) quot. in case quot. in sup. Terminated employee sued former employer, alleging that she suffered severe emotional distress as a result of being pressured to return to work while she was under a doctor's care for anxiety. Granting summary judgment for defendant as to plaintiff's claim for intentional infliction of emotional distress, this court held that plaintiff failed to carry her burden of showing that defendant's conduct rose to the requisite level of extreme and outrageous behavior. The court pointed out that defendant attempted to contact plaintiff by telephone on three occasions only and spoke to plaintiff twice after the onset of her health problems, and that the conversations centered around her health, her work project, and her expected return date. Anderson v. DSM N.V., 589 F.Supp.2d 528, 538.

D.N.J.2007. Cit. in sup., com. (d) quot. in case quot. in sup. Female police officer sued township, township's police department, and department's police chief, alleging gender discrimination, due-process violations, retaliation, and intentional infliction of emotional distress (IIED) in connection with disciplinary actions against her and denial of promotion. This court granted summary judgment for defendants, holding, inter alia, that plaintiff failed to show that defendants' conduct was extreme or outrageous under New Jersey law, noting that in a factually similar case, also decided under Restatement Second of Torts § 46, a Pennsylvania court had held that a city and police department that suspended their police captain for 15 days and transferred her after she testified on behalf of a former subordinate had not engaged in conduct sufficiently outrageous to support an IIED claim. Smith v. Township of East Greenwich, 519 F.Supp.2d 493, 513, 514.

D.N.J.2006. Com. (j) quot. in case quot. in ftn. Borrowers sued loan-servicing companies, alleging that defendants, among other things, wrongfully continued attempts to collect on borrowers' home mortgage loan after it was discharged in bankruptcy. This court, inter alia, denied defendants' motion to dismiss plaintiffs' claim for emotional-distress damages resulting from defendants' alleged wrongful actions, holding that such claims were highly fact sensitive and thus ill-suited for dismissal at an early stage. The court noted that plaintiffs might nevertheless face an uphill battle in establishing their claims, as common-law theories of intentional or negligent infliction of emotional distress required a showing of emotional distress so severe that no reasonable person could be expected to endure it. Hutchinson v. Delaware Sav. Bank FSB, 410 F.Supp.2d 374, 386.

D.N.J.2005. Com. (j) quot. in case quot. in disc. Pro se litigant filed complaint against neighbors, law firm, and others, who moved to dismiss and to have plaintiff declared a vexatious litigant. Granting the motion, the court held, inter alia, that plaintiff's claim for intentional infliction of emotional distress failed because plaintiff presented nothing more than bald allegations to show

that defendants engaged in any outrageous conduct toward her. Perry v. Gold & Laine, P.C., 371 F.Supp.2d 622, 627.

D.N.J.2001. Adopted in case quot. in disc., com. (d) quot. in disc. Former employee of county board of social services sued county board and supervisors for, in part, intentional infliction of emotional distress, alleging that she was unlawfully subjected to disciplinary action and was later fired because she objected to defendants' imposition of a dress code. Granting in part defendants' motion for summary judgment, the court held, inter alia, that plaintiff's allegations of improper purpose on defendants' part in the form of retaliation and harassment did not alone provide the basis for a claim of intentional infliction of emotional distress, since plaintiff failed to show that defendants' conduct was outrageous and operated to create an intolerable working environment. Marrero v. Camden County Bd. of Social Services, 164 F.Supp.2d 455, 479.

D.N.J.2001. Cit. in case quot. in disc. Condominium unit owners sued condominium association and board of trustees for violations of Fair Housing Act and intentional infliction of emotional distress, alleging that after plaintiffs filed petition with Department of Housing and Urban Development objecting to exclusion of children from condominium's adult lounge, defendants responded by shunning and ostracizing plaintiffs and engaging in a campaign to discredit them. This court granted defendants summary judgment, holding, inter alia, that defendants' actions in response to what they perceived as unnecessary antagonism and meritless and expensive litigation caused by plaintiffs did not rise to the level of outrageous conduct required for intentional infliction of emotional distress. Sporn v. Ocean Colony Condominium Ass'n, 173 F.Supp.2d 244, 254.

D.N.J.2001. Coms. (d) and (j) quot. in case quot. in sup. Former employee sued employer for Title VII violations and intentional infliction of emotional distress, among other claims, alleging that employees seeking promotions were required to take personality test that inappropriately asked for private sexual, medical, and religious information. This court dismissed in part, holding, inter alia, that plaintiff failed to sufficiently allege an emotional-distress claim, because such standardized psychological testing for management positions had been used for several decades and thus was not utterly intolerable. The fact that test was given to hundreds of employees negated intentionality as to plaintiff. Moreover, plaintiff failed to allege that he suffered severe emotional distress. Witherspoon v. Rent-A-Center, Inc., 173 F.Supp.2d 239, 242.

D.N.J. 2000. Com. (j) cit. and quot. in disc. Settlement agreement and modified joint plan of reorganization were proposed in multidistrict litigation and bankruptcy proceeding involving Chapter 11 debtors, companies that marketed magazine subscriptions and other merchandise through sweepstakes contests. Certain holders of consumer claims objected to plan confirmation and/or settlement agreement. Approving settlement agreement and plan, district court held, inter alia, that (1) proposed plan satisfied “best interest of creditors” or “fairness” test; (2) proposed settlement was fair, adequate, and reasonable; (3) claims of objectors who believed that they had won significant sweepstakes prizes were not unique; and (4) allocation formula used to divide the refund pool in proportion to class members' purchases of debtors' products was fair, adequate, and reasonable. In re American Family Enterprises, 256 B.R. 377, 424.

D.N.J.2000. Cit. in sup., com. (d) quot. in disc. and cit. in sup. Former employee who claimed that she had been sexually harassed by her supervisors sued former employer and supervisors for, in part, intentional infliction of emotional distress. Denying in part defendants' motion to dismiss, the court held, inter alia, that plaintiff's allegations that she was subjected to a continuous pattern of intolerable conduct, including denial of advancement and retaliation, after she rejected her supervisors' sexual advances were sufficient to state a claim for intentional infliction of emotional distress. Calkins v. Dollarland, Inc., 117 F.Supp.2d 421, 431, 432.

D.N.J.2000. Quot. in case cit. in disc. Electronics-store owner who had been subject of county's civil consumer fraud action sued county and individual county employees in their official capacities, alleging, among other things, religious discrimination and intentional and negligent infliction of emotional distress. The court granted defendants judgment on the pleadings, holding, inter alia, that owner failed to allege that defendants' actions, even if they were sufficiently extreme and outrageous, caused him to suffer severe emotional distress. Hassoun v. Cimmino, 126 F.Supp.2d 353, 371.

D.N.J.2000. Com. (d) quot. in case quot. in disc. Worker sued employer for, inter alia, violations of the Age Discrimination in Employment Act and intentional infliction of emotional distress, alleging that he was routinely passed over for promotions in favor of younger, less qualified workers. Entering partial summary judgment for defendant, the court held, among other things, that plaintiff had failed to establish that he suffered an adverse employment action or that defendant's conduct was so extreme or outrageous as to allow recovery. Horvath v. Rimtec Corp., 102 F.Supp.2d 219, 236.

D.N.J.2000. Coms. quot. in case quot. in sup. Employee sued employer, supervisor, and various individuals to whom supervisor reported for violations of Title VII and the New Jersey Law Against Discrimination (LAD), alleging that she was subjected to a sexually hostile work environment. Plaintiff also asserted several common-law claims. Granting in part and denying in part defendants' motions for summary judgment, the court held that plaintiff's failure to establish an adverse employment action was fatal to her Title VII claim, that supervisor's managers were not liable for aiding and abetting supervisor's violations of the LAD, and that it would be premature to conclude that plaintiff could prove no set of facts that would allow her to recover under a theory of intentional infliction of emotional distress. Newsome v. Administrative Office of Courts, 103 F.Supp.2d 807, 825, judgment affirmed 51 Fed.Appx. 76 (3rd Cir.2002).

D.N.J.2000. Com. (d) quot. in case quot. in sup. Plaintiff in wrongful-death action against vehicle manufacturer moved to supplement his complaint to add claims for defamation and intentional infliction of emotional distress in connection with defendant's assertion that a faulty airbag was not the cause of death of driver, plaintiff's decedent, but that plaintiff murdered her. Granting the motion, the court held, in part, that, while plaintiff's allegations were sufficient to establish prime facie cases of defamation and intentional infliction of emotional distress, defendant would be allowed to argue that its allegation, made during the course of legal proceedings, was conditionally

privileged. Thomas v. Ford Motor Co., 111 F.Supp.2d 529, 538, affirmed in part, reversed in part 137 F.Supp.2d 575 (2001).

D.N.J.1999. Com. (j) quot. in case quot. in sup. High school seniors who became drunk and disorderly on a class trip and were subsequently punished by exclusion from their graduation ceremony sued the school for violation of the Civil Rights Act and intentional infliction of emotional distress, among other claims. One of the students alleged that he suffered emotional distress when he was accidently left behind at an amusement park and was forced to take a cab back to the hotel where the students were staying. This court dismissed in part, holding, inter alia, that the emotional distress a high school senior suffered after missing the bus back to the hotel on a class trip was not so severe that no reasonable man could be expected to endure it. Carlino v. Gloucester City High School, 57 F.Supp.2d 1, 29, affirmed in part 44 Fed.Appx. 599 (3d Cir.2002).

D.N.J.1999. Com. (d) quot. in case quot. in disc. Terminated employee sued employer for intentional infliction of emotional distress and state and federal civil-rights violations. This court granted defendants summary judgment, holding, inter alia, that defendants' conduct was not extreme and outrageous, because defendants did not engage in any harassing conduct, they conducted themselves in a businesslike manner, and they never physically threatened or yelled at plaintiff. Lemke v. International Total Services, Inc., 56 F.Supp.2d 472, 488.

D.N.J.1999. Com. (d) quot. in case quot. in disc. Former employee who alleged that former employer's policies and practices unlawfully discriminated against her sued former employer for, in part, intentional infliction of emotional distress. Granting defendant's motion for partial dismissal, the court held, inter alia, that plaintiff failed to state a viable claim for intentional infliction of emotional distress. Since plaintiff did not allege that she had to seek medical assistance or that any specific ailments afflicted her, she failed to establish that the emotional distress she suffered was so severe that no reasonable person could be expected to endure it. Mardini v. Viking Freight, Inc., 92 F.Supp.2d 378, 384.

D.N.J.1999. Com. (d) cit. generally in case cit. in disc. After being fired, a female employee sued her employer for wrongful discharge and intentional infliction of emotional distress, alleging that she was entitled to a leave from employment because of the birth of her child and that she was discriminated against because of her pregnancy or family status. This court granted defendant's motion for summary judgment, holding, inter alia, that plaintiff failed to state a claim for intentional infliction of emotional distress, because defendant's actions of discharging plaintiff after the birth of her child and after five months of paid sick leave did not rise to the level of intentional and outrageous conduct. McConnell v. State Farm Mut. Ins. Co., 61 F.Supp.2d 356, 363.

D.N.J.1998. Com. (d) quot. in case quot. in disc. Telephone-company technician sued company, supervisors, and co-worker for violations of the New Jersey Law Against Discrimination (NJLAD), alleging that she was discriminated against on the basis of her gender, and that co-worker's sex-based remarks and violent outbursts amounted to intentional infliction of emotional distress. Defendants moved for summary judgment. Granting the motions in part and denying them

in part, the court held, inter alia, that supervisors' failure to remedy the situation once they were made aware of co-worker's alleged sexual harassment of plaintiff was insufficient to support the imposition of individual liability under NJLAD; that material factual issues existed as to plaintiff's sexual-discrimination and hostile-work-environment claims against telephone company; and that co-worker's conduct, though rude and unacceptable, did not rise to the level of outrageousness necessary to support a claim for intentional infliction of emotional distress. Ferraro v. Bell Atlantic Co., Inc., 2 F.Supp.2d 577, 588.

D.N.J.1998. Quot. in case quot. in sup., coms. (d) and (j) quot. in case quot. in sup. Plaintiff sued the United States, among others, for, in part, intentional infliction of emotional distress under the Federal Tort Claims Act (FTCA), alleging that he was wrongfully arrested and imprisoned pursuant to an arrest warrant issued for a different individual. Granting in part defendant's motion to dismiss, the court held, inter alia, that a two-and-one-half-hour airport detention of plaintiff by agents of the Immigration and Naturalization Service following plaintiff's arrival from the Dominican Republic, absent any allegations that plaintiff was beaten, held under unbearable conditions, or otherwise severely mistreated in any manner during this period, did not rise to the level of outrageous and extreme conduct necessary to support a claim under the FTCA for intentional infliction of emotional distress. Moreover, plaintiff failed to allege that he suffered any specific traumatic symptoms that would support an inference that the detention resulted in severe emotional distress that no reasonable person could be expected to endure. Ramirez v. U.S., 998 F.Supp. 425, 434.

D.N.J.1998. Cit. in headnote, quot. in case quot. in disc. An insured parent whose children had cystic fibrosis sued her excess health insurer and administrator to recover for the insurer's failure to issue a policy with a $25,000, rather than a $50,000, deductible. Among other things, plaintiff asserted that by denying coverage defendants intentionally inflicted emotional distress on plaintiff. Plaintiff argued that defendants threatened to sue plaintiff before the Division of Insurance Fraud Prevention when they knowingly lacked a factual or legal basis. This court granted in part and denied in part defendants' motion to dismiss, holding, inter alia, that defendants' refusal to issue the policy at the $25,000 deductible base, even with knowledge of plaintiff's dire financial need, could not be construed as outrageous conduct. The court stated that, while defendants' conduct may have constituted breach of contract or fraud, insurance companies regularly deny coverage or place conditions on its issuance in situations similar to this one. Yourman By and Through Yourman v. People's Sec. Life, 992 F.Supp. 696, 697, 705.

D.N.J.1997. Com. (j) quot. in case quot. in disc. White male former university employee sued university and university officials for, inter alia, violations of the American with Disabilities Act (ADA) and the New Jersey Law Against Discrimination (NJLAD), and for the common law tort of intentional infliction of emotional distress in connection with his dismissal. Defendants moved for summary judgment on the ground that plaintiff was discharged for poor performance. Granting defendants' motions, the court held, in part, that plaintiff's ADA claim was barred for failure to exhaust all administrative remedies; that plaintiff had not established a prima facie case of unlawful discrimination under the NJLAD; and that defendants' alleged wrongdoing, which included making a few stray, sarcastic comments in plaintiff's presence, did not rise to the level

of extreme outrageousness necessary to support a claim for intentional infliction of emotional distress. Ditzel v. Univ. of Medicine & Dentistry New Jersey, 962 F.Supp. 595, 608.

D.N.J.1997. Quot. in case quot. in disc. An arrestee sued police detectives and a city under 42 U.S.C. § 1983, alleging his constitutional rights were violated when defendants wrongfully arrested him. Plaintiff argued that defendants' actions in wrongfully arresting him without probable cause and failing to properly investigate the shooting while he remained in jail for eight days over Thanksgiving were extreme and outrageous and utterly intolerable. This court granted defendants summary judgment, holding, inter alia, that plaintiff failed to state a claim for intentional infliction of emotional distress, because defendants' conduct was not sufficiently extreme and outrageous. Green v. City of Paterson, 971 F.Supp. 891, 911.

D.N.J.1997. Com. (d) quot. in case quot. in disc. An employee of a water-works commission sued a water-works commissioner for Title VII violations and intentional infliction of emotional distress, among other claims, alleging that defendant created a hostile work environment and retaliated against her for filing an incident report after the two had an argument. Plaintiff alleged that the commissioner implied that she drove her husband to commit suicide, when, in fact, he died from cancer. This court granted defendant partial summary judgment, holding, inter alia, that plaintiff failed to state a viable emotional-distress claim, because she did not show that she suffered any distress from the comment about her husband's suicide. The court noted that defendant's comment that plaintiff's husband committed suicide because plaintiff talked too much and nagged him could reopen her emotional scars and that this comment constituted outrageous conduct. Lombardi v. Cosgrove, 7 F.Supp.2d 481, 498.

D.N.J.1997. Coms. (d) and (j) cit. generally in headnotes and quot. in case quot. in sup. A former employee whose varicose veins caused her pain and limited the amount of time she could remain standing sued her former employer for, in part, intentional infliction of emotional distress, alleging that she had taken the job as shirt-cuff cutter in return for the concession that she could work parttime in a sit-down position but that defendant had terminated her employment without attempting to accommodate her. The court granted defendant summary judgment on plaintiff's emotional-distress claim, holding, inter alia, that plaintiff presented no evidence that defendant's conduct in discharging her was outrageous or that she suffered severe emotional distress. Plaintiff's understandable frustration and depression over losing her job did not rise to the level of severe distress. Nieves v. Individualized Shirts, 961 F.Supp. 782, 784, 797.

D.N.J.1997. Com. (d) quot. in case cit. in disc. Former telephone-company employee who claimed to have been terminated because of his age, race, and nationality sued former employer for, inter alia, violations of 42 U.S.C. §§ 1985, 1986, and 1988. Employee also asserted various common law claims, including one for intentional infliction of emotional distress. Entering summary judgment for employer, the court held, in part, that after employer rebutted employee's prima facie case of age, race, and national origin discrimination, employee failed to show that the articulated reason for his termination was merely a pretext for discrimination, and that the circumstances leading to employee's dismissal did not constitute conduct so extreme and outrageous as to give rise to

a cause of action for intentional infliction of emotional distress. Silvestre v. Bell Atlantic Corp., 973 F.Supp. 475, 487.

D.N.J.1997. Cit. in case quot. in disc. After plaintiff's defamation case was removed to federal court, plaintiff moved to remand his case to state court on the ground that defendant failed to remove the action within 30 days of service of the complaint. Denying the motion, this court held that, since plaintiff's complaint did not reveal on its face a specific amount that plaintiff claimed as damages, nor did it indicate that plaintiff's damages were in excess of the minimum required for federal diversity jurisdiction, the 30-day removal period commenced when defendant received the statement of damages, from which he could first ascertain the amount of damages sought. The court noted that a case involving a cause of action for intentional infliction of emotional distress marked the Third Circuit's move away from an inquiry as to what a defendant knew or should have known toward a focus on the actual language of the pleadings. Vartanian v. Terzian, 960 F.Supp. 58, 60.

D.N.J.1995. Cit. but dist. Port Authority engineer who alleged he received disproportionate merit increases, was denied promotions, and was transferred to less enviable positions in retaliation for filing a complaint of racial discrimination with the EEOC sued employer for, inter alia, intentional infliction of emotional distress. Employer moved for summary judgment. Granting the motion, the court held that, based on the facts presented, engineer failed to show that employer engaged in conduct that was atrocious or utterly intolerable to a civilized society or that it caused him to suffer severe mental distress. King v. Port Authority of New York and New Jersey, 909 F.Supp. 938, 943.

D.N.J.1994. Subsec. (1) quot. in sup., com. (d) quot. in case quot. in sup. A program administrator who was stricken with cancer sued a computer equipment company for discrimination, breach of contract, and intentional infliction of emotional distress, alleging that employer unjustly rejected her applications for promotion, impermissibly announced her disability at a management meeting, refused to allow her to leave work for chemotherapy treatments, demoted her, and threatened her with discharge. This court granted in part and denied in part defendant's motion to dismiss, holding, inter alia, that plaintiff alleged a litany of facts that could support an emotional-distress claim. It noted that plaintiff alleged a continuing pattern of harassment, which several courts had found adequate to survive a motion to dismiss. Bishop v. Okidata, Inc., 864 F.Supp. 416, 427.

D.N.J.1994. Cit. in headnotes, cit. in sup., com. (d) cit. in headnote and quot. but dist., com. (j) quot. in case cit. in ftn. Dismissed employee sued former employer for, inter alia, intentional infliction of emotional distress allegedly suffered when he was discharged in a manner that violated defendant's discharge policy and guidelines as set forth in its employee handbook. Granting defendant's motion for summary judgment on this point but reserving issues of handbook interpretation and plaintiff's expectations under it for trial, the court held that despite plaintiff's allegations that defendant's conduct had left him demoralized and discouraged, he had not shown that it was so obnoxious or repugnant that no reasonable member of a civilized society could be expected to endure the resulting distress. Sellitto v. Litton Systems, Inc., 881 F.Supp. 932, 934, 941.

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D.N.J.1993. Cit. in sup., coms. (d) and (j) quot. in case quot. in sup., com. (h) cit. in sup. Employee who resigned sued her former employer and supervisor for intentional infliction of emotional distress, inter alia, alleging that her supervisor made demeaning remarks about women and disparaging remarks about her fiance and that her employer allowed this hostile work environment to exist, as a result of which she suffered great emotional distress. Granting defendants' motion to dismiss, the court held that neither defendant employer's negligent failure to supervise defendant supervisor and provide plaintiff with a nonhostile working environment nor defendant supervisor's offensive comments and attempts to initiate unwanted conversations rose to the level of outrageousness necessary to support plaintiff's claim under New Jersey law. Obendorfer v. Gitano Group, Inc., 838 F.Supp. 950, 954, 955.

D.N.J.1992. Com. (j) quot. in disc. and quot. in case quot. in disc. Parents who alleged that their child was injured during birth brought a medical malpractice action against the treating physicians, including a claim for negligent infliction of emotional distress. Denying defendants' motion for partial summary judgment, the court held, inter alia, that plaintiffs' evidence that they observed the injury to their child as a result of medical negligence and that the distress they experienced after his injury was continual, frequent, and profound raised a jury question as to whether their emotional distress was sufficiently severe to support their claim. Phillips v. Cooper OB/GYN Associates, 811 F.Supp. 1018, 1024, 1025.

D.N.J.1991. Cit. in disc., coms. (d) and (j) quot. in case quot. in sup. A terminated employee sued his former employer and supervisors for intentional infliction of emotional distress, inter alia. Before terminating the plaintiff, the defendant had placed him on probation several times for violating company and FAA safety regulations and had issued internal reports regarding the plaintiff's poor performance. In addition, the defendants had required the plaintiff to attend counseling sessions dealing with his poor performance. The court granted the defendants summary judgment, holding that the plaintiff was not entitled to recover for intentional infliction of emotional distress because he failed to produce evidence of extreme and outrageous conduct by the defendants directed at him. In addition, the court said that the plaintiff proffered no evidence to support a finding that he suffered severe emotional distress; at no time did the plaintiff consult a doctor regarding his anxiety. Fregara v. Jet Aviation Business Jets, 764 F.Supp. 940, 956.

D.N.J.1991. Cit. in disc., coms. (d) and (j) quot. in cases quot. in disc. A franchisor terminated its franchise agreement with a corporate franchisee. The corporate franchisee sued the franchisor alleging, inter alia, that it suffered severe emotional distress as a result of the franchisor divulging financial and personal information about the franchisee and its president to a potential buyer of the franchise. The franchisee also sought to amend this count of the complaint to include its president as a plaintiff. The district court denied leave to amend and dismissed this count, holding that the complaint stated no cause of action for emotional distress suffered by the franchisee, a corporation. The court stated that even if the president of the franchisee was added as a plaintiff, the divulgences alleged did not rise to the level of outrageousness and atrociousness required to recover under this theory. Glenside West Corp. v. Exxon Co., U.S.A., 761 F.Supp. 1100, 1113.

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D.N.J.1990. Quot. in sup. A black female employee who was discharged by her employer sued the employer for intentional infliction of emotional distress, inter alia. The court dismissed the claim on the ground that the plaintiff's allegations did not support a conclusion that the defendant's conduct was so extreme and outrageous as to go beyond all possible bounds of decency. The court said that the plaintiff had difficulty presenting facts that would indicate racial prejudice during her six weeks at the defendant's firm, she did not seek any professional help for emotional distress, and she did not offer a report of a psychiatric expert in support of her emotional distress claim. Butler v. Sherman, Silverstein & Kohl, P.C., 755 F.Supp. 1259, 1267.

D.N.J.1990. Com. (d) quot. in case quot. in disc., com. (h) quot. in disc., com. (j) cit. and quot. in case quot. in sup. Parents of a patient who died while being treated at a hospital sued the hospital and the treating physicians for negligence and medical malpractice. The parents also sued one of the physicians for intentional and negligent infliction of emotional distress after he allegedly performed an invasive medical procedure on the decedent's dead body. Granting the physician's motion for summary judgment concerning the claim for intentional and negligent infliction of emotional distress, this court held, inter alia, that the plaintiffs could not maintain a cause of action for intentional infliction of emotional distress, finding as a matter of law that the plaintiffs did not suffer emotional distress so severe that no reasonable person could be expected to endure it. It indicated that the plaintiffs' anger, grief, stress, and insomnia was insufficiently severe distress so as to allow recovery. Lacy v. Cooper Hospital/University Medical Center, 745 F.Supp. 1029, 1034-1035.

D.N.J.1990. Cit. in disc., coms. (d) and (j) quot. in case cit. in disc. An employee was terminated from his position as manager for falsifying reports after an investigation by the employer. The employee sued the employer alleging wrongful discharge, breach of an oral contract, false imprisonment, intentional infliction of emotional distress, and violation of the state statute against discrimination. This court granted the employer's motion for summary judgment, holding, inter alia, that there was no bargained-for exchange to enforce any oral agreement and that the conduct of the supervisors in investigating the employee's conduct did not as a matter of law amount to false imprisonment or intentional infliction of emotional distress. The court stated that the organization and implementation of an investigation into the falsification of business reports were acceptable business practices and did not amount to outrageous behavior. Likewise, the supervisors' act of raising their voice in the context of an investigation into an employee's wrongdoing was not outrageous conduct. Maietta v. United Parcel Service, Inc., 749 F.Supp. 1344, 1367-1368, affirmed 932 F.2d 960 (3d Cir.1991).

D.N.J.1990. Com. (d) quot. in case quot. in disc., com. (g) quot. in disc. A beer manufacturer obtained an order to seize merchandise marketed and manufactured by a sportswear company and sold by a T-shirt company that wrongfully used trademarks owned by the beer manufacturer. The beer manufacturer sued the sportswear company, its president, and the T-shirt store for federal and common law copyright and trademark infringement and unfair competition. The defendants counterclaimed, alleging in part that the trademark seizure action was an intentional infliction of emotional distress and constituted malicious interference with contract. This court granted partial

summary judgment in favor of the plaintiff, holding, inter alia, that the plaintiff's conduct did not rise to the level of outrageousness needed to create a triable issue on the counterclaim. The court stated that mere evidence that ex parte seizure legal proceedings were being instituted against the defendants was insufficient to support a claim that the resulting mental distress was so severe that no reasonable person could withstand it. It also rejected both the defendants' counterclaim alleging malicious interference with contract and the sportswear company's assertion that it had printed the shirts in reliance on the apparent authority of one of the plaintiff's licensees. Major League Baseball Promotion v. Colour-Tex, 729 F.Supp. 1035, 1054, 1054-1055.

D.N.J.1988. Cit. in disc., com. (d) cit. and quot. in disc. A discharged employee sued his former employers and two of their officers for wrongful termination and the resulting emotional distress. This court, inter alia, granted the corporate defendants' motions for summary judgment on the employee's claim for intentional infliction of emotional distress, holding that termination of employment, standing alone, could not support a claim for emotional distress; evidence of some sort of harassing behavior was necessary in addition to the termination. Borecki v. Eastern Intern. Management Corp., 694 F.Supp. 47, 61, 62.

D.N.J.1988. Quot. in disc., com. (d) quot. in part in case quot. in disc. A distributor settled with several creditors in a lawsuit that alleged fraud, negligence, and racketeering; the settlement agreement contained a clause stating that terms of the settlement were to remain confidential. After a creditor released a statement to several trade publications disclosing the filing of the fraud and racketeering suit, the distributor sued the creditor for defamation, breach of contract, and intentional infliction of emotional distress. This court granted the defendant's motion for summary judgment on the intentional infliction of emotional distress claim, holding that the plaintiff's allegation that the defendant's actions were egregious because they were intentional was insufficient to support a claim, and that the plaintiff had not produced evidence of outrageous conduct and emotional distress, which are required elements of the tort. The court further justified its grant of summary judgment by noting the availability of damages for emotional distress in the underlying defamation claim. Kramer v. Monogram Models, Inc., 700 F.Supp. 1348, 1357, judgment reversed 875 F.2d 66 (3d Cir.1989).

D.N.J.1988. Quot. in case quot. in disc., com. (d) quot. in case quot. in disc. In separate actions, individuals arrested for petty disorderly offenses sued a borough, a county, and several law enforcement officers under a federal civil rights statute and state law theories, including intentional infliction of emotional distress. After consolidation of the suits, the court granted in part and denied in part the parties' cross-motions for summary judgment, denying the defendants' motion for summary judgment on the intentional infliction of emotional distress claim. The court stated that a fact issue existed as to whether the strip/body cavity searches the plaintiffs were subjected to after they were arrested without a warrant constituted extreme and outrageous conduct going beyond all possible bounds of decency. O'Brien v. Borough of Woodbury Heights, 679 F.Supp. 429, 439, 440.

D.N.J.1987. Cit. in sup. A terminated employee sued her former employer and some of its employees alleging, inter alia, intentional infliction of emotional distress. The defendants moved for summary judgment. The court denied defendants' motion and held that a factual dispute existed as to whether the standard of intentional infliction of emotional distress had been established by the plaintiff. The court explained that liability was imposed for intentional infliction of emotional distress when the conduct was found to exceed all bounds usually tolerated by decent society and when the actions were especially calculated to cause and did cause serious mental distress; furthermore, other courts have found a substantial issue of fact as to whether alleged harassment by an employer constituted intentional infliction of emotional distress. Porta v. Rollins Environmental Services (NJ), Inc., 654 F.Supp. 1275, 1285, judgment affirmed 845 F.2d 1014 (3d Cir.1988).

D.N.J.1986. Cit. in disc. A company relocated its offices and offered financial assistance to any employees who desired to move with the company. One employee who relocated was later terminated in a cost-cutting move. Although the company assisted this employee in gaining new employment, the ex-employee sued it for breach of an implied employment agreement and intentional infliction of emotional distress. This court granted the defendant's motion for summary judgment, holding, inter alia, that the defendant's conduct did not rise to the level of outrageous conduct required to sustain a cause of action. Brunner v. Abex Corp., 661 F.Supp. 1351, 1359.

D.N.J.1983. Com. (d) quot. in case quot. in sup. The plaintiff, a patron of the defendant casino, had a history of problems with the management. On one occasion, the plaintiff was evicted and ordered not to return. When the patron did return, the defendant's security guards arrested her. Plaintiff sued for damages on several counts, including intentional infliction of emotional distress. Because there was considerable factual dispute over the circumstances that led to the arrest and the specific incident itself, the defendant's motion for summary judgment was denied. Roth v. Golden Nugget Casino/Hotel, Inc., 576 F.Supp. 262, 267, 268.

D.N.M.

D.N.M.2023. Com. (g) cit. in sup. and quot. in case cit. in sup. Minor citizen of Guatemala, who was separated from her father when she illegally crossed the border from Mexico into New Mexico with her father when she was two years old, sued the United States under the Federal Tort Claims Act, alleging that the government's treatment of her constituted an intentional infliction of emotional distress under New Mexico law. This court granted the government's motion to dismiss for lack of subject-matter jurisdiction under the Act, holding that plaintiff's emotional-distress claim had no state-law analog, because the government's conduct did not violate federal law. The court cited Restatement Second of Torts § 46 in noting that some outrageous conduct was privileged, and that the prime example of privileged conduct was conduct that a defendant had a legal right to perform. S.E.B.M. by and through Felipe v. United States, 659 F.Supp.3d 1249, 1264.

D.N.M.2020. Cit. in sup., cit. and quot. in case quot. in sup. Tree-crew laborer sued former employer, general manager, supervisor, and several coworkers, alleging, among other things, a

claim for intentional infliction of emotional distress in connection with the events leading up to his termination. This court granted in part defendants' motion to dismiss, with leave to amend, holding that plaintiff failed to specify which acts made up his claim for intentional infliction of emotional distress, and which defendants committed those acts. The court noted that the Supreme Court of New Mexico had adopted Restatement Second of Torts § 46, which set forth the elements that a plaintiff was required to prove in order to state a claim for intentional infliction of emotional distress. Lucero v. Board of Directors of Jemez Mountains Cooperative, Inc., 495 F.Supp.3d 1135, 1174, 1175.

D.N.M.2019. Cit. in case cit. in disc. Arrestee brought, inter alia, a claim for false arrest against police officer, alleging that defendant lacked the lawful authority to arrest him. This court granted defendant's motion for summary judgment, holding that the record reflected that defendant had probable cause to effectuate plaintiff's arrest. The court noted that it looked to the Restatement Second of Torts to determine when a claim for false arrest accrued, because New Mexico caselaw had adopted Restatement sections such as §§ 46, 324A, 496B, 766, and 766B, and frequently followed the Restatement when developing new tort areas. Favela v. City of Las Cruces ex rel. Las Cruces Police Department, 398 F.Supp.3d 858, 924.

D.N.M.2019. Cit. in case cit. in ftn. Consumer filed various claims against seller of a discounted medical-benefit plan and insurance broker, alleging that broker, acting on behalf of seller, repeatedly called and texted her cellular telephone number with a pre-recorded message or artificial voice without her consent, even though she did not have a business relationship with seller or broker and had registered her number with the National Do Not Call Registry. This court denied in part seller's motion to dismiss, holding that consumer stated a claim for civil conspiracy under New Mexico law by alleging wrongful acts and a close relationship between seller and broker. In making its decision, the court noted that the Supreme Court of New Mexico had been very willing to adopt the view of the Restatement of Torts to assist in the development of new tort areas, and that it had adopted large swaths of tort law from the Restatement Second of Torts, including § 46, which articulated a cause of action for intentional infliction of emotional distress. Mohon v. Agentra LLC, 400 F.Supp.3d 1189, 1239.

D.N.M.2017. Cit. in case quot. in disc.; com. (d) quot. in case quot. in disc. Corporation filed, inter alia, a claim for intentional interference with prospective contractual relations against union that conducted an organized campaign in a labor dispute in response to plaintiff's failure to recognize defendant as employees' representative. This court denied plaintiff's request for injunctive relief, holding that plaintiff's tortious-interference claim was preempted by federal labor laws governing a union's secondary activities and that plaintiff failed to demonstrate clear proof of defendant's involvement in any alleged tortious conduct. The court explained that common law governed harassment claims and that the New Mexico Supreme Court recognized the definition of the tort of intentional infliction of emotional distress as set forth in Restatement Second of Torts § 46. Firebird Structures, LLC v. United Brotherhood of Carpenters and Joiners of America, Local Union No. 1505, 252 F.Supp.3d 1132, 1184.

D.N.M.2016. Cit. and quot. in sup., cit. and quot. in cases cit. and quot. in sup.; com. (d) quot. in sup. Former employee brought a claim for intentional infliction of emotional distress (IIED) against former employer in connection with allegations that her former supervisor belittled and berated her, demoted her, and ultimately terminated her. This court granted in part employer's motion to dismiss, holding, among other things, that employee failed to state a claim for IIED under New Mexico law. The court noted that New Mexico courts followed the definition of extreme and outrageous conduct set forth in Restatement Second of Torts § 46, and reasoned that the supervisor's alleged conduct in belittling and berating employee for not being able to complete certain course work in preparation for attempting to obtain a trades degree was not so extreme and outrageous as to state an IIED claim. Benavidez v. Sandia National Laboratories, 212 F.Supp.3d 1039, 1067, 1068, 1090.

D.N.M.2016. Cit. in ftn., quot. in case quot. in sup.; com. (c) quot. in sup. (quoting § 45 of T.D. No. 5, 2007, which is now § 46 of the Official Text); com. (d) quot. in case quot. in sup.; com. (e) cit. in case quot. in sup. Former employee at a plant that processed cheese and dairy products brought a claim for, among other things, intentional infliction of emotional distress (IIED) against former employer in connection with allegations that her supervisors sprayed her with water so as to expose her undergarments and the outline of her anatomy approximately three times per week during the seven years of her employment. This court denied in part employer's motion to dismiss, holding that employee sufficiently alleged outrageous conduct in support of her IIED claim. The court explained that a reasonable juror could find that supervisors' alleged conduct, in regularly spraying employee with water in a physically invasive and humiliating manner, went beyond the bounds of decency and constituted outrageous conduct within the meaning of Restatement Second of Torts § 46. Hartwell v. Southwest Cheese Company, LLC, 276 F.Supp.3d 1188, 1214, 1215.

D.N.M.2016. Cit. in cases cit. and quot. in disc. Following his arrest for driving under the influence where the toxicology test was negative for alcohol and positive for prescription medications, disabled arrestee brought an action against county, sheriff's department, and deputy, alleging discrimination under the Americans with Disabilities Act, false arrest, false imprisonment, and malicious abuse of process under state law. This court granted partial summary judgment for defendants on the discrimination claim, holding that plaintiff was arrested pursuant to probable cause, and declined to exercise supplemental jurisdiction over the remaining claims, remanding them to state court. The court explained that, while the Supreme Court of New Mexico had not addressed when a cause of action for false arrest or false imprisonment accrued, it often followed the view of the Restatement Second of Torts, noting that the court had adopted the elements of the tort of intentional infliction of emotional distress as set forth in § 46. Trujillo v. Rio Arriba County ex rel. Rio Arriba County Sheriff's Department, 319 F.R.D. 571, 623.

D.N.M.2014. Adopted and cit. in cases cit. and quot. in disc. In arrestee's action against county and director of a detention center following his arrest and incarceration based on a bench warrant that had been cancelled, this court noted that New Mexico courts had not stated when a plaintiff's causes of action for false arrest and for false imprisonment accrued; however, the Restatement Second of Torts provided that the statute of limitations for false imprisonment and false arrest began to run

only when the imprisonment ended, and New Mexico courts often looked to the law as stated in the Restatement Second of Torts, adopting, for instance, the tort of intentional infliction of emotional distress, as articulated in § 46. Chavez v. County of Bernalillo, 3 F.Supp.3d 936, 985, 986.

D.N.M.2013. Cit. in cases quot. in sup., com. (d) quot. in sup., com. (e) quot. in case quot. in sup. Physician brought various claims against, among others, medical center's chief medical officer, chairman of its board of trustees, and a member of its medical executive committee, after defendants temporarily and then indefinitely suspended his medical privileges at medical center and imposed harsh requirements for regaining those privileges. Granting in part and denying in part defendants' motion to dismiss plaintiff's claim for intentional infliction of emotional distress, this court held that, while reasonable minds could conclude that chief medical officer's conduct —in, among other things, including clearly false statements about plaintiff in his reports to the state medical board—rose to the level of being extreme and outrageous, the same was not true for the remaining defendants' actions in allegedly violating plaintiff's due-process rights. Osuagwu v. Gila Regional Medical Center, 938 F.Supp.2d 1180, 1195.

D.N.M.2010. Adopted in cases cit. in sup. In this case in which this court predicted that the Supreme Court of New Mexico would adopt the approach of the Restatement Second of Torts that the statute of limitations for false-arrest and false-imprisonment claims under New Mexico law began to run when the imprisonment ended, the court cited Restatement Second of Torts § 46 for the proposition that New Mexico courts had been very willing to adopt the view of the Restatement to assist their development of new tort areas. Gose v. Board of County Com'rs of County of McKinley, 727 F.Supp.2d 1256, 1261.

D.N.M.2005. Com. (i) quot. in sup. Current and former subdivision residents sued operators of adjacent uranium milling facility for contaminating groundwater aquifers that served as residents' sole source of water. Denying defendants' motion to dismiss plaintiffs' claim for intentional infliction of emotional distress, this court held, among other things, that the continuous, hazardous contamination alleged by plaintiffs would be sure to cause distress to whomever was going to use the water. The court noted that the intent element of the tort was met when the actor knew that distress was certain, or substantially certain, to result from his conduct, or when the actor acted recklessly, in deliberate disregard of a high degree of probability that the emotional distress would follow. Wilcox v. Homestake Mining Co., 401 F.Supp.2d 1196, 1202.

D.N.M.2001. Com. (d) cit. in case cit. in sup. Hispanic former employee sued former employer for, in part, intentional infliction of emotional distress. Granting in part defendant's motion for summary judgment, this court held, inter alia, that isolated racial remarks by supervisor and co-workers and retaliatory treatment, including close monitoring by supervisor and receipt of multiple reprimands, though callous and distasteful, were not sufficiently extreme and outrageous to state a claim for intentional infliction of emotional distress. Rodriguez v. America Online, 183 F.Supp.2d 1340, 1358.

D.N.M.2001. Com. (d) quot. in case quot. in sup. Insured who had suffered a stroke sued insurer for, in part, intentional infliction of emotional distress after insurer terminated her disability benefits. Granting defendant's motion for partial summary judgment, the court held, inter alia, that when, as here, an insurer's decision to terminate disability benefits did not rise to the level of bad faith, that decision could not be characterized as the extreme and outrageous conduct necessary to maintain an action for intentional infliction of emotional distress. Yumukoglu v. Provident Life & Acc. Ins. Co., 131 F.Supp.2d 1215, 1228, affirmed 36 Fed.Appx. 378 (10th Cir.2002).

D.N.M.1999. Quot. generally in case quot. in disc. Former hospital employees sued a doctor and the hospital for intentional infliction of emotional distress, among other claims, alleging that the doctor routinely made disparaging and offensive remarks pertaining to minorities and women, repeatedly used offensive, inappropriate language regarding race and gender in public in the department, made physical contact with plaintiffs, and interfered with their employment duties. This court denied in part defendants' motion for summary judgment, holding, inter alia, that reasonable minds could conclude that the doctor's conduct rose to the level of being outrageous. Nieto v. Kapoor, 61 F.Supp.2d 1177, 1182, opinion affirmed 268 F.3d 1208 (10th Cir.2001).

D.N.M.1998. Cit. in case cit. in disc. A job applicant sued an insurance company for Title VII violations, breach of contract, and intentional infliction of emotional distress, among other claims, alleging that the insurer discriminated against her because of her gender in not appointing her as the insurer's agent to succeed her father, for whom she had worked for several years. This court granted the insurer summary judgment, holding, inter alia, that the insurer's altering the qualifications for its agents and failure to create an opening for plaintiff did not constitute intentional infliction of emotional distress. Ewing v. State Farm Mut. Auto. Ins. Co., 6 F.Supp.2d 1281, 1290.

D.N.M.1997. Quot. in case quot. in disc., com. (h) quot. in case quot. in disc. A transsexual sued a magazine for defamation, invasion of privacy, interference with business relations, intentional infliction of emotional distress, and prima facie tort. The article referred to plaintiff's status as a transsexual and examined plaintiff's involvement in two lawsuits filed against her by the SEC for alleged securities law violations. One suit was filed before plaintiff's sex change and the other was filed afterward. This court granted defendants' motion to dismiss, holding, inter alia, that plaintiff failed to state an emotional-distress claim, because there was nothing extreme or outrageous about defendant's conduct. The court stated that the references to plaintiff's transsexual status were highly relevant to the central inquiry of the article. Although the article made numerous references to plaintiff's sex, gender, and transsexual status, the article did not contain defamatory falsehood. Schuler v. McGraw-Hill Companies, Inc., 989 F.Supp. 1377, 1390, judgment affirmed 145 F.3d 1346 (10th Cir.1998).

D.N.M.1996. Com. (d) quot. in sup., com. (h) cit. in case cit. in disc. The Equal Employment Opportunity Commission sued an employer for allegedly violating the Americans with Disabilities Act by retaliating against and terminating an employee who suffered from AIDS. The former employee intervened as plaintiff, alleging, in part, a claim for intentional infliction of emotional distress. Granting, in part, defendant's motion for judgment as a matter of law, the court held,

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inter alia, that defendant's alleged wrongful conduct did not rise to the level of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. The court stated that the most egregious conduct alleged to have occurred in this case happened at an employee meeting that plaintiff-intervenor did not attend, and that the alleged statements by defendant's owner at the meeting, that plaintiff-intervenor would be transferred around until he quit and that people with AIDS should be placed in colonies, raised only an inference of improper motivation. E.E.O.C. v. MTS Corp., 937 F.Supp. 1503, 1514.

D.N.M.1986. Cit. in sup., coms. (d) and (h) quot. in sup. An employee sued her former employer, alleging discriminatory employment policies and seeking relief under Title VII of the Civil Rights Act and under state tort law. The court dismissed the employee's claim for intentional infliction of emotional distress, holding that the employer's conduct was not so extreme and outrageous as to state a claim for this tort. The court noted that, although the employer's method of terminating the employee was unpleasant and hurtful, this behavior was not on par with the egregiousness of facts in cases that did successfully raise intentional infliction of emotional distress claims, such as behavior involving serious racial slurs. Salazar v. Furr's Inc., 629 F.Supp. 1403, 1411.

D.N.M.Bkrtcy.Ct.

D.N.M.Bkrtcy.Ct.2018. Cit. in sup., cit. in case quot. in sup.; com. (d) quot. in sup. Former romantic partner of Chapter 7 debtor brought an adversary proceeding against debtor, alleging that debtor was liable for giving her genital herpes and that his debt to her was nondischargeable. After a bench trial, this court held that, while debtor was liable to plaintiff for civil battery, and the debt arising from the battery was nondischargeable on the ground that debtor's actions were willful and malicious, plaintiff failed to state a claim against debtor for intentional infliction of emotional distress. The court reasoned that debtor's conduct was not sufficiently extreme and outrageous to state a claim for intentional infliction of emotional distress under New Mexico law or Restatement Second of Torts § 46. In re Bolles, 593 B.R. 832, 840, 841.

E.D.N.Y.

E.D.N.Y.2021. Com. (d) quot. in case cit. in sup. Prominent saxophonist brought a claim for libel against aspiring saxophonist; defendant counterclaimed for, among other things, intentional infliction of emotional distress (IIED), alleging that plaintiff used his age and prominence to manipulate her into a sexual relationship, threaten her career, withhold performance opportunities, and threaten her with legal action. This court denied defendant's motion for summary judgment, holding that defendant's counterclaim for IIED failed as a matter of law. Quoting Restatement Second of Torts § 46, Comment *d*, the court explained that the alleged conduct against defendant did not rise to the level of extreme and outrageous conduct necessary to sustain an IIED claim. Coleman v. Grand, 523 F.Supp.3d 244, 266.

E.D.N.Y.2019. Com. (d) quot. in case quot. in sup. Senior public-school teachers brought, among other things, claims of intentional infliction of emotional distress (IIED) against principal, assistant principal, and department of education, alleging that defendants harassed plaintiffs, cursed at them, and repeatedly told them that they were going to terminate senior teachers. This court granted in part defendants' motion to dismiss, holding that plaintiffs failed to state an IIED claim. The court explained that defendants' conduct, while insulting and tortious, did not rise to the level of outrageousness needed under Restatement Second of Torts § 46, Comment *d*, to sustain an IIED claim. Lebowitz v. New York City Department of Education, 407 F.Supp.3d 158, 180.

E.D.N.Y.2011. Com. (d) quot. in sup. Athletic trainer who told federal investigators that he had injected a major-league-baseball player with steroids sued player, asserting, inter alia, a claim for intentional infliction of emotional distress (IIED). Granting defendant's motion to dismiss the IIED claim, this court held that that claim was duplicative of plaintiff's causes of action alleging defamation and malicious prosecution; while defendant's revelation of private medical information about plaintiff's child was the only nonduplicative basis for plaintiff's IIED claim, the claim failed because the disclosure of that information did not rise to the level of extreme and outrageous conduct necessary to support an IIED claim. McNamee v. Clemens, 762 F.Supp.2d 584, 610.

E.D.N.Y.2005. Com. (d) cit. in sup. United States citizens injured in and survivors of United States citizens killed in suicide bombing in Israel sued Jordanian bank under federal Anti-Terrorism Act and asserted a claim for intentional infliction of emotional distress, alleging that the bank knowingly provided terrorist organizations with financial services and other support. After denial of preliminary injunction, this court granted bank's motion to dismiss, holding, inter alia, that although the bank was liable under the federal Anti-Terrorism Act for supporting terrorist activities by intentionally creating and administering death and dismemberment benefit plans for families of suicide bombers, its conduct was too removed from the actual suicide attack, and thus not sufficiently outrageous or extreme, to support common-law claims for intentional infliction of emotional distress. Linde v. Arab Bank, PLC, 384 F.Supp.2d 571, 590.

E.D.N.Y.2004. Com. (d) cit. in disc. Former executive chef who was fired and charged with petit larceny for allegedly stealing restaurant equipment brought suit for, in part, intentional infliction of emotional distress against corporation that owned restaurant where he was employed, as well as two of its officers. Granting defendants' motion for summary judgment on the emotional-distress claim, the court determined, inter alia, that plaintiff failed to allege any conduct by defendants that was sufficiently "extreme and outrageous" as to go beyond all possible bounds of decency and be regarded as intolerable in a civilized community. Lawson v. New York Billiards Corp., 331 F.Supp.2d 121, 131.

E.D.N.Y.2000. Cit. in disc., coms. (d) and (e) quot. in disc., illus. 11 and 19 cit. in disc. Husband and wife who were ultimately acquitted of criminal charges arising from their involvement in an attempted drug sting sued customs agents, air courier that cooperated with agents in the operation, and city police officers for violations of 42 U.S.C. § 1983. Defendants moved for summary judgment. Granting the motions in part and denying them in part, the court held, inter alia, that,

while a private actor enlisted by law enforcement could, in certain situations, claim qualified immunity from liability for its part in an official's abuse of authority, courier was not entitled to such immunity, since a reasonable private person in its position would not have believed that the official conduct here was not patently abusive, and that plaintiffs' claim for intentional infliction of emotional distress, though adequately pled, appeared time-barred. Mejia v. City of New York, 119 F.Supp.2d 232, 285, 286.

E.D.N.Y.1999. Com. (d) quot. in case quot. in sup. Former employee who had been diagnosed with Type I diabetes sued his former employer for disability-based discrimination in violation of federal and state law and asserted a state-law claim for, inter alia, intentional infliction of emotional distress. Granting defendant's motion for summary judgment, the court held, in part, that supervisor's phone call to plaintiff in the hospital, informing plaintiff that he had received a poor performance appraisal and would have to return the company car, and termination of plaintiff's employment immediately on his return from disability leave did not constitute intentional and outrageous conduct necessary to state a claim for intentional infliction of emotional distress. Burke v. Royal Insurance Co., 39 F.Supp.2d 251, 262.

E.D.N.Y.1999. Com. (d) cit. and quot. in disc. A white former teacher at a Catholic elementary school sued the school for intentional infliction of emotional distress and Title VII employment discrimination, among other claims, alleging that the school schemed to fire the white, lay teachers and replace them with Hispanic nuns from Argentina. Plaintiff also alleged that the school's assistant principal subjected her to pervasive verbal abuse and false ridicule of her self-esteem. This court granted defendant summary judgment, holding, inter alia, that, although the principal's conduct might have been unpleasant and unprofessional, it did not rise to the requisite extreme or outrageous level to support a claim for intentional infliction of emotional distress. Ticali v. Roman Catholic Diocese of Brooklyn, 41 F.Supp.2d 249, 266, affirmed 201 F.3d 432 (2d Cir.1999).

E.D.N.Y.1998. Cit. in headnote, cit. in sup. Former employee sued deputy director of former employer for, inter alia, intentional infliction of emotional distress in connection with defendant's response to plaintiff's complaint of supervisor's sexual harassment. Defendant moved to dismiss. Denying the motion, the court held, in part, that material factual issues existed as to whether defendant, who allegedly made further unwanted sexual advances toward plaintiff as she was informing him of supervisor's actions, behaved so reprehensibly that plaintiff could maintain an action for intentional infliction of emotional distress. Archer v. Economic Opportunity Com'n of Nassau, 30 F.Supp.2d 600, 603, 610.

E.D.N.Y.1998. Cit. generally in case quot. in disc. A clerical employee for the county sued the county administrator and the city for, among other claims, intentional infliction of emotional distress, alleging that the administrator sexually harassed her. This court granted in part and denied in part the city's motion for summary judgment, holding, inter alia, that plaintiff had not alleged willful conduct on the city's part. Gryga v. Ganzman, 991 F.Supp. 105, 112, certification granted 1998 WL 229127 (E.D.N.Y1998).

E.D.N.Y.1998. Subsec. (1) quot. in case quot. in disc. A telephone customer sued a phone company for intentional infliction of emotional distress, among other claims, alleging that a telemarketer employed by the company misrepresented certain features of its residential phone account program, inducing her to switch service from another company, and causing her to develop a phobia by which she mistrusted all telemarketers. This court dismissed plaintiff's complaint, holding, inter alia, that plaintiff's emotional-distress claim failed, because defendant's conduct was not sufficiently outrageous. Katz v. MCI Telecommunications Corp., 14 F.Supp.2d 271, 275.

E.D.N.Y.1998. Cit. and quot. in disc. Former employee who alleged that she was sexually harassed by her supervisor sued former employer, among others, for, inter alia, intentional and reckless infliction of emotional distress, negligent hiring, negligent supervision, and negligent investigation. Granting defendant's motion to dismiss, the court held, in part, that the intentional-tort claim was time-barred, that New York did not recognize a cause of action for reckless infliction of emotional distress, and that New York's Workers' Compensation Law provided the exclusive remedy for negligently inflicted employment-related injuries. Stordeur v. Computer Associates Intern., Inc., 995 F.Supp. 94, 102.

E.D.N.Y.1998. Cit. in headnote, com. (d) quot. in case quot. in disc. Former husband sued investment company, former wife's divorce attorney, and state court justices for actions connected with a divorce, alleging intentional infliction of emotional distress, among other claims. Plaintiff alleged that the attorney's behavior caused plaintiff to incur large legal fees and dissipation of marital assets. This court dismissed the emotional distress claim against the attorney, holding, inter alia, that plaintiff failed to prove outrageous conduct, because advocating on behalf of one's client in a divorce proceeding typically results in the opposition's incurring such costs. Vasile v. Dean Witter Reynolds Inc., 20 F.Supp.2d 465, 472, 496, affirmed 205 F.3d 1327 (2d Cir.2000).

E.D.N.Y.1997. Com. (d) cit. generally in headnotes and quot. in case quot. in sup. Insured sued insurer for, in part, intentional infliction of emotional distress after insurer denied her coverage claim under her fire insurance policy. Dismissing the case, the court held, inter alia, that, even if defendant knew that it would not honor plaintiff's insurance claim, its insistence that plaintiff remain in the United States during the period that the claim was allegedly being evaluated, causing her to postpone trips to Israel to visit her ailing mother, was not conduct that was sufficiently outrageous in character or extreme in degree to maintain an action for intentional infliction of emotional distress; plaintiff was free to leave the United States and resolve her insurance claim upon her return. The court stated that defendant's refusal to pay the claim prior to completing its investigation was also not outrageous conduct. Harary v. Allstate Ins. Co., 983 F.Supp. 95, 96, 100.

E.D.N.Y.1997. Cit. generally in case quot. in disc. After insurer stopped paying insured's disability benefits, insured sued insurer for, inter alia, anticipatory breach of contract, breach of contract, and intentional infliction of emotional distress. Defendant moved to dismiss the first and third claims. Granting the motion, the court held, in part, that New York did not recognize a cause of action for anticipatory breach where there was an alleged repudiation of an executory contract for the payment of money only, and that plaintiff's claim for intentional infliction of emotional

distress failed because defendant's conduct was not sufficiently extreme or outrageous. The court was not persuaded by plaintiff's argument that defendant's refusal to continue paying his disability benefits implied a criminal indifference to civil obligations. MaGee v. Paul Revere Life Ins. Co., 954 F.Supp. 582, 587.

E.D.N.Y.1997. Subsec. (1) and com. (d) quot. generally in case quot. in sup. Homeowners sued a town, the building commissioner, the town supervisor, the building inspector, and a prior building commissioner for, in part, intentional infliction of emotional distress, arising from defendants' unsuccessful criminal prosecution of plaintiffs for zoning and building violations involving improper drainage, setback requirements, and filling of land without a permit. Granting, in part, defendants' motion to dismiss, the court held, inter alia, that there were no allegations in plaintiffs' complaint that, if true, would constitute conduct so outrageous as to give rise to a claim for intentional infliction of emotional distress, and thus the claim failed as a matter of law. Willner v. Town of North Hempstead, 977 F.Supp. 182, 195.

E.D.N.Y.1995. Com. (d) quot. in case quot. in sup. Homeowners sued airline for, inter alia, infliction of emotional distress based on the alleged outrageousness of the events incident to the crash of one of defendant's airplanes into plaintiffs' backyard. Granting in part defendant's motion for summary judgment, the court held, in part, that defendant's actions with regard to the accident did not rise to the level of extreme and reckless conduct necessary to maintain a claim for emotional damages based on outrageous conduct. The court, moreover, refused to extend defendant's direct duty of care to plaintiffs and all the other nonpassengers its airplanes flew over on a daily basis. In re Air Crash Disaster at Cove Neck, Long Island, N.Y., 885 F.Supp. 434, 440.

E.D.N.Y.1995. Com. (d) cit. in headnote and quot. in case quot. in disc. An Orthodox Jewish man sued ex-wife's attorney, who had contacted the district attorney's office concerning the man's alleged violation of the state domestic relation law, alleging, among other claims, intentional infliction of emotional distress. This court granted defendant summary judgment, holding, inter alia, that the attorney's communications with the district attorney's office, the Rabbinical board, and others regarding the veracity of plaintiff's statements regarding the removal of barriers to remarriage did not constitute outrageous conduct. The attorney had an obligation to his client to investigate her case and to advance her legal interests, and his conduct was entirely reasonable. Furthermore, there was no evidence that the attorney's conduct was intended to inflict emotional distress on plaintiff. Kalika v. Stern, 911 F.Supp. 594, 596, 605.

E.D.N.Y.1992. Quot. in case quot. in disc., cit. in disc. A seaman who suffered emotional injuries while at sea sued a shipping company pursuant to the Federal Employers' Liability Act and the Jones Act, alleging negligence and unseaworthiness. The allegedly negligent incidents ranged from plaintiff's being temporarily demoted to his being ordered to work under unsafe conditions, and plaintiff claimed that these acts constituted the negligent infliction of emotional distress, causing him to experience depression. This court granted defendant's motion for summary judgment, holding that plaintiff failed to demonstrate any legally cognizable acts of negligence or damages so as to sustain a cause of action. Plaintiff's engaging in heated arguments with other

seamen did not constitute unconscionable abuse, and, although plaintiff may have been made fearful by his experience as a seaman, such feelings were not caused by defendant's negligent acts. Puthe v. Exxon Shipping Co., 802 F.Supp. 819, 827, affirmed 2 F.3d 480 (2d Cir.1993).

E.D.N.Y.1990. Subsec. (1) quot. in case quot. in disc., com. (d) quot. in case quot. in disc. Alleging breach of contract, intentional infliction of emotional distress, fraud, and wrongful discharge, the manager of a retirement community sued her former employer after he discharged her without warning or notice. The manager alleged that she had been induced by the employer to leave her prior employment in Ohio and relocate to New Jersey to accept the managerial position from which she was terminated, and that she suffered distress, anxiety, and depression as a result of her termination. Granting the employer's motion to dismiss in part and denying it in part, this court held, inter alia, that the manager had failed to state a cause of action for intentional infliction of emotional distress, because she failed to allege that her former employer's action in dismissing her without warning or notice was outrageous in character or extreme in degree. Dickerson v. Kaplan, 763 F.Supp. 694, 702.

E.D.N.Y.1989. Subsec. (1) quot. in case quot. in sup. A discharged employee sued his former employer for age discrimination and intentional infliction of emotional distress. This court granted the defendant's motion to dismiss the emotional distress count, holding that, even if the plaintiff's allegations of age discrimination, being blamed for other employees' abuses, and being deceived by his former employer by being told he would work the day shift were true, they did not describe conduct so outrageous and extreme as to support the charge. Realmuto v. Yellow Freight System, Inc., 712 F.Supp. 287, 289.

E.D.N.Y.1987. Subsec. (1) cit. in sup. An employee of a hospital that was under investigation by the state government cooperated fully with the investigations. As a result of her cooperation, the employee alleged, the hospital undertook a campaign of harassment toward her. The employee sued the hospital, asserting various claims including one for intentional infliction of emotional distress. This court granted in part and denied in part the defendant's motion for dismissal, holding, inter alia, that the defendant's conduct, which included insults, indignities, annoyances, and petty oppressions, did not amount to the outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Kirwin v. New York State Office of Mental Health, 665 F.Supp. 1034, 1040.

E.D.N.Y.1986. Com. (d) quot. in sup. A physician who specialized in the treatment of rheumatism and arthritis sued an arthritis foundation for prima facie tort and intentional infliction of emotional distress when it dropped his name from its referral list pursuant to a change in its requirements for listing. The trial court granted the defendant's motion for summary judgment on both claims. The court stated that there was no evidence that the defendant intended to cause the plaintiff severe emotional harm nor any evidence that the plaintiff had suffered extreme emotional distress. Solinsky v. Arthritis Foundation, 635 F.Supp. 620, 624.

E.D.N.Y.1985. Subsec. (1) quot. in disc., com. (d) quot. in disc. A terminated employee sued his former employer for breach of an alleged employment contract, false imprisonment, assault, and intentional and negligent infliction of emotional distress. The employer removed the action to federal court. The district court granted the defendant's motion for a directed verdict on the plaintiff's breach of contract claim for failure to state a claim because there was no evidence in the contract of an express limitation on the employer's right to terminate employees at will. The court denied the defendant's motion for a directed verdict on all other claims, holding, inter alia, that the plaintiff's testimony about being placed in apprehension of immediate harm established a prima facie case for his claim for intentional infliction of emotional distress. Leahy v. Federal Exp. Corp., 609 F.Supp. 668, 673.

E.D.N.Y.Bkrtcy.Ct.

E.D.N.Y.Bkrtcy.Ct.2022. Com. (d) quot. in case quot. in sup. Chapter 13 debtor brought a pro se adversary proceeding for, among other things, a claim for intentional infliction of emotional distress (IIED) against trustee of debtor's bankruptcy estate, alleging that defendant caused extreme emotional distress in plaintiff by sending her a letter claiming that a hearing on a motion to dismiss her bankruptcy petition was adjourned, notwithstanding the fact that defendant had not yet filed a motion to dismiss. This court granted in part defendant's motion to dismiss, holding that plaintiff failed to state a claim for IIED. The court explained that neither defendant's erroneously sent letter, nor plaintiff's conclusory statements that she felt threatened and intimidated by defendant, demonstrated the extreme and outrageous conduct, as defined by Restatement Second of Torts § 46, Comment *d*, necessary to sustain a claim for IIED. In re Modikhan, 639 B.R. 792, 817.

N.D.N.Y.

N.D.N.Y.2008. Com. (d) quot. in case quot. in sup. Female police officer brought gender discrimination and other claims against city, police department, and several co-workers, alleging, among other things, that defendants released private and protected employment information contained in her personnel file and made false statements about her work performance that were intended to cause her harm. Granting summary judgment for defendants on plaintiff's claim for intentional infliction of emotional distress, this court held, inter alia, that the alleged behavior, namely, publication of plaintiff's complaint of discrimination and defendants' comments in regards to the complaint, did not offend all bounds of decency, and thus fell far short of the conduct required to sustain such a claim under New York law. Lore v. City of Syracuse, 583 F.Supp.2d 345, 384.

N.D.N.Y.2006. Adopted in case cit. in sup. (general cite), com. (d) quot. in case quot. in sup. As part of school secretary's employment-discrimination action, secretary sued superintendent, board of education, and school district for intentional infliction of emotional distress, after her request to be reassigned to a full-time position following a heart attack was denied by superintendent. Granting in part defendants' motion to dismiss, this court held, inter alia, that plaintiff's complaint, which portrayed superintendent's actions as extreme and outrageous through use of conclusory

adjectives like "defamatory," "retaliatory," and "harassing," but did not allege specific actions that rose to the level of extreme and outrageous conduct, failed to state a claim for intentional infliction of emotional distress. Burns v. Cook, 458 F.Supp.2d 29, 47.

N.D.N.Y.1999. Com. (d) cit. in case quot. in disc. After wife, through her personal guardian, sued husband for fraud and conversion of certain marital assets, husband brought third-party complaint against wife's personal guardian, alleging, in part, intentional infliction of emotional distress. Granting in part personal guardian's motion for summary judgment, the court held, inter alia, that personal guardian's alleged conduct in making harassing telephone calls, sending libelous letters, and demanding money in exchange for not reporting Medicaid and tax fraud by husband was not sufficiently outrageous to sustain a claim for intentional infliction of emotional distress. Hodge ex rel. Skiff v. Hodge, 78 F.Supp.2d 29, 36.

N.D.N.Y.1998. Com. (d) quot. in case quot. in sup. Employee who was terminated shortly after returning from maternity leave for refusing to leave her infant son and attend an out-of-town seminar sued her former employer for sex, disability, and pregnancy-based discrimination in violation of federal and state statutes. Denying, in part, plaintiff's motion to amend her complaint, the court held, inter alia, that plaintiff did not allege conduct on the part of defendant that was sufficiently outrageous in character and extreme in degree to permit addition of a claim for intentional infliction of emotional distress. Bond v. Sterling, Inc., 997 F.Supp. 306, 312.

N.D.N.Y.1998. Com. (d) quot. in case quot. in disc. Police officers arrested a man who was engaged in the alleged business practice of allowing stored fuel tanks to leak waste petroleum into the ground. The arrestee sued the police officers and an investigator for the state attorney general, alleging, among claims, intentional infliction of emotional distress. This court, among other dispositions, dismissed plaintiff's emotional-distress claim, holding, inter alia, that no claim for intentional infliction of emotional-distress could lie where the conduct underlying the claim fell within the ambit of plaintiff's claims for malicious prosecution and assault and battery. Hansel v. Sheridan, 991 F.Supp. 69, 75.

N.D.N.Y.1998. Com. (d) quot. in case quot. in disc. Former director of town youth commission sued town and town officials for, inter alia, intentional infliction of emotional distress in connection with an investigation that defendants opened regarding plaintiff's failure to turn over to town the money collected on various ski trips. Granting defendants' motion for summary judgment, the court held, in part, that plaintiff's allegations did not rise to the level of outrageous conduct necessary to sustain a claim for intentional infliction of emotional distress. Hathaway v. County of Essex, 995 F.Supp. 62, 69, affirmed 172 F.3d 37 (2d Cir.1999).

N.D.N.Y.1995. Com. (d) quot. in case quot. in sup. After town's police officers, at the request of store personnel, asked African-American customers to leave the store, customers sued town and police officers, among others, alleging civil-rights violations and a state-law claim for intentional infliction of emotional distress, inter alia. Granting defendants' motion for summary judgment, the court held, in part, that defendants were not liable for intentional infliction of emotional distress

under New York law, since defendants' actions in threatening plaintiffs with arrest for trespass, calling for backup prior to approaching them, and detaining them in public view in the store's main entrance, as well as requesting their driver's licenses and ordering a criminal background check on them, were not so egregious as to be beyond all bounds of decency. Robinson v. Town of Colonie, 878 F.Supp. 387, 409.

N.D.N.Y.1994. Subsec. (1) cit. in case quot. in disc., com. (d) quot. in case quot. in disc. Female sheriff's deputies sued county and county officials for, inter alia, intentional infliction of emotional distress allegedly suffered as a result of defendants' sexual harassment, discrimination and retaliatory acts. Specifically, plaintiffs maintained that defendants verbally abused them, denied them sick leave while routinely granting it to male deputies, forced them to strip-search male inmates when male deputies were available for the task, stationed them in cell blocks without providing a way to summon assistance in the event a dangerous situation arose, and repeatedly assigned them menial tasks. Granting defendants' motion for summary judgment on this part of the complaint, the court held that their conduct was not so obnoxious, intolerable, or unendurable as to support plaintiffs' cause of action. Doolittle v. Ruffo, 882 F.Supp. 1247, 1259.

N.D.N.Y.1994. Cit. in case quot. in sup. A disabled black male whose properties burned down sued the fire chief and the village for, among other claims, intentional infliction of emotional distress, alleging that defendants harassed and discriminated against him and demolished his property without giving him notice and an opportunity to be heard. He asserted that defendants had subjected him to building code requirements not enforced against white property owners, and that village police had previously failed to investigate incidents of property damage to his buildings. This court granted defendants summary judgment as to plaintiff's federal claims and pendent state law claims, and dismissed plaintiff's emotional distress claim for lack of subject matter jurisdiction. The court held, inter alia, that plaintiff had properly stated a claim for intentional infliction of emotional distress. Waldron v. Rotzler, 862 F.Supp. 763, 770.

N.D.N.Y.1992. Subsec. (1) cit. in case cit. in disc. Two women who were involuntarily committed to a psychiatric center sued the hospital and its staff members who were responsible for their commitment, alleging intentional infliction of emotional distress, inter alia. This court granted in part and denied in part defendants' motion for summary judgment. The court granted defendant physician's motion for summary judgment on the emotional distress claim on the ground that the committing physician's conduct was privileged, since the physician determined that plaintiffs posed a substantial risk of harm to others. Rubenstein v. Benedictine Hosp., 790 F.Supp. 396, 413.

N.D.N.Y.1989. Subsec. (1) quot. in case cit. in disc. A former employee who argued that he was wrongfully terminated from his job sued the employer for age discrimination under federal law and alleged three pendent state law claims, including one for intentional infliction of emotional distress. Granting the defendant's motion to dismiss the claim of intentional infliction of emotional distress, the court held that the defendant's sole allegation that he was discharged fell substantially below the strict standard applicable to intentional infliction of emotional distress claims that the

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defendant's conduct must be outrageous in character, extreme in degree, and beyond all bounds of decency. Wanamaker v. Columbian Rope Co., 713 F.Supp. 533, 545.

S.D.N.Y.

S.D.N.Y.2021. Cit. in sup.; com. (f) quot. in case quot. in sup. Nanny filed a claim for, among other things, intentional infliction of emotional distress against parents who had formerly employed her to care for their son, alleging that they caused her to lose her position with a subsequent family by defaming her as a stalker and harasser in social-media posts. This court denied parents' motion for partial dismissal, holding that nanny plausibly alleged extreme and outrageous conduct on the part of parents in support of her claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court pointed to nanny's allegations that parents engaged in a multi-pronged campaign to harass her to drive her far away from their son, with the knowledge that she was suffering from emotional distress after having recently been the victim of a violent attack. Moraes v. White, 571 F.Supp.3d 77, 105.

S.D.N.Y.2018. Cit. in sup. (general cite); subsec. (1) quot. in case quot. in sup. Former user of a web-based dating application brought an action against operator of the application and related corporate entities, after his ex-boyfriend set up a false personal profile on the application impersonating plaintiff, alleging that the application was deceptively designed because it lacked safety features to prevent impersonation and it failed to remove impersonating profiles. This court granted defendants' motion to dismiss, holding that, because plaintiff's allegations were premised on defendants' purported failure to monitor, prevent, and remove content it had not created, the Communications Decency Act immunized defendants from liability. The court explained that, even if the Act did not apply, plaintiff failed to plausibly allege the necessary elements of a claim for intentional infliction of emotional distress as set forth in Restatement Second of Torts § 46. Herrick v. Grindr, LLC, 306 F.Supp.3d 579, 593, 594.

S.D.N.Y.2018. Com. (d) quot. in case quot. in sup. Parents of a murder victim sued news network, reporter, and contributor, alleging intentional infliction of emotional distress and other claims in connection with an article in which defendants reported that the victim, who was a former employee of the Democratic National Committee, was murdered for leaking sensitive, private emails from the committee's servers. This court granted defendants' motions to dismiss, holding that plaintiffs failed to set forth clear and concise allegations of specific instances in which each individual defendant engaged in extreme and outrageous conduct, as required in order to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court noted that, absent such allegations, a plaintiff could not recover even if a defendant acted with a tortious or criminal intent, or his or her conduct was characterized by malice or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort. Rich v. Fox News Network, LLC, 322 F.Supp.3d 487, 500.

S.D.N.Y.2017. Cit. in ftn. Former owner and operator of debtor car dealership brought an adversary proceeding against trustee of debtor's bankruptcy estate, alleging that defendant breached his promise not to sue plaintiff's parents to recover assets that debtor fraudulently transferred to parents prepetition. The bankruptcy court granted defendant's motion to dismiss, finding that plaintiff lacked standing, because he had not sufficiently alleged that he suffered an injury in fact as a result of defendant's actions. While affirming on other grounds, this court held that plaintiff's allegations —that he suffered from nightmares from defendant's alleged breach of their agreement and that defendant's actions cost him his marriage—were sufficient to satisfy the injury-in-fact requirement. The court cited Restatement Second of Torts § 46 in reasoning that, although emotional distress was intangible, intangible injuries could be concrete, and emotional distress constituted a concrete injury for purposes of standing. In re Big Apple Volkswagen, LLC, 571 B.R. 43, 50.

S.D.N.Y.2011. Subsec. (2)(a) and com. (*l*) cit. in disc. (erron. cit. as com. /). Parents of high-school student who was suspended by school superintendent for the remainder of his senior year brought a state-law claim for, inter alia, intentional infliction of emotional distress (IIED) against school district and district officials, alleging that defendants failed to properly address any ongoing discrimination and violence against their son, and made false statements about him by accusing him of racism. This court, inter alia, dismissed student's mother's IIED claim, holding that, even assuming that New York courts recognized a claim of IIED upon a bystander, student's mother failed to state such a claim, because there was no allegation that she was present at any meeting in which the alleged emotional distress arose, except for a particular conference where defendants' conduct did not rise to the level of extreme and outrageous conduct. TC v. Valley Cent. School Dist., 777 F.Supp.2d 577, 590.

S.D.N.Y.2008. Cit. in sup. (general cite), com. (d) quot. in sup. and quot. in case quot. in sup., coms. (e) and (f) quot. in sup., illus. 5, 6, and 11 cit. in disc. Sister of assistant district attorney who committed suicide as he was about to be arrested on a charge of attempting to solicit a minor online brought civil-rights action against television network whose cast and crew had waited outside preparing to film the arrest, and an additional claim for intentional infliction of emotional distress (IIED) under Texas law. Denying defendant's motion to dismiss the IIED claim, this court held, inter alia, that a reasonable jury could find that defendant abused its power in reckless disregard of decedent's rights, in an unethical manner that overstepped "all possible bounds of decency" and would be outrageous to an average member of the community; plaintiff alleged, among other things, that defendant intruded into a law-enforcement operation in order to pander to lurid curiosity and caused police to deviate from sound police practice. Conradt v. NBC Universal, Inc., 536 F.Supp.2d 380, 395, 396.

S.D.N.Y.2008. Coms. (d) and (j) quot. in sup. and quot. in case cit. in ftn. Prisoner who was released 22 years after being convicted of a crime he did not commit sued police officers and others for, among other things, intentional infliction of emotional distress. Denying in part defendants' motion to dismiss, this court held, inter alia, that plaintiff's allegations were sufficient to sustain the claim under New York law; here, there was no question that the alleged conduct—maliciously falsifying evidence that caused plaintiff to spend 22 years in prison for a crime he did not commit—was so

outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Newton v. City of New York, 566 F.Supp.2d 256, 275.

S.D.N.Y.2008. Quot. in case quot. in sup., com. (j) quot. in case quot. in sup. Bus passenger who, because of a disability, used a power wheelchair and whose speech was impaired sued city transit authorities, bus operator, and others, asserting a claim for intentional infliction of emotional distress (IIED), inter alia. Granting transit defendants' motion to dismiss, and dismissing, sua sponte, the complaint as against bus operator, this court held that bus operator's alleged conduct in telling plaintiff to power off her wheelchair without explaining why and ultimately delaying her transportation approximately 40 minutes was not sufficiently extreme and outrageous to meet the requirements for an IIED claim. Stephens v. Shuttle Associates, L.L.C., 547 F.Supp.2d 269, 274.

S.D.N.Y.2007. Quot. in case quot. in disc., com. (j) quot. in case quot. in disc. Landowners located near manufacturer's facility brought a class action against manufacturer and chemical company that allegedly supplied manufacturer with materials containing polychlorinated biphenyls (PCBs), claiming that defendants dispersed harmful PCBs onto their properties. This court, inter alia, denied defendants' motion to dismiss landowners' claims of intentional infliction of emotional distress, holding that an allegation of knowingly subjecting individuals to exposure to a highly toxic substance, while purposely concealing from those so exposed the serious injuries that might result from such exposure, and in reckless disregard of those risks, could constitute the extreme and outrageous conduct required for this tort under New York law. Abbatiello v. Monsanto Co., 522 F.Supp.2d 524, 536.

S.D.N.Y.2007. Adopted in case cit. in ftn., subsec. (1) and com. (d) quot. in case quot. in sup. and cit. in ftn. Residents and business owners who lived near two gasoline stations found or suspected to have leaked gasoline into the soil asserted, inter alia, a claim for intentional infliction of emotional distress (IIED) against owners of the gas stations and owners' suppliers, after plaintiffs' private wells tested positive for the gasoline additive MTBE. Granting defendants' motion for summary judgment on this portion of the complaint, this court held that, even if defendants' alleged conduct in knowingly marketing a product capable of causing widespread property damage could be considered extreme and outrageous, plaintiffs' IIED claim failed because there was no evidence that, by engaging in such conduct, defendants intended to cause, or disregarded a substantial probability of causing, severe emotional distress to plaintiffs. In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, 528 F.Supp.2d 303, 312.

S.D.N.Y.2006. Quot. in case quot. in sup. Terminated provisional employee of city hospital brought various civil-rights claims against hospital, city, union, and others. This court granted defendants' motion to dismiss, holding in regard to plaintiff's additional claim for intentional infliction of emotional distress, that plaintiff failed to allege any specific actions on the part of any defendant within New York's one-year statute of limitations for intentional tort claims that were sufficient on their own to state a claim for intentional infliction of emotional distress; plaintiff apparently had

not had any direct contact with defendants after the effective date of her termination, which was more than one year prior to the filing of the complaint. Cabrera v. NYC, 436 F.Supp.2d 635, 647.

S.D.N.Y.2006. Com. (d) quot. in case quot. in sup. Resident of homeless shelter who was involuntarily committed to psychiatric hospital brought various claims against social worker employed by shelter. This court dismissed the claims, holding, inter alia, that the magistrate's report properly concluded that the conduct plaintiff ascribed to defendant—denying plaintiff an opportunity to return to the shelter on account of "red tape," thereby prolonging her alleged unlawful imprisonment at psychiatric hospital—did not rise to the high threshold of extreme and outrageous conduct necessary to establish a claim for intentional infliction of emotional distress. Fisk v. Letterman, 424 F.Supp.2d 670, 674.

S.D.N.Y.2006. Cit. in case quot. in sup. Inmate of detention center brought pro se action against center's guards and officials, alleging that he was unconstitutionally assaulted, verbally abused, strip-searched, and deprived of his property by defendants while he was being held in pretrial custody. This court, inter alia, granted defendants' motion to dismiss plaintiff's claim for intentional infliction of emotional distress, holding that, while plaintiff alleged that defendants acted with the purpose of inflicting emotional distress, he failed to allege that he actually suffered any severe emotional distress. Noting that intentional infliction of emotional distress was meant to apply in only the rarest circumstances, the court concluded that plaintiff's failure to allege one of its elements was fatal to his claim. Jean-Laurent v. Wilkerson, 438 F.Supp.2d 318, 328.

S.D.N.Y.2006. Com. (d) adopted and quot. in case quot. in sup. Medical photographer formerly employed by university health center and university medical school sued his former employers and others for, in part, intentional infliction of emotional distress, alleging that he suffered severe emotional distress as a result of his termination and defendants' alleged conversion and defamation. Granting in part defendants' motion for summary judgment, this court held, inter alia, that plaintiff's claim failed because he offered no concrete evidence regarding physical or behavioral symptoms of severe emotional distress, and provided no evidence of malice sufficient to fulfill the intent requirement for the claim. Slue v. New York University Medical Center, 409 F.Supp.2d 349, 371, reconsideration denied 2006 WL 212294 (S.D.N.Y.2006).

S.D.N.Y.2006. Com. (d) quot. in sup. Individual who was wrongfully arrested by two plainclothes police officers sued officers and others, alleging that officers repeatedly punched him during the arrest, and, after determining that he was not the person they were seeking, strip searched him, held him overnight, and denied him the opportunity to contact his family. This court, inter alia, granted defendants' motion to dismiss plaintiff's claim for intentional infliction of emotional distress. The court found that, even assuming the truth of plaintiff's allegations, officers' actions could not be considered so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Williams v. City of Mount Vernon, 428 F.Supp.2d 146, 160.

S.D.N.Y.2005. Com. (d) quot. in case quot. in disc. Plaintiff sued nurse and medical center that employed nurse, after nurse, while working at a crisis hotline called by plaintiff, phoned authorities to alert them to a potentially suicidal person, and plaintiff was taken to a hospital, against her will, for a 29-hour evaluation for having suicidal thoughts, during which time plaintiff's cat died. The court granted defendants' motion for summary judgment and dismissed plaintiff's claims, holding, inter alia, that plaintiff did not allege or show that defendants' conduct in following normal procedures with individuals who might be contemplating suicide was extreme or outrageous enough to sustain a claim of negligent infliction of emotional distress. Matthews v. Malkus, 377 F.Supp.2d 350, 361.

S.D.N.Y.2005. Com. (j) cit. in case quot. in disc. Worker sued her employer's workers' compensation insurer and its physician, asserting several causes of action based on the insurer's allegedly premature termination of physical-therapy payments stemming from a prior work-related injury, after which worker suffered a broken hip and other injuries. This court granted insurer's motion to dismiss plaintiff's claim for intentional infliction of emotional distress. Noting that reaching the first element of such a claim was difficult in New York courts, the court stated that insurer's cessation of payments for physical therapy did not rise to the level of extreme emotional conduct required under state law to sustain an emotional-distress claim. Polidoro v. Chubb Corp., 386 F.Supp.2d 334, 338.

S.D.N.Y.2005. Com. (d) quot. generally in case quot. in disc., com. (j) cit. in case quot. in disc. Injured employee sued employer, workers' compensation insurance carrier and carrier's physician after employee's injuries worsened following carrier's denial of additional physical therapy. Granting defendants' motion to dismiss, the court found that employee's claim for intentional infliction of emotional distress would not succeed under New York law, as insurance carrier's alleged conduct was not sufficiently extreme or outrageous to meet the standard necessary. The requirement of extreme or outrageous behavior for a claim of severe emotional distress was strictly applied in New York courts. Polidoro v. Chubb Corp., 354 F.Supp.2d 349, 352, 353.

S.D.N.Y.2005. Subsec. (1) cit. in ftn. Tug-boat captain who failed drug test sued employer on various grounds after being fired. Granting employer's motion for summary judgment, the court held, inter alia, that plaintiff's claim for intentional infliction of emotional distress failed because plaintiff did not allege any facts indicating that employer's conduct was exceptionally egregious. Smith v. McAllister Towing of New York, L.L.C., 361 F.Supp.2d 348, 350.

S.D.N.Y.2004. Com. (d) quot. in sup. Suspect sued city and several police officers and district attorneys for violating his constitutional rights and various common law torts after he was arrested and indicted, but never tried, on charges of murder and attempted robbery. Granting city's summary-judgment motion on all claims, this court found, inter alia, that suspect's claim for intentional infliction of emotional distress failed because he could not demonstrate that the arrest and indictment were the result of the city having acted intentionally or recklessly in a way that was so “extreme and outrageous” as to go beyond all grounds of decency and to be regarded as intolerable in a civilized community. Brown v. City of New York, 306 F.Supp.2d 473, 481.

S.D.N.Y.2003. Com. (d) quot. in case quot. in sup. Former employee sued employer for, in part, intentional infliction of emotional distress. Granting defendant's motion for summary judgment, the court held, inter alia, that plaintiff's allegations that defendant prevented plaintiff from attending meetings and social events, denied him his chosen workplace for the benefit of a younger co-worker, destroyed and scattered his books and documentation, deprived him of his work tools, and subjected him to insults and slurs based on his nationality did not describe the kind of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress. Chimarev v. TD Waterhouse Investor Services, Inc., 280 F.Supp.2d 208, 215, 227, affirmed 99 Fed.Appx. 259 (2d Cir.2004).

S.D.N.Y.2003. Com. (d) quot. in case quot. in sup. Terminated employee sued former employer for violations of federal law and intentional infliction of emotional distress, inter alia. Granting in part employer's motion for summary judgment, the court held that supervisor's critical performance reviews and his comment, following employee's demotion, that employee was "nothing" or "nobody" did not constitute extreme or outrageous conduct sufficient to support claim for emotional distress. Darboe v. Staples, Inc., 243 F.Supp.2d 5, 19.

S.D.N.Y.2003. Com. (d) quot. generally in case quot. in sup. After being fired for repeatedly failing to deposit store receipts, Hispanic former employee sued employer and her former supervisor for Title VII civil-rights violations and intentional infliction of emotional distress, inter alia. This court granted defendants summary judgment, holding, inter alia, that plaintiffs' allegations were insufficient to constitute intentional infliction of emotional distress, since plaintiff alleged only that defendants conducted a legitimate investigation into a substantial loss of money, that the funds were lost on her watch, and that defendants terminated her after she violated their policies a second time while a legitimate investigation was ongoing. There was no evidence that defendants' actions were extreme and outrageous. Ortiz v. Brookstone Co., 274 F.Supp.2d 456, 465.

S.D.N.Y.2002. Com. (d) quot. in case quot. in disc. Owner of car dealerships and his wife sued car manufacturer and its subsidiary for, in part, intentional infliction of emotional distress, alleging that defendants threatened them with termination of dealership and foreclosure on their home, terminated dealerships' credit line, engaged in excessive audits, told dealership employees that dealership was failing, imposed onerous lending terms on dealership's customers, and provided financial assistance to plaintiff's competitors. This court granted defendants summary judgment, holding, inter alia, that defendants' threats, which consisted of statements that plaintiff's dealership was running out of time and that defendants would throw plaintiff out and go after his house, might have been heavy-handed or unfair, but were not outrageous conduct. Bronx Chrysler Plymouth, Inc. v. Chrysler Corp., 212 F.Supp.2d 233, 248.

S.D.N.Y.2002. Subsec. (1) cit. in disc., com. (j) quot. in disc. Insured sued insurer for breach of contract, intentional infliction of emotional distress, and bad faith, after insurer ceased making disability-insurance payments under individual and group policies. This court granted in part insurer's motion to dismiss, holding, inter alia, that insured's emotional-distress claim failed,

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because insurer's conduct of terminating insured's benefits, while troubling, did not rise to the requisite level of extreme and outrageous conduct. It noted that prior courts considering similar facts had characterized such claims for intentional infliction of emotional distress as true contract cases recast in tort. Wiener v. Unumprovident Corp., 202 F.Supp.2d 116, 122.

S.D.N.Y.2001. Quot. generally in case quot. in sup. Homosexual former employee of a museum that was part of the Smithsonian Institution sued co-workers for assault, battery, intentional infliction of emotional distress, and tortious interference with a contract. Plaintiff alleged that he was discriminated against because of his sexual orientation and that co-workers intentionally hit and touched him on a regular basis as they walked past his desk. This court granted defendants' motion to substitute the United States as the named defendant and to dismiss the action. The court held, inter alia, that plaintiff's emotional-distress claim failed, because plaintiff's description of unwanted physical contact in his work environment did not rise to the requisite level of outrageous conduct. Marley v. Ibelli, 203 F.Supp.2d 302, 311, judgment affirmed 52 Fed.Appx. 564 (2d Cir.2002).

S.D.N.Y.2001. Subsec. (1) quot. in case quot. in disc. Investigator for city's office of medical examiner sued city, police department, and members of city department of investigation, alleging intentional infliction of emotional distress, among other claims, arising from the criminal prosecution and subsequent acquittal of plaintiff for the theft of a ring from a death scene. This court granted defendants partial summary judgment, holding, inter alia, that plaintiff's emotional-distress claim failed, because no reasonable jury could find that defendants' conduct was designed only to harm plaintiff, who acknowledged that defendants' initiation of the criminal prosecution was intended to prevent embarrassment to the city from media reports of plaintiff's huge overtime earnings. Savino v. City of New York, 168 F.Supp.2d 172, 179, judgment reversed in part 331 F.3d 63 (2d Cir.2003).

S.D.N.Y.2000. Com. (h) cit. in case quot. in disc. Consumers sued issuer of credit card, among others, for, inter alia, intentional infliction of emotional distress in connection with defendant's repeated telephone calls to plaintiffs in an attempt to recover a debt owed by their daughter-in-law. Dismissing the complaint, the court held, in part, that even if plaintiffs' allegations of telephone calls at unusual hours were true, such conduct did not constitute extreme and outrageous behavior on defendant's part. Conboy v. AT & T Corp., 84 F.Supp.2d 492, 507, affirmed241 F.3d 242 (2d Cir.2001).

S.D.N.Y.1998. Com. (d) quot. in case quot. in disc. An assistant to a university dean sued the university for civil-rights violations and intentional infliction of emotional distress, among other claims. Plaintiff alleged that the dean made sexual comments regarding his attraction to plaintiff, repeatedly asked her to dinner, called her at home, and sent her expensive gifts. After plaintiff complained to the university's affirmative action office, the dean searched her desk, erased her computer files, falsely accused her of misplacing files, gave her several memoranda criticizing her performance, and transferred her to a menial position in another department. This court dismissed in part plaintiff's claims, holding, inter alia, that plaintiff failed to state an emotional-distress claim.

Plaintiff's allegations regarding the dean's sexual harassment and retaliatory conduct, while more than reprehensible if true, did not constitute extreme and outrageous conduct. Burrell v. City University of New York, 995 F.Supp. 398, 416.

S.D.N.Y.1998. Com. (d) quot. in case cit. in disc. Female former employee sued former employer and various supervisors and co-workers for, inter alia, violations of Title VII and intentional infliction of emotional distress. Defendants moved for summary judgment. Granting the motion in part and denying it in part, the court held, among other things, that summary judgment was appropriate to the extent that plaintiff alleged quid pro quo sexual harassment under Title VII, but that material factual issues existed as to whether she was subjected to a hostile work environment, and that the conduct complained of, specifically consistent comments by one of plaintiff's supervisors that were made to debase and humiliate her, was not sufficiently extreme and outrageous as to support an action for intentional infliction of emotional distress. Ponticelli v. Zurich American Ins. Group, 16 F.Supp.2d 414, 440.

S.D.N.Y.1997. Subsec. (1) quot. in case quot. in sup. and adopted in case cit. in disc. A pregnant employee who was terminated six months after commencing maternity leave sued her former employer for wrongful termination in violation of federal law and asserted a pendent state-law claim for intentional infliction of emotional distress. Granting defendant's motion for summary judgment, the court held, inter alia, that plaintiff failed to state a claim for intentional infliction of emotional distress under New York law, since she was unable to satisfy, even remotely, any of the tort's elements pursuant to Restatement (Second) of Torts § 46. The court said that plaintiff's claim for intentional infliction of emotional distress involved no factual allegations independent of those relating to her termination. Lacoparra v. Pergament Home Centers, Inc., 982 F.Supp. 213, 230, 231.

S.D.N.Y.1997. Cit. in headnote, quot. in case quot. in sup., com. (d) quot. in case quot. in sup., com. (f) quot. in ftn. in sup. An employee sued his employer and supervisors for intentional infliction of emotional distress, after he was removed from his position during a corporate reorganization and placed on “surplus” status; he was subsequently discharged following his failure to report to work for medical reasons. Granting defendants' motion for summary judgment, the court held, inter alia, that defendants' alleged conduct in frustrating plaintiff's attempts to find a “budgeted” position, transferring him to a small windowless office without a telephone, assigning him work that was not suitable for someone of his experience, and removing plaintiff's name from a company-newsletter article about a course that plaintiff had taught was not sufficiently extreme and outrageous to state a claim for intentional infliction of emotional distress. Mariani v. Consolidated Edison Co. of New York, 982 F.Supp. 267, 267, 273, 277, order affirmed 172 F.3d 38 (2d Cir.1998).

S.D.N.Y.1997. Com. (h) cit. in ftn. The former senior vice president and publisher of a magazine was demoted and then fired, allegedly because she became pregnant with a second child. The vice president sued her former employer for federal Title VII violations, violations of the New York State and City Human Rights Laws, and intentional infliction of emotional distress, among other claims. This court granted defendant's motion to dismiss the emotional-distress and negligent-supervision claims, holding, inter alia, that it was extraordinarily unlikely that New York courts

would allow liability for employment discrimination on the emotional-distress theory in the face of the legislature's enactment of a more limited remedy. The court stated that recognizing a cause of action for intentional infliction of emotional distress based on employment discrimination would extend liability for punitive damages where the legislature had declined to do so in the Human Rights Law. The court further concluded that, while the conduct alleged was reprehensible, New York courts would find it an insufficient basis for liability. Silberstein v. Advance Magazine Publishers, Inc., 988 F.Supp. 391, 392.

S.D.N.Y.1996. Com. (d) quot. in disc. A father and son whose application for an investment account was denied by a brokerage firm sued the broker for intentional infliction of emotional distress and discrimination on the basis of Canadian citizenship, race, sexual orientation, and disability. This court granted defendant's motion to dismiss, holding, inter alia, that plaintiffs failed to state a claim for intentional infliction of emotional distress, because the conduct alleged by plaintiffs was not extreme and outrageous. Cheung v. Merrill Lynch, Pierce, Fenner & Smith, 913 F.Supp. 248, 254.

S.D.N.Y.1996. Com. (d) quot. generally in case quot. in disc. After his father died, a man allegedly schemed to cause his half-sister to suffer a nervous breakdown so that he could gain control of his mother's assets. The half-sister and the mother sued the man for intentional infliction of emotional distress. This court denied defendant's motion to dismiss, holding, inter alia, that plaintiffs stated an emotional-distress claim, because they alleged that defendant engaged in a continuous course of harassing conduct that commenced around the time of the father's death. Such conduct was geared towards defendant's ultimate economic gain. The court stated that continuous and coercive harassment can establish a cause of action for intentional infliction of emotional distress, and that the alleged events occurred within one year of the filing of the complaint. Neufeld v. Neufeld, 910 F.Supp. 977, 984.

S.D.N.Y.1996. Cit. generally in disc. Fast-food restaurant customer who claimed that he was denied use of the facility's restroom because of his race sued restaurant's franchisee, among others, for, inter alia, violations of 42 U.S.C. §§ 1981 and 1982, and for intentional infliction of emotional distress. Franchisee moved for summary judgment. Granting in part and denying in part the motion, the court held that material factual issues as to whether franchisee's acts were purposefully discriminatory and racially motivated precluded summary judgment on customer's 42 U.S.C. § 1981 claim; use of the restroom did not constitute a property right under 42 U.S.C. § 1982; and franchisee's conduct was not so outrageous or extreme as to support a claim for intentional infliction of emotional distress. Perry v. Burger King Corp., 924 F.Supp. 548, 553.

S.D.N.Y.1995. Cit. in headnote and in sup. After receiving inadequate bonuses, employee sued employer for breach of contract, prima facie tort, and intentional infliction of emotional distress in connection with his demotion from district manager to sales representative. This court granted in part defendant's motion for summary judgment, holding, inter alia, that plaintiff failed to state a viable emotional distress claim, since a demotion by an employer during an employer-employee

dispute does not ordinarily constitute extreme, outrageous conduct, nor can it be assumed to cause severe emotional injury. Cartelli v. Lanier Worldwide, Inc., 872 F.Supp. 1253, 1254, 1256.

S.D.N.Y.1995. Subsec. (1) cit. in headnotes and quot. in case quot. in sup. Residents of apartment buildings sued landlords and others for failure to remove lead paint. Denying in part defendants' motion to dismiss, the court held, inter alia, that plaintiffs stated a cause of action for intentional infliction of emotional distress by alleging that defendants knew that plaintiffs' residences would expose plaintiffs to lead, causing them physical and mental injuries, that lead poisoning and its risks would cause any parent of a young child to suffer severe emotional distress, including ongoing concern for and fear of the child's safety, and that defendants' failure to prevent plaintiffs' exposure to lead paint in violation of federal and local law was outrageous. German v. Federal Home Loan Mortg. Corp., 885 F.Supp. 537, 542, 571.

S.D.N.Y.1995. Cit. in headnote, subsec. (1) quot. in case cit. in disc. Deaf employee who was dismissed for allegedly stealing a co-worker's money sued employer for, inter alia, violations of the Americans with Disabilities Act and intentional infliction of emotional distress. Employee, who could communicate only via a sign language interpreter, argued, among other things, that a human-resources manager with little signing experience knowingly misinterpreted his side of the story, misrepresenting to employer that he stole the money in order to pay off credit-card debt. Granting in part and denying in part employer's motion for summary judgment on the statutory claims and granting the motion with regard to the common law claim, the court held that employee failed to establish that human-resources manager's actions were outrageous or that she intended to cause employee emotional distress. Mohamed v. Marriott Intern., Inc., 905 F.Supp. 141, 144, 157.

S.D.N.Y.1995. Subsec. (1) cit. in headnotes and quot. in case quot. in sup. An attorney sued her former law firm for, among other claims, civil-rights violations and intentional infliction of emotional distress, alleging that she was discriminated against and fired because she was a woman, became pregnant, and had a child. Plaintiff alleged that the firm isolated her from firm activities after learning of her pregnancy, that a firm partner had stated that the firm should stop hiring women, and that her billable hours had decreased because the firm told her that no work was available. This court granted in part defendant's motion for summary judgment, holding, inter alia, that plaintiff failed to state an emotional-distress claim, because defendant's conduct was not extreme and outrageous. Sigmon v. Parker Chapin Flattau & Klimpl, 901 F.Supp. 667, 671, 681.

S.D.N.Y.1995. Subsec. (1) cit. in headnotes and quot. in case quot. in sup., com. (d) quot. in sup. A terminated hospital employee sued the hospital for age discrimination and intentional infliction of emotional distress. Plaintiff alleged that the visits by the supervisor and the employee from human resources were done in such a way so that all of her coemployees could observe her being disciplined and were used to intimidate, shock, and place pressure upon her. This court granted hospital partial summary judgment, holding, inter alia, that plaintiff failed to establish intentional infliction of emotional distress, since the actions by plaintiff's supervisors fell far short of the extreme- and outrageous-behavior standard. The court stated that threats of termination did not rise

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to the level of extreme and outrageous behavior. Stylianou v. St. Luke's/Roosevelt Hosp. Center, 902 F.Supp. 54, 55, 57.

S.D.N.Y.1995. Cit. generally in sup., subsec. (1) quot. and adopted in case quot. in disc., com. (d) quot. in case quot. in sup. Former employee sued former employer for sexual harassment under Title VII, and for the common law tort of intentional infliction of emotional distress. Employer moved to dismiss. Granting the motion, this court held that dismissal of the Title VII claim was appropriate where employee failed to exhaust her administrative remedies and where she could not prove that employer failed to remedy the harassment. The emotional distress claim warranted dismissal because employee's allegation that employer retaliated against her by subjecting her to humiliating criticism and adverse job evaluations, and depriving her of certain work-related opportunities, did not rise to the level needed to sustain a claim of outrageous conduct. Walsh v. National Westminster Bancorp., Inc., 921 F.Supp. 168, 174.

S.D.N.Y.1994. Com. (d) quot. in case quot. in sup. Former resident of managed-care retirement community sued assignee of community's operator for refund of plaintiff's entrance fee, alleging, among other claims, that she suffered emotional distress and should be awarded $1 million. The court dismissed, holding, inter alia, that the failure or inability of defendant to pay the entire amount of its obligations under a nonrecourse note did not constitute conduct that could be deemed outrageous or beyond the possible bounds of decency. The court said that defendant, at worst, was selfishly pursuing its own business interests at plaintiff's expense. Barnum v. Millbrook Care Ltd. Partnership, 850 F.Supp. 1227, 1238.

S.D.N.Y.1994. Cit. and quot. in sup., com. (d) quot. in sup. Two cruise-ship passengers and their husbands sued the cruise line for negligence and intentional infliction of emotional distress after a cabin steward raped one woman and verbally assaulted the other. Plaintiffs asserted that authorities in St. Thomas and Miami were never notified of plaintiffs' complaints, that evidence was collected by ship personnel in a haphazard way, and that defendants' attorney misrepresented applicable law. This court granted defendants summary judgment, holding, inter alia, that defendants did not owe a duty to aid plaintiffs in the subsequent investigation of plaintiffs' complaints and that defendants' conduct surrounding the subsequent investigation did not constitute intentional infliction of emotional distress. While defendants' conduct may have been unsympathetic or even callous, it was not so extreme as to be utterly reprehensible. York v. Commodore Cruise Line, Ltd., 863 F.Supp. 159, 164-165.

S.D.N.Y.1993. Cit. and quot. in case cit. in disc. Hispanic female employee sued her former employer, manager, and company vice president, alleging discriminatory discharge, discrimination in hiring, and sexual harassment. Granting in part defendants' motion to dismiss, this court held, inter alia, that, under New York law, allegations that the employer's racial discrimination caused plaintiff emotional distress did not give rise to liability for intentional infliction of emotional distress. Cruz v. Ecolab Pest Elimination Div., Ecolab, Inc., 817 F.Supp. 388, 393.

S.D.N.Y.1993. Subsec. (1) cit. and quot. in sup., com. (d) quot. in case quot. in sup. Model attacked by woman at a party hosted by fashion studio sued the studio, among others, for intentional infliction of emotional distress, alleging that, one month after plaintiff's attack, studio held fashion show with models made up to appear that they had blood flowing from their foreheads down their cheeks similar to the way plaintiff looked immediately after her attack. The court granted defendant's motion for summary judgment, holding that, taking plaintiff's assertion as true, that defendant attempted to capitalize upon plaintiff's assault for its own fashion/business purposes, defendant's primary purpose was to advance its own business interests, and any conduct that harmed plaintiff was incidental and therefore not actionable. Fontaine v. Ryan, 849 F.Supp. 190, 204.

S.D.N.Y.1992. Subsec. (1) cit. in disc., com. (d) quot. in disc. A former employee who was fired from his job sued his former employer and former co-workers, alleging age discrimination, tortious interference with contract and intentional infliction of emotional distress. He specifically asserted that allegations against him of sexually harassing a subordinate female employee were merely a pretext for his firing so that his employer could be relieved of any obligation to pay his salary and future retirement benefits. Granting in part defendants' motion to dismiss plaintiff's claim for intentional infliction of emotional distress, this court held, inter alia, that plaintiff's allegations with respect to his discharge and the circumstances leading up thereto fell far short of the requisite level of outrageousness. Augugliaro v. Brooks Bros., Inc., 802 F.Supp. 956, 964.

S.D.N.Y.1992. Com. (d) quot. in sup. Black female employee sued railroad for employment discrimination under state and federal law, intentional infliction of emotional distress, and prima facie tort, alleging that she was denied promotion to four positions for which she was qualified and that the positions were awarded to white employees who were equally or less qualified. The court granted in part railroad's motion for summary judgment, holding that issues of fact as to whether railroad's articulated reasons for failing to promote plaintiff were pretextual precluded summary judgment on three of plaintiff's employment discrimination claims, but plaintiff did not allege extreme and outrageous conduct sufficient to sustain a claim for intentional infliction of emotional distress, as her claims were essentially ordinary employment discrimination claims and there was no evidence that railroad acted intentionally in causing plaintiff emotional distress. Bradley v. National R.R. Passenger Corp. (Amtrak), 797 F.Supp. 286, 294.

S.D.N.Y.1992. Subsec. (1) quot. in case cit. in disc. (Erron. cit. as subsec. (a).) Union member who attempted to distribute literature critical of union officials sued the officials for intentional infliction of emotional distress, inter alia, after defendants hired private investigators to put plaintiff's apartment under surveillance. The court denied defendants' motion to dismiss, holding that discovery might establish sufficient facts to permit the trier of fact to determine that one or more of the defendants intended to put plaintiff in fear of his life or well-being. Guzman v. Bevona, 810 F.Supp. 509, 513.

S.D.N.Y.1992. Subsec. (1), com. (d) quot. in case quot. in sup. and quot. generally in sup. Salesman sued his former employer for intentional infliction of emotional distress, inter alia, alleging that

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employer misrepresented reasons for his dismissal and attempted to coerce him into signing a severance agreement to avoid paying him commission. The district court denied defendant's motion to dismiss on other grounds but granted the motion with regard to the emotional distress claim. It held that employer's statements about plaintiff's job performance did not demonstrate sufficiently outrageous conduct. It compared this case to others in which state courts dismissed similar employee claims where employer's behavior was more serious, such as giving unjustifiably poor evaluations, improperly denying vacations, or wrongfully terminating employees. Knudsen v. Quebecor Printing (U.S.A.) Inc., 792 F.Supp. 234, 240.

S.D.N.Y.1992. Subsec. (1), com. (d) quot. but dist. Husband and wife sued hotel for negligent and intentional infliction of emotional distress and loss of consortium resulting after hotel employees erroneously and belligerently informed husband, in response to his repeated requests that they check their registration lists, that his wife had not registered there as a guest. Granting in part hotel's motion to dismiss, the court held that, although plaintiffs' complaint stated a claim for negligent infliction of emotional distress as to husband, in that hotel negligently performed a duty undertaken to locate his wife, husband could not recover for intentional infliction of emotional distress because there was no allegation permitting a reasonable jury to find that hotel's conduct was "utterly intolerable in a civilized community." Perrin v. Hilton International, Inc., 797 F.Supp. 296, 302.

S.D.N.Y.1992. Cit. in disc., com. (d) quot. in disc., quot. in case quot. in disc. and quot. in ftn. An employee who had numerous confrontations with her supervisors ranging from alleged crank phone calls to sexual abuse and bad shift assignments brought a lawsuit under the Federal Employers' Liability Act (FELA) for intentional and negligent infliction of emotional distress. This court granted the employer's motion for summary judgment, determining that disagreements regarding the collective bargaining agreement, disputes over the propriety of invoking formal disciplinary procedures, personality conflicts between managers and employees, and even outright manifestations of personal distaste for an employee did not constitute unconscionable abuse or outrageous behavior. In light of its conclusion, the court deemed it unnecessary to resolve whether the FELA covered emotional distress claims. Visconti v. Consolidated Rail Corp., 801 F.Supp. 1200, 1209, 1210, 1212, 1213.

S.D.N.Y.1990. Subsec. (1) and com. (d) cit. in case quot. in disc. and quot. in case quot. in disc. After a boxing promoter sued a boxer and his agent concerning contracts between the parties, the defendants claimed that the contracts were unconscionable and asserted counterclaims for slander and intentional infliction of emotional distress. Granting the promoter's motion for partial summary judgment, this court held that, despite the promoter's power and stature in the boxing field and that extendable terms of the contracts could amount to the rest of the boxer's professional life, the contracts were not unconscionable when made, according to New York law. The court also held that statements made by the promoter were not sufficiently factual to be susceptible to being proved true or false as to be considered slanderous, nor were certain statements so extreme and uncivil as to provide a cause of action for intentional infliction of emotional distress. The contention that the promoter said or implied that the boxer was not the deserving champion was an insufficient

predicate for such a cause of action, especially where the parties' relationship was defined by a business or employment context. Don King Productions, Inc. v. Douglas, 742 F.Supp. 778, 785, 786.

S.D.N.Y.1990. Com. (d) quot. in disc. A former general manager for an insurance sales office sued his former employer, alleging that the defendant dismissed him to prevent him from obtaining higher pension benefits and to avoid paying him certain commissions that were due and owing to him. He sued on a theory of intentional infliction of emotional distress, inter alia. This court dismissed the claim, holding that nothing in the pleading rose to the level of outrageousness required to maintain a claim for intentional infliction of emotional distress. Lawford v. New York Life Ins. Co., 739 F.Supp. 906, 918.

S.D.N.Y.1990. Cit. in case quot. in ftn. A female railroad engineer sued her employer and its predecessor under the Federal Employers Liability Act (FELA), alleging negligence in failing to protect her from sexual harassment. Denying the defendants' motion for summary judgment, this court held that the plaintiff had stated a cause of action for the negligent infliction of emotional distress under FELA by alleging both physical contact in causing her injuries and a significant physical injury. The court also decided that it need not determine whether the defendants' conduct was extreme and outrageous since the plaintiff had made it quite clear that she was alleging negligent, not intentional, infliction of emotional distress. It noted that a cursory review of New York law on negligent infliction of emotional distress indicated that New York did not follow the majority rule, which required some manifestation of physical injury in order for a plaintiff to recover. Masiello v. Metro-North Commuter RR., 748 F.Supp. 199, 206.

S.D.N.Y.1989. Com. (d) quot. in case cit. in disc. A discharged employee sued his former employer for intentional infliction of emotional distress, inter alia, alleging, among other things, that the defendant forced the plaintiff to sign a termination agreement, slandered him by calling him a swindler at a company meeting, libeled him in a magazine article, and withheld his wages. On the plaintiff's motion to reargue the defendant's motion to dismiss, the court adhered to its decision to dismiss the intentional infliction of emotional distress claim, stating that, under New York law, abusive or wrongful discharge of an at-will employee, without more, did not constitute the extreme and outrageous behavior necessary to give rise to a cause of action for intentional infliction of emotional distress. Loudon v. Hayek, 756 F.Supp. 107, 109.

S.D.N.Y.1989. Subsec. (1), com. (d) quot. in case cit. in disc. After a one-half owner of a woolen materials import and distributing company sued the other shareholder to recover his vested accrued benefits under the retirement and pension plans, the defendant joined a bank that acted as the investment adviser for the plans as a third-party defendant, asserting a claim of intentional infliction of emotional distress, inter alia, against the bank. Granting the third-party defendant's motion to dismiss the claim, the court held not only that the claim was time-barred but also that the allegations that the bank refused to extend a letter of credit and failed to disclose its dealings with a competitor did not amount to the type of outrageous conduct regarded as atrocious and

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utterly intolerable in a civilized community necessary to maintain a claim for intentional infliction of emotional distress. Resnick v. Resnick, 722 F.Supp. 27, 36.

S.D.N.Y.1989. Subsec. (1) quot. in case cit. in disc., coms. (d) and (f) cit. in disc. An employee with a terminal illness who had retired from his job and had begun collecting long-term disability and pension benefits sued his former employer for intentional infliction of emotional distress, inter alia, for allegedly forcing him to retire because of his age and refusing to pay his group life insurance premiums. Granting the defendant's motion for summary judgment, the court held that the conduct of which the plaintiff complained was insufficient as a matter of law to provide the basis for a claim for intentional infliction of emotional distress, because it was not extreme or outrageous nor offensive to a civilized society. The court also stated that, although an actor's knowledge of another's susceptibility to emotional distress by reason of a physical or mental condition might render conduct outrageous, the plaintiff's illness was insufficient to render the defendant's conduct actionable in this case. Rooney v. Witco Corp., 722 F.Supp. 1040, 1043, 1044.

S.D.N.Y.1988. Subsec. (1) and com. (d) quot. in case cit. in disc. A woman sued her former employer, alleging sex discrimination and intentional infliction of emotional distress. The court granted the defendant's motion to dismiss the intentional infliction of emotional distress claim, holding that the plaintiff had failed to state a claim. The court said that the defendant's conduct in sending the plaintiff, who was on sick leave, a letter asking for clarification concerning a specific date for her return to work and stating that she might be terminated for lack of availability did not constitute the extreme and outrageous behavior necessary for the claim. Burger v. Health Ins. Plan of Greater New York, 684 F.Supp. 46, 51.

S.D.N.Y.1987. Subsec. (1) quot. in case cit. in sup., com. (d) quot. in sup. A black female employee sued her employer and management personnel, alleging, inter alia, intentional infliction of emotional distress. The defendants moved for summary judgment. The court granted the defendants' motion because the plaintiff's allegations of negative evaluations, harassment, unfavorable job assignments, and disparaging statements were found insufficient, as a matter of law, to state a claim for intentional infliction of emotional distress. The court stated that such a claim must allege conduct that is sufficiently shocking and outrageous as to surpass all reasonable bounds of decency. Bradley v. Consolidated Edison Co. of New York, Inc., 657 F.Supp. 197, 205.

S.D.N.Y.1987. Subsec. (1) and com. (d) quot. in case quot. in disc. The original owner of an oil painting by Monet that disappeared in Germany during the Second World War sought the return of the painting from a subsequent purchaser. The court found for the plaintiff, holding that the original owner established a superior right to possession of the painting, and ordered the subsequent purchaser to return it. The court stated that the plaintiff did not unreasonably delay her demand for the painting's return and that the unique quality of the painting warranted its return. In dismissing the defendant's counterclaim for intentional infliction of emotional distress, the court held that the original owner's conduct fell short of the requisite atrociousness and intolerableness. DeWeerth v. Baldinger, 658 F.Supp. 688, 696, judgment reversed 836 F.2d 103 (2d Cir.1987), cert. denied 486 U.S. 1056, 108 S.Ct. 2823, 100 L.Ed.2d 924 (1988).

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S.D.N.Y.1987. Subsec. (1) and com. (d) quot. in case quot. in disc. An importer of fine watches sued American and Swiss watch manufacturers for injuries resulting from the defendants' RICO and antitrust violations, fraud, conversion, and intentional infliction of emotional distress, alleging that the defendants conspired to submit documents to the United States Customs Service fraudulently stating that the defendant American manufacturer was not owned or controlled by the Swiss owner of the watch's trademark. This court granted in part and denied in part the defendants' motion to dismiss, holding, inter alia, that the basis for the plaintiff's claim of intentional infliction of emotional distress, that the American manufacturer's trademark recordation led to the plaintiff's federal indictment, was insufficient to state a claim for this tort because the plaintiff failed to allege either specific intent or outrageous conduct by the defendants. Shaw v. Rolex Watch, U.S.A., Inc., 673 F.Supp. 674, 683.

S.D.N.Y.1986. Com. (d) cit. in disc. After providing business and social assistance to the defendant for 15 years, the plaintiff alleged that the defendant agreed to give her a $6.5 million house, a $4 million trust fund, and the rent-free possession of a condominium until she remarried. The plaintiff sued the defendant for, inter alia, intentional infliction of emotional distress, alleging that he reneged and had his agents enter the condominium, strip it of valuable items, change the locks while she was out and her daughter was ill at home, and station armed guards in the lobby to keep out unauthorized persons. This court denied the defendant's motion to dismiss the claim of intentional infliction of emotional distress, holding that the placing of armed guards, the changing of the locks, the exclusion of visitors, the entry without consent and the removal of objects without consent demonstrated a course of conduct designed to intimidate, threaten and humiliate, and that it was for the trier of fact to determine whether those acts were outrageous. Bower v. Weisman, 639 F.Supp. 532, 541.

S.D.N.Y.1986. Com. (c) quot. in sup. The plaintiff sued her former employer for employment discrimination and intentional infliction of emotional distress, alleging that she had been fired while four less experienced and less knowledgeable employees were retained, that her time records were forged to make her appear habitually late, and that she had been told she would be blackballed and unemployable in the industry if she filed a complaint with the State Division of Human Rights. This court granted summary judgment for the employer on the intentional infliction of emotional distress claim, holding that as a matter of law, the conduct the plaintiff alleged, even if true, did not rise to the level of outrageous conduct necessary to constitute the tort under New York law. The court noted that New York had no cause of action for abusive or wrongful employee discharge, and that all of the allegations taken together failed to demonstrate a deliberate and malicious campaign of harassment. Kovich v. Manhattan Life Ins. Co., 640 F.Supp. 134, 136.

S.D.N.Y.1986. Quot. in ftn. An author sought a declaratory judgment against his insurer that its policy provided him with coverage for legal expenses he might incur in defending a lawsuit brought by the subject of a book. Partially awarding the author summary judgment, this court held that the lawsuit brought by the subject of the book for libel and intentional infliction of emotional distress was within the coverage that the policy contemplated and thus required the insurer to indemnify

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the author for legal expenses and any eventual judgment. McGinniss v. Employers Reinsurance Corp., 648 F.Supp. 1263, 1270.

S.D.N.Y.1985. Subsec. (1) and com. (d) quot. in case quot. in sup. Plaintiff, a terminated female sales representative, sued her employer for employment discrimination under Title VII and asserted a state law claim against three of her superiors for intentional infliction of emotional distress. Plaintiff had a persistently unsatisfactory employment record, including her engagement in a forbidden trade practice known as "steering." The Title VII claim was tried to the court; the tort claim was presented to a jury, which found for the plaintiff. The court held for the employer on the Title VII claim, finding the employee's claims of sexual harassment and discrimination unfounded. The court also granted defendants' motions for judgement n.o.v. on the tort claim, holding that plaintiff utterly failed to make out a case for intentional infliction of emotional distress. Buddle v. Heublein, Inc., 613 F.Supp. 491, 497.

S.D.N.Y.1984. Com. (d) quot. in sup. The plaintiff, who compiled a book of verse, poetry, limericks, and epigrams, refused to withdraw portions of the book to which the defendant's parent company objected. When the defendant discontinued promotion, distribution, and sales of the book, the plaintiff sued for intentional infliction of emotional distress. This court granted in part and denied in part the defendant's motion to dismiss for failure to state a claim, holding that the trier of fact had to determine if the defendant's conduct was extreme and outrageous. Conniff v. Dodd, Mead & Co., 593 F.Supp. 266, 269.

S.D.N.Y.1984. Quot. in case quot. in sup., com. (d) quot. in sup. The defendant supervisor corrected the conduct of the plaintiff employee in front of other persons. In a later private conversation, the defendant was alleged to have questioned the plaintiff's sexual preference. The plaintiff sued for intentional infliction of emotional distress in state court. The defendant removed the action to this court and moved for dismissal. This court dismissed the action. The conduct causing such distress must be outrageous, said the court, and the law should not interfere in every case when a person's feelings are hurt. The court concluded that criticism of job performance and questions about sexual preference do not constitute outrageous conduct sufficient to support the tort. Moye v. Gary, 595 F.Supp. 738, 739.

S.D.N.Y.1983. Quot. in part in disc., cit. in sup., subsecs. (1) and (2) cit. in sup., subsec. (2)(a) quot. in part in disc., com. (1) quot. in sup., Caveat quot. in sup. The parents of a murder victim brought an action against the convicted murderer. After disposition of all other issues, the plaintiffs moved for the entry of judgment on their claim for infliction of severe emotional distress. The court noted that the New York Court of Appeals had adopted s 46 of the Restatement of Torts 2d as stating the law of New York as to the tort of infliction of emotional distress. The necessary import of the adoption was that recklessness was one ground under New York law for imposing liability for the infliction of emotional disturbance when it was accompanied by extreme and outrageous conduct. The court also noted that adherence by the New York courts to the Restatement section in question led to the further conclusion that, under certain circumstances, a plaintiff could recover for the infliction of emotional distress where an assault or other wrongful conduct was directed at a

third person. In deciding whether the parents could recover for the trauma they suffered following the discovery of their dying daughter, the court stated that while the Restatement would generally limit recovery to situations where a family member was present at the time of the injury to the third person, a caveat attached to the Restatement section indicated that there might arise situations where such presence was not required as a predicate to the imposition of liability. The court also noted that there was no sound basis in reason or policy for placing such a narrow limit on recovery in such situations. As the assault that led to their daughter's death had taken place in the plaintiffs' home, and they had discovered their horribly injured daughter while still struggling for life, the court decided that the parents could recover on their claim. It accordingly granted the parents' motion for the entry of judgment. Garland v. Herrin, 554 F.Supp. 308, 310, 313-315, reversed 724 F.2d 16 (2d Cir.1983). See above case.

S.D.N.Y.1982. Subsec. (1) cit. in disc., com. (d) quot. in disc. The plaintiff organization brought an action against the authors and publisher of a book allegedly defaming it. The defendants counterclaimed for prima facie tort; they also brought a separate action for malicious prosecution, which set forth essentially the same allegations as those in the counterclaim, and which was dismissed for failure to state a claim. The court dismissed the complaint against the defendants and granted summary judgment in favor of the plaintiff on the defendants' prima facie tort counterclaim, stating that it merely realleged a defective cause of action for a traditional tort. The court rejected the defendants' motion to add a claim of intentional infliction of emotional distress because the plaintiff's acts of attempting to review the manuscript and threatening to commence a lawsuit could not be characterized as “outrageous;” thus the claim was legally deficient. Church of Scientology of California v. Siegelman, 94 F.R.D. 735, 740, 741.

S.D.N.Y.1982. Subsec. (1) cit. in sup. A physician brought an action against the chairman of a peer review committee of a county medical society, alleging that an investigation undertaken by the committee into claims that he was overcharging for his services went beyond legitimate necessity by inquiring into the merits of his underlying procedures. The defendant moved for a summary judgment. In response to the plaintiff's claim that the defendant's conduct during the investigation constituted an intentional infliction of severe emotional distress, the court stated that to support such a cause of action, the defendant's conduct would have had to rise to a level of extreme and outrageous behavior exceeding all bounds usually tolerated by a decent society. The court found that the defendant's conduct during the investigation scarcely rose to such a level, and the plaintiff's complaint failed to state a cause of action for intentional infliction of severe emotional distress. The complaint was dismissed. Greenfield v. Kanwit, 546 F.Supp. 220, 225, affirmed 714 F.2d 113 (2d Cir. 1982).

S.D.N.Y.1980. Subsec. (1) and com. (d) quot. in a case quot. in sup. The plaintiff was employed as a truck driver by the defendant until he was designated as a voluntary quit by defendant. The plaintiff, asserting that he had been ill, filed a grievance of wrongful discharge with his union. The grievance led to an arbitration hearing at which it was adjudged that the plaintiff was a voluntary quit. According to the terms of the union's contract with the defendant, the decision of the arbitration panel was final and binding on all parties. The plaintiff then sued both the employer and the union

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but did not assert a claim against the union. The plaintiff alleged, in part, that the real reason for his discharge had been a vendetta against him, performed by the defendant's dispatcher in retaliation for the plaintiff's complaints about work practices. The union asked and received dismissal of the complaint against it. The employer filed a pre-answer motion for dismissal of the complaint or for summary judgment maintaining, inter alia, that the plaintiff's suit was an attempt to vacate the arbitration award, was time-barred, and was barred for failing to allege that the union had breached its duty of fair representation. The defendant's motion for summary judgment was granted as to plaintiff's claim of wrongful discharge. The plaintiff's claim of a vendetta actually amounted to outrageous conduct causing the plaintiff emotional distress, so that it was a claim for the common law tort of intentional infliction of emotional distress. The court maintained that liability attaches under this theory when the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and was atrocious and utterly intolerable in a civilized community. The court did not find that the defendant was liable for such conduct. Additionally, the court held that defendant's acts constituted contract grievances subject to the compulsory grievance machinery provided for by the collective bargaining agreement. The court therefore dismissed the action against the defendant. Dinger v. Anchor Motor Freight, Inc., 501 F.Supp. 64, 69.

S.D.N.Y.1973. Cit. This was an action brought by the plaintiff, the former wife of the defendant, to determine the continued validity of an antenuptial agreement in the light of the husband's subsequent divorce. Plaintiff also sought damages for defendant's allegedly tortious course of conduct contending that the defendant had harassed her by bringing continuous litigation against her based upon their marital difficulties, and that this treatment had caused her to suffer greatly. Their marriage originated in 1956 and lasted until 1961 when a separation decree was granted. The period between 1961 and 1967 was fraught with continuous litigation, and the defendant obtained a divorce decree in 1967. The court dismissed plaintiff's complaint stating that both plaintiff and defendant have a right to engage in legal proceedings, and the defendant's conduct since 1964 had not been malicious and without justification, but rather was strictly related to the legitimate enforcement of legal rights he held against the plaintiff. Rosenstiel v. Rosenstiel, 368 F.Supp. 51, 64, aff'd without op. 503 F.2d 1397 (2d.Cir.1974).

S.D.N.Y.Bkrtcy.Ct.

S.D.N.Y.Bkrtcy.Ct.2017. Cit. in disc. Former prisoner, whose convictions for various crimes were vacated, filed a motion seeking leave to assert claims for, among other things, malicious prosecution, infliction of emotional distress, and spoliation of evidence against, among others, bankrupt car manufacturer and successor that purchased manufacturer's assets, based on allegations that manufacturer was complicit in his wrongful convictions. This court denied plaintiff's motion as to successor, holding, among other things, that successor did not assume manufacturer's tort liabilities under the sale agreement between successor and manufacturer. The court cited Restatement Second of Torts §§ 46, 653, and 870 in noting that plaintiff's claims for malicious prosecution, infliction of emotional distress, and spoliation of evidence were claims asserted under tort law. In re Motors Liquidation Company, 576 B.R. 761, 776.

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W.D.N.Y.

W.D.N.Y.1995. Subsec. (1) quot. in case quot. in ftn., com. (d) quot. in case quot. in ftn. A college student who had engaged in an extensive research project sued a fellow student and four doctors who had published plaintiff's research project without attributing plaintiff's contribution, alleging, among other claims, intentional infliction of emotional distress. This court granted defendants' motion to dismiss, holding the Copyright Act preempted plaintiff's claims for unlawful conversion, unlawful competition, and unjust enrichment. Furthermore, since plaintiff did not own a copyright, she failed to state a copyright-infringement claim. Since no federal issues survived, plaintiff's state law cause of action for intentional infliction of emotional distress would be dismissed for lack of jurisdiction. The court noted that the unauthorized publication of plaintiff's study and research project fell far short of the "extreme and outrageous" standard. Patrick v. Francis, 887 F.Supp. 481, 486.

W.D.N.Y.1992. Com. (d) cit. in sup. Former employee brought an action for intentional infliction of emotional distress, inter alia, against his former employer, alleging that his supervisors engaged in a systematic course of conduct that was threatening, harassing, and calculated to cause him to resign or retire early. Granting defendant's motion for summary judgment, the court found no significant indication that defendant's conduct toward plaintiff reached the level of extreme and outrageous conduct required under New York law to state a prima facie case of intentional infliction of emotional distress. Spence v. Maryland Cas. Co., 803 F.Supp. 649, 673, judgment affirmed 995 F.2d 1147 (2d Cir.1993).

W.D.N.Y.1991. Subsec. (1) cit. in case quot. in disc., com. (d) quot. in case quot. in disc. Two teachers sued the superintendent of schools and the president of the board of education, among others, for intentional infliction of emotional distress, inter alia, after the board suspended the teachers for making an adult-theme movie with school equipment and then turned the videotape over to the district attorney's office for a determination as to whether it was pornographic. The court held that the defendants were not liable for intentional infliction of emotional distress because the plaintiffs did not establish that the defendants' conduct was outrageous, extreme, and beyond the bounds of decency. Rothschild v. Board of Educ. of City of Buffalo, 778 F.Supp. 642, 661.

W.D.N.Y.1984. Subsec. (1) cit. in case quot. in disc., com. (d) cit. in case quot. in disc. In a suit involving age and gender discrimination in the hiring and discharge of employees, the individual plaintiffs also sued a hotel for alleged intentional infliction of emotional harm. The defendant filed a motion to dismiss. The court held, inter alia, that the plaintiffs stated a cause of action against a specific hotel for intentional infliction of emotional distress. The court explained that the plaintiffs alleged that the defendant implemented a willful, wanton, and malicious claim to illegally terminate them; the allegation survived the motion to dismiss because, if proven to be accurate, the elements of the allegation may be in accord with New York's requirements for intentional infliction

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of emotional distress. People of State of N.Y. by Abrams v. Holiday Inns, Inc., 656 F.Supp. 675, 683.

W.D.N.Y.Bkrtcy.Ct.

W.D.N.Y.Bkrtcy.Ct.1982. Subsec. (1) quot. but dist. (Erron. cit. as § 846.) A bank commenced an action against a debtor for the balance due on a delinquent installment promissory note. The debtor filed for a Chapter 13 bankruptcy and counterclaimed for damages, as he alleged that the bank had caused him intentional infliction of emotional distress. This court entered judgment for the bank and dismissed the debtor's counterclaim. The court stated that the debtor had a heavy burden to prove that the bank's actions were outrageous and beyond all bounds of decency. It found that most courts look for a planned program of harassment or threats in the bank's actions to see if they were outrageous. The court noted that if the bank's actions were outrageous, then causation and damages were virtually presumed. The court found that repeated telephone calls to the debtor from the bank and visits by bank employees did not constitute conduct outrageous enough to support a claim of intentional infliction of emotional distress. The court stated that a creditor did have a right to pursue a delinquent account. The court noted that the debtor's claimed physical symptoms of distress could have been caused by his marital problems or by problems he had with the court over the handling of a surrogate matter as executor for an estate, for which he was suspended from practicing law for two years. The court stated that the debtor failed to prove a causal relation between his physical symptoms and the bank's action. In re Baker, 18 B.R. 243, 244.

E.D.N.C.

E.D.N.C.2017. Com. (d) cit. and quot. in cases quot. in sup. Former employee of college filed an employment-discrimination action against college and its president, alleging, among other things, that president engaged in numerous instances of rude behavior toward him and was thus liable to him for intentional infliction of emotional distress. This court granted summary judgment for defendants, holding, as a matter of law, that president did not engage in extreme and outrageous conduct, as required to state a claim for intentional infliction of emotional distress. The court explained that, under North Carolina law and Restatement Second of Torts § 46, liability for intentional infliction of emotional distress did not extend to mere insults, indignities, or threats. Howard v. College of the Albemarle, 262 F.Supp.3d 322, 340.

E.D.N.C.2015. Com. (j) quot. in case quot. in sup. Individual who was arrested for assault on a government official brought various claims against arresting officer and city after the charge against him was dropped, alleging, among other things, intentional infliction of emotional distress (IIED). This court granted defendants' motion for summary judgment on plaintiffs' IIED claim, holding that plaintiff failed to proffer any medical documentation or other evidence from which a jury could find that he suffered severe emotional distress within the meaning of Restatement Second of Torts § 46. While plaintiff asserted that it had been almost impossible for him to function since his arrest, he had not sought any treatment for his emotional distress other than one visit

to a chaplain two or three weeks after his arrest; although a medical diagnosis was not always necessary, North Carolina courts had found a plaintiff's decision not to seek a medical diagnosis highly probative of the alleged level of distress. Johnson v. City of Fayetteville, 91 F.Supp.3d 775, 814.

E.D.N.C.2013. Com. (d) quot. in case quot. in sup., com. (j) quot. in disc. Female former employee, acting pro se, sued former supervisor and male co-worker, asserting pendent state-law claims for intentional infliction of emotional distress (IIED) in connection with allegations of sexual harassment. Granting defendants' partial motion to dismiss, this court held that plaintiff's allegations that supervisor was rude, gossiped, lied, made plaintiff perform tasks that were outside the scope of her job, and interfered with her ability to work failed to rise to the level of extreme and outrageous conduct necessary to state a claim for IIED under North Carolina law. Furthermore, while co-worker's alleged acts of attempting to kiss her, following her to her car and the restroom, and becoming more aggressive with his flirtations so that she had to physically push him away were improper, they were not the sufficiently extreme and outrageous conduct that North Carolina required for a claim of IIED where, as here, sexual harassment was at issue. Moody-Williams v. LipoScience, 953 F.Supp.2d 677, 690, 692.

E.D.N.C.1995. Coms. (d) and (j) quot. in case quot. in sup. Former employee, alleging she was dismissed for filing a sexual-harassment complaint with the EEOC, sued employer for retaliatory discharge and intentional infliction of emotional distress. Employer moved for summary judgment. Granting the motion, the court held that employee was unable to establish a prima facie case for retaliatory discharge, while employer had articulated several nondiscriminatory reasons for the termination. Furthermore, plaintiff, who admitted she never believed her job was in jeopardy for refusing to accede to her supervisor's allegedly harassing demands, had not shown that the distress she claimed to have experienced was so severe as to be unendurable. Bray v. Tenax Corp., 905 F.Supp. 324, 330.

M.D.N.C.

M.D.N.C.2019. Com. (d) quot. in case quot. in sup. Student brought a claim for intentional infliction of emotional distress (IIED) against, among others, student's purported assailant and university counselor, who was in a romantic relationship with assailant at the time of the purported assault, alleging, inter alia, that, after assailant sexually assaulted her, defendants slandered her when she tried to report the assault and disclosed her confidential sexual-assault report widely within the university. This court denied in part defendants' motion to dismiss, holding that plaintiff alleged sufficient facts to establish a claim for IIED. The court relied on Restatement Second of Torts § 46, Comment *d*, in defining the extreme and outrageous conduct necessary for an IIED claim as conduct that was so extreme and outrageous as to go beyond all possible bounds of decency, and explained that assailant's alleged sexual assault and counselor's use of confidential university records to slander plaintiff constituted such extreme and outrageous conduct. McClean v. Duke University, 376 F.Supp.3d 585, 612.

M.D.N.C.2014. Subsec. (1) cit. in ftn. Widow of railroad employee brought an action against railroad under the Federal Employers' Liability Act (FELA), alleging that her husband committed suicide in response to harassment he received on the job for refusing to violate certain safety regulations. Granting in part defendant's motion to dismiss, this court held that plaintiff's FELA claim did not satisfy the "zone of danger" test, because her injuries did not result from a physical impact or an imminent threat of physical impact. The court, citing Restatement Second of Torts § 46(1), noted that even severe mental or emotional injuries that led to physical manifestations were insufficient, on their own, to bring a claim within FELA. Fulk v. Norfolk Southern Ry. Co., 35 F.Supp.3d 749, 755.

M.D.N.C.2012. Com. (d) quot. in case quot. in sup. Undergraduate student sued university for intentional infliction of emotional distress (IIED) and other claims in connection with its conduct toward her in the months following her rape at an off-campus party, including its actions in sending her a letter in which it allegedly encouraged her to transfer to another institution. This court granted summary judgment for university on student's IIED claim, holding that the record did not establish any basis for finding that university's actions amounted to extreme and outrageous conduct or that student suffered severe emotional distress as a result. The court reasoned that there was no evidence that university coerced, duped, or tricked student into transferring; instead, the undisputed facts showed that student initiated the transfer discussions and intended to transfer permanently, and that university merely sent student a form letter based on a template used for any transferring students. Rouse v. Duke University, 914 F.Supp.2d 717, 728.

M.D.N.C.2011. Com. (i) quot. in case quot. in sup. Three former members of university lacrosse team, who were investigated, but not indicted, on charges of rape, sexual assault, and kidnapping, brought a claim for intentional infliction of emotional distress (IIED) against university, city police officers, and others, alleging that defendants made false and inflammatory statements, manufactured inculpatory evidence and concealed exculpatory evidence, and intimidated witnesses. Dismissing plaintiffs' IIED claim, this court held that plaintiffs failed to include any factual allegations as to each plaintiff's emotional or mental disorders, condition, or diagnosis, in order to state a claim that each of them suffered from severe emotional distress; they also failed to sufficiently allege a link between any emotional or mental disorder or condition and the specific misconduct alleged in this claim. McFadyen v. Duke University, 786 F.Supp.2d 887, 979.

M.D.N.C.2004. Com. (j) quot. in case quot. in disc. African-American female employee sued former employer for civil-rights violations and intentional and negligent infliction of emotional distress, inter alia, alleging that she was discriminated against and was fired in retaliation for her EEOC complaint. This court granted defendant summary judgment, holding, inter alia, that plaintiff's claim for negligent infliction of emotional distress failed because she did not provide evidence to support conclusion that she suffered emotional distress, including chronic frustration, insomnia, and fear. Plaintiff's mere allegation that she was frustrated, afraid, and sleep deprived did not show that she suffered severe distress. She did not indicate that medical expert would testify

as to her condition, and she did not seek a diagnosis. Kimes v. Laboratory Corp. of America, Inc., 313 F.Supp.2d 555, 568.

M.D.N.C.2004. Com. (d) quot. in ftn. and quot. in case quot. in disc. Librarian who was terminated from her position brought suit against county and its library-services director, alleging violations of various federal statutes and the state disabilities act, and asserting state-common-law claims for intentional and negligent infliction of emotional distress. Granting in part defendants' motion for summary judgment, and dismissing plaintiff's claim for intentional infliction of emotional distress, the court held, inter alia, that plaintiff failed to allege that defendants' harassment constituted extreme and outrageous conduct that went beyond all bounds of decency and would be considered intolerable in a civilized community. Sheaffer v. County of Chatham, 337 F.Supp.2d 709, 732.

M.D.N.C.2001. Coms. (d) and (j) quot. in case quot. in sup. Maintenance employee for private school sued the school and school officials for violations of the Age Discrimination in Employment Act (ADEA) and the Rehabilitation Act, and for negligent and intentional infliction of emotional distress. This court granted the officials' motion to dismiss, holding, inter alia, that defendants' handling of plaintiff's termination was not extreme and outrageous. Furthermore, plaintiff did not suffer severe emotional distress as required to state a claim for negligent and intentional infliction of emotional distress. Plaintiff's conclusory allegation of damages for mental anguish and pain and suffering was insufficient to state an emotional-distress claim. Swaim v. Westchester Academy, Inc., 170 F.Supp.2d 580, 584, 585.

M.D.N.C.2001. Com. (d) quot. in case quot. in sup. African-American employee sued employer after being terminated from assembly-line position, alleging, inter alia, intentional infliction of emotional distress. Granting in part employer's partial motion to dismiss, this court held, inter alia, that defendant's conduct in giving plaintiff excessive workload and creating a hostile work environment, while deplorable, did not rise to the level of “extreme and outrageous” conduct necessary to sustain claim for intentional infliction of emotional distress. Thomas v. Northern Telecom, Inc., 157 F.Supp.2d 627, 634.

M.D.N.C.1999. Com. (f) cit. in disc. Employee who was discharged after he suffered a heart attack and went on medical leave sued employer for, in part, intentional infliction of emotional distress. Granting in part defendant's motion to dismiss, the court held, inter alia, that defendant's conduct in terminating plaintiff's employment at a time when plaintiff was in poor health did not rise to the level of extreme and outrageous action necessary to state a claim for intentional infliction of emotional distress. The court said that while a defendant's knowledge of a plaintiff's particular susceptibility to distress would bear upon a determination of whether conduct was extreme and outrageous, it was not dispositive. Atkins v. USF Dugan, Inc., 106 F.Supp.2d 799, 811.

M.D.N.C.1999. Com. (f) cit. in disc. Employee who was discharged while on an approved medical leave of absence sued former employer for violations of the Family and Medical Leave Act (“the Act”) and intentional and negligent infliction of emotional distress. Granting in part and denying in part defendant's motion to dismiss, the court held that plaintiff's allegations of violations of the Act

were sufficient to withstand the motion to dismiss, and that, while the conduct complained of was not so extreme and outrageous as to support a claim for intentional infliction of emotional distress, a triable issue existed as to whether defendant should have foreseen that its alleged negligence in the manner in which it terminated plaintiff would have caused her severe emotional distress. Buser v. Southern Food Service, Inc., 73 F.Supp.2d 556, 573.

M.D.N.C.1995. Com. (d) quot. in sup. After police responded to a 911 call reporting a hostage situation in an apartment complex involving a man with psychiatric problems, they proceeded to tackle the man, handcuff him, and have him involuntarily committed. The man sued the city and the police officers for civil-rights violations and intentional infliction of emotional distress, among other claims. This court granted defendants summary judgment, holding, inter alia, that plaintiff failed to state an emotional-distress claim, because there was no showing that defendants engaged in extreme and outrageous conduct that was intended to and did in fact cause plaintiff severe and disabling emotional distress. Defendants acted as reasonable police officers in attempting to prevent plaintiff from harming himself and others, and their intent was to keep plaintiff from hurting himself or others. White v. Town of Chapel Hill, 899 F.Supp. 1428, 1438, affirmed 70 F.3d 1264 (4th Cir.1995).

M.D.N.C.1994. Com. (d) cit. in headnotes and quot. in case quot. in sup. A nurse who was fired from her job at a poultry-processing plant sued the plant owner for race discrimination and intentional infliction of emotional distress, among other claims. This court granted defendant summary judgment, holding, inter alia, that defendant's conduct in terminating plaintiff's employment was not extreme and outrageous. The court stated that it was not considered extreme and outrageous conduct for defendant, after the institution of this lawsuit by plaintiff, to subpoena plaintiff's employment records from a subsequent employer for the purposes of defending against plaintiff's lawsuit. Cromer v. Perdue Farms, Inc., 900 F.Supp. 795, 797, 802, affirmed 65 F.3d 166 (4th Cir.1995).

W.D.N.C.

W.D.N.C.2016. Com. (j) quot. in case quot. in sup. African American employee brought, inter alia, a claim for negligent infliction of emotional distress (NIED) against his former employer, alleging that defendant failed to investigate plaintiff's reports of his supervisor's and coworker's misconduct, including that they verbally and physically assaulted him, threatened to have him fired, drove a forklift at him, and ultimately caused his suspension. This court held that defendant's motion for summary judgment would be granted as to plaintiff's NIED claim unless plaintiff could show cause as to why there was a genuine issue of material fact on the element of "severe emotional distress." Quoting Restatement Second of Torts § 46, the court explained that, in accordance with North Carolina law, liability should be imposed only where the distress inflicted was so severe that no reasonable man could be expected to endure it, and plaintiff's testimony regarding his stress, lack of motivation, and difficulty sleeping was not sufficient. Reid v. Dalco Nonwovens, LLC, 154 F.Supp.3d 273, 297.

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W.D.N.C.2011. Com. (d) quot. in case quot. in sup. (general cite). As part of their action for unpaid wages under the Fair Labor Standards Act, former employees of a boarding school for troubled teens brought, inter alia, a pendent state-law claim for intentional infliction of emotional distress (IIED) against school. This court allowed defendant's motion to dismiss the IIED claim, holding that defendant's alleged conduct in concealing the violent histories of the boys whom plaintiffs would be supervising was not sufficiently extreme and outrageous to state an IIED claim under North Carolina law; while defendant's alleged conduct could be construed as counterproductive to an efficient work environment, there were no plausible allegations that it went beyond all possible bounds of decency, especially where the alleged concealment was viewed in the context of plaintiffs seeking and obtaining employment at a school for troubled teens and knowing from day one of the violent tendencies of the boys they were supervising. Bonham v. Wolf Creek Academy, 767 F.Supp.2d 558, 572.

W.D.N.C.2002. Com. (d) quot. in case quot. in disc. African-American employee who alleged that her employment was terminated because of her race and her refusal to sign a false affidavit sued former employer for, in part, intentional infliction of emotional distress. Granting in part defendant's motion to dismiss, the court held, inter alia, that defendant's alleged actions in making a racially discriminatory statement to plaintiff after she refused to sign the affidavit, and then dismissing her from her position, did not rise to the level of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Jackson v. Blue Dolphin Communications of North Carolina, L.L.C., 226 F.Supp.2d 785, 794.

W.D.N.C.2000. Cit. in disc. Female employees at brake shop sued employer and plant manager for, among other things, intentional infliction of emotional distress arising from alleged sexual harassment by defendants. Denying defendants summary judgment on emotional-distress claim, this court held, inter alia, that defendants' alleged sexual harassment was sufficiently extreme to support plaintiffs' claim for intentional infliction of emotion distress. Cox v. Indian Head Industries, Inc., 123 F.Supp.2d 892, 902.

W.D.N.C.1991. Com. (d) quot. in sup. A stockbroker was discharged from his employment allegedly for trading extensively in accounts for customers he knew had died well before he began such trading. The stockbroker claimed that the real reason for the termination was that he had discovered widespread insider trading was being conducted by employees with the tacit approval of the office manager. The stockbroker sued his employer, alleging, among other things, retaliatory discharge and intentional infliction of emotional distress. This court granted in part the employer's motion for summary judgment. As to the emotional distress claim, the court held that while the employer's actions in terminating the stockbroker may have been insensitive or inappropriate, the court did not believe that the evidence indicated that the conduct was extreme or outrageous. The court found that the stockbroker had merely lost his job that was governed by an employment agreement providing for discharge without cause. Haburjak v. Prudential Bache Securities, Inc., 759 F.Supp. 293, 303.

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W.D.N.C.1990. Com. (d) quot. in sup. Black former and current employees sued an employer for civil rights violations. This court granted summary judgment for the defendant on all of the plaintiffs' § 1981 claims, holding that claims for inadequate pay, demotion, termination, retaliatory discrimination, racial harassment, and failure to promote were not actionable under this statute. The court also granted summary judgment for the defendant on some of the plaintiffs' Title VII claims and on the plaintiffs' pendent jurisdiction claims for wrongful discharge and intentional infliction of emotional distress. The court stated that the defendant's conduct did not rise to the level of outrageousness required to establish liability under the latter tort, nor was it established that the defendant's conduct directly caused the physical problems claimed by the plaintiffs. It rejected the plaintiffs' contention that racial discrimination per se exceeds the bounds of decency tolerated by a reasonable society, and emphasized that the plaintiffs admitted that little of the defendant's conduct was overt. Frazier v. First Union Nat. Bank, 747 F.Supp. 1540, 1554.

W.D.N.C.1988. Cit. in disc., quot. in case cit. in sup. A fired sales representative sued her former employer for intentional infliction of emotional distress, alleging that her telephone messages were used by male sales representatives to usurp her prospective sales opportunities, information was secretly retrieved from her business files and her mail, her customer accounts were transferred to others without just cause, and her customers were charged more than others. The court granted the defendant's motion for summary judgment, stating that the defendant's alleged conduct did not rise to a level of conduct beyond all possible bounds of decency that could be regarded as atrocious and utterly intolerable in a civilized community. Keziah v. W.M. Brown & Son, Inc., 683 F.Supp. 542, 548, 549, judgment affirmed in part, reversed in part 888 F.2d 322 (4th Cir.1989).

W.D.N.C.1987. Com. (d) cit. and quot. in sup. A 59-year-old worker who was demoted when his employer restructured his department, eliminating his old position, sued the employer for age discrimination and intentional infliction of emotional distress after his demotion and the creation of a new position to be filled by a younger employee were announced at a meeting. Granting the defendant's motion for summary judgment, this court held that the demotion was not related to age but to experience and that it was handled in a professional and dignified manner. Hardin v. Champion Intern. Corp., 685 F.Supp. 527, 531, 532.

D.N.D.

D.N.D.2006. Cit. in case quot. in sup. After ex-wife unlawfully removed her two children from county's custody during a visitation at a rape crisis center and absconded with them for a period of 18 months before being apprehended, ex-husband, who had been scheduled to regain custody sued county and center for, inter alia, intentional infliction of emotional distress. This court granted defendants' motions for summary judgment, holding that ex-husband failed to raise a genuine issue of material fact as to whether defendants' conduct in creating and carrying out the visitation plan was extreme and outrageous. The court concluded that no reasonable person would describe ex-husband's allegations of misconduct, including defendants' failure to memorialize the visitation

plan in writing, as "atrocious and utterly intolerable in a civilized community." Geraci v. Women's Alliance, Inc., 436 F.Supp.2d 1022, 1036.

N.D.Ohio,

N.D.Ohio, 2016. Cit. in ftn.; coms. (d) and (j) quot. in case quot. in sup. and cit. in ftn. Veteran who resided at a domiciliary operated by the Veterans Administration (VA) brought an action under the Federal Tort Claims Act against the United States, after he was sexually propositioned by the VA chaplain who was part of his treatment team. This court granted defendant's motion to dismiss plaintiff's claim for intentional infliction of emotional distress, holding, as a matter of law, that plaintiff failed to state such a claim under Restatement Second of Torts § 46. The court reasoned that, while chaplain's actions were inappropriate, they were insufficient to rise to the level of outrageous conduct as a matter of law, and, even if the chaplain's conduct was sufficiently outrageous, plaintiff failed to allege that his resulting mental anguish was so serious that no reasonable person could be expected to endure it. French v. United States, 195 F.Supp.3d 947, 956.

N.D.Ohio, 2016. Com. (d) quot. in case quot. in sup. Former employee sued former employer and former supervisor, alleging intentional infliction of emotional distress (IIED) and other claims in connection with her termination. This court granted summary judgment for defendants, holding, among other things, that plaintiff's allegations that supervisor was an unpleasant, difficult and bad boss, and that he harassed her, screamed at her, and threw boxes at her office door were insufficiently extreme and outrageous to form the basis of an IIED claim. The court reasoned that having a lousy boss was not a matter beyond all possible bounds of decency, regarded as atrocious, and utterly intolerable in a civilized community, as required to state such a claim under Restatement Second of Torts § 46. See v. Cleveland Clinic Foundation, 222 F.Supp.3d 569, 576-577.

N.D.Ohio, 2016. Com. (d) quot. in cases quot. in sup. and cit. in ftn.; com. (j) quot. in case quot. in sup. and cit. in ftn. Employee who wore visible hearing aids on both ears sued employer and supervisor for, among other things, disability discrimination and intentional infliction of emotional distress (IIED), after supervisor made two comments regarding employee's hearing and effectively demoted employee. While denying defendants' motion for summary judgment as to plaintiff's discrimination claim, this court granted defendants' motion as to plaintiff's IIED claim, holding that the alleged discriminatory conduct—two isolated comments and an effective demotion—were not sufficiently extreme and outrageous to state a claim under Restatement Second of Torts § 46. Sessin v. Thistledown Racetrack, LLC, 187 F.Supp.3d 869, 880.

N.D.Ohio

N.D.Ohio, 2015. Com. (d) quot. in case quot. in sup. Former employee of an office-supply store brought a claim for intentional infliction of emotional distress (IIED), inter alia, against former employer and others, alleging that defendants discriminated, harassed, and retaliated against her

based on her three pregnancies, her requests for leave due to the pregnancies, and her need to express breast milk; defendants asserted that employee was terminated for threatening a coworker in violation of the store's code of conduct. This court granted summary judgment for defendants, holding that plaintiff failed to point to any evidence of injury sufficient to support an IIED claim. The court noted that the Supreme Court of Ohio followed the definition of "extreme and outrageous conduct" set forth in Restatement Second of Torts § 46. Flagg v. Staples the Office Superstore East, Inc., 138 F.Supp.3d 908, 920.

N.D.Ohio.

N.D.Ohio, 2012. Subsec. (1) quot. in case quot. in sup., com. (d) cit. in sup. and quot. in case quot. in sup. Arrestee and his parents brought a civil-rights action against police department, police officers, and others in connection with an early morning incident in which officers, with the intent of citing arrestee for driving erratically, forced their way into plaintiffs' home and shot arrestee with a stun gun. Granting defendants' motion for judgment on the pleadings as to parents' claims, this court held that parents could not rely on any aspect of the arrest in support of their claim for intentional infliction of emotional distress (IIED), because arrestee had pled guilty to resisting arrest, which constituted an admission under Ohio law that the arrest was conducted in a lawful and reasonable manner; liability for IIED could be found only where the defendant's conduct was both extreme and outrageous, and, as a logical matter, if an act was reasonable, i.e., neither tortious nor criminal, it could not qualify as extreme and outrageous. Hayward v. Cleveland Clinic Foundation, 878 F.Supp.2d 860, 865.

N.D.Ohio

N.D.Ohio, 2010. Com. (d) quot. in case quot. in sup. Female employee of local union who allegedly was sexually harassed by local's former president brought, inter alia, a state-law claim for intentional infliction of emotional distress (IIED) against local union, international union, and former president. Granting summary judgment for defendants on that claim, this court held that plaintiff's allegations that representatives of international union observed former president's harassing conduct toward her during labor negotiations but took no steps to prevent it and that international union failed to timely respond to her complaint of sexual harassment did not assert conduct that was sufficiently outrageous to state an IIED claim against international union; in addition, plaintiff's IIED claim against local union and former president failed because her statements in her affidavit that she suffered severe emotional distress, anxiety, sleeplessness, and nightmares were insufficient to demonstrate that she sustained severe and debilitating emotional injury proximately caused by former president's alleged conduct. Kendel v. Local 17AUnited Food and Commercial Workers, 748 F.Supp.2d 732, 744.

N.D.Ohio,

N.D.Ohio, 2009. Com. (j) quot. in case quot. in sup. Employee who discovered that she was pregnant after accepting a position with corporate employer as a business analyst, sued employer after it terminated her, alleging intentional infliction of emotional distress, inter alia. This court granted summary judgment for defendant on that claim, finding that plaintiff failed to meet the severe mental anguish element for the tort. The court reasoned that, while plaintiff suffered some stress due to the loss of her job, she pointed to no evidence that she suffered mental anguish of a nature that no reasonable person could be expected to bear. Pizzimenti v. Oldcastle Glass, Inc., 666 F.Supp.2d 839, 848.

N.D.Ohio

N.D.Ohio, 2007. Quot. in case quot. in sup. Former employees of village brought various claims against village and supervisor in connection with allegations of sexual harassment by supervisor. Adopting the magistrate's report and recommendation, this court granted defendants' motion for summary judgment, holding, inter alia, that plaintiffs' claims for intentional infliction of emotional distress failed as a matter of law. The court concluded that nothing in the facts asserted by plaintiffs supported such a claim, reasoning that the conduct complained of by plaintiffs, including sexist jokes and behavior, yelling, and poor management skills, did not satisfy the high burden of extreme and outrageous conduct that had to be met under Ohio law. Hale v. Village of Madison, 493 F.Supp.2d 928, 940-941.

N.D.Ohio, 2006. Com. (d) quot. in case quot. in sup. Female factory employee whose employment was terminated sued former employer, union local, and employee-assistance-program counselor for, in part, intentional infliction of emotional distress. Granting defendants' motion for summary judgment, this court held, inter alia, that plaintiff's emotional-distress claim failed, since plaintiff did not show: that employer's reliance on a county prosecutor's statement and plaintiff's own admissions to conclude that she stole employees' social security numbers was unreasonable; that defendants engaged in disparate treatment; that counselor's sexual advances were unwelcome; that counselor or anyone else retaliated against her; or that defendants intended to cause her emotional distress. Finally, termination from employment, even if wrongful, was not outrageous conduct. Jaquez v. Herbert, 447 F.Supp.2d 858, 876.

N.D.Ohio, 2005. Com. (d) quot. in case quot. in disc. African-American worker brought a civil-rights action against his employer, claiming that he was racially discriminated against in various ways, including not being rehired following a business downturn. Granting in part defendant's motion for summary judgment, this court held, inter alia, that plaintiff's allegations did not meet the standard for outrageous conduct to support his claim for intentional infliction of emotional distress. Plaintiff's only specific assertion of defendant's outrageous conduct was that his supervisor had laughed off his concerns about being forced to enter a manhole without safety precautions, despite plaintiff's preexisting fear of enclosed spaces. Since plaintiff did not show that he had suffered any serious anguish as a result, he could not prevail on his emotional-distress claim. Guy v. Central Locating Service, Ltd., 389 F.Supp.2d 843, 857.

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N.D.Ohio, 2005. Com. (d) quot. in case quot. in disc. Production supervisor brought claims for intentional infliction of emotional distress against automobile manufacturer and production worker she supervised, among other claims. This court granted summary judgment for defendants on the emotional-distress claims, holding, inter alia, that, even if worker made threats against plaintiff in confidential communications to management, the threats were not extreme and outrageous, and were not the proximate cause of any psychological injury to plaintiff. Additionally, plaintiff did not show that manufacturer intended to cause her emotional distress, engaged in extreme and outrageous conduct, or caused severe emotional distress, three required elements of the claim. Langley v. DaimlerChrysler Corp., 407 F.Supp.2d 897, 905, affirmed 502 F.3d 475 (6th Cir.2007).

N.D.Ohio, 2003. Coms. (d) and (g) quot. in case quot. in disc. Truck driver sued employer, terminal manager, and labor-relations manager, claiming racial discrimination, defamation, and intentional infliction of emotional distress, inter alia, alleging that managers engaged in outrageous conduct by alleging, at his grievance hearings, that he had sexually harassed female hardware-store employee. This court granted defendants' motion for partial dismissal, holding, inter alia, that because plaintiff would not be able to show that defendants' behavior was outrageous without referring to terms of union collective-bargaining agreement, his emotional-distress claim was preempted by § 301 of Labor Management Relations Act. Defendants acted under agreement's terms when they made statements. Fitzgerald v. Roadway Exp., Inc., 262 F.Supp.2d 849, 858.

N.D.Ohio, 2002. Subsec. (1) quot. in case quot. in sup. After being fired in a company reorganization, phone-company employee who suffered from arthritis, colitis, and migranes and her disabled child sued employer company for violations of Americans with Disabilities Act and intentional infliction of emotional distress, inter alia. This court granted defendant summary judgment on emotional-distress claim, holding, inter alia, that plaintiff had submitted neither expert testimony nor testimony of lay-witness family members who were acquainted with her and could testify that plaintiff suffered the kind of severe emotional response required under Ohio law. Plaintiff's own affidavit did not provide guarantee of genuineness necessary to survive motion for summary judgment. Anthony v. United Telephone Co. of Ohio, 277 F.Supp.2d 763, 777, affirmed 110 Fed.Appx. 680 (6th Cir.2004).

N.D.Ohio, 2002. Com. (d) quot. in case quot. in sup. Members and officers of local union asserted, in part, a state-law claim of intentional infliction of emotional distress against international union and its officers, alleging that defendants removed local officer from office on pretextual grounds and threatened to blacklist him, take his job, and end his union membership. This court granted defendants summary judgment on emotional-distress claim, holding, inter alia, that defendant officers' statements to local officers that plaintiff officer would never work as a union insulator or hold office if contractors' allegations about plaintiff officer were true were not outrageous. While defendant officer's raised voice and use of obscenities might have caused plaintiff officer to feel threatened, the threats to take actions that international union would be justified in taking did not constitute outrageous conduct. Conway v. International Ass'n of Heat and Frost Insulators and Asbestos Workers, 209 F.Supp.2d 731, 761, affirmed 93 Fed.Appx. 780 (6th Cir.2004).

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N.D.Ohio, 2002. Coms. (d) and (j) quot. in case quot. in sup. Female employee brought action against employer and male supervisor, alleging sexual discrimination, sexual harassment, retaliation, and intentional infliction of emotional distress. Granting defendants summary judgment, this court held, inter alia, that supervisor's questioning paternity of plaintiff's child, his yelling at employees, and his generally insulting demeanor, while in poor taste, did not rise to level of extreme and outrageous conduct to support claim for intentional infliction of emotional distress. Roelen v. Akron Beacon Journal, 199 F.Supp.2d 685, 696.

N.D.Ohio, 2002. Coms. (d) and (j) quot. in case quot. in sup. Plaintiff, who was arrested for possession of illegal drugs and held for 75 days after police officers conducted an illegal search of his residence, where a police informant had planted the drugs, sued officers, among others, for, in part, intentional infliction of emotional distress. Denying in part defendants' motion for summary judgment, this court held, inter alia, that genuine issues of material fact existed as to whether defendants' intentional conduct was sufficiently extreme and outrageous to go beyond the bounds of decency, and as to whether their conduct caused plaintiff serious emotional distress for which he required medical treatment. Sinick v. County of Summit, 196 F.Supp.2d 560, 569, reversed in part, appeal dismissed in part 76 Fed.Appx. 675 (6th Cir.2003).

N.D.Ohio, 2001. Quot. in case quot. in sup. Employee who alleged that she was sexually harassed by supervisor sued employer and supervisor for, in part, intentional infliction of emotional distress. Denying in part defendants' motion for summary judgment, the court held, inter alia, that genuine issues of material fact existed as to whether supervisor's alleged propositions, veiled threats, and physical contact were sufficiently outrageous and extreme to support plaintiff's claim for intentional infliction of emotional distress. McCormick v. Kmart Distribution Center, 163 F.Supp.2d 807, 831.

N.D.Ohio, 2001. Com. (d) quot. in case quot. in sup. Employee who alleged that his employment was terminated because of his disability brought, in part, a pendent state-law claim for intentional infliction of emotional distress against his former employer. Granting in part defendant's motion for summary judgment, the court held, inter alia, that defendant's treatment of plaintiff in terms of making work assignments and applying its sick-leave policy prior and subsequent to plaintiff's injury did not rise to the level of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Ray v. Libbey Glass, Inc., 133 F.Supp.2d 610, 620, judgment affirmed 38 Fed.Appx. 302 (6th Cir.2002).

N.D.Ohio, 2000. Com. (d) quot. in case quot. in disc. African-American customers of hair salon sued salon for, inter alia, intentional infliction of emotional distress in connection with defendant's alleged failure to provide certain services of particular interest to patrons in plaintiffs' position, or to train staff on care, treatment, and styling of African-American hair. Entering partial summary judgment for defendant, the court held, among other things, that, even if plaintiffs were able to establish that they had been humiliated and embarrassed, they had failed to prove that defendant

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engaged in conduct so extreme as to go beyond all possible bounds of decency. Halton v. Great Clips, Inc., 94 F.Supp.2d 856, 871.

N.D.Ohio, 2000. Com. (d) quot. in case quot. in disc. Employee of public school district sued school board and superintendent for whom she worked for, inter alia, "hostile work environment" sexual harassment and intentional infliction of emotional distress. Entering partial summary judgment for defendants, the court held, in part, that material factual issues existed as to whether plaintiff had been the target of gender-based discrimination; however, superintendent's conduct in allegedly making false accusations against plaintiff, berating her, changing her daily job expectations, and encouraging her to quit did not rise to the level of outrageousness necessary to support a claim for the intentional infliction of emotional distress. Plotner v. Swanton Local Bd. of Educ., 85 F.Supp.2d 747, 754.

N.D.Ohio, 1998. Cit. in disc. A company fired a 59-year-old employee, along with 18 other employees, as part of a reorganization and reduction in force. The 59-year-old employee sued the company, alleging, among other claims, violation of the Age Discrimination in Employment Act and intentional infliction of emotional distress. This court granted defendant summary judgment, holding, inter alia, that plaintiff failed to state an emotional-distress claim, because being fired due to age discrimination was not outrageous conduct that could give rise to a valid claim of emotional distress. Godfredson v. Hess & Clark, Inc., 996 F.Supp. 730, 740, affirmed 173 F.3d 365 (6th Cir.1999).

N.D.Ohio, 1998. Com. (d) quot. in case quot. in sup. A Catholic elementary-school teacher who was dismissed for violation of her contractual obligation to reflect the values of the Catholic Church after she became sexually involved with a married man sued the school, the diocese, and three school employees for, in part, intentional infliction of emotional distress. Granting defendants' motion for summary judgment, the court held, inter alia, that, in light of plaintiff's violation of her employment contract, plaintiff's allegations that she was unfairly disciplined, that defendants failed to renew her teaching contract, and that the school wrongfully instituted a no-smoking policy did not assert conduct that was sufficiently outrageous to state a claim for intentional infliction of emotional distress. Gosche v. Calvert High School, 997 F.Supp. 867, 873, affirmed 181 F.3d 101 (6th Cir.1999).

N.D.Ohio, 1998. Cit. in headnote, cit. in case cit. in disc. A postal clerk who suffered migraine headaches sued the United States Postal Service pursuant to the Family and Medical Leave Act, claiming that defendant wrongly discharged her from employment for failure to maintain a regular work schedule, and that the discharge was an intentional infliction of emotional distress. This court granted defendant's motion to dismiss plaintiff's claims for wrongful discharge and intentional infliction of emotional distress, but denied defendant's motion for summary judgment on plaintiff's Family and Medical Leave Act claim. The court held, inter alia, that plaintiff could not bring a claim for intentional infliction of emotional distress, because this claim was within the Federal Employee's Compensation Act, and even if the court had jurisdiction, plaintiff failed to state an

emotional-distress claim because defendant's conduct was not outrageous. Vargo-Adams v. U.S. Postal Service, 992 F.Supp. 939, 940, 944.

N.D.Ohio, 1997. Subsec. (1) quot. in case quot. in disc. A white female former employee sued her former employer and co-workers for, in part, intentional infliction of emotional distress, alleging that defendants harassed her because of her common law marriage to a black male co-worker and then terminated her for misconduct and poor attendance. Granting in part defendants' motion to dismiss, the court held, inter alia, that plaintiff failed to show that defendants' alleged actions rose to the level of outrageousness required to state a claim for intentional infliction of emotional distress under Ohio law. DeLoach v. American Red Cross, 967 F.Supp. 265, 268.

N.D.Ohio, 1997. Com. (d) quot. in case quot. in sup. A male former employee brought an action for sexual harassment and retaliatory discharge under Title VII against his former employer, a co-worker, and a supervisor and asserted, in part, a state-law claim for intentional or reckless infliction of emotional distress. Granting in part defendants' motion for summary judgment, the court held, inter alia, that individual defendants' alleged acts in making sexual comments to plaintiff, touching plaintiff's chest, sides, and shoulders, ridiculing plaintiff and using foul language around him, and falsely subjecting him to discipline were insults, indignities, and annoyances that did not rise to the level of outrageousness required to sustain a claim for intentional infliction of emotional distress. Griswold v. Fresenius USA, Inc., 978 F.Supp. 718, 733.

N.D.Ohio, 1997. Com. (d) quot. in case quot. in disc. Former employee sued former employer, co-worker, and supervisor for, inter alia, sexual harassment in violation of Title VII and state common law, and negligent and intentional failure to provide a safe workplace. Defendants moved to dismiss. Granting the motions in part and denying them in part, the court held that, while Title VII did not permit individual liability, co-worker and supervisor could be found individually liable for sexual harassment under Ohio Rev.Code § 4112.99, and that Ohio recognized negligent failure to provide a safe workplace as a valid cause of action; however, dismissal was appropriate as to the claim for intentional failure to provide a safe workplace, which the court treated as a claim for intentional infliction of emotional distress, because the conduct complained of was not sufficiently extreme or outrageous to support recovery. Griswold v. Fresenius USA, Inc., 964 F.Supp. 1166, 1174.

N.D.Ohio, 1994. Subsec. (1) cit. in case quot. in disc. Family members of a Navy sailor who was killed in a ship's explosion sued a television network for intentional infliction of emotional distress, alleging that the network implied that the sailor was a homosexual and that he purposefully caused the ship's explosion to commit suicide. This court granted the network summary judgment, holding that the emotional-distress claim failed because the broadcast did not constitute extreme and outrageous conduct in that the reporter had no malicious intent and his only purpose was to accurately report on the government's allegations and findings. Furthermore, there was a complete failure of proof of serious emotional distress, as plaintiffs offered no reports of doctors, social workers, psychologists, or other experts. Hartwig v. National Broadcasting Co., 863 F.Supp. 558, 562, decision affirmed 76 F.3d 379 (6th Cir.1996).

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N.D.Ohio, 1994. Cit. generally in disc., com. (i) quot. in disc. AIDS patient who experienced a severe non-AIDS related allergic reaction sued hospital admitting physician and others for, inter alia, intentional infliction of emotional distress after defendant refused to treat him. Plaintiff alleged that defendant's refusal to treat was motivated by extreme and outrageous discrimination, as evidenced by his statement that an AIDS patient, once admitted, became impossible to discharge. Denying defendant's motion for summary judgment, the court held that a jury could conclude that the emotional distress plaintiff complained of came as a result of learning that his underlying illness was the true reason that defendant refused him treatment. Howe v. Hull, 874 F.Supp. 779, 789, 790.

N.D.Ohio,1993. Cit. in case quot. in disc., cit. in sup., com. (d) quot. in case cit. in sup., com. (h) quot. in ftn. Employee who alleged that she was sexually harassed by co-workers sued her employer for intentional infliction of emotional distress, inter alia. Granting defendant's motion for summary judgment, the court held that defendant could not be held vicariously liable on plaintiff's claim, since there was no proof that the offending co-workers acted within the scope of employment or that defendant was negligent in failing to prevent their sexual harassment of plaintiff. The court stated, moreover, that the offensive conduct alleged by plaintiff, i.e., pin-ups of scantily clad celebrities in common areas and the receipt of pornographic photographs in plaintiff's locker, was not so outrageous as to be utterly intolerable in a civilized community and thus did not rise to the level of tortious conduct necessary for plaintiff's claim. Baab v. AMR Services Corp., 811 F.Supp. 1246, 1268-1270.

N.D.Ohio, 1989. Com. (d) quot. in case quot. in sup. and quot. generally in sup. (Erron. cit. as subsec. (1).) A black female secretary was repeatedly denied job upgrades, promotions, and salary increases by her employer, allegedly causing her to suffer serious physical and emotional illness. She sued her employer for damages, alleging racial discrimination in violation of federal civil rights laws and intentional infliction of emotional distress in violation of state law. This court dismissed the complaint and held, inter alia, that the plaintiff failed to assert evidence sufficient to maintain a claim for intentional infliction of emotional distress. The court stated that under Ohio law the standards necessary to sustain that claim in employment actions were stringent and that the plaintiff's claims of racial bias, harassment and humiliation were not so extreme or outrageous as to warrant relief. It reached this conclusion despite acknowledging that the plaintiff had a demoralizing relationship with her inept, unyielding, and insensitive supervisor. Anthony v. TRW, Inc., 726 F.Supp. 175, 178-179, 181.

N.D.Ohio, 1989. Subsec. (1) quot. but dist. Employees sued their employers for sexual and religious discrimination and intentional infliction of emotional distress. The defendants moved for summary judgment on all of the plaintiffs' claims. Granting the defendants' motion on the intentional infliction of emotional distress claim, the court held that the defendants' conduct as alleged by the plaintiffs did not as a matter of law rise to the level of extreme and outrageous conduct as defined under Ohio law. Taylor v. National Group of Companies, Inc., 729 F.Supp. 575, 578.

N.D.Ohio, 1987. Subsec. (1) quot. in case quot. in disc. A daughter sued her father for intentional or negligent infliction of emotional distress after he married another woman while he was still married to her mother. This court dismissed the case for failure to state a claim, holding that bigamy coupled with neglect was not the type of conduct that was so outrageous and extreme that it supported a cause of action for the intentional or negligent infliction of emotional distress. Starr v. Corley, 662 F.Supp. 219, 221.

N.D.Ohio.Bkrtcy.Ct.

N.D.Ohio Bkrtcy.Ct.2016. Com. (d) quot. in case quot. in sup. Neighbors filed an adversary proceeding against Chapter 7 debtors, asserting claims for, among other things, intentional infliction of emotional distress (IIED) based on allegations that debtors falsely stated at a township zoning-board public hearing that neighbors tried to run over their son with neighbors' vehicle. This court denied neighbors' IIED claim, holding that neighbors failed to show that debtors' statements were extreme and outrageous, as required to state a claim under Restatement Second of Torts § 46. The court explained that, under § 46, extreme and outrageous conduct gave rise to liability when it was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. In re Palmer, 555 B.R. 611, 627.

N.D.Ohio Bkrtcy.Ct.

N.D.Ohio Bkrtcy.Ct.2013. Subsec. (1) quot. in case quot. in ftn. Teacher, who had received a Chapter 7 discharge more than seven and a half years prior, filed a motion to partially seal her bankruptcy records, alleging that, as a result of unfettered public access to information about her bankruptcy, she had been subjected to ridicule by her students, fellow teachers, and the community at large, which caused her severe emotional distress and threatened her job performance. This court denied the motion, holding that, even if that the adverse effects that debtor was suffering as a result of the ridicule were otherwise sufficient to give rise to a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46(1), debtor had failed to provide a causal link between the alleged injury and public access to her bankruptcy information. In re Creighton, 490 B.R. 240, 245.

S.D.Ohio,

S.D.Ohio, 2018. Cit. in disc., adopted in cases cit. in disc.; coms. (d), (g), and (h) quot. in disc. Independent insurance agent brought an action against insurer, asserting claims for, inter alia, intentional infliction of emotional distress (IIED) arising after she was allegedly not offered servicing rights to insurer's books of policies and was terminated from an agency agreement for failing to meet production goals. This court granted summary judgment in part for defendant, holding that plaintiff failed to demonstrate conduct so outrageous as to support her IIED claim.

The court quoted Restatement Second of Torts § 46, Comment *d*, in defining the standard of offensive conduct required to prevail on an IIED claim, noting that, under § 46, Comment *g*, liability for emotional distress was not imposed simply because a defendant caused distress by enforcing his legal rights in a permissible way, like terminating an agency agreement for a failure to meet production goals. McGrath v. Nationwide Mutual Insurance Company, 295 F.Supp.3d 796, 815-816.

S.D.Ohio

S.D.Ohio, 2015. Illus. 14 quot. in sup. Sister and daughter of decedent brought claims for intentional and negligent infliction of emotional distress against county coroner who declared decedent's death a suicide and had his body transported to a hospital before plaintiffs arrived at his house. This court granted defendant's motion to dismiss, holding that plaintiffs failed to state a claim for intentional or negligent infliction of emotional distress to the extent that their claims were based on learning that decedent had died of suicide. Although learning of decedent's death caused plaintiffs emotional distress, defendant was required by statute to determine the cause of death and the manner and mode in which the death occurred, and to notify any known relatives of decedent's death, and, under Restatement Second of Torts § 46, a defendant was not liable for a plaintiff's emotional distress if the defendant did no more than insist upon his or her legal rights in a permissible way, even if the defendant was well aware that such insistence was certain to cause emotional distress. Elfers v. Varnau, 101 F.Supp.3d 753, 765.

S.D.Ohio,

S.D.Ohio, 2014. Com. (d) quot. in case quot. in sup. Arrestee brought, inter alia, a pendent state-law claim for intentional infliction of emotional distress (IIED) against the United States, alleging that she was arrested for drug trafficking based on a mistaken identification that the Federal Bureau of Investigation provided to city police. This court granted defendant's motion to dismiss, holding that defendant's improper identification of plaintiff leading to her mistaken arrest was not sufficiently extreme and outrageous pursuant to Restatement Second of Torts § 46, Comment *d*, to state a claim for IIED. Snyder v. U.S., 990 F.Supp.2d 818, 835.

S.D.Ohio, 2013. Subsec. (1) quot. in case quot. in sup., com. (d) quot. in sup. Victim of a home invasion by unknown assailants brought a claim for intentional infliction of emotional distress (IIED), inter alia, against two paramedics who were dispatched to the scene, alleging that defendants left the scene without providing plaintiff with medical care and that they "ridiculed" her in their incident report. This court dismissed that claim without prejudice, holding that it was unclear whether plaintiff had adequately stated such a claim, based on the limited factual allegations contained in the complaint. The court pointed out that plaintiff did not indicate when she read defendants' report or what effect it had on her, nor did she provide any description of the emotional distress that she suffered as a result. Shoup v. Doyle, 974 F.Supp.2d 1058, 1092.

S.D.Ohio

S.D.Ohio, 2010. Cit. in disc., com. (d) quot. in sup. Law-school student disciplined by university for honor-code violations brought, inter alia, claim for intentional infliction of emotional distress against university. This court granted judgment as a matter of law for defendant, holding that no conduct alleged to have been engaged in by any person associated with plaintiff's discipline would evoke the exclamation "outrageous" from any reasonable juror, and plaintiff had presented no evidence of any psychological injury, severe or not, stemming from his suspension from university. Valente v. University of Dayton, 689 F.Supp.2d 910, 925.

S.D.Ohio, 2007. Subsec. (1) quot. in case quot. in sup., com. (d) quot. in sup. Purchaser of manufactured home sued seller and manufacturer of the home for, among other things, intentional infliction of emotional distress, in connection with various alleged delays and defects in the construction of the home. Granting summary judgment for defendants, this court held, inter alia, that plaintiff failed to raise a genuine issue of material fact that his emotional injury was both severe and debilitating as required by Ohio courts. The court pointed out that plaintiff had not sought medical treatment or psychological counseling for the depression and strained relationship he allegedly experienced as a result of the problems surrounding the home. Lang v. D & J Homes, 494 F.Supp.2d 799, 809, 810.

S.D.Ohio, 2007. Subsec. (1) quot. in case quot. in sup. and adopted, com. (d) quot. in sup. Former police officer sued city and others, alleging that he was subjected to varying degrees of harassment by co-workers, including psychological intimidation, as well as theft of personal property from his home. Granting in part defendant's motion for summary judgment, this court held, inter alia, that there was no genuine issue of material fact as to plaintiff's claim for intentional infliction of emotional distress, because plaintiff had filed exhibits, without any analysis, in response to defendant's assertions that the record was devoid of any evidence of extreme or outrageous conduct on the part of city, or of any mental anguish or suffering endured by plaintiff that no reasonable person could be expected to endure. The court granted plaintiff leave to file a motion for reconsideration spelling out specific evidence supporting the claim. Roemer v. City of Dayton, 496 F.Supp.2d 873, 885.

S.D.Ohio, 2006. Com. (d) quot. in case quot. in sup. (p. 73 erron. cit. as § 73). Former employee, who allegedly had been diagnosed with bipolar disorder, panic disorder, eating disorder, posttraumatic stress disorder, and anxiety, brought suit for, in part, intentional infliction of emotional distress against former employer, claiming that she was subjected to closer scrutiny than her co-workers, was not given instructions on performing her job, was unfairly reprimanded, and was not paid her earned but unused vacation and sick days, and that her performance evaluations contained false statements. Granting defendant's motion for summary judgment, this court held, inter alia, that defendant's alleged conduct was not sufficiently extreme and outrageous to support plaintiff's claim for intentional infliction of emotional distress. Edwards v. Dialysis Clinic, Inc., 423 F.Supp.2d 789, 799.

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S.D.Ohio, 2003. Com. (d) quot. in sup. Employee with carpal tunnel syndrome and tendonitis sued employer for discrimination under Americans with Disabilities Act and state law, and for intentional infliction of emotional distress following employer's alleged failure to accommodate employee based on her condition. Granting in part employer's motion for summary judgment, this court held, inter alia, that employee's emotional-distress claim was time-barred, and that employer's adverse action in disregarding employee's medical condition, even if discriminatory, did not amount to infliction of emotional distress without proof of something more. Benge v. General Motors Corp., 267 F.Supp.2d 794, 804.

S.D.Ohio, 2003. Subsec. (1) adopted in case cit. in sup., com. (d) quot. in case quot. in sup. Male employee who alleged that he had been sexually harassed by female co-workers brought, in part, a state-law claim for intentional infliction of emotional distress against co-workers and union representatives. Sustaining defendants' motion for summary judgment, the court held that union representatives' conduct of glaring at plaintiff while standing outside his work station and failing to conduct an impartial investigation of his complaints was not so extreme and outrageous as to create a fact issue on plaintiff's claim. Co-workers' acts of giving plaintiff a brief, unwanted massage and making sexually suggestive comments to him, while inappropriate and insulting, did not rise to the level of extreme and outrageous conduct as a matter of law. Greenwood v. Delphi Automotive Systems Inc., 257 F.Supp.2d 1047, 1072, affirmed 103 Fed.Appx. 609 (6th Cir.2004).

S.D.Ohio, 2003. Subsec. (1) cit. in case quot. in sup., com. (d) quot. generally in case quot. in sup. Arrestee brought a claim for intentional infliction of emotional distress against arresting officer, city police department, and officer's superiors following acquittal on underlying claim. Granting defendants summary judgment, this court held, inter alia, that lawful detention and arrest, absent a showing of bad faith by officer, could not give rise to tort action for infliction of emotional distress. Hale v. Vance, 267 F.Supp.2d 725, 736.

S.D.Ohio, 2003. Subsec. (1) cit. in case quot. in sup. After county fired a female custodial worker when she requested leave due to harassing conduct by her supervisor and other county employees, worker sued county board of commissioners for sexual harassment, hostile work environment, and intentional infliction of emotional distress, inter alia. This court granted defendants summary judgment, holding that plaintiff's emotional-distress claim failed, since defendants' actions were not discriminatory or outrageous. Even had plaintiff demonstrated that defendants could be found liable under Title VII, such a conclusion would not be enough, since discrimination, by itself, was insufficient to support claim for intentional infliction of emotional distress under Ohio law. Shoemaker-Stephen v. Montgomery County Bd. of Com'rs, 262 F.Supp.2d 866, 888.

S.D.Ohio, 2003. Subsec. (1) cit. in case quot. in sup. Former employee asserted a claim for intentional infliction of emotional distress in her employment-discrimination action against employer, alleging that she was terminated after being granted medical leave based on a diagnosis of depression. Granting in part defendant's motion for summary judgment, this court held, inter alia, that although the facts adduced by plaintiff gave rise to genuine issues relating to claims of

discrimination and retaliation, they did not describe conduct that was sufficiently extreme and outrageous to support a claim of intentional infliction of emotional distress. Swanson v. Senior Resource Connection, 254 F.Supp.2d 945, 962.

S.D.Ohio, 2003. Com. (d) quot. in case quot. in sup. Parents of third-grade student sued school and teacher for, in part, intentional infliction of emotional distress, after teacher looked inside student's pants in an attempt to find money missing from teacher's desk. Granting in part defendants' motion for summary judgment, this court held, inter alia, that teacher's conduct did not rise to the level of outrageousness required to state a claim for intentional infliction of emotional distress. Watkins v. Millennium School, 290 F.Supp.2d 890, 903.

S.D.Ohio, 2002. Subsec. (1) quot. in case quot. in disc. African-American employee who alleged that she was wrongfully demoted from a supervisory position because of her race sued employer for, in part, intentional infliction of emotional distress. Sustaining defendant's motion for summary judgment, this court held, inter alia, that plaintiff did not establish a claim for intentional infliction of emotional distress; defendant's conduct in demoting plaintiff against her will was not outrageous, and the fact that plaintiff continued to see the psychologist whom she had been seeing prior to her demotion did not establish the existence of severe and debilitating emotional distress resulting from her demotion. Bush v. American Honda Motor Co., Inc., 227 F.Supp.2d 780, 800.

S.D.Ohio, 2002. Com. (d) quot. in case quot. in disc. A hospital patient's father was arrested after he engaged in an argument with hospital security guard, who had called police for assistance. Father and his wife sued police officer for intentional infliction of emotional distress, assault and battery, and false imprisonment, inter alia. This court granted officer's motion for summary judgment on the emotional-distress claim, holding, inter alia, that there was no evidence that officer's act of arresting father and escorting him out of hospital either intentionally or recklessly caused wife severe emotional distress, the arrest did not constitute extreme or outrageous conduct, and plaintiffs failed to show severe emotional distress, as wife merely “had a hard time” dealing with the situation. Shevlin v. Cheatham, 211 F.Supp.2d 963, 971.

S.D.Ohio, 2002. Com. (d) quot. in sup. and adopted in cases cit. in disc., com. (h) cit. in case cit. in disc. After cancer patient's employment was terminated by employer, patient sued employer for, in part, intentional infliction of emotional distress. Granting in part defendant's motion for summary judgment, the court held, inter alia, that defendant's conduct in discharging plaintiff was not sufficiently extreme and outrageous to support a claim for intentional infliction of emotional distress. The court said that defendant had granted plaintiff an extended leave of absence and had otherwise accommodated her prior to her discharge. White v. Honda of America Mfg., Inc., 191 F.Supp.2d 933, 955.

S.D.Ohio, 2001. Subsec. (1) quot. in ftn., com. (d) quot. generally in ftn. Three mothers and their infant children brought suit for, in part, intentional infliction of emotional distress against department store that prohibited plaintiffs' breast-feeding activities in public areas of its stores. Granting defendant's motion for summary judgment, the court held, inter alia, that, assuming

that defendant had a special relationship with plaintiffs, plaintiffs' emotional-distress claim based on public policy nevertheless failed because defendant had discharged its duty to refrain from insulting plaintiffs or treating them unlawfully by extending to them at all time respectful and decent treatment while exercising its lawful right to prohibit breast-feeding in its stores' public areas. Derungs v. Wal-Mart Stores, Inc., 162 F.Supp.2d 861, 869, affirmed 374 F.3d 428 (6th Cir.2004).

S.D.Ohio, 2001. Subsec. (1) and coms. adopted in case quot. in sup., com. (d) quot. in case quot. in sup. Temporary-employment-agency employee assigned to a United States Air Force base by agency's customer brought suit for, in part, intentional infliction of emotional distress against United States, alleging that she was sexually harassed by members of Air Force. Sustaining defendant's motion for summary judgment, the court held, inter alia, that although one member's conduct in making sexually offensive comments and staring at plaintiff was inappropriate for the workplace and might have caused plaintiff to feel hurt or embarrassed, his actions were not sufficiently extreme and outrageous to support a claim for intentional infliction of emotional distress. Dodge v. U.S., 162 F.Supp.2d 873, 887.

S.D.Ohio, 2001. Com. (d) quot. in case quot. in disc. After restaurant customer was punched by another customer during restaurant brawl, injured customer sued city, police officers, assailant, assailant's friends, restaurant, and security guard for intentional infliction of emotional distress, inter alia. This court granted summary judgment for one of assailant's friends on emotional-distress claim, holding, in part, that even if friend made a conscious decision to allow his friends to commit assault and battery upon plaintiff and then help them flee, those actions, without more, were not extreme and outrageous. Although plaintiff alleged that he suffered emotional distress to the point of not being able to perform normal daily functions or work for some period of time, this bare allegation was insufficient to defeat summary-judgment motion. Neuens v. City of Columbus, 169 F.Supp.2d 780, 790, reversed and vacated 303 F.3d 667 (6th Cir.2002).

S.D.Ohio, 2000. Com. (d) quot. in case cit. in disc. Black female former middle-school assistant principal sued school district, claiming that she was transferred to another school and denied of promotions in violation of federal civil-rights statutes and Ohio statutory and common law. Granting defendant partial summary judgment, this court held, inter alia, that defendant's conduct was not so extreme and outrageous as to support a claim for intentional infliction of emotional distress. Black v. Columbus Public Schools, 124 F.Supp.2d 550, 587, affirmed in part, vacated in part 79 Fed.Appx. 735 (6th Cir.2003).

S.D.Ohio, 1999. Adopted in case quot. in disc. Employee who was discharged sued her former employer for, in part, intentional infliction of emotional distress. Granting in part defendant's motion for summary judgment, the court held, inter alia, that defendant's managers' acts of repeatedly asking plaintiff when she was planning to resign, not replacing her assistant, taking money from her paycheck for being a few minutes late, joking about her in the office, retaining her personal possessions after she was discharged, and inquiring into her personal beliefs to change her mind about her religion did not rise to the level of extreme and outrageous conduct necessary

to state a claim for intentional infliction of emotional distress. Hartley v. Dayton Computer Supply, 106 F.Supp.2d 976, 982.

S.D.Ohio, 1997. Com. (d) cit. in case quot. in disc. Children of a suicide victim sued a television station and its reporter and cameraman for intentional infliction of emotional distress, among other claims, alleging that defendants entered the victim's home, filmed her body, and broadcast the film on the news. This court granted in part and denied in part defendants' motion for summary judgment, holding, inter alia, that a fact issue existed as to whether defendants' actions were extreme and outrageous, and that defendants were not privileged by the First Amendment to enter the victim's home without permission. Barrett v. Outlet Broadcasting, Inc., 22 F.Supp.2d 726, 747.

S.D.Ohio, 1997. Subsec. (1) and com. (d) cit. in case quot. in sup. A former employee who alleged that he was laid off and that two or more native white Americans were hired before and/or subsequent to his termination sued his former employer and supervisor for, in part, intentional infliction of emotional distress, alleging that he was subjected to a racially hostile work environment and discrimination. Denying in part defendants' motion to dismiss, the court held, inter alia, that plaintiff's allegations, construed in a light most favorable to plaintiff, supported a claim for intentional infliction of emotional distress. The court stated that proof of the claim required evidence that extreme and outrageous conduct by defendants caused plaintiff to suffer severe emotional distress. Osman v. Isotec, Inc., 960 F.Supp. 118, 122, 123.

S.D.Ohio, 1995. Com. (d) quot. in sup. Construction contractor for a fast-food restaurant sued restaurant for intentional infliction of emotional distress and breach of contract, among other claims, alleging that defendant's failure to pay for work performed constituted extreme and outrageous conduct. This court dismissed in part, holding, inter alia, that plaintiff failed to state an emotional distress claim, because defendant's conduct was not extreme and outrageous. The court stated that plaintiff alleged breach of contract and then tried to make that into an intentional-infliction case merely by adding that defendant did it to cause emotional distress and that defendant was successful. Klusty v. Taco Bell Corp., 909 F.Supp. 516, 522.

S.D.Ohio, 1990. Com. (d) quot. in case cit. in sup. A 59-year-old man was demoted, replaced, and, two years later, terminated. He sued his former employer on a theory of intentional infliction of emotional distress, inter alia, alleging that his termination was in callous disregard of his rights and past services on behalf of the defendant, and that such disregard constituted outrageous and extreme conduct, even if the defendant's officials were cool and calm at the termination meeting. The court granted the defendant summary judgment, holding that the plaintiff's termination was not extreme and outrageous conduct, and noting that the mere unjustifiable nature of a termination did not make it outrageous, and certainly not so extreme in character and degree as to make it beyond all possible bounds of decency. Hawley v. Dresser Industries, Inc., 737 F.Supp. 445, 469.

S.D.Ohio, 1988. Subsec. (1) quot. in case cit. in disc. A group of employees sued their union for violation of its duty of fair representation, fraud, and intentional infliction of emotional distress. The suit was removed to this court because most of the plaintiffs' counts presented an action

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under the Labor Management Relations Act. This court denied in part and granted in part the plaintiffs' motion to remand the action back to state court, holding that the counts requiring the court to interpret the terms of the plaintiffs' collective bargaining agreement were preempted from being pleaded under state law and thus could not be remanded. However, the plaintiffs' allegations that they had suffered emotional distress, because they had been intentionally barred from participation in discussions on modification of the collective bargaining agreement, did not require interpretation of the agreement, and thus were not preempted and could be remanded. Adkins v. General Motors Corp., 713 F.Supp. 1043, 1053, affirmed in part, vacated in part946 F.2d 1201 (6th Cir.1991).

S.D.Ohio, 1988. Com. (d) quot. in case quot. in sup. An employee sued her employer for sexual harassment and discrimination and intentional infliction of emotional distress. The court awarded the plaintiff compensation based on the degree and duration of the harassment and the harm that she suffered. The court stated that the defendant's harassment, which continued for four years, and his refusal to perform mandatory performance and salary reviews for the plaintiff because she refused his sexual advances constituted extreme and outrageous conduct, and that the testimony of the plaintiff's psychologists supported her claim that she suffered severe emotional distress as a result of the defendant's acts. Shrout v. Black Clawson Co., 689 F.Supp. 774, 782.

S.D.Ohio, 1988. Coms. (d) and (e) quot. in disc. A female prison employee sued her male supervisor and the prison superintendent, claiming that her supervisor sexually harassed her by unwanted touching and sexual solicitation and that the superintendent fired her following her complaints and her unwillingness to be harassed. The plaintiff's causes of action included pendent state claims for invasion of privacy, intentional infliction of emotional distress, and assault and battery. In a prior decision, the district court granted the defendants' motion to dismiss certain parts of the complaint, not including the state claims. This court granted the defendants' motion for limited summary judgment in part, holding, inter alia, that the defendants were entitled to summary judgment on the assault and battery claim. The court noted that the privacy and emotional distress claims for compensatory and punitive damages remained, as they were not challenged and the court had jurisdiction over them. It cautioned that even though an employee might be especially susceptible to emotional distress arising from the captive audience nature of an employment relationship, the language and conduct of co-workers and supervisors must be very extreme to sustain the cause of action. Valerio v. Dahlberg, 716 F.Supp. 1031, 1041.

S.D.Ohio, 1986. Coms. (d) and (h) quot. in sup. An employee sued her former employer for, inter alia, intentional infliction of emotional distress after she was terminated from her employment, allegedly on the basis of her age and sex. This court granted summary judgment for the employer, holding that the employer's conduct did not rise to the level of being so extreme and outrageous so as to go beyond all possible bounds of decency, despite the alleged pattern of pressure and harassment suffered by the employee, the intentional downgrading of the employee's appraisal, and the threats of demotion and/or termination. Crawford v. ITT Consumer Financial Corp., 653 F.Supp. 1184, 1192.

S.D.Ohio, 1986. Cit. and quot. in case cit. in disc., coms. (j) and (d) quot. in sup. A discharged female employee sued her former employer for intentional infliction of emotional distress. This court found for the employer, holding that the employer's conduct in firing the employee because she engaged in an extramarital sexual affair with her supervisor was not so extreme in degree as to go beyond all possible bounds of decency, or to be regarded as atrocious, and utterly intolerable in a civilized community. Oldfather v. Ohio Dept. of Transp., 653 F.Supp. 1167, 118*l*, 1182, dismissed 816 F.2d 681 (6th Cir. 1987).

S.D.Ohio, 1985. Cit. generally in disc. The president and principal shareholder of a corporation and his wife brought an action against another corporation, alleging tortious interference with prospective business advantage and intentional infliction of emotional distress. The claims arose from the defendant corporation's breach of contract with the plaintiffs' corporation. Plaintiffs' corporation had previously sued defendant for the breach. The district court sustained defendant's motion to dismiss the plaintiffs' tortious interference claim, holding that it would amount to a relitigation of the corporation's previous action for breach. The court, however, overruled the motion to dismiss plaintiffs' intentional infliction of emotional distress claim, holding that a question existed as to whether defendant's deliberate failure to pay certain debts was conduct of the requisite extreme and outrageous nature. Foreman v. General Motors Corp., 625 F.Supp. 1048, 1051.

S.D.Ohio, 1985. Subsec. (1) cit. in sup. (erron. cit. as § 346(1)), subsec. (1) quot. in sup., com. (d) quot. in sup. A terminated employee and his wife brought separate suits against the husband's former employer for intentional or reckless infliction of emotional distress. The defendant moved to dismiss, claiming that a threat of physical violence was needed to maintain such an action and that plaintiffs failed to allege such a threat. The district court denied the defendant's motion, finding that Ohio law referred to the Restatement to define actionable conduct and that nowhere did the Restatement or its comments specifically require a threat of physical violence for intentional or reckless infliction of emotional distress. Yungkau v. Dean Witter Reynolds, Inc., 628 F.Supp. 23, 24.

N.D.Okl.

N.D.Okl.2022. Cit. in cases cit. and quot. in sup. Employee brought, among other things, a claim for intentional infliction of emotional distress (IIED) against medical practice and owners, alleging that defendants terminated plaintiff's employment while plaintiff was undergoing extensive medical treatment and rehabilitation. This court granted defendants' motion to dismiss, holding that plaintiff failed to state a claim for IIED. The court explained that defendants' termination of plaintiff was not outrageous under Restatement Second of Torts § 46, because it was expected that plaintiff would not be able to work for at least six more months after plaintiff had spent more than five weeks in intensive care and transferred to an in-patient rehabilitation facility. Cline v. Clinical Perfusion Systems, Inc., 637 F.Supp.3d 1255, 1270.

N.D.Okl.2016. Cit. in sup., cit. in cases cit. and quot. in sup. Former employee filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against former employer, alleging that, after returning to work following a leave of absence for a nervous breakdown, he did not want to work at his old position, defendant knew that he was suffering from depression, refused to offer him an accommodation, and strung him along for months making him think he could transfer to a new position when defendant did not intend to reassign him. This court granted in part defendant's motion for summary judgment, holding that plaintiff's allegations were not sufficient to support the level of extreme and outrageous conduct necessary for an IIED claim. Citing Restatement Second of Torts § 46, the court reasoned that the evidence showed that plaintiff applied to jobs for which he was unqualified or was not the most experienced applicant, and failed to show that the persons making the hiring decision had any knowledge that he claimed to be disabled. Russell v. Phillips 66 Company, 184 F.Supp.3d 1258, 1275.

N.D.Okl.2014. Cit. in sup., cit. in case quot. in sup. Former city employee brought a state-law claim for intentional infliction of emotional distress (IIED), inter alia, against several city officers, alleging that he was forced to undergo an unconstitutional drug and alcohol screening and then was unlawfully fired when he raised questions about its propriety. Granting defendants' motion to dismiss this claim, this court held that plaintiff's allegations that defendants participated in implementing and/or continuing a policy that ultimately resulted in the violation of his constitutional rights, that he was retaliated against when he raised concerns about his rights, that employees were instructed not to speak to him, that an inquiry was made into his performance, that the locks were changed on his office, and that he was ultimately terminated and allegedly defamed by being called an extortionist and snitch did not assert conduct that was sufficiently extreme and outrageous to state an IIED claim. The court noted that, in Oklahoma, a claim for IIED was governed by the narrow standards laid out in Restatement Second of Torts § 46. Romero v. City of Miami, 8 F.Supp.3d 1321, 1334.

N.D.Okl.2012. Quot. in sup., cit. in ftn., cit. in case quot. in ftn. Former employee of town sued town, police officers, and others, alleging that, as punishment for voicing his opinion about the operation of the town, defendants arrested him on trumped up charges, took him to a distant jail, and forced him to expend time and resources defending himself against an arrest and charge for which there was no jurisdiction or probable cause, thereby causing him to suffer embarrassment and ridicule. Denying defendants' motion to dismiss plaintiff's claim for intentional infliction of emotional distress, this court held that reasonable minds could differ as to whether defendants' actions, as alleged by plaintiff, rose to the level of outrageousness required to maintain a claim for intentional infliction of emotional distress, and that, when reasonable persons could differ, it was for the jury to decide, subject to the oversight of the court. Allen v. Town of Colcord, Okla., 874 F.Supp.2d 1276, 1290.

N.D.Okl.2011. Cit. in sup., com. (d) quot. in case quot. in sup. African American former employee sued former employer, alleging intentional infliction of emotional distress, inter alia, arising from racial discrimination by employer. Granting defendant's motion for summary judgment, this court held that plaintiff's testimony that, among other things, defendants failed to promote him to full-

time work and enforced a ban on cellular phone usage during work against him but not against Caucasian employees was insufficient to prove that defendant engaged in a pattern of consistent and severe discriminatory behavior that rose to the level of extreme and outrageous conduct; moreover, plaintiff failed to produce any evidence that he suffered severe emotional distress as a result of defendant's alleged conduct. Green v. Paragon Films, Inc., 814 F.Supp.2d 1174, 1186, 1187.

N.D.Okl.2007. Cit. in case quot. in sup. Independent contractor, who performed individual rehabilitation services for clients of nonprofit corporation, brought various claims against corporation for, among other things, allegedly discriminating against her on the basis of her religion and disability, fostering a hostile work environment, and retaliating against her after she filed for unemployment benefits. Granting summary judgment for defendants, this court held, inter alia, that plaintiff failed to state a claim for intentional infliction of emotional distress, because she did not allege actions by defendant that were sufficiently extreme and outrageous to satisfy Oklahoma's high standard of actionable conduct within the employment context. Edwards v. Creoks Mental Health Services, Inc., 505 F.Supp.2d 1080, 1096.

N.D.Okl.2006. Coms. (d), (i), and (j) quot. in cases quot. in disc. Fifty-two Indian nationals recruited by company to live and work at company's Oklahoma plant brought federal civil-rights/labor-standards action against company and its president, including an additional state-law claim for intentional infliction of emotional distress. After finding that the work assignments, restrictions, living conditions, name-calling, profanity, and threats that plaintiffs experienced at the hands of defendants, when considered as a totality, were sufficiently extreme and outrageous to support plaintiffs' emotional-distress claim, the court concluded that president, who had directly participated in this conduct, was personally liable for his tortious acts. Chellen v. John Pickle Co., Inc., 446 F.Supp.2d 1247, 1292, 1293, amending and superseding 434 F.Supp.2d 1069.

N.D.Okl.2006. Com. (d) quot. in case quot. in sup. Licensed physician who specialized in cardiovascular and related surgery brought suit, together with his corporation, against various hospitals and competing medical professionals for, in part, intentional infliction of emotional distress, alleging that defendants interfered with plaintiffs' reputation and livelihood by, among other things, telling patients and other doctors that physician was being stripped of his credentials and privileges and refusing to refer patients to him. Dismissing the claim with prejudice, this court held, inter alia, that plaintiffs failed to allege facts sufficient to support the necessary elements of their claim. The court stated that the claim was little more than an assertion that plaintiffs were ousted by defendants from the Tulsa cardiovascular-surgery market without good cause, and concluded that such conduct was not extreme and outrageous. Cohlmia v. Ardent Health Services, LLC, 448 F.Supp.2d 1253, 1272.

N.D.Okl.2005. Cit. in disc., subsec. (1) and com. (d) quot. in case quot. in disc. Former administrative assistant sued church conference and her supervisor for intentional infliction of emotional distress and other claims after being terminated. Granting in part defendants' motion for summary judgment, the court concluded that supervisor's alleged conduct, which included

rubbing employee's shoulders, telling another employee that she was untrustworthy, and failing to praise her when informing others that she was terminated, was not sufficiently outrageous to support a claim for intentional infliction of emotional distress under Oklahoma Law, especially since plaintiff had not sought counseling and only claimed a lack of sleep resulting from this conduct. Bolin v. Oklahoma Conference of the United Methodist Church, 397 F.Supp.2d 1293, 1298.

N.D.Okl.2005. Cit. in disc. Current and former city employees brought claim for, inter alia, intentional infliction of emotional distress against city and supervisors for, among other things, allegedly implementing surreptitious video and audio surveillance of their workplace. This court granted defendants' motions for summary judgment. The court held, among other things, that defendants implemented no surveillance that constituted the extreme and outrageous conduct necessary to establish the emotional-distress claim, since the only allegation potentially rising to the level of such conduct involved surveillance of the restroom, and the camera providing this surveillance only pointed in the direction of the restroom door and generally could not view inside it. Williams v. City of Tulsa, OK, 393 F.Supp.2d 1124, 1130.

N.D.Okl.2003. Cit. in case cit. in disc. After department store fired a deaf and legally blind janitor due to her assaults against two coemployees, janitor sued store for violations of the Americans with Disabilities Act and intentional infliction of emotional distress. Plaintiff alleged that coemployee knew of plaintiff's disabilities, yet engaged in campaign of harassment, which included moving items from her work station, ridiculing her, and making repeated unwelcome physical contact. Adopting magistrate's report, this court denied defendants' motion for summary judgment on the emotional-distress claim, stating that fact issues existed as to whether coemployee acted intentionally or recklessly toward plaintiff, whether conduct was extreme and outrageous given plaintiff's disabilities, and whether conduct caused plaintiff severe emotional distress. Campbell v. Wal-Mart Stores, Inc., 272 F.Supp.2d 1276, 1302.

N.D.Okl.2001. Com. (d) cit. in sup. Former prison inmate brought a claim for intentional infliction of emotion distress against state drivers-license examiner, alleging that defendant forced her to have sex with him while she was on work-release at drivers-license center. Denying defendant's motion for summary judgment, this court held, inter alia, that defendant's alleged conduct was sufficiently extreme and outrageous to support a claim for intentional infliction of emotional distress. Smith v. Cochran, 216 F.Supp.2d 1286, 1297, decision affirmed 339 F.3d 1205 (10th Cir.2003).

N.D.Okl.2001. Com. (d) quot. generally in disc. After telephone reservation sales agent who suffered from Bell's Palsy and fibromyalgia was terminated from her employment, she sued employer for, in part, intentional infliction of emotional distress. Granting summary judgment for defendant, the court held, inter alia, that defendant's discharge of plaintiff for excessive absences did not rise to the level of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress. Thompson v. Cendant Corp., 130 F.Supp.2d 1255, 1263.

N.D.Okl.1998. Com. (d) quot. in case quot. in disc. Technician sued former employer for sexual harassment in violation of Title VII, wrongful discharge in violation of the Family and Medical Leave Act (FMLA), and intentional infliction of emotional distress. Defendant moved for summary judgment. Granting the motion in part and denying it in part, the court held that, while material factual issues existed as to whether the alleged conduct of plaintiff's supervisor was so severe and pervasive as to create a hostile work environment, defendant's response was proportional and reasonable and reasonably calculated to end any harassment, and that because defendant took prompt remedial action in response to plaintiff's complaints of sexual harassment, plaintiff failed to establish that defendant acted in an extreme and outrageous manner; however, plaintiff's claim for violations of the FMLA survived defendant's motion for summary judgment. Henderson v. Whirlpool Corp., 17 F.Supp.2d 1238, 1248.

N.D.Okl.1996. Com. (d) cit. generally in headnotes and quot. in case quot. in sup. Former employee who was terminated for allegedly violating employer's policy against absenteeism brought an action against employer for, inter alia, intentional infliction of emotional distress based on harassment in the work place. Granting in part defendant's motion for summary judgment, the court held that, even assuming the truth of plaintiff's allegations that co-workers referred to plaintiff as "crazy" and/or as "a lunatic" and talked about people on Prozac or going to a mental-health facility, that behavior was not the kind of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress under Oklahoma law. McClain v. Southwest Steel Co., Inc., 940 F.Supp. 295, 296, 300.

N.D.Okl.1991. Com. (d) quot. in case quot. in sup. A former employee sued her former employer and a foreman for intentional infliction of emotional distress, inter alia, alleging that the foreman engaged in continued sexual harassment, the employer ignored and acquiesced in that harassment, and the harassment caused her severe physical and emotional distress. The jury awarded the plaintiff damages against both defendants but the court granted the defendants' motions for directed verdict and judgment n.o.v., holding, inter alia, that, because the foreman's conduct occurring within the two-year limitations period before the claim was filed was not sufficiently extreme and outrageous to constitute intentional infliction of emotional distress and the plaintiff conceded as such regarding the conduct during this period, the claim was time-barred. Marshall v. Nelson Elec., 766 F.Supp. 1018, 1030.

W.D.Okl.

W.D.Okl.2009. Com. (d) quot. in sup. Public-school-district executive who was laterally transferred with no loss of pay from her position supervising 15 school principals to another position in the district brought federal civil-rights claims, as well as a state-law claim for intentional infliction of emotional distress (IIED) against the school district, district superintendent, and others. This court granted summary judgment for defendants, holding, in regard to the IIED claim, that none of plaintiff's allegations, including her assertion that she was transferred in retaliation for the exercise of her First Amendment rights and her attempts to assist an African-American student

who was being unfairly disciplined, met the level of extreme and outrageous conduct required to sustain this tort under Oklahoma law. Converse v. City of Oklahoma City, 649 F.Supp.2d 1310, 1319-1320.

W.D.Okl.2009. Com. (d) quot. in case quot. in sup. Female employee brought a pendent state-law claim of intentional infliction of emotional distress (IIED) against employer, alleging that she was subjected to a continuing hostile work environment due to the actions of defendant's vice president/ COO, and that defendant did nothing to ameliorate the situation but instead retaliated against her by transferring her to a less desirable position. Granting defendant's motion for summary judgment on the IIED claim, this court held that Oklahoma courts had routinely held that workplace-harassment claims did not rise to the level of outrageous conduct necessary to support a claim of IIED, and concluded that nothing in plaintiff's allegations indicated that a contrary result should be reached in this case. Daniels v. C.L. Frates and Co., 641 F.Supp.2d 1214, 1218.

W.D.Okl.2008. Com. (j) quot. in case quot. in sup. Relatives of federal transfer-center inmate who died of an apparent suicide sued United States in connection with its treatment of relatives after inmate's death. This court ruled for plaintiffs on their claim for intentional infliction of emotional distress and awarded a total of $1.1 million to plaintiffs, including $50,000 to the estate of inmate's father, who died before trial. On remand for additional findings as to the severity of the emotional distress suffered by each plaintiff, the court held, inter alia, that the award to father's estate represented the minimum necessary to compensate each individual plaintiff for the government's extreme and outrageous actions in initially failing to disclose the unusual circumstances of inmate's death. The court noted that, under Oklahoma law, in many cases, the extreme and outrageous character of the defendants' conduct was in itself important evidence that the distress existed. Estate of Trentadue v. U.S., 560 F.Supp.2d 1124, 1127, 1137.

W.D.Okl.1997. Cit. in headnotes, cit. and quot. in disc., com. (d) quot. in disc., com. (j) quot. in case quot. in ftn. A hoax victim whose business phone number appeared on internet bulletin board advertisements of items glorifying the bombing of the Oklahoma City federal building sued a radio station for intentional infliction of emotional distress, among other claims, after a radio host urged listeners to call the victim's phone number to protest. This court granted defendant summary judgment, holding, inter alia, that plaintiff failed to prove that the disc jockey acted in an extreme or outrageous manner. Zeran v. Diamond Broadcasting, Inc., 19 F.Supp.2d 1249, 1250, 1253, 1254.

W.D.Okl.1992. Cit. but dist. An employee who was dismissed because he stole a decorative bottle of wine from a company function and then lied about it sued his former employer and supervisors for intentional infliction of emotional distress, inter alia, alleging that defendants made statements to prospective employers concerning the reason for his termination. Granting defendants' motion for summary judgment, the court held that defendants' alleged actions did not rise to the level of outrageous conduct necessary to support plaintiff's claim for intentional infliction of emotional distress. Tatum v. Philip Morris, Inc., 809 F.Supp. 1452, 1470.

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D.Or.

D.Or.2018. Com. (d) quot. in case quot. in sup. Former employee who suffered from depression, alcoholism, bipolar disorder, generalized anxiety, and post-traumatic stress disorder brought claims for, among other things, intentional infliction of emotional distress against former employer and its successor arising from certain actions taken by his supervisor in connection with his termination. This court granted employer's motion for summary judgment on employee's emotional-distress claim, holding that supervisor's alleged conduct—in falsely claiming that employee failed to disclose that he had previously been arrested and taken to a hospital for a mental-health/suicide evaluation, and in yelling at him during a meeting in which she denied his request for a reasonable accommodation for his disabilities—did not establish the level of extreme or outrageous conduct sufficient to sustain such a claim under Restatement Second of Torts § 46. Reaves v. Nexstar Broadcasting, Inc., 327 F.Supp.3d 1352, 1375.

D.Or.2014. Com. (d) quot. in case quot. in sup. Former charter-school student who was allegedly sexually harassed by another student filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against school and school board, alleging that defendants allowed plaintiff's sexual harasser to interact with her despite having a separation plan in place the prior year, suspended plaintiff, required her to write an apology letter to the harasser, and confiscated her personal notes on harasser's behaviors that she took pursuant to her therapist's instructions. This court granted defendants' motion to dismiss, holding that plaintiff failed to raise a genuine issue of material fact. Citing Restatement Second of Torts § 46, the court explained that plaintiff did not allege facts sufficient to establish that defendants' conduct rose to the necessary level of extreme and outrageous conduct required for an IIED claim. T.L. ex rel. Lowry v. Sherwood Charter School, 68 F.Supp.3d 1295, 1320.

D.Or.2011. Coms. (d) and (i) quot. in case quot. in sup. After father and his minor son were involved in a physical altercation with teenagers at a shopping mall, mall owners encouraged police to arrest all of those involved; father, individually and on behalf of son, sued mall owners and property managers for intentional infliction of emotional distress (IIED), inter alia, alleging that defendants only requested police action in retaliation for father's statements to news media that there were customer safety problems at the mall. Granting defendants' motion for summary judgment, this court held that plaintiffs failed to establish the requisite intent for the claim—more specifically, that defendants intended to inflict emotional harm in order to prevent plaintiffs from making public statements—because defendants requested that everyone involved in the altercation be prosecuted, not just those who made statements. The court further reasoned that defendants' actions were not socially intolerable as required for this claim under Oregon law, because requesting that all individuals involved in a physical altercation be prosecuted was not extreme or outrageous conduct. Giulio v. BV CenterCal, LLC, 815 F.Supp.2d 1162, 1180.

D.Or.2011. Com. (h) quot. in case quot. in sup. Parents brought various claims against school district on behalf of their minor child in connection with its provision of special education services

to him while he was a middle school and high school student, alleging, among other things, that defendant intentionally inflicted emotional distress on them by obtaining child's juvenile court records. Granting summary judgment for defendant, this court held, as to the intentional-infliction claim, that defendant did not violate a state statute concerning the confidentiality of juvenile records, that the statute reflected what was socially tolerable, and that, because there was no violation, defendant's conduct did not constitute an extraordinary transgression of the bounds of socially tolerable conduct. G.R. ex rel. Russell v. Dallas School Dist. No. 2, 823 F.Supp.2d 1120, 1148.

D.Or.2008. Coms. (d) and (i) cit. in cases quot. in sup. Bicyclist who was charged with a bicycle-light violation and interference with police officers brought a pendent state-law claim for intentional infliction of emotional distress (IIED), as part of her federal action under § 1983, against city and police officers. This court granted summary judgment for defendants on the IIED claim, holding that officers' conduct in pulling up to plaintiff in an unmarked car at night, failing to identify themselves as police officers, ignoring plaintiff's requests that they identify themselves, failing to use the car lights in a manner that would suggest they were police officers, and chasing her into her yard and pulling her out of her house by her arm and her hair, even viewed in the light most favorable to plaintiff, simply did not constitute a transgression sufficiently extraordinary to meet the requirements for an IIED claim. Child v. City of Portland, 547 F.Supp.2d 1161, 1168.

D.Or.2006. Coms. (d) and (i) quot. in cases quot. in sup. Former police officer of Mexican ancestry brought racial harassment/discrimination claims against city, police department, and supervisors. Adopting the magistrate's recommendation that defendants' motion for summary judgment be granted as to plaintiff's claim for intentional infliction of emotional distress, this court held, inter alia, that plaintiff failed to present facts to support his claim that the alleged conduct by defendants, which included numerous racist comments and threats to retaliate against plaintiff if he continued to complain of the comments, exceeded all possible bounds of decency or could be characterized as atrocious. Sizemore v. City of Dallas, 443 F.Supp.2d 1201, 1221.

D.Or.2005. Coms. (d) and (1) quot. in case quot. in disc. Auto technician nearing retirement who alleged that defendant and its shop manager discriminated against him on the basis of age in violation of state and federal statutes, asserted additional common-law claim for intentional infliction of emotional distress. The court granted defendant summary judgment on this claim, holding that plaintiff failed to establish that the manager's treatment of him, which included criticizing his performance and communication skills, and disciplining him over his allegedly faulty repairs, was unreasonable and exceeded the ordinary treatment of employees by other businesses, much less that it exceeded all possible bounds of decency. Scott v. Sears, Roebuck and Co., 395 F.Supp.2d 961, 981, 982.

D.Or.2000. Com. (d) cit. in disc. Former employee sued employer for, inter alia, intentional infliction of emotional distress, alleging that termination of plaintiff in airport as he was preparing to leave on a family vacation constituted extraordinary conduct. Entering partial summary judgment for defendant, the court held, among other things, that, while the timing and location of

plaintiff's dismissal, as well as the proximity of the act to his family, all made for an unpleasant confrontation, such behavior did not rise to the level of egregiousness necessary to support recovery under a theory of intentional infliction of emotional distress. Araujo v. General Elec. Information Services, 82 F.Supp.2d 1161, 1174, affirmed and remanded 25 Fed.Appx. 615 (9th Cir.2002).

D.Or.1996. Com. (I) quot. in case cit. in disc. Two nonprofit corporations and several individuals sued several anti-abortion organizations and individuals, alleging violations of RICO, the Freedom of Access to Clinics Act, state statutes, and state tort law claims, including intentional infliction of emotional distress. This court denied defendants' motion to dismiss and granted in part and denied in part one defendant organization's motion for judgment on the pleadings, holding, inter alia, that plaintiffs stated a claim for intentional infliction of emotional distress, because the court could not conclude as a matter of law that defendants' alleged threatening conduct did not exceed the bounds of socially tolerable conduct. Plaintiffs alleged that defendants published and disseminated posters, which threatened physical harm to plaintiffs, with specific intent to inflict severe mental and emotional distress upon plaintiffs. The complaint also contained significant background regarding the potential violent effect of defendants' posters, such as murder, attempted murder, and assault of the individuals targeted in the posters. Planned Parenthood v. American Coalition, 945 F.Supp. 1355, 1386.

D.Or.1994. Com. (d) quot. in case quot. in sup. Discharged employee sued her former employer for intentional infliction of emotional distress, inter alia. Granting defendant's motion for summary judgment, the court held, in part, that plaintiff failed to prove that she suffered severe emotional distress as a result of defendant's allegedly abusive conduct and that defendant's conduct was not sufficiently outrageous to support plaintiff's intentional infliction of emotional distress claim. Montgomery v. J.R. Simplot Co., 916 F.Supp. 1033, 1041, affirmed 76 F.3d 387 (9th Cir.1996).

D.Or.1993. Com. (j) quot. in part in sup. Two female employees sued employer for intentional infliction of emotional distress, inter alia, allegedly arising out of male supervisor's sexually inappropriate behavior. Granting partial summary judgment for defendant and making other dispositions, the court held, inter alia, that, under Oregon law, emotional distress attributable to complaints from other workers who were harassed by supervisor, or the general stresses of employment, was not actionable. Meagher v. Lamb-Weston, Inc., 839 F.Supp. 1403, 1410.

D.Or.1990. Coms. (d) and (j) cit. in case quot. in sup. A husband and wife separated shortly after they were involved in an automobile accident. The wife settled her claim against the driver of the other car and presented the driver's insurance company with a written waiver, purportedly signed by her husband, which released and signed over his rights to any settlement proceeds to the wife. The husband, who was liable for his wife's unpaid medical bills, claimed that the signature was forged and sued the insurance company, alleging that accepting the waiver and entering into a settlement agreement with the wife without regard to his interests constituted the tort of outrageous conduct. This court dismissed the complaint for failure to state a claim, finding that the conduct alleged, even if true, would not support a claim for outrageous conduct because

the husband produced no evidence that the insurance company acted intentionally or recklessly in a way designed to cause emotional distress to him by accepting a waiver that was valid on its face and arriving at a negotiated settlement with his wife. Showalter v. Rinard, 752 F.Supp. 963, 967.

E.D.Pa.

E.D.Pa.2022. Com. (d) cit. in case cit. in sup. Former township employee brought, among other things, a claim for intentional infliction of emotional distress (IIED) against supervisor, alleging that defendant pitted plaintiff against his girlfriend, made threatening phone calls after hours, and engaged in retaliation against plaintiff in an attempt to pressure him to not testify about defendant's supervisory conduct in maintaining township roadways. This court granted in part defendant's motion to dismiss, holding that plaintiff failed to state a claim for IIED. Citing Restatement Second of Torts § 46, Comment *d*, the court explained that defendant's conduct, as alleged, was not extreme or outrageous such that it could sustain an IIED claim, because it was, at most, objectionable and distasteful. Geraghty v. East Bradford Township, 584 F.Supp.3d 10, 20.

E.D.Pa.2021. Com. (d) quot. in case quot. in sup. and cit. in ftn. Brother filed claims for, among other things, intentional infliction of emotional distress against sister and her husband in connection with allegations that defendants falsely informed their mother that he had tried to break into her safe. This court granted sister and her husband's motion to dismiss, holding that brother failed to allege any conduct by sister or her husband that met the standard required to state a claim for intentional infliction of emotional distress under the law of either Pennsylvania or Florida. The court noted that both Pennsylvania and Florida courts generally followed the Restatement Second of Torts, which defined outrageous conduct as that beyond all possible bounds of decency, and regarded as atrocious, and utterly intolerable in a civilized community. Greiser v. Drinkard, 516 F.Supp.3d 430, 440.

E.D.Pa.2021. Com. (d) cit. in case cit. in sup.; coms. (h) and (*i*) quot. in sup. Employee brought, among other things, a claim for intentional infliction of emotional distress (IIED) against coworker, alleging that defendant repeatedly sexually harassed her over the course of several months by attempting to grope her, making graphic and sexual remarks about her body, and offering payment for sexual favors. This court denied in part defendant's motion to dismiss, holding that plaintiff alleged sufficient facts to state a claim for IIED. Citing Restatement Second of Torts § 46, the court explained that plaintiff satisfactorily alleged the intentional, extreme, and outrageous nature of defendant's conduct and that she suffered severe emotional distress as a result of such conduct; furthermore, under Pennsylvania law, plaintiff's claim did not accrue until defendant's repeated actions rendered his conduct sufficiently outrageous to support an IIED claim. Smith v. RB Distribution, Inc., 515 F.Supp.3d 311, 315, 319, 320.

E.D.Pa.2020. Com. (d) quot. in case quot. in disc. Administrator of estate of correctional-facility detainee, on behalf of herself and the estate, brought, among other things, a claim for intentional infliction of emotional distress (IIED) against healthcare-services providers, alleging

that defendants acted in an extreme and outrageous manner when they prescribed decedent blood and psychotropic medications that gave him the means and opportunity to overdose and die. This court granted defendants' motion for summary judgment, holding that defendants' actions in allowing decedent to keep a thirty-day pack of medications on his person despite his history of overdosing on pills was not sufficiently extreme or outrageous so as to sustain an IIED claim, because the record did not indicate that defendants knew of his history of overdose, and defendants otherwise provided decedent with appropriate medical care. Quoting Restatement Second of Torts § 46, Comment *d*, the court noted that it was not sufficient in an IIED claim for plaintiff to show that defendants acted with tortious or criminal intent. McDonald-Witherspoon v. City of Philadelphia, 481 F.Supp.3d 424, 455.

E.D.Pa.2020. Cit. in case cit. in sup.; com. (d) quot. in sup. Employee brought, among other things, a claim for intentional infliction of emotional distress against employer, alleging that her supervisors and human-resources personnel retaliated against her when she complained that a coworker sexually harassed her repeatedly. This court granted in part defendant's motion to dismiss, holding that plaintiff failed to show that its conduct was extreme and outrageous. Citing Restatement Second of Torts § 46, the court observed that, under state caselaw, employers could be found to have acted outrageously and in an extreme manner if they engaged in both harassment and retaliation, but plaintiff did not allege that defendant participated in the harassment. Smith v. RB Distribution, Inc., 498 F.Supp.3d 645, 666.

E.D.Pa.2019. Quot. in cases quot. in ftn. Pilot who resided in New Jersey brought a lawsuit against employer, an Indiana-based airline company that purportedly told plaintiff he would work at its Philadelphia base if he was hired and completed training at its Indiana headquarters, alleging, inter alia, that a claim for intentional infliction of emotional distress (IIED) arose when defendant terminated his employment in the middle of a flight-training class, in front of his peers, after inducing him to leave his Texas-based employer and move across the country for training. This court denied defendant's motion to transfer venue to Indiana, holding that there were no concerns about enforceability of the judgment, because the laws regarding IIED claims in both Pennsylvania and Indiana drew from Restatement Second of Torts § 46 and were identical. Dariz v. Republic Airline Inc., 377 F.Supp.3d 499, 504.

E.D.Pa.2018. Com. (d) quot. in case quot. in disc. Arrestee brought a lawsuit against arresting officers, alleging that defendants committed intentional infliction of emotional distress when they stopped and arrested him without reasonable suspicion. This court granted defendants' motion for summary judgment, holding, inter alia, that plaintiff's claim of intentional infliction of emotional distress failed because defendants' conduct did not rise to the level of physically harmful, outrageous conduct necessary to award relief. The court cited Restatement Second of Torts § 46, Comment *d*, in explaining that defendants' conduct had to be so extreme as to go beyond all possible bounds of civilized society in order for plaintiff's claim to have merit. Sarin v. Magee, 333 F.Supp.3d 475, 483.

E.D.Pa.2016. Cit. in case quot. in sup. Pet owner brought a claim for intentional infliction of emotional distress against humane society and officers of the society who were authorized to enforce animal cruelty laws, alleging that defendants seized all fifteen of her pets while executing an unlawful search warrant and later refused to return two of her pets despite a court order requiring them to do so. This court granted defendants' motion to dismiss that claim with leave to supplement the complaint, holding that plaintiff failed to plead that defendants' actions amounted to the outrageousness required to sustain such a claim under Restatement Second of Torts § 46. While a statement by one defendant during the search that he was seizing plaintiff's pets because he was "the Big Bad Wolf" was rude and unprofessional, it did not rise to the requisite level of outrageousness, and none of defendants' other alleged conduct met the necessary threshold. Bamont v. Pennsylvania Society for the Prevention of Cruelty to Animals, 163 F.Supp.3d 138, 155.

E.D.Pa.2016. Cit. in ftn., cit. in cases cit. and quot. in ftn.; subsec. (1) and com. (d) quot. in case quot. in sup. High-school softball player and her parents brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against softball coach who had a sexual relationship with player and was ultimately convicted in criminal court for charges arising from that relationship. This court denied plaintiffs' motion for summary judgment as to the IIED claim, holding that a reasonable jury could find that defendant's conduct was not sufficiently extreme and outrageous to support the claim. The court cited Restatement Second of Torts § 46 for the elements of an IIED claim and explained that liability was reserved for conduct that was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, which did not necessarily include all behavior that was illegal. Nace v. Pennridge School District, 185 F.Supp.3d 564, 583, 584.

E.D.Pa.2016. Subsec. (2) cit. in case quot. in sup. Parents brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against residential facility for individuals with disabilities where son was a resident, and against facility employees, alleging that, after defendants did not receive funding for son's care and their petition for involuntary confinement was denied, they conspired to remove him from their care, falsified reports of his escalating aggressive behaviors, transported him to and abandoned him at a crisis center, failed to provide medical records to the center, and refused to return him to the facility, which led to son being declared homeless by the state and suffering two grand mal seizures. This court granted defendants' motion to dismiss parents' IIED claim, holding that, while the allegations were sufficiently extreme and outrageous, plaintiffs failed to allege that they were present when any of the conduct occurred, which was a requirement under Restatement Second of Torts § 46(2) when the conduct was directed at a third person. Schutt v. Melmark, Inc., 186 F.Supp.3d 366, 378.

E.D.Pa.2015. Cit. in case cit. in sup. City resident filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against city, alleging that, after city police officers arrested her while she was intoxicated and locked out of her apartment, they released her, while she was still intoxicated, in a high crime area where she was abducted and raped by a third party. This court denied in part defendant's motion for summary judgment, holding that plaintiff sufficiently stated an IIED claim. The court noted that the Pennsylvania Supreme Court did not explicitly recognize

an IIED tort, and relied on Third Circuit caselaw that predicted that the state supreme court would adopt Restatement Second of Torts § 46 in recognizing the tort. Arnold v. City of Philadelphia, 151 F.Supp.3d 568, 579.

E.D.Pa.2015. Subsec. (1) and com. (d) quot. in sup. Firefighter brought a claim for intentional infliction of emotional distress against news publisher, after it used his photograph in an article about a fire-department scandal in which plaintiff had no involvement. This court granted defendant's motion to dismiss, holding that defendant's alleged conduct was not sufficiently extreme or outrageous to establish a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court reasoned that, although being falsely implicated in a scandal involving lewd or lascivious conduct was unfair and unfortunate, and potentially defamatory in some circumstances, it was not extreme or outrageous. Cheney v. Daily News, L.P., 102 F.Supp.3d 708, 717, 718.

E.D.Pa.2015. Cit. in case quot. in sup. Operator of a 25-dog kennel in his 1,350 square foot home brought a claim for, among other things, intentional infliction of emotional distress (IIED) against state nonprofit corporation that was empowered to enforce state law pertaining to the prevention of cruelty to animals, as well as several of corporation's employees, after the state withdrew 134 charges against plaintiff following a suppression hearing related to defendants' execution of a search warrant for his home, and plaintiff was found not guilty of one remaining charge related to his sale of an injured puppy to defendants. This court granted in part defendants' motion for summary judgment, holding that plaintiff failed to support his IIED claim with competent medical evidence showing that he actually suffered the claimed distress, as required to state such a claim under Restatement Second of Torts § 46. Lawson v. Pennsylvania SPCA, 124 F.Supp.3d 394, 409.

E.D.Pa.2014. Cit. and quot. in sup., cit. in case quot. in sup., cit. in case quot. in ftn.; com. (d) quot. in sup. After owners' home was improperly sold by mortgagee at a sheriff's sale, owner brought, inter alia, a claim for intention infliction of emotional distress (IIED) against mortgagee. This court granted in part defendants' motion for summary judgment, holding that plaintiffs failed to provide sufficient evidence to support their IIED claim. Citing Restatement Second of Contracts § 46, the court pointed out that an IIED claim required that plaintiffs allege conduct by defendants that was so outrageous and extreme as to go beyond all possible bounds of decency, and concluded that, not only did plaintiffs not accomplish this, but they also did not provide confirmation by a medical expert that they suffered distress. DeHart v. HomEq Servicing Corp., 47 F.Supp.3d 246, 254, 257, 258.

E.D.Pa.2014. Quot. in sup., cit. in case cit. in sup.; com. (d) quot. in sup. Parents of a deceased marine brought, inter alia, an intentional-infliction-of-emotional-distress (IIED) claim arising under Pennsylvania common law and the Federal Tort Claims Act against the United States and others, alleging that, after discovering that the decedent's heart had been removed during an autopsy in Greece, doctors at a U.S. naval base concealed that information from plaintiffs, and that defendant knew or should have known that plaintiffs' discovery of this deception would cause acute and lasting emotional distress. Granting in part defendant's motion to dismiss, this court held

that defendant's conduct did not rise to the level of outrageousness required to sustain an IIED claim. The court noted that, in evaluating IIED claims, Pennsylvania courts applied the standard set forth in Restatement Second of Torts § 46, and, here, defendant's decision as to what information to tell plaintiffs, rather than being sufficiently extreme and outrageous to meet the § 46 standard, simply reflected a contrary approach to relaying uncomfortable facts to a grieving parent. LaLoup v. U.S., 29 F.Supp.3d 530, 541, 542.

E.D.Pa.2013. Cit. in sup., quot. in case quot. in sup. As part of a larger action, Hispanic police detective brought claims for intentional infliction of emotional distress (IIED), inter alia, against city police department and its employees, alleging that he suffered extreme emotional distress as a result of personal attacks by his co-workers, which included "hostile desk gags" (such as putting his desk on crates) and the theft of his gun, all of which were aimed at him because he was the only Hispanic officer on his shift. Granting summary judgment for defendants as to this claim, this court held that plaintiff's allegations were not sufficient to support an IIED claim under Pennsylvania law. The court explained that, under Pennsylvania law, where, as here, an alleged workplace harm was motivated by personal reasons and arose from conduct that would not normally be expected in the workplace, a plaintiff could pursue a "personal animus" IIED claim; however, in this case, no reasonable jury could find defendants' actions so atrocious and utterly intolerable in nature that they went beyond all possible bounds of decency in a civilized society, such that they would support liability. Alers v. City of Philadelphia, 919 F.Supp.2d 528, 561.

E.D.Pa.2013. Cit. in sup., com. (d) quot. in case quot. in sup. Parents who temporarily lost custody of their infant son as a result of county's child-abuse investigation brought, inter alia, a pendent state-law claim for intentional infliction of emotional distress (IIED) against hospital physician who reported to county authorities his opinion that the child had been abused, contending that the pattern of medical misrepresentations made by defendant to support his false allegations of child abuse amounted to outrageous conduct. Granting summary judgment for defendant, this court held that plaintiffs failed to show that defendant's conduct was sufficiently extreme and outrageous to support their IIED claim. The court concluded that, although plaintiffs submitted medical evidence that defendant's opinions regarding their child were possibly erroneous, without an expert opinion that defendant's opinions were grossly negligent, plaintiffs could not succeed on their claim. Dennis v. DeJong, 953 F.Supp.2d 568, 593.

E.D.Pa.2011. Cit. in sup., com. (d) quot. in cases quot. in sup. Parents and their infant son brought a pendent state-law claim for intentional infliction of emotional distress (IIED) against hospital physician, social worker employed by hospital, and employees of county child-services agency, arising from the temporary removal of infant from parents' custody for suspected child abuse. This court dismissed this claim with prejudice against social worker and county employees, holding, inter alia, that these defendants' alleged conduct in contacting county authorities based on their suspicions of child abuse was not sufficiently extreme or outrageous to state an IIED claim; further, even though physician allegedly falsely asserted to police officer, for the purpose of securing father's arrest, that infant had a skull fracture and could not breathe on his own, the court dismissed plaintiffs' IIED claim against him without prejudice, because plaintiffs did not provide expert

medical confirmation that his conduct caused them emotional distress. Dennis v. DeJong, 867 F.Supp.2d 588, 659, 660.

E.D.Pa.2011. Cit. in case cit. in ftn. Former art teacher sued school district that formerly employed him, former medical provider, and numerous individuals, alleging intentional infliction of emotional distress and other claims in connection with his termination from school district. Granting in part defendants' motion to dismiss, this court held that school district's alleged failure to provide plaintiff with medical leave and benefits, and medical provider's alleged breach of plaintiff's privacy rights under the Patient's Bill of Rights and/or the Health Insurance Portability and Accountability Act, did not rise to the level of outrageous conduct required to state a claim for intentional infliction of emotional distress. Ruder v. Pequea Valley School Dist., 790 F.Supp.2d 377, 397.

E.D.Pa.2011. Cit. and quot. in sup. Mother of suspect who was shot and killed while fleeing from police brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against police officers who shot suspect. Denying defendants' motion for summary judgment as to that claim, this court held that, if plaintiff's version of the facts was accepted as true and the police fired 55 shots, in her presence, at an unarmed man who was running away from them, a reasonable jury could find that it constituted outrageous conduct for purposes of her IIED claim. Sullivan v. Warminster Tp., 765 F.Supp.2d 687, 708.

E.D.Pa.2010. Com. (d) cit. and quot. in case quot. in sup. Factory worker sued employer and co-worker, asserting, inter alia, a claim for intentional infliction of emotional distress (IIED) against co-worker. Granting co-worker's motion for summary judgment, this court held that co-worker's alleged conduct on one occasion in pushing a utility knife into plaintiff's breast in such a way as to “scare the wits out of her” was not sufficiently outrageous to support plaintiff's IIED claim under Pennsylvania law. The court noted that plaintiff only cited one case that, like this case, did not involve retaliation in addition to harassment, and stressed that that case, unlike this case, involved conduct that was incessant; while retaliation was not a mandated factor under Pennsylvania law for an IIED claim asserted in the employment context, it was a weighty factor. Rorrer v. Cleveland Steel Container, 712 F.Supp.2d 422, 438.

E.D.Pa.2010. Com. (e) cit. in sup. In this civil-rights lawsuit, African-American employee brought, inter alia, a pendent state-law claim for intentional infliction of emotional distress against police sergeant, alleging that he was terminated from his position as a doorman providing security at a bar and grill after police sergeant arrested him on false charges of public drunkenness and disorderly conduct. This court granted defendant's motion to dismiss that claim, holding that, while plaintiff sufficiently pled extreme and outrageous conduct by alleging that defendant arrested him despite knowing that he was neither intoxicated nor behaving in a disorderly manner, called his employer to tell the owner that he had been arrested and was unfit to work as a doorman providing security, requested owner to terminate his employment, and made the phone call, assertions, and requests to owner because of his race, the claim nonetheless failed because he did not adequately plead harm. White v. Brommer, 747 F.Supp.2d 447, 467.

E.D.Pa.2009. Subsec. (1) cit. in case quot. in ftn. Judgment debtor sued judgment creditors, seeking a declaratory injunction barring enforcement of creditors' New York judgment against debtor, as well as compensatory and punitive damages, and alleging, among other things, that the judgment was obtained in violation of her due-process rights. Granting defendants' motion to dismiss plaintiff's claim for intentional infliction of emotional distress, this court held, inter alia, that plaintiff failed to show some type of physical harm resulting from defendant's allegedly outrageous conduct in order to satisfy the element of severe emotional distress. In making its decision, the court noted that the Pennsylvania Supreme Court had thus far only assumed arguendo that the tort of intentional infliction of emotional distress existed in Pennsylvania. Di Loreto v. Costigan, 600 F.Supp.2d 671, 701.

E.D.Pa.2009. Subsec. (1) quot. in case quot. in sup., subsec. (2) quot. in sup. and cit. in case cit. in sup. Former ballet student and his wife sued ballet patron, patron's foundation, and officers of foundation, alleging that patron sexually abused student over the course of eight years while defendants financially supported his education and ballet training. This court denied defendants' motion to dismiss student's claim for intentional infliction of emotional distress, holding that one defendant's alleged threats of deportation and cessation of financial support made to student while he was in the hospital for depression could reasonably be regarded as extreme and outrageous; the court, however, granted the motion as to wife, noting that the alleged conduct occurred before plaintiffs were married and that the complaint did not allege that wife suffered any bodily harm. Doe v. Schneider, 667 F.Supp.2d 524, 533.

E.D.Pa.2007. Cit. and quot. in disc., com. (d) quot. in case cit. in disc. Former high-school student who had an approximately ten-month-long sexual relationship with her band teacher during her senior year brought, in part, a claim of intentional infliction of emotinal distress (IIED) against band teacher and school's principal. This court denied defendants' motions for summary judgment on the IIED claims, holding that principal's alleged conduct in ignoring the sexual relationship after being put on notice of it, thus allowing it to continue for another seven months, was sufficiently extreme as to be labeled outrageous under Pennsylvania law; additionally, teacher's argument that he could not be held liable because plaintiff consented to the relationship, and because his having sex with plaintiff was not criminal failed, since plaintiff lacked the capacity to consent to the sex, and there was no requirement that a claim for IIED be based in criminal activity. Chancellor v. Pottsgrove School Dist., 501 F.Supp.2d 695, 710, 711.

E.D.Pa.2007. Subsec. (1) quot. in case quot. in sup. and in ftn. Wife, individually, and on behalf of her husband's estate, sued, among others, township's chief of police, alleging, inter alia, that defendant's supervision of "showdown-style" negotiations in a siege situation involving police and her mentally unstable husband caused her husband's suicide and constituted intentional infliction of emotional distress (IIED). This court denied defendant's motion to dismiss the IIED claim, holding, among other things, that plaintiff sufficiently alleged extreme and outrageous conduct when she asserted that police, who were at decedent's house to serve an involuntary commitment order and take him into custody, disconnected decedent's electricity, threatened him with felony

arrest, and blasted loud music, screeching noises, and hundreds of canisters of pepper spray into his house. Heckensweiler v. McLaughlin, 517 F.Supp.2d 707, 720.

E.D.Pa.2005. Cit. in disc., subsec. (1) quot. in disc. After the Equal Employment Opportunity Commission brought an action against employer for retaliatory firing and other unlawful practices, the employee who was fired brought several claims against his former employer for wrongful discharge under federal and state law. This court denied in part employer's motion to dismiss employee's state-law claims, holding, inter alia, that factual issues existed as to whether employer's conduct toward employee was sufficiently outrageous to sustain employee's claim for intentional infliction of emotional distress. Employer's conduct included bringing an action against employee for violation of a noncompete agreement and publishing accusations that employee was untrustworthy and would not pay creditors. E.E.O.C. v. Creative Playthings, Ltd., 375 F.Supp.2d 427, 437.

E.D.Pa.2003. Subsec. (1) quot. in case quot. in sup. Former police officer sued borough and others for wrongful termination in violation of due process, breach of collective-bargaining agreement, and intentional infliction of emotional distress, alleging that defendants conspired to deprive plaintiff of his job while he was on sick leave and that they knew it would deprive plaintiff of medical care during a serious illness. This court granted in part defendants' motion to dismiss, holding, inter alia, that defendants' conduct did not rise to requisite level of outrageousness to support emotional-distress claim. Since plaintiff's claims arose from allegations of unlawful termination and were unrelated to sexual harassment and subsequent retaliation, plaintiff's complaint was outside universe of cognizable emotional-distress claims. Capresecco v. Jenkintown Borough, 261 F.Supp.2d 319, 323.

E.D.Pa.2003. Cit. in disc., subsec. (1) quot. in ftn. After a prison inmate assaulted corrections officers, an internal investigation resulted in disciplinary hearings against the officers and initial five-day suspensions, which were eventually reduced to written reprimands, for improper use of excessive force against an inmate. Although one officer called for help during altercation with inmate, the prison's public-address system was inoperative. Officers sued the county for, inter alia, due-process violations, malicious prosecution, and intentional infliction of emotional distress. This court dismissed in part, holding, inter alia, that plaintiffs' emotional-distress claims failed because defendants' conduct could not reasonably be regarded as so extreme and outrageous as to permit recovery. Keim v. County of Bucks, 275 F.Supp.2d 628, 635.

E.D.Pa.2003. Com. (d) quot. in case quot. in disc. Former employee sued employer for intentional infliction of emotional distress, among other claims. Granting in part defendant's motion for summary judgment, the court held, inter alia, that plaintiff's claim for intentional infliction of emotional distress failed as a matter of law, because the alleged conduct, including a threat by coemployee to ruin plaintiff's career, defendant's failure to review slides causing plaintiff to cancel a scientific presentation, abandonment by former colleagues as evidenced by their decision not to participate as coauthors with her on a paper, and lies told by defendant's witnesses in state-court

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litigation, did not rise to the level of outrageousness necessary to recover for intentional infliction of emotional distress under Pennsylvania law. Lin v. Rohm and Haas Co., 293 F.Supp.2d 505, 522.

E.D.Pa.2003. Quot. in case quot. in sup. After store security guard grabbed mother, forced her to the floor, handcuffed her, dragged her through the mall to the store, and had her transferred to police department to be charged for retail theft while her young children were abandoned in the mall, mother sued store on one daughter's behalf, alleging, inter alia, intentional infliction of emotional distress. This court granted defendant's motion for summary judgment on the claim for intentional infliction of emotional distress, holding, inter alia, that there was no medical evidence to support the existence of physical or emotional injury to daughter. Robinson v. May Dept. Stores Co., 246 F.Supp.2d 440, 444.

E.D.Pa.2002. Cit. and quot. in cases quot. in sup. Patient who was erroneously informed that she had tested positive for HIV sued, among others, physician, health-services corporation, and the United States, asserting, in part, a claim for intentional infliction of emotional distress. Granting defendants' motion for summary judgment, the court held, inter alia, that defendants' conduct could in no way be categorized as outrageous, since there was nothing in the record to suggest that defendants intentionally deceived plaintiff or that they relayed the information to her in an atrocious or offensive manner. Wilder v. U.S., 230 F.Supp.2d 648, 653.

E.D.Pa.2001. Com. (d) quot. in sup. Oil-tanker engineer sued shipping company for intentional infliction of emotional harm, among other claims, due to harassment by other crew members and the lack of a properly fitting immersion suit. This court granted in part defendant's motion for summary judgment, holding, inter alia, that plaintiff's emotional-distress claim failed, because the conduct by defendant's employees aboard the ship did not rise to the requisite level of outrageousness. Given that the voyage was confined to waters where a suit was not legally required, defendant's failure to provide plaintiff with a properly fitting one was not extreme and outrageous conduct. Similarly, the ill treatment of plaintiff by his superiors and co-workers did not provide a basis for his claim. Barclay v. Keystone Shipping Co., 128 F.Supp.2d 237, 244, 245.

E.D.Pa.2001. Quot. in sup. Police captain who was suspended and transferred after testifying at trial of another officer filed suit against city, police department, and police officials, alleging, inter alia, intentional infliction of emotional distress. Granting in part defendant's motion for summary judgment, this court held, inter alia, that a reasonable jury could not find that defendants' conduct was outrageous enough to satisfy elements of tort of intentional infliction of emotional distress. Dooley v. City of Philadelphia, 153 F.Supp.2d 628, 665.

E.D.Pa.2000. Quot. in disc., cit. in ftn., com. (d) quot. in disc. and quot. in case cit. in disc. In wrongful-discharge action, customer-service representative sued former employer for, inter alia, intentional infliction of emotional distress. Entering summary judgment for defendant, the court held, in part, that even if defendant terminated plaintiff in a particularly embarrassing manner and spread rumors about her alleged wrongdoing in the workplace, such conduct was not so outrageous

or extreme as to give rise to an action for intentional infliction of emotional distress. Landmesser v. United Air Lines, Inc., 102 F.Supp.2d 273, 281.

E.D.Pa.2000. Cit. in headnote, com. (d) quot. in case quot. in disc., com. (j) quot. in disc. White tenant and her black friend sued the landlord of the apartment building for intentional infliction of emotional distress, among other claims, alleging that the landlord threatened to kill the tenant and remove the black friend and her two children from the apartment if she did not remove them. This court denied defendants' motion to dismiss, holding, inter alia, that the ejection of a tenant from her home with threats of violence in retaliation for her refusal to accede to racial discrimination was sufficiently outrageous and extreme to sustain a claim for intentional infliction of emotional distress. Lane v. Cole, 88 F.Supp.2d 402, 406, 407.

E.D.Pa.2000. Com. (d) cit. in case cit. in disc. The father of two African-American children who were enrolled at a public high school sued the city school district and others, alleging intentional infliction of emotional distress, among other claims. This court granted in part defendants' motion for judgment on the pleadings, holding, inter alia, that plaintiff's allegations of wrongful conduct on the part of the school's assistant principal and a teacher—leaking to the press, to the school district, and to Jewish groups plaintiff's letter accusing the school's white and Jewish teachers of being racist and pressuring to have plaintiff terminated as a member of the school's advisory panel and removed as president of the school's home and school association—did not rise to the level of outrageousness required to sustain a claim for intentional infliction of emotional distress. Smith v. School District of Philadelphia, 112 F.Supp.2d 417, 428.

E.D.Pa.1999. Cit. in disc. City police sergeant was charged with, and acquitted of, perjury in testimony he gave concerning accusations of civil-rights violations against another officer; sergeant sued FBI agents who pursued investigations of both men for, inter alia, intentional infliction of emotional distress. Entering summary judgment for agents, the court held, in part, that agents did not act in an extreme and outrageous manner, especially where they played no part in the decision to indict sergeant. Gatter v. Zappile, 67 F.Supp.2d 515, 521.

E.D.Pa.1999. Cit. in sup., coms. (d), (e), (h), and (j) cit. in sup. Three sisters sued city and various city agencies to recover damages sustained when, as foster children, they were repeatedly sexually assaulted by their foster family's teenage son. Granting in part and denying in part defendants' motion to dismiss, the court held that plaintiffs had stated a claim for, among other things, intentional infliction of emotional distress, as they had established that defendants were at least reckless in their disregard of plaintiffs' complaints about son's conduct, which was sufficiently extreme to cause plaintiffs to experience severe emotional distress. Jordan v. City of Philadelphia, 66 F.Supp.2d 638, 642, 643.

E.D.Pa.1999. Cit. in case quot. in ftn., subsec. (1) cit. in ftn. Landlord who was charged with, but acquitted of, prostitution, promoting prostitution, and conspiracy sued arresting officers for, inter alia, intentional infliction of emotional distress, alleging that he was falsely imprisoned and interrogated without counsel, and that defendants coerced a witness into implicating him. Entering

summary judgment for defendants, the court held, in part, that there was no evidence that the witness, who merely related that she had felt threatened by defendants, had actually been coerced by them, and that, because defendants had probable cause to arrest plaintiff, his allegation of false imprisonment could not support a claim for intentional infliction of emotional distress. Olender v. Township of Bensalem, 32 F.Supp.2d 775, 792.

E.D.Pa.1999. Cit. in case quot. in ftn. Police dispatcher sued township and police officials for intentional infliction of emotional distress, among other claims, alleging that defendants, through their employees, continually engaged in unwelcome behavior consisting of sexually offensive comments, inappropriate touching, and unwanted gifts of a sexual nature. This court denied in part defendants' motion to dismiss, holding, inter alia, that plaintiff sufficiently alleged a pattern of sexual harassment and retaliation against her by her supervisors for complaining about sexual harassment to state a cause of action for intentional infliction of emotional distress. Regan v. Township of Lower Merion, 36 F.Supp.2d 245, 250.

E.D.Pa.1999. Subsec. (1) quot. in sup. In action brought pursuant to the Age Discrimination in Employment Act (ADEA), laborer asserted state-law claim against former employer for, inter alia, intentional infliction of emotional distress. Denying defendant's motion for summary judgment, the court held, in part, that assigning plaintiff to more difficult tasks than he was asked to perform before he filed his ADEA claim and refusing to provide plaintiff with tools and equipment necessary to perform his job safely amounted to extreme and outrageous conduct. Schmidt v. Montgomery Kone, Inc., 69 F.Supp.2d 706, 715.

E.D.Pa.1999. Quot. in case quot. in disc. Former employee who claimed that she was not promoted because she practiced Seventh Day Adventism sued former employer for, inter alia, intentional infliction of emotional distress. Dismissing this count of the complaint, the court held that failure or refusal to promote was not sufficiently extreme or outrageous as to be considered atrocious or intolerable in civilized society. Van Cleve v. Nordstrom, Inc., 64 F.Supp.2d 459, 464.

E.D.Pa.1998. Subsec. (1) cit. in headnote and quot. in disc. Employee who was discharged after failing to attend one of his required doctor's appointments for monitoring his alcohol problem sued his former employer for, in part, intentional infliction of emotional distress. Granting defendant's motion to dismiss or, alternatively, for summary judgment, the court held, inter alia, that the Labor Management Relations Act preempted plaintiff's state-law claim for intentional infliction of emotional distress, since disposition of the claim, which would require resolution of the question of whether defendant properly discharged plaintiff, was not possible without an analysis and interpretation of the terms of the collective-bargaining agreement pertaining to just discharge and to grievance procedures. Henderson v. Merck & Co., Inc., 998 F.Supp. 532, 534, 540.

E.D.Pa.1998. Cit. in disc. Former executive sales director for insurance company sued company, among others, for violations of the Fair Labor Standards Act/Equal Pay Act. Plaintiff also asserted common law claims for, inter alia, intentional infliction of emotional distress. Defendant moved to dismiss the complaint. Granting the motion in part and denying it in part, the court held that

dismissal was inappropriate with respect to plaintiff's statutory claims; however, plaintiff could not maintain her claim for intentional infliction of emotional distress where her allegations amounted to no more than breach of contract, and the alleged breach was not of such a kind that serious emotional disturbance was particularly likely to result. Jean Anderson Hierarchy v. Allstate Life Ins. Co., 2 F.Supp.2d 688, 693.

E.D.Pa.1998. Cit. in disc. A woman sued a city, its mayor, and its police commissioner for civil-rights violations and intentional infliction of emotional distress, among other claims. Plaintiff alleged that defendants improperly charged her with disorderly conduct arising out of her statement at a city council meeting that the mayor was an "ignorant bastard." This court granted in part and denied in part defendants' motion to dismiss, holding, inter alia, that plaintiff's emotional-distress claim was defective because she failed to allege that defendants' conduct caused her to seek medical treatment. Johnson v. City of Chester, 10 F.Supp.2d 482, 491.

E.D.Pa.1998. Cit. in headnote, quot. in disc., com. (d) quot. in disc. Wife and daughter sued husband's accountant, among others, for, inter alia, intentional infliction of emotional distress, alleging that defendant fraudulently concealed the true value of husband's assets during divorce proceedings. Entering summary judgment for defendant, the court held, in part, that plaintiffs' failure to establish that defendant committed the act complained of precluded an action for intentional infliction of emotional distress in connection with that act. Perlberger v. Perlberger, 32 F.Supp.2d 197, 199, 210, vacated in part, modified in part 34 F.Supp.2d 282 (E.D.Pa.1998).

E.D.Pa.1997. Cit. in disc., cit. in case quot. in sup. High school student sued school district and district employees for, inter alia, violations of Title IX, alleging that defendants failed to prevent plaintiff's male classmates from sexually harassing her. Plaintiff also asserted claims for prima facie tort and intentional infliction of emotional distress. Defendants moved to dismiss. Granting the motions in part and denying them in part, the court held that plaintiff stated a cognizable Title IX claim against district; that Title IX liability did not attach to individual employees; that district was immune from liability for willful misconduct; that employees were not liable under a theory of prima facie tort because Pennsylvania did not recognize prima facie tort as a valid cause of action and, even if it did, affirmative conduct, as opposed to the nonfeasance alleged here, was required; and that employees could not be found liable for intentional infliction of emotional distress, since their negligent failure to act formed the basis of the claim. Collier by Collier v. William Penn School Dist., 956 F.Supp. 1209, 1217.

E.D.Pa.1997. Cit. in headnotes, quot. in disc., com. (d) quot. and quot. in case quot. in disc., com. (h) cit. in disc. Therapist prevailed in a lawsuit brought by parents of a patient who accused therapist of having falsely implanted memories of satanic abuse in their daughter's mind. Therapist then sued parents and their attorneys for, inter alia, wrongful use of civil proceedings, defamation, and intentional infliction of emotional distress, alleging, among other things, that defendants initiated their lawsuit in the absence of probable cause and with the wrongful purpose of forcing plaintiff out of practice. Defendants moved to dismiss. Granting the motions in part and denying them in part, the court held that plaintiff had not properly alleged that attorneys filed the earlier

lawsuit for an improper purpose and, absent an improper purpose, the question of probable cause did not arise; that parents were not liable for wrongful use of civil proceedings; that plaintiff stated a claim for defamation against parents; and that defendants' conduct was not sufficiently extreme and outrageous as to permit recovery under a theory of intentional infliction of emotional distress. Mansmann v. Tuman, 970 F.Supp. 389, 391, 392, 401-403.

E.D.Pa.1996. Cit. in disc., cit. in ftn., cit. and cit. generally in cases cit. in ftn., subsec. (1) quot. in ftn. in sup., com. (d) quot. in case quot. in sup., com. (h) cit. in disc. Woman sued her psychotherapist for negligent and intentional infliction of emotional distress in connection with the 12-year sexual relationship that he initiated with her. Defendant moved to dismiss. Denying the motion, the court held that plaintiff, whom defendant owed a fiduciary duty of care, had successfully pled her negligence cause of action, and that defendant's conduct was sufficiently outrageous and extreme to allow plaintiff to recover under a theory of intentional infliction of emotional distress. Corbett v. Morgenstern, 934 F.Supp. 680, 683, 684.

E.D.Pa.1996. Cit. in ftn., cit. in sup., com. (d) quot. in sup. Judgment debtor and his wife sued constable and others for intentional infliction of emotional distress, inter alia, alleging that constable, acting for or on behalf of the other defendants, altered an order of execution or caused it to be altered so that it appeared to be issued against plaintiff husband individually and not against his corporation then purported to levy upon and seize personal property belonging to the individual plaintiffs and posted notices of levy and sale. Denying in part constable's motion to dismiss, the court held that plaintiffs stated a claim for intentional infliction of emotional distress under Pennsylvania law by alleging that they suffered from “anxiety, distress, discomfort and embarrassment” as a result of defendants' actions and that defendants' conduct was “extreme and dangerous” and “intentional and reckless” and “caused Plaintiffs severe emotional distress.” Miniscalco v. Gordon, 916 F.Supp. 478, 480, 481.

E.D.Pa.1995. Cit. in headnote, quot. but dist., com. (d) quot. in case quot. in disc. Accountant who claimed he was discharged when he reported his supervisor's illegal and unethical business practices to employer sued employer for, inter alia, intentional infliction of emotional distress. Granting defendant's motion for summary judgment, the court held that plaintiff did not raise a genuine issue of material fact as to whether his supervisor engaged in illegal or unethical conduct and that defendant's failure to inform former clients of plaintiff's termination, resulting in their continued telephone calls to him after his dismissal, did not amount to outrageous or utterly intolerable conduct. Brown v. Peoples Security Ins., 890 F.Supp. 411, 412, 415.

E.D.Pa.1995. Subsec. (1) cit. in case cit. in disc. Hotel restaurant manager who was terminated when he refused to divorce his Roman Catholic wife sued his father, a partner in the hotel and an officer of the hotel's management company, for intentional infliction of emotional distress. Dismissing plaintiff's complaint, the court held that while it did not condone defendant's threats of discharge or his conduct, his actions did not rise to the level of outrageous, obnoxious, or intolerable behavior needed to support plaintiff's claim. Furthermore, plaintiff failed to allege

physical injury, a necessary component of an action for intentional infliction of emotional distress in Pennsylvania. Frankel v. Warwick Hotel, 881 F.Supp. 183, 187.

E.D.Pa.1995. Cit. in disc. After car accident, a mentally retarded injured driver sued her insurer for intentional infliction of emotional distress, alleging that insurer's adjuster called her employer, threatening to expose him to criminal liability in order to pressure her into accepting an inadequate settlement of her suit with the other driver. Plaintiff sought production from insurer of its file on plaintiff's claims, asserting that production would shed light on whether adjuster's threat was known to and condoned by insurer's officials. This court granted in part plaintiff's motion to compel, holding that plaintiff was entitled to discovery not only of the ordinary work product, but also of the opinion work product relevant to the emotional-distress claim. Plaintiff's claim depended on proof of the insurer's officials' mental state; thus, the opinions and mental impressions of the officials in handling the negligence claim against other driver were directly at issue. Hartman v. Banks, 164 F.R.D. 167, 168.

E.D.Pa.1995. Cit. in disc. Former executive director of county opportunity board sued board and others for wrongful discharge and asserted several state law claims sounding in trespass, including civil conspiracy and malicious interference with contractual rights. Granting in part and denying in part defendants' motions to dismiss, the court held that plaintiff's claims for civil conspiracy and tortious interference with contractual relations were not precluded under the exclusivity provisions of Pennsylvania's workers' compensation statute; the statute was limited to damages for physical injury, and plaintiff's state law claims were not the types of claims that the state legislature intended to preempt when it passed its workers' compensation law. The court stated that defendants' citation of cases holding that intentional-infliction-of-emotional-distress claims were barred by the workers' compensation statute did not help defendants' arguments, because emotional-distress claims had a physical-injury component. Pierce v. Montgomery County Opportunity Bd., Inc., 884 F.Supp. 965, 973.

E.D.Pa.1994. Com. (h) cit. in case cit. in sup. An HIV-positive attorney who was fired by his law firm sued the firm and his supervising attorney for, among other claims, intentional infliction of emotional distress. He alleged that supervisor acted in an outrageous manner by failing to renew plaintiff's contract, disseminated false and defamatory information to conceal his discriminatory purpose, took steps to force plaintiff to voluntarily leave the firm, and abruptly fired him and threatened to forcibly remove him from the firm's premises. This court granted in part and denied in part defendants' motion for summary judgment, holding, inter alia, that even if the jury were to accept plaintiff's factual allegations, it would establish only that supervisor's role in plaintiff's firing stemmed from an improper motive, which was insufficient to support an emotional distress claim. Doe v. Kohn, Nast & Graf, P.C., 862 F.Supp. 1310, 1328.

E.D.Pa.1994. Cit. in case cit. in sup. Employee who was fired from his position as sales manager sued former employer for intentional infliction of emotional distress and other claims. Granting in part defendant's motion to dismiss, the court held, inter alia, that defendant's conduct in firing plaintiff a week before Christmas did not rise to the level of outrageousness required under

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Pennsylvania law, since defendant's actions, although harsh, were not so extreme as to go beyond all bounds of decency, despite defendant's harmful motive and the resulting effects on plaintiff. Mulgrew v. Sears Roebuck & Co., 868 F.Supp. 98, 103.

E.D.Pa.1993. Cit. in case cit. in disc. A transit authority employee sued his employer for damages from intentional infliction of emotional distress and loss of reputation caused by an unconstitutional drug test. The jury returned a verdict for the employee, and this court denied the employer's various postverdict motions, holding, inter alia, that the employee was not required to present medical testimony concerning the existence of emotional distress resulting from violation of his constitutional rights, particularly in view of the corroborating evidence that was presented. Bolden v. Southeastern Pa. Transp. Auth., 820 F.Supp. 949, 953, judgment affirmed 21 F.3d 29 (3d Cir.1994).

E.D.Pa.1993. Com. (d) cit. in disc. Former country club golf pro sued township, township's commissioners, and police officers and officials for several claims, including intentional infliction of emotional distress, after commissioners directed police to investigate theft and conspiracy charges against golf pro. Plaintiff alleged that although defendants knew the allegations were unfounded, they waged a two-year campaign to brand him a criminal conspirator and thief even though he was not arrested or charged with criminal wrongdoing. Granting in part defendants' motion to dismiss, this court held, inter alia, that, while plaintiff's allegations of governmental abuse were arguably serious, the emotional distress claim could not proceed as drafted because plaintiff erroneously alleged that all defendants acted outrageously. One defendant police officer, for example, was alleged only to have executed two search warrants and was not alleged to have known that accusations were meritless. Ersek v. Township of Springfield, Delaware County, 822 F.Supp. 218, 222.

E.D.Pa.1993. Com. (d) quot. in case cit. in sup. A disability insurer sued its insured for insurance claim fraud, among other claims; the insured counterclaimed, asserting various contract and tort claims, including intentional infliction of emotional distress. This court, granting in part the insurer's motion to dismiss and to strike, held, inter alia, that, under Pennsylvania law, the insurer's alleged conduct in claiming that the insured knowingly made misrepresentations on his disability claim was not sufficiently outrageous to support an emotional distress claim. Great West Life Assur. Co. v. Levithan, 834 F.Supp. 858, 862.

E.D.Pa.1993. Quot. in sup., com. (j) quot. in case cit. in disc. After a Pennsylvania resident was arrested and detained in Pennsylvania for a murder in New Jersey, he sued a New Jersey township, its police department, and a police officer for defamation, malicious prosecution, and intentional infliction of emotional distress, inter alia. Granting in part defendants' motion for summary judgment, this court determined that plaintiff could not prevail on the claim of intentional infliction of emotional distress regardless of whether the law of New Jersey or of Pennsylvania was applicable, since under Pennsylvania law there was no competent medical evidence in the record of the severity of the alleged mental distress, and under New Jersey law there was no evidence that

the alleged emotional distress was so severe that "no reasonable man could be expected to endure it." Lohman v. Township of Oxford, 816 F.Supp. 1025, 1032.

E.D.Pa.1993. Cit. and quot. in sup., com. (d) quot. in sup. Former chef for monastery located on private university campus sued monastery and university, alleging age discrimination in his discharge and intentional infliction of emotional distress. Granting in part defendants' motion for summary judgment, the court held, inter alia, that, under Pennsylvania law, mere discharge of plaintiff after approximately 10 years of service was not outrageous conduct that would support an emotional distress claim, even if the discharge was groundless. Stouch v. Brothers of Order of Hermits of St. Augustine, 836 F.Supp. 1134, 1144, 1145.

E.D.Pa.1993. Quot. in disc., cit. in cases cit. and quot. in disc.; com. (d) quot. in disc., com. (f) quot. and cit. in sup., com. (i) quot. in sup.; illus. 9-12 cit. in sup. Sexual assault victim sued television station and commanding officer of city's sex crimes unit for intentional infliction of emotional distress, among other claims, regarding officer's evening news interview. The court granted defendants' motions for summary judgment, stating that although a reasonable listener could have concluded that officer's statement implied that undisclosed facts existed indicating that plaintiff had engaged in consensual sexual intercourse with a stranger while driving at high speed and then fabricated a story of abduction and rape for the police, neither officer's statement nor broadcast by station was sufficiently outrageous to support intentional infliction of emotional distress claim; mere fact that television station was informed beforehand that plaintiff would be upset by the broadcast was insufficient to make broadcast outrageous. It noted also that station presented public safety official's comments that were sympathetic to plaintiff. Weinstein v. Bullick, 827 F.Supp. 1193, 1203-1205.

E.D.Pa.1992. Coms. (d) and (j) quot. in sup. A former employee sued his employer, a designer/manufacturer of electronics systems, alleging, inter alia, the intentional infliction of emotional distress and defamation in connection with remarks made by a co-worker regarding the plaintiff's national origin. The court granted in part the defendant's motion for summary judgment, holding that the alleged remarks were not sufficiently outrageous to permit recovery for emotional distress or sufficiently harmful to support a defamation claim. Gorwara v. AEL Industries, Inc., 784 F.Supp. 239, 247.

E.D.Pa.1992. Cit. in disc. Prisoner brought an action for intentional infliction of emotional distress, inter alia, against state corrections officers who searched his prison cell and opened his privileged legal mail. The court entered judgment for defendants, holding that intentional infliction of emotional distress required intent that went beyond all acceptable bounds and that defendants acted without the requisite intent. Proudfoot v. Williams, 803 F.Supp. 1048, 1054.

E.D.Pa.1991. Com. (d) quot. in disc. A collection attorney represented a client on a contingent fee basis. The attorney resigned from the practice of law for reasons unrelated to this representation, and the client directed him to return all files previously assigned to him. The attorney sued the client, seeking quantum meruit recovery of contingency fees and asserting claims for defamation

and intentional infliction of emotional distress. This court dismissed the emotional distress count of the plaintiff's complaint with prejudice, holding, inter alia, that the behavior described lacked the requisite degree of outrageousness to form the basis for the cause of action. The court reasoned that the attorney's allegations that the client deliberately sought to cause him various economic hardships by failing to make timely payment of his invoices were merely allegations of ordinary hardships common in many business relationships. Eisenberg v. General Motors Acceptance Corp., 761 F.Supp. 20, 23.

E.D.Pa.1990. Subsec. (1) quot. in disc., com. (d) quot. in sup. and cit. generally in ftn. A public transit authority discharged a train engineer following a positive drug and alcohol test result taken after the engineer was involved in a fatal train accident with an automobile, killing the automobile's driver and injuring its passengers. The engineer sued the transit authority for, inter alia, intentional infliction of emotional distress. This court granted the defendant's motion to dismiss for failure to state a claim, holding that the administration of a drug and alcohol test and the discharge of the plaintiff in connection with a fatal train accident clearly did not constitute conduct so outrageous as to uphold the plaintiff's claim for intentional infliction of emotional distress. Quitmeyer v. S.E. Pa. Transp. Authority, 740 F.Supp. 363, 368.

E.D.Pa.1989. Cit. generally in disc., cit. in case quot. in ftn. A nursing home patient and her family sued the owner and operator of a nursing home for violating the Social Security Act by discharging her against her will, and for breach of contract and intentional infliction of emotional distress. This court granted in part the defendant's motion to dismiss, holding, inter alia, that because Congress did not intend to provide for a private right of action under the Social Security Act creating Medicaid, the plaintiffs could not maintain this action. The court also held that the patient's family could not maintain an action for intentional infliction of emotional distress under Pennsylvania law because they could not demonstrate either that they were within the zone of danger of the defendant's conduct, or that they fell within a recognized exception to the zone of danger requirement. It stated that none of the family members actually witnessed the patient's transfer to another hospital, as they learned of the transfer from a third party. Chalfin v. Beverly Enterprises, Inc., 741 F.Supp. 1162, 1172.

E.D.Pa.1989. Cit. in ftn., subsec. (1) cit. in ftn. and quot. in sup., com. (d) quot. in case quot. in disc. and quot. in sup., com. (k) quot. in ftn. Four former railroad employees sued the railroad pursuant to the Federal Employers' Liability Act, alleging that they suffered from emotional or stress-related injuries as a result of the defendant's failure to provide them with a safe workplace. Granting the defendant's motion for summary judgment, the court held that the plaintiffs did not state a claim for intentional infliction of emotional distress because they failed to allege outrageous conduct and that they failed to state a claim for negligent infliction of emotional distress because the conduct they alleged was not the type recognized by the tort, namely, some kind of specific physical contact or impact on themselves or a third party or incidents of offensive conduct directed specifically at them. Kraus v. Consolidated Rail Corp., 723 F.Supp. 1073, 1080, 1081, 1086, 1088, appeal dismissed 899 F.2d 1360 (3d Cir.1990). See above case.

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E.D.Pa.1988. Com. (d) cit. in case quot. in disc. A discharged employee sued his employer, alleging violations of the Age Discrimination in Employment Act and the Employee Retirement and Income Security Act, and intentional infliction of emotional distress. The court granted in part the employer's motion for summary judgment, holding that forcing an employee to use a machine that was in poor condition and "riding" and "keeping the heat" on an employee in an attempt to make him retire did not constitute conduct that could be reasonably regarded as so extreme and outrageous as to permit recovery for intentional infliction of emotional distress. Clark v. France Compressor Products, 694 F.Supp. 112, 114.

E.D.Pa.1988. Cit. in disc., cit. and quot. in ftn. A mother sued a rehabilitation hospital for intentional infliction of emotional distress arising out of alleged failure to provide adequate supervision for her son, an accident victim, who was further injured when he fell out of his wheelchair and was occasionally given improper medications. The court granted the hospital's motion to dismiss, holding that, under Pennsylvania law, the plaintiff could state a claim for emotional distress only if she could demonstrate that she was within the "zone of danger" of the defendant's conduct, or if the circumstances of her injuries fell within a recognized exception to the zone of danger requirement, which she failed to demonstrate in this case. The court noted that Pennsylvania had fashioned its own approach to the tort of intentional infliction of emotional distress apart from the language of the Restatement. Schachter v. Moss Rehabilitation Hosp., 695 F.Supp. 186, 187-189.

E.D.Pa.1987. Com. (d) quot. in case cit. in sup. An employee sued her employer for sex discrimination, wrongful discharge, and intentional infliction of emotional distress as a result of her supervisor's actions. This court granted in part and denied in part the defendant's motion to dismiss the complaint, holding that the emotional distress count failed to state a claim. The court reasoned that activities such as checking the plaintiff's work more frequently than that of other employees, sitting and staring at her for 10 minutes at a time, calling her at home to demand that she report to work, and berating her for low work production were not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. Aquino v. Sommer Maid Creamery, Inc., 657 F.Supp. 208, 211.

E.D.Pa.1987. Com. (d) quot. in case quot. in sup. A former employee and his wife sued the former employer for, inter alia, breach of contract and intentional infliction of emotional distress after the husband was discharged from his job. This court granted the employer's motion for summary judgment, holding, inter alia, that the facts as alleged were not extreme or outrageous enough to allow recovery for intentional infliction of emotional distress, and that the employer-employee status is not a special relationship justifying relaxation of this standard. Engstrom v. John Nuveen & Co., Inc., 668 F.Supp. 953, 959.

E.D.Pa.1987. Com. (d) quot. but dist. Homeowners sued an exterminator for strict liability and intentional infliction of emotional distress after it spilled a cancer-causing chemical in their basement which contaminated the air in the house. Granting in part the exterminator's motion for

partial summary judgment, this court held that the defendant was not strictly liable for engaging in an ultrahazardous activity because its conduct was for the benefit of the plaintiffs, not for itself. The court also held that the exterminator's conduct was not sufficiently extreme or outrageous to impose liability for intentional infliction of emotional distress. Villari v. Terminix Intern., Inc., 677 F.Supp. 330, 336.

E.D.Pa.1987. Com. (d) cit. in sup. Homeowners sued a pest control company for contaminating their house with a hazardous termiticide, alleging that the company sold or distributed unreasonably dangerous insecticides and failed to warn the plaintiffs of the danger. This court granted partial summary judgment for the plaintiffs on the ground that even if the company was providing a hybrid sales-service transaction, it was strictly liable in tort for defects in the product. The court reasoned that to require a consumer to pursue a manufacturer would belie one of the goals of products liability law—to respond to the realities of the distribution of products in a changing society. Villari v. Terminix Intern., Inc., 663 F.Supp. 727, 733.

E.D.Pa.1986. Com. (d) quot. in sup. and cit. in disc., illus. 4 quot. in disc., com. (f), illus. 13 cit. in sup. A handicapped chauffeur sued his employer and its clients for slander, intentional interference with prospective business advantage, and intentional infliction of emotional distress, after the clients allegedly told the employer that they were embarrassed to have a handicapped driver. After deciding that Pennsylvania law should govern the dispute because it had the most significant relationship to the issues, the court awarded the defendants summary judgment. The court held that the plaintiff's three causes of actions failed since the alleged statements made by the clients were not defamatory because they were opinions, the plaintiff could not prove intent to interfere with business advantage, and the clients' statements did not rise to the required level of extreme and outrageous conduct necessary to prove a cause of action for intentional infliction of emotional distress. McFadden v. Burton, 645 F.Supp. 457, 463.

E.D.Pa.1985. Com. (d) cit. in sup. A television investigation team filmed a police officer leaving an after-hours club with an envelope in his hand. During the broadcast a reporter voiced suspicions that the officer was corrupt. The officer sued the broadcasting company alleging that the broadcast defamed him, placed him in a false light, invaded his privacy, and caused emotional distress. Plaintiff filed a motion to compel discovery and defendant moved for summary judgment. The trial court denied plaintiff's motion to compel discovery on the ground that defendant's sources of information were protected under Pennsylvania's shield law. The court granted defendant's motion for summary judgment because plaintiff could not establish actual malice. The court held, inter alia, that defendant was not liable for intentional infliction of emotional distress because defendant's conduct was not so outrageous in character or extreme in degree as to be regarded as atrocious or utterly intolerable. Coughlin v. Westinghouse Broadcasting and Cable, 603 F.Supp. 377, 389, affirmed 780 F.2d 340 (3d Cir.1985), cert. denied 476 U.S. 1187, 106 S.Ct. 2927, 91 L.Ed.2d 554 (1986).

E.D.Pa.1985. Subsec. (1) quot. in sup., com. (d) quot. in case cit. in sup. After the plaintiff was involved in a car accident with an insured of the defendant insurance company, she sued

the insurance company for, inter alia, invasion of privacy and intentional infliction of emotional distress because the defendant had a credit report on the plaintiff prepared as part of its investigation, without notifying the plaintiff that such a report had been requested. This court granted the defendant's motions for summary judgment on both claims, holding that the report was not communicated to either the public at large or to so many people that it was substantially certain to become public knowledge, so there was no publication, and therefore no invasion of privacy; and that the defendant's conduct was not sufficiently extreme or outrageous to constitute intentional infliction of emotional distress. Houghton v. New Jersey Mfrs. Ins. Co., 615 F.Supp. 299, 308, judgment reversed 795 F.2d 1144 (3d Cir.1986).

E.D.Pa.1985. Quot. in disc., com. (d) quot. in disc., com. (h) cit. in disc. After an employee was terminated because of irregularities in his expense reports, the employee sued his former employer and supervisor, alleging among other things, defamation, false imprisonment, invasion of privacy, and intentional and negligent infliction of emotional distress. The court granted the employer's motion for summary judgment, except as to the basic claim for defamation, the claim for defamation by conduct, and the claim for invasion of privacy. The court held that there was a material issue of fact for the jury as to the truth of the allegedly defamatory communication, thereby denying the employer's motion for summary judgment, regardless of who bore the burden of proving truth or falsity; the court also noted that the parties strongly disagreed as to the meaning of those words as reasonably understood by the audience. The court held that there was a qualified privilege, but a question of fact existed as to whether this privilege had been abused by excessive publication or lack of reasonable care to ascertain the truth. The court noted that, although some states required that there be recklessness for an abuse of a qualified privilege, this state required only negligence. The court held that there was no false imprisonment because the employee had a means of escape. The court also held that there was a material issue of fact whether any information placing the employee in a false light had been communicated to the public. The court rejected the employee's claim for intentional infliction of emotional distress, because the conduct complained of was not outrageous; the employer had communicated the alleged defamatory remarks to a group of employees that had a valid interest in the situation. Krochalis v. Insurance Co. of North America, 629 F.Supp. 1360, 1372, 1373.

E.D.Pa.1985. Subsec. (1) and com. (d) quot. in sup. and com. (h) cit. in disc. After his employment as president of the defendant corporation was terminated, the plaintiff brought an action for age discrimination, breach of an employment contract, and intentional infliction of emotional distress. The defendants, which included related corporations, moved for summary judgment. This court granted summary judgment on the intentional infliction of emotional distress claim, because the plaintiff had failed to demonstrate that the conduct of the defendants was sufficiently extreme or outrageous, but it denied summary judgment on the age discrimination claim, since there existed a material issue of fact whether age was a determinative factor in the plaintiff's discharge. The court denied summary judgment on the breach of contract claim because an issue existed whether the plaintiff had used his best efforts in carrying out his duties, and the defendants had failed to show sufficient frustration of purpose to bar the contract claim. Madreperla v. Williard Co., 606 F.Supp. 874, 879, 880.

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E.D.Pa.1984. Quot. in sup., com. (d) cit. in case cit. in sup. and quot. in ftn. A woman sued her former employer for sex discrimination, intentional infliction of emotional distress, and wrongful discharge. She claimed that the plaintiff's managers had made disparaging remarks about her marital status and her role as a mother, and had purposely overloaded her work schedule, causing her to collapse at work. The plaintiff had eventually been terminated from her employment. This court held that the plaintiff could not recover punitive damages or damages for pain and suffering under Title VII, since it furnished an equitable remedy. The defendant's conduct was held not to be so extreme and outrageous to support a claim for intentional infliction of emotional distress. The court concluded that, by filing the instant action, the plaintiff had forfeited an exclusive remedy for wrongful discharge provided under Pennsylvania statute. Hooten v. Pennsylvania College of Optometry, 601 F.Supp. 1151, 1154, 1155.

E.D.Pa.1984. Subsec. (1) quot. in disc., com. (d) quot. in sup. Victim of bladder cancer and his wife sued various sellers of unnamed chemical products, several trade associations, and a research institute in strict liability and in negligence, claiming that his disease was caused by carcinogens in unidentified chemical products used in the printing industry. Plaintiff included a claim for intentional infliction of emotional distress, alleging that defendants knew or should have known of the dangers of some unnamed product and failed to warn plaintiffs. The court dismissed the strict liability and negligence claims, holding that plaintiffs failed to state a cause of action because they could not identify any product as the cause of injury. It also dismissed the emotional distress claim, holding that defendants' alleged inaction over a long period of time was not the extreme and outrageous conduct required for recovery. Klein v. Council of Chemical Associations, 587 F.Supp. 213, 225, 226.

E.D.Pa.1983. Cit. in sup., com. (d) quot. in sup., illus. 1 cit. in sup. The plaintiff sued the defendants for malicious prosecution, abuse of process, intentional infliction of emotional distress, civil conspiracy and defamation. The plaintiff had criticized cancer care insurance sold by the defendants; he alleged that the defendants harassed him with lawsuits and defamed him in retaliation. This court granted in part and denied in part the defendants' motion to dismiss. The malicious prosecution count was dismissed because, under the laws of the states where the complained-of proceedings occurred, the plaintiff did not satisfy the arrest/seizure element. The abuse of process count was dismissed for failure to allege arrest of person or seizure of property. The emotional distress count was dismissed for failure to allege sufficiently extreme or outrageous conduct. The civil conspiracy count was not dismissed, and after looking to the laws of the plaintiff's domicile, this court allowed amendment of the defamation count to show abuse of a qualified privilege. Denenberg v. American Family Corp. of Columbus, Ga., 566 F.Supp. 1242, 1251-1252.

E.D.Pa.1983. Cit. and quot. in disc. An employee sued her employer under ERISA alleging that she was improperly denied disability benefits and for intentional infliction of emotional distress by the handling of her claim for disability. The court granted the employer's motion for summary judgment, holding that although ERISA preempted state law relating to employee benefit

plans, state laws relating to intentional infliction of emotional distress impacted ERISA plans too tenuously to be considered as law relating to such plans. Therefore the employee's claim for emotional distress was not barred by preemption. In this case however, the employee did not establish that the employer's conduct in investigating her situation was extreme or outrageous. Kelly v. International Business Machines Corp., 573 F.Supp. 366, 372, judgment affirmed 746 F.2d 1467 (3d Cir.1984).

E.D.Pa.1983. Cit. in case quot. in disc., subsec. (1) quot. in sup., com. (d) quot. in sup. A purchaser of securities and his family brought an action against various defendants, including a brokerage firm, its officers and a broker, alleging violations of the Securities Act of 1933, the Securities Exchange Act of 1934, the Racketeer Influenced and Corrupt Organizations Act, and pendent state claims including infliction of emotional distress. The defendants filed motions to dismiss. The court granted the defendants' motion with respect to the claim for infliction of emotional distress, holding that the defendants' alleged fraudulent conduct did not rise to the level of extreme and outrageous conduct, and therefore the complaint failed to establish intentional infliction of emotional distress. The motions to dismiss were granted in part and denied in part on other grounds with respect to the other claims. Kimmel v. Peterson, 565 F.Supp. 476, 498, 499.

E.D.Pa.1983. Subsec. (1) quot. in sup., com. (d) cit. in disc. An employee filed an employment discrimination action against her former employer, alleging that the plant manager engaged in a continuing course of sexual advances which were rejected by the employee, and that the manager retaliated against the rejections by making the workplace oppressive for the employee, causing severe emotional distress. The court denied the former employer's motion to dismiss with respect to the claim for intentional infliction of emotional distress, holding that the former employee's complaint was sufficient to state a cause of action for intentional infliction of emotional distress. The motion to dismiss was granted in part and denied in part on other grounds. Shaffer v. National Can Corp., 565 F.Supp. 909, 914, 915.

E.D.Pa.1983. Cit. in sup. The defendant corporation fired the plaintiff employee for stealing some brushes. At that time the plaintiff had one month to work until retirement. The retirement benefits the plaintiff would have received were far greater than those for which he qualified as a result of his discharge. The plaintiff sued for intentional infliction of emotional distress. The defendant moved to dismiss for failure to state a cause of action. After reviewing the four elements of this tort, the court held that the plaintiff should be allowed to offer evidence in support of his claim, and it denied the defendant's motion. Shipkowski v. United States Steel Corp., 585 F.Supp. 66, 69.

E.D.Pa.1983. Coms. (d) and (j) quot. in part in sup., com. (h) cit. in disc. A former managerial employee brought a wrongful termination suit against her employer alleging, inter alia, that the employer's conduct prior to the employee's forced resignation constituted intentional infliction of mental distress. The court granted the employer's motion for summary judgment as to this count. The court found that although the employer's conduct of removing the employee from her former position and taking away her private office and secretary was intentional and highly inappropriate, it was not the type of extreme and outrageous conduct required to support a cause of action for

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intentional infliction of emotional distress. In addition, the court found that the plaintiff failed to prove that she suffered severe emotional distress. Wells v. Thomas, 569 F.Supp. 426, 433, 434.

E.D.Pa.1982. Subsec. (1) quot. in sup., com. (d) quot. in sup., com. (h) cit. in sup., and com. (e) cit. in sup. An employee brought an action against his former employer claiming, inter alia, intentional infliction of emotional distress. The plaintiff argued that the defendant employer had induced him to refrain from seeking other employment and to commit himself to continued employment with the defendant while the defendant was aware that a contemplated change would require the plaintiff to relocate his home to a distant, even foreign, city. The court granted the defendant's 12(b)(6) motion to dismiss and held that the plaintiff failed to state a claim upon which relief could be granted. The court found that the extreme nature of conduct required to establish liability for intentional infliction of emotional distress was absent from the facts of this case, and noted that courts generally have steadfastly refused to extend the scope of this tort to anything but the most extreme and outrageous form of misconduct. While the defendant's conduct in this case might be characterized as offensive and unfair, it is not so extreme as to find liability. The court further noted that the plaintiff's attempted analogy to landlord-tenant cases was misplaced, as liability in those cases for intentional infliction of emotional distress was used to buttress other legal sanctions directed towards policing the conduct of notorious "slumlords." Cautilli v. GAF Corp., 531 F.Supp. 71, 72-75.

E.D.Pa.1982. Subsec. (1) cit. in sup. The plaintiff received collection letters from the defendant record club and brought this action, alleging libel and intentional infliction of emotional distress. The defendants moved to dismiss for lack of jurisdiction and failure to state a claim. The court stated that even if the plaintiff could correct certain jurisdictional defects, the case would then have to be dismissed on the merits. Even if the letters were false and defamatory, there had not been any publication, which was a requirement in a libel action in Pennsylvania. The court stated that the communications between the defendant and its attorney were not defamatory because they could not have reasonably lowered the plaintiff's reputation in the community or deterred others from dealing with him. In any case, such a conversation would be absolutely privileged as preliminary to a proposed judicial proceeding. The court also found that the statements made were not extreme and outrageous, as required to support a claim for mental distress. Complaint dismissed. Jones v. RCA Music Service, 530 F.Supp. 767, 768.

E.D.Pa.1982. Subsec. (1) quot. in ftn. in disc. An employee sued his former employer, the Interstate Commerce Commission, seeking compensatory and punitive damages, reinstatement, transfer, and backpay for the allegedly intentional, wanton, and malicious violation of his First Amendment rights. The court found that the employee's allegations regarding the harassment he received in retaliation for a letter he sent to Congress stated a cognizable First Amendment claim. However, the court held that the statute of limitations had run on this claim. The court applied the tort statute of limitations for the intentional infliction of emotional distress, because the employee's complaint stated that the acts of the employer were "extreme and outrageous," and, through this conduct, the employer "intentionally inflicted severe emotional distress" on the employee. Lawrence v. United States, 631 F.Supp. 631, 635.

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E.D.Pa.1981. Cit. in disc. but dist. The plaintiff husband developed asbestosis and the plaintiffs, the husband and his wife, sued to recover for the infliction of emotional distress. The plaintiffs alleged that they had endured enhanced anguish from the deterioration of the family unit. On a motion to file a third amended complaint, this court stated that recovery depended upon the foreseeability of the harm. The court stated that Pennsylvania appeared not to require direct visual perception, however, the event triggering the distress had been described as sudden or violent. Therefore the court found that Pennsylvania courts would not allow recovery for emotional distress resulting from the development of an occupational disease. Amader v. Johns-Manville Corp., 514 F.Supp. 1031, 1033.

E.D.Pa.1981. Cit. generally in disc. and com. (d) cit. and quot. in case quot. in disc. An action was brought against a state trooper to recover inter alia, for an intentional infliction of mental distress in connection with the trooper's issuing traffic citations to the plaintiff who was believed to have been involved in a hit and run automobile collision. The defendant moved for summary judgment. The court held that there was insufficient evidence of outrageous conduct to make out a claim under Pennsylvania law for the intentional infliction of mental distress, notwithstanding the plaintiff's assertion that the trooper had accused the plaintiff based upon his personal "feelings" about the case. The court stated that the issuance of the traffic citations against the plaintiff, which were supported by probable cause, was not conduct which any reasonable person could deem outrageous. The defendant's motion for summary judgment was granted. Curran v. Dural, 512 F.Supp. 699, 704.

E.D.Pa.1981. Cit. in disc., subsec. (1) cit. and quot. in sup. and cit. in case quot. in disc. and coms. (d) and (h) quot. in disc. Airline passengers brought an action against an airline seeking to recover damages for difficulties they incurred when their flight to Philadelphia was forced to fly directly to Syracuse due to the weather conditions in the Philadelphia area. The court granted summary judgment in favor of the airline holding, inter alia, that the passengers' complaint failed to state a cause of action, under Pennsylvania law, for either intentional infliction of emotional distress, negligent infliction of emotional harm, or emotional harm caused by a breach of contract. With respect to the passengers' intentional infliction of emotional harm claim, the court held that the first element of that cause of action, i.e., that the defendant's conduct had been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, was clearly absent. The court stated that it was for the court to determine, in the first instance, whether a defendant's conduct could be characterized as sufficiently extreme and outrageous to meet that standard. The court found that the passengers' negligent infliction of emotional harm claim failed because they had not alleged that the airline had been negligent in any manner which threatened the passengers with a danger of physical impact. The court also concluded that the passengers were barred from recovering for emotional harm caused by a breach of contract because they had not alleged any physical injury or physical impact. The court stated that recovery for an emotional disturbance resulting from a breach of contract is not allowed, in the absence of bodily harm caused by the breach. Kutner v. Eastern Airlines, Inc., 514 F.Supp. 553, 557.

E.D.Pa.1981. Cit. and quot. in disc. Plaintiff brought an action alleging that the defendant magazine publisher had defamed him by publishing a photograph of him wearing his "Mummer's" costume with a caption stating, "A New Year's tribute here to all the ostriches who gave their tails to make the world free for closet transvestites from South Philly to get themselves stinking drunk." The defendant moved for summary judgment. The court held that the plaintiff could maintain a defamation action against the magazine and the fact that the picture and caption appeared in the humor section of the magazine raised a jury question as to whether the publication of the picture was so obviously humorous that no person seeing it would have taken it as defamatory. The plaintiff also alleged that the defendant, by publishing the photograph and caption, invaded his privacy by portraying him before the public in a false light and in a manner offensive to reasonable persons. The court stated that in order to prove a claim for false light invasion of privacy, the plaintiff must show that the false light in which he has been placed would be highly offensive to the reasonable person and that the defendant had knowledge of and acted in reckless disregard as to the falsity of the publicized matter and false light in which it placed the plaintiff. The court held that the question of whether a reasonable person would find the statement highly offensive should be decided by a jury. The court also held that the evidence presented a jury question as to whether the defendant's conduct constituted extreme and outrageous conduct which caused severe emotional distress to the plaintiff. Accordingly, the defendant's motions for summary judgment were denied. Martin v. Municipal Publications, 510 F.Supp. 255, 260.

E.D.Pa.1980. Cit. in disc. and quot. in sup. and cit. in case quot. in disc. The plaintiff brought an action against the plaintiff's insurance company, for terminating the monthly disability payments that it had been making to the plaintiff under this policy. Count II of the plaintiff's complaint demanded punitive damages on the grounds that the defendant never intended to pay the plaintiff under this policy and purposefully and maliciously refused to pay benefits and as a result, caused the plaintiff to suffer anxiety, nervousness and distress. The defendant filed a motion to dismiss Count II because it failed to state a claim upon which relief could have been granted in either assumpsit and in trespass. The court noted that the plaintiff did not state whether his claim for punitive damages was in assumpsit or trespass. The court assumed initially that the plaintiff had alleged a breach of contract action based upon the defendant's breach of its duty as an insurer to deal fairly and in good faith with the plaintiff. The court stated that Pennsylvania law did not allow recovery of punitive damages in an action in assumpsit. Therefore the court held that Count II must be dismissed for failure to state a claim upon which relief could be granted in that it demanded punitive damages for an action in assumpsit. Alternatively, the court considered whether Count II sought punitive damages only in a trespass action, for the intentional infliction of emotional distress. The court discussed Pennsylvania law and concluded that an allegation for infliction of emotional distress, based upon the breach of an insurer's duty of fair dealing, fails to state a claim upon which relief could be granted. Therefore, the court granted the defendant's motion to dismiss Count II of the complaint. Mazzuia v. Monarch Life Ins. Co., 487 F.Supp. 1299, 1301-1303.

E.D.Pa.1979. Cit. in sup. An employee brought an action against his employer and his union for interference with business relations and for intentional infliction of emotional distress. The plaintiff was a foreman of the defendant company, a management position. He was notified by

the company that he was to stop being foreman and would be returned to his former position as group leader, pursuant to a collective bargaining agreement. Through this action he would have replaced an employee who had less seniority. The union objected to the transfer and threatened to strike if it occurred whereby the company rescinded the transfer. The defendants moved for summary judgment on both counts. The court denied the union's motion with regard to the claim of tortious interference with business relations because the complaint did set forth a recognizable claim and the union failed to put forth any evidence addressed to this issue. The court also denied the union's motion with regard to the claim of intentional infliction of emotional distress because a strike threat might constitute outrageous conduct and because the plaintiff had asserted that the conduct was directed at him intentionally for reasons relating to union politics and that assertion, if proven, would adequately establish the element of intention required to maintain the action. The employer's motion for summary judgment was granted. Gingras v. General Elec. Co., 476 F.Supp. 644, 649.

E.D.Pa.1979. Quot. in disc. and coms. (d) and (h) cit. and quot. in part in disc. The plaintiff was fired by his employer, the defendant, after the plaintiff had made a number of long distance phone calls from the employer's business phone. The plaintiff alleged defamation, intentional infliction of emotional distress, tortious and wrongful discharge and intentional interference with the plaintiff's prospective contractual relations. The defendant moved for summary judgment. The court granted the motion as a matter of law with regard to the defamation count because the plaintiff had not shown publication of a material fact which was a necessary element of the tort. The court found that the defendant's conduct was not unreasonable and therefore granted the motion with regard to the intentional infliction of emotional distress count because such a claim cannot exist unless the defendant's conduct was outrageous. The plaintiff failed to charge that the defendant's conduct was against public policy or in bad faith and therefore the general rule applied which allows an employer to terminate the employment relationship for any or no reason. The defendant argued that there were no genuine issues of fact raised by the plaintiff as to material elements of the claim of interference with prospective contractual relations. The court agreed and granted the defendant's motion on this claim. Lekich v. International Bus. Mach. Corp., 469 F.Supp. 485, 488.

E.D.Pa.1979. Com. (d) cit. in sup. Employee and his wife instituted suit against a rail corporation, the husband's employer, and the vice-president and treasurer thereof, alleging actionable injuries arising out of adjustments in the employee's employment status, a wanton act which caused the plaintiffs severe mental and emotional distress. The defendants filed motions to dismiss for lack of jurisdiction over the subject matter and to dismiss for failure to state a claim upon which relief can be granted. The court held, inter alia, that the acts of the rail corporation and its vice-president and treasurer were fully justified statutorily, and did not rise to the level of the kind of extreme or outrageous conduct necessary to recovery for infliction of mental distress. Wenzer v. Consolidated Rail Corp., 464 F.Supp. 643, 650, affirmed612 F.2d 576 (3rd Cir.1979).

E.D.Pa.1978. Cit. in sup. Former employee brought an action against his former employer alleging, inter alia, that certain actions by employer during the course of employee's employment constituted wrongful harassment amounting to a tortious infliction of mental and emotional

distress. Plaintiff claimed that he had been excluded from meetings which were necessary to the performance of his job and was then expected to be familiar with the matters discussed therein; that papers on his desk had been constantly rearranged so as to annoy him; and that rumors had been circulated to the effect that his job was in jeopardy. The court granted the employer's motion to dismiss the complaint because the alleged conduct was not of that extreme and outrageous type which is necessary to support an action for intentional infliction of mental distress. Beidler v. W.R. Grace, Inc., 461 F.Supp. 1013, 1016, judgment aff'd 609 F.2d 500 (3rd Cir.1979).

E.D.Pa.1977. Quot. in op. and com. (j) quot. in ftn. in sup. This was an action by a former professional football player against the club for which he had played to recover a balance allegedly due on his contract, damages for defamation, and damages for infliction of emotional distress. Plaintiff, who had signed three separate standard player contracts, had sustained a permanently related football injury during the first year and was refused payment on the two remaining contracts. Defendant had made posttrial motions following plaintiff's jury verdict. In denying defendant's motions, the court held that there was evidence supporting the jury determination that the three separate contracts containing continuation of salary clauses, in the event of a football-related injury, constituted a single three-year contract, and that there was evidence that the team physician intentionally inflicted mental distress on plaintiff by making a false statement to the press concerning a fatal disease from which plaintiff was allegedly suffering. Chuy v. Philadelphia Eagles Football Club, 431 F.Supp. 254, 262, 263, judgment aff'd 595 F.2d 1265 (3rd Cir.1979). See above case.

E.D.Pa.1976. Quot. in ftn. and dist. and subsec. (2)(a) and com. (l) cit. and dist. and com. (i) cit. in ftn. and dist. This was a diversity action brought by a father seeking damages for emotional distress resulting from intentional defamation of plaintiff's daughter who was dismissed from her position as a cashier in a hotel when defendant's personnel informed the hotel that she was a thief, although they knew that the charge was untrue when they "falsely and maliciously" made it. Plaintiff alleged that as a result of this defamation, a prior coronary condition was aggravated and he suffered a coronary attack of a disabling nature, resulting in his great emotional distress and economic hardship. The question before the court was whether plaintiff stated a cause of action under Pennsylvania law. In dismissing the complaint for failure to state a claim, the court noted that while there may "possibly be a set of facts which would justify the recognition of a cause of action in favor of persons who suffer severe emotional distress due to the defamation of a member of their immediate family which comes to their attention sometime after it occurs * * * to create such a new class of potential plaintiffs based on the facts in this case would not be a proper elaboration of current Pennsylvania law." Waugh v. Gaudio Bros., Inc., 422 F.Supp. 392, 394.

E.D.Pa.Bkrtcy.Ct.

E.D.Pa.Bkrtcy.Ct.1988. Cit. in disc., cit. in case cit. in disc. An employer dismissed an employee after receiving from a former employer evaluations that characterized the employee as having a "poor attitude and less than satisfactory production." The employee sued the former employer on

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theories of defamation and intentional infliction of emotional distress, which allegedly led to his dismissals. This court granted the defendant summary judgment on the infliction of emotional distress claim because the former employer's conduct was not sufficiently extreme or outrageous. The court reasoned that the former employer's expressed dissatisfaction in lower pay and poor support was not extreme and stated that the evaluation, even if false, was not so outrageous as to create liability. In re Frymire, 87 B.R. 856, 861.

M.D.Pa.

M.D.Pa.2018. Cit. in cases cit. in ftn.; com. (d) quot. in case quot. in disc. Former student brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against private boarding school, after it expelled plaintiff following his second hospitalization for mental and emotional issues, alleging that defendant encouraged plaintiff to seek hospitalization despite knowing it would result in his expulsion, knew that expelling plaintiff would force him to return to a difficult home life, and expelled him primarily to avoid the liability of keeping him enrolled. This court granted plaintiff's motion to amend, holding that plaintiff alleged sufficient facts for his IIED claim to survive dismissal. The court determined that defendant's conduct rose to the level of outrageousness required for an IIED claim under Restatement Second of Torts § 46, Comment *d*, noting that, although Pennsylvania had not yet explicitly recognized the tort of IIED, the Third Circuit predicted that the Pennsylvania Supreme Court would ultimately adopt § 46's formulation of the tort. Dobson v. Milton Hershey School, 356 F.Supp.3d 428, 439.

M.D.Pa.2018. Com. (d) quot. in case quot. in sup. Former chairman of the board of directors of a medical-device corporation brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against board members and shareholders, alleging, inter alia, that defendants falsely accused him of misusing corporate funds, filed a criminal complaint claiming that plaintiff committed theft by deception, and defamed him and put him in a false light by publicizing documents stating plaintiff had misused funds and failed to disclose that he had been indicted and arrested. This court granted in part defendants' motion for summary judgment, holding, inter alia, that defendants' alleged conduct did not arise to the level of outrageousness necessary for an IIED claim. The court cited Restatement Second of Torts § 46, Comment *d*, in explaining that plaintiff's allegations that defendants acted maliciously, with criminal intent, or with the intent to inflict emotional distress was not sufficiently outrageous to support an IIED claim. Martin v. Finley, 349 F.Supp.3d 391, 430.

M.D.Pa.2018. Cit. in ftn.; com. (d) quot. in case quot. in sup. Mother of a middle-school student who committed suicide sued private, nonprofit institutions that provided cost-free education, housing, and medical care to low-income children like student, alleging that institutions caused student to commit suicide by suspending her for the following year and compelling her to return to her father's home after treating her for mental-health issues that were driven largely by her father's alcoholism and her unstable family life with him. On reconsideration, this court denied institutions' motion to dismiss mother's claim for intentional infliction of emotional distress filed on behalf of

student, but granted the motion without prejudice as to her claim filed on her own behalf. The court reasoned, in part, that mother failed to establish that she personally experienced any physical harm, as required for her to recover on such a claim under Pennsylvania law and Restatement Second of Torts § 46. Wartluft v. Milton Hershey School, 354 F.Supp.3d 584, 594.

M.D.Pa.2016. Com. (d) quot. in case quot. in sup. Parents of minor special-needs student who had been diagnosed with various developmental disorders brought an action against public school district, alleging that defendant discriminated against student due to his disabilities and denied his right to a free appropriate public education in violation of federal law. This court denied in part defendant's motion to dismiss, holding that plaintiffs stated a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court pointed to plaintiffs' allegations that defendant inappropriately used physical restraints on student over 20 times when he was only 7 and 8 years old, that this conduct traumatized him, and that plaintiffs witnessed some of the occasions when defendants used the physical restraints on student and saw how he was traumatized. A.C. v. Scranton School District, 191 F.Supp.3d 375, 392.

M.D.Pa.2012. Subsec. (1) quot. in sup. Husband and wife and their two minor children brought claims for, among other things, intentional infliction of emotional distress (IIED) against two physicians who examined one of the children, alleging that defendants' misdiagnosis of the child as suffering from Shaken Baby Syndrome led to a child-abuse investigation and the filing of criminal charges against husband. Granting defendants' motion to dismiss plaintiffs' IIED claim, this court held that plaintiffs failed to allege conduct that was intentional, reckless, or extreme and outrageous, as required to state such a claim. The court reasoned that plaintiffs' complaint established only that defendants engaged in independent medical examinations of the child and concluded thereafter, based on methodology promulgated by the American Academy of Pediatricians, that the child had been abused. Isbell v. Bellino, 983 F.Supp.2d 492, 515.

M.D.Pa.2012. Quot. in sup., quot. in case quot. in sup., subsec. (1) cit. in case quot. in sup. Co-administrators of estate of arrestee who committed suicide shortly after being admitted to county correctional facility sued facility and others for, among other things, intentional infliction of emotional distress (IIED). This court denied defendants' motion to dismiss, holding that it would be premature to dismiss plaintiffs' IIED claim at this stage and that it was appropriate to permit plaintiffs to engage in discovery on that claim. The court noted, however, that it had serious reservations about the validity of plaintiff's IIED claim under existing Pennsylvania law, because the outrageous conduct asserted by plaintiffs was that defendants denied arrestee necessary psychiatric medication, whereas the cases in which Pennsylvania courts had found a cause of action for IIED truly presented what from any vantage point was deliberately extreme and outrageous conduct. Ponzini v. Monroe County, 897 F.Supp.2d 282, 290.

M.D.Pa.2012. Com. (d) quot. in case quot. in sup. Asian-Pakistani female employee, who was born in Pakistan and identified as a Muslim and a practitioner of Islam, sued former employer, alleging, among other things, that employer unlawfully discriminated against her based on her race, national origin, and religion in violation of federal and state laws. This court granted employer's motion

for partial summary judgment on employee's claim for intentional infliction of emotional distress, holding that, even assuming, arguendo, that all of the conduct complained of was intentional and discriminatory, mere callousness or insensitivity on the part of a defendant did not suffice to establish liability on such a claim. The court noted that, according to the Supreme Court of Pennsylvania, it was extremely rare to find conduct in the employment context that would rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress under Pennsylvania law. Syed v. YWCA of Hanover, 906 F.Supp.2d 345, 361.

M.D.Pa.2010. Cit. in case quot. in sup., subsec. (1) quot. in sup. Restaurant patron who suffered a seizure and was subdued by police officers with an electroshock device when he refused medical treatment sued borough, police department, and officers, asserting federal civil-rights claims and a claim for intentional infliction of emotional distress under Pennsylvania law. This court denied defendants' motion for summary judgment on the emotional-distress claim, holding that, if a jury found that defendants deliberately used extreme force to subdue a subject suffering from physical distress and not resisting officers' physical control, they could find that such conduct went beyond all bounds of human decency; additionally, while plaintiff could not prevail on the claim solely based on his testimony that he began seeing a psychiatrist after the incident as treatment for depression, he could potentially provide competent medical evidence that would demonstrate to a jury that he suffered emotional distress. Shultz v. Carlisle Police Dept., 706 F.Supp.2d 613, 628.

M.D.Pa.2009. Cit. and quot. in sup., com. (d) quot. in case quot. in sup. African-American family sued hotel and its front desk clerk for racial discrimination and intentional infliction of emotional distress after clerk denied father's request for a room for himself, his fiancée, and their minor daughter. Denying summary judgment for defendants, this court held, inter alia, that plaintiffs alleged sufficient facts to state a valid claim for intentional infliction of emotional distress under Pennsylvania law. The court rejected defendants' argument that their alleged conduct was not extreme and outrageous, citing, among other things, plaintiffs' allegations that clerk openly admitted to denying plaintiffs a room because of their race in the presence of plaintiffs and others in the hotel lobby while openly providing the same services to white patrons. Shumate v. Twin Tier Hospitality, LLC, 655 F.Supp.2d 521, 541, 543.

M.D.Pa.2009. Cit. in sup. Current and former prisoners at county correctional facility brought federal civil-rights claims as well as state-law claims for intentional infliction of emotional distress (IIED), inter alia, alleging that they were abused by prison officials during their incarceration. Denying in part and granting in part defendants' motion for summary judgment on plaintiffs' IIED claims, this court held that because most of the plaintiffs had proferred competent evidence to establish severe emotional injury as a result of defendants' conduct, defendants were not entitled to summary judgment on the IIED claims. However, because one of the plaintiffs failed to provide any competent medical evidence that he suffered severe emotional distress, and the only evidence of such distress was provided by his own testimony, defendants were entitled to summary judgment on that plaintiff's IIED claim. Zimmerman v. Schaeffer, 654 F.Supp.2d 226, 256.

M.D.Pa.2008. Subsec. (1) cit. in sup. Individual who was arrested in his backyard by two police officers who were searching for a person from a neighboring property sued officers and others, alleging that officers threatened to shoot his dog, forcibly restrained him, and transported him to the police station for a few hours before letting him go after he requested that they stop harassing him and leave his property. Denying in part defendants' motion to dismiss, this court held that plaintiff stated a claim for intentional infliction of emotional distress against defendants in their individual capacities under Pennsylvania law; while the sufficiency of plaintiff's medical evidence would be considered at a later stage of litigation, plaintiff adequately alleged that defendants acted in a deliberate, malicious, extreme and outrageous manner by physically injuring him in a manner necessitating medical attention, and that he suffered severe emotional distress as a result. Kokinda v. Breiner, 557 F.Supp.2d 581, 595.

M.D.Pa.2006. Cit. in disc., cit. in case quot. in disc., subsec. (1) and com. (d) quot. in sup. African-American woman sued police officers for, in part, intentional infliction of emotional distress, after officers, among other things, arrested her in her home and prevented her husband from helping her locate her telephone before learning that she had been misidentified. This court granted defendants' motion to dismiss this claim, holding that plaintiff's allegations that officers' conduct was “egregious” and that one officer insulted her by effectively calling her a liar did not rise to the necessary level of extreme or outrageous conduct; additionally, plaintiff failed to allege that she suffered any severe emotional injury because of her brief encounter with officers. Hines v. Proper, 442 F.Supp.2d 216, 223, 224.

M.D.Pa.2004. Cit. and quot. in disc. Co-administrators of decedent's estate sued a correctional facility as well as various medical providers and personnel, alleging deprivation of civil rights and asserting pendent state-law claims for negligence, negligent infliction of emotional distress, wrongful death, and survival. This court denied defendants' motion for a more definitive statement as to specific language and causes of action set forth in the complaint, and granted defendants' motion to strike the negligent-infliction-of-emotional-distress claim, finding, inter alia, that an individual could not recover for emotional distress if he or she was not actually present to witness the allegedly tortious conduct. Thomas v. Luzerne County Correctional Facility, 310 F.Supp.2d 718, 723.

M.D.Pa.2002. Cit. in case quot. in sup., com. (d) cit. in sup. and cit. in case quot. in sup. Husband and wife sued group health insurer for intentional infliction of emotional distress, fraudulent inducement and concealment, breach of contract, negligence, and RICO violations, after insurer refused to pay for husband's medical bills. Plaintiffs alleged that insurer's delay in processing their application caused emotional distress that contributed to husband's medical problems. This court dismissed plaintiffs' claim for intentional infliction of emotional distress, holding, inter alia, that the delay in processing an insurance application did not constitute extreme and outrageous conduct. Piper v. American Nat. Life Ins. Co. of Texas, 228 F.Supp.2d 553, 563.

M.D.Pa.2002. Quot. in case quot. in disc., cit. generally in case quot. in ftn. Teacher sued school district, school board, and others for intentional infliction of emotional distress, inter alia, alleging

that defendants singled her out for disparate treatment and ultimate discharge, and that, following plaintiff's successful appeal of her termination in arbitration, defendants advised other teachers not to associate with plaintiff, and school principal began weekly evaluations of plaintiff, which were not required of other teachers. This court granted defendants' motion to dismiss plaintiff's complaint, holding, inter alia, that defendants' conduct did not rise to level of egregiousness or outrageousness necessary to state emotional-distress claim. Also, complaint failed to allege with specificity any physical injury, illness, or harm suffered by plaintiff. Zugarek v. Southern Tioga School Dist., 214 F.Supp.2d 468, 481.

M.D.Pa.1999. Cit. in disc., com. (d) quot. in case cit. in disc. Police officer sued borough and individual borough employees, among others, for, inter alia, intentional infliction of emotional distress in connection with defendants' role in charging plaintiff with giving perjurious information in an unrelated case, despite the existence of a nonprosecution agreement. Entering summary judgment for defendants, the court held, in part, that plaintiff had failed to establish that the conduct complained of was extreme and outrageous, or that he had suffered severe emotional distress as a result of it. Williams v. Fedor, 69 F.Supp.2d 649, 668.

M.D.Pa.1995. Cit. in headnotes and sup., com. (d) quot. in sup. After an HIV-positive patient's surgery for a leg abscess and osteomyelitis was delayed by the treating doctor's refusal to perform the surgery without first obtaining protective suits for himself and his surgical staff, the patient sued the doctor for, among other claims, intentional infliction of emotional distress. This court granted in part the doctor's motion to dismiss, holding, inter alia, that plaintiff failed to state a cause of action for intentional infliction of emotional distress because there was no evidence to suggest that the doctor's statements that he was seeking to obtain special protective gear from the hospital before performing the surgery were made in a manner insulting or offensive to plaintiff, or that plaintiff perceived them as such or suffered any emotional distress. Sharrow v. Bailey, 910 F.Supp. 187, 189, 194.

M.D.Pa.1994. Cit. in disc., cit. in case quot. in sup., com. (d) quot. in part in sup. and quot. in case quot. in sup. Teacher suspended indefinitely by school district sued principal and district superintendent for intentional infliction of emotional distress, among other claims, alleging that he was given unsatisfactory job-performance review by principal signed by superintendent on wrong form with inadequate observation; he was suspended with no hearing for events surrounding physical contact with a student; union did not support him in his grievances and complaints; and the actions were taken in retaliation for his exercise of his free speech rights. The court held that the conduct, whether events were viewed singly or in combination, did not rise to level of outrageousness contemplated by § 46. Kessler v. Monsour, 865 F.Supp. 234, 241.

M.D.Pa.1991. Cit. in case quot. in disc., quot. in ftn. A female former college professor sued the college, the dean, and her immediate supervisor for, inter alia, intentional infliction of emotional distress alleging that she was sexually harassed and subjected to gender-based discrimination during her employment. The district court granted the defendants' motion for summary judgment on this count of the complaint, holding that the evidence was insufficient as a matter of law to show

that the conduct of the defendants was so outrageous that it would support a cause of action for intentional infliction of emotional distress. The court reasoned that the plaintiff was not subjected to coercive demands, nor was she subjected to threats if she refused to accede to sexual demands. Garvey v. Dickinson College, 761 F.Supp. 1175, 1190.

M.D.Pa.1991. Cit. in cases cit. and quot. in sup., subsec. (1) quot. in sup. Neighboring property owners were involved in a dispute over what was considered "common areas." When the defendant neighbor caused the plaintiff neighbor's daughter-in-law to be issued a citation by the state police for criminal trespass for being in an area that the plaintiff considered a "common area," the neighbor sued to protect his right to use the common areas and sought damages for intentional infliction of emotional distress. This court granted partial summary judgment for the defendants with respect to the intentional infliction of emotional distress claim, and stayed the action to allow the plaintiff to establish legal ownership of the property. The court found that the causing of the daughter-in-law to be issued a criminal trespass citation did not rise to the level of outrageousness required for an emotional distress claim. In addition, the plaintiff's claim lacked supporting medical evidence, because he had never seen a mental health provider as a result of the defendant's conduct and had no medical expert to testify that his cardiovascular surgery was connected to the defendant's conduct. McCormick v. Camp Pocono Ridge, Inc., 760 F.Supp. 1113, 1116, 1117.

M.D.Pa.1990. Cit. in cases quot. in sup. Three women arrested while attempting to stop allegedly illegal election procedures sued the arresting officers, a county, and an election judge for intentional infliction of emotional distress, inter alia, claiming that the arresting officers used unnecessary force in that the plaintiffs were kicked, dragged and thrown around, punched, and handcuffed, yet the criminal charges against them were later dismissed. This court assumed that Pennsylvania recognized a cause of action for intentional infliction of emotional distress and held that it could not state as a matter of law that there existed no set of facts on which relief could be granted. Accordingly, the court denied the defendants' motion to dismiss and issued an order for further proceedings, noting that the plaintiffs would be required to prove outrageous conduct on the part of the defendants as well as competent medical evidence of harm. Shoop v. Dauphin County, 766 F.Supp. 1323, 1326.

M.D.Pa.1989. Quot. in case cit. in disc., com. (h) cit. in case cit. in disc., com. (k) quot. in disc. A recipient of a prosthetic heart valve sued the manufacturer of the valve in strict liability, inter alia, after watching a television program that discussed incidents of failure or malfunction in the valve. The plaintiff alleged that he suffered severe emotional injuries on learning that the valve had potential defects and sought recovery for mental suffering, inter alia. The court granted the defendant's motion for summary judgment, stating that the plaintiff's heart valve had functioned properly for seven years and that the plaintiff's emotional distress was not the result of a physical injury or some medically identifiable effect linked to a failure of the valve but was related to the contents of the television program. Brinkman v. Shiley, Inc., 732 F.Supp. 33, 34, judgment affirmed 902 F.2d 1558 (3rd Cir.1989).

M.D.Pa.1989. Quot. in ftn. A discharged prison matron and her husband sued a county corrections board, a correctional facilities board, a prison board, and a county for employment discrimination and various pendent state law claims. This court granted in part and denied in part the defendants' motion for summary judgment, holding, inter alia, that the plaintiff stated a cause of action against the prison warden for emotional distress, where the complaint alleged the warden had engaged in both sexual harassment and retaliatory behavior, but that this claim remained quite tenuous in light of the fact that the plaintiffs had provided no competent medical evidence of causation and severity required by Pennsylvania law. Handley v. Phillips, 715 F.Supp. 657, 675.

M.D.Pa.1988. Cit. in sup., cit. in ftn., subsec. (1) and com. (d) quot. in sup. A woman and her husband sued her former employer and supervisor for intentional infliction of emotional distress and loss of consortium, alleging that the supervisor's sexual harassment caused the woman to leave her job and become physically ill. Denying the defendants' motion to dismiss, this court held, inter alia, that the alleged conduct of the supervisor was sufficiently outrageous to state a claim for intentional infliction of emotional distress, and that the husband could bring the loss of consortium claim without proving physical injury. Bowersox v. P.H. Glatfelter Co., 677 F.Supp. 307, 309-311.

M.D.Pa.1988. Cit. in disc., subsec. (1) quot. in sup., com. (d) quot. in sup. An employee sued his employer for inducing him to leave his union position to take a management job, falsely promising that he could return to his union position at any time. The court granted the defendant partial summary judgment, holding that the plaintiff's claim of intentional infliction of emotional distress could not be maintained because the defendant's conduct did not meet the requirements of being extreme and outrageous, even if, as alleged, it had purposefully removed the plaintiff from his position, with no intention of allowing him to return, and did this with an awareness that the plaintiff had some physical problems that would make it difficult for him to perform management duties. Malia v. RCA Corp., 690 F.Supp. 334, 337.

M.D.Pa.1986. Subsec. (1) cit. in disc. After an at-will employee was discharged from his position, he sued his former employer for, inter alia, intentional infliction of emotional distress. The court granted the defendant's motion for summary judgment, holding that the plaintiff had not established that the defendant's conduct in discharging the employee met the test of extremeness required to establish a cause of action for intentional infliction of emotional distress. Gaiardo v. Ethyl Corp., 697 F.Supp. 1377, 1384.

M.D.Pa.1985. Subsec. (1) quot. but dist., com. (h) cit. but dist. An employee sued his employer, alleging that he had been discharged because of his religious beliefs, which mandated that he miss work to observe the Sabbath. This court granted the employer's motion for summary judgment on the claim of intentional infliction of emotional distress, holding that no evidence had been presented to support a finding of extreme and outrageous conduct on the part of the employer. The court reasoned that, although Pennsylvania has recognized a cause of action for intentional infliction of emotional distress and has adopted the definition set forth in the Restatement, in this case the employer's conduct—sending warning letters, suspending and discharging the employee

because of his absences—was not so extreme as to permit recovery. Krushinski v. Roadway Exp., Inc., 627 F.Supp. 934, 938.

M.D.Pa.1985. Quot. but dist., com. (d) cit. in sup. The plaintiff brought suit for injunctive relief and damages for alleged violations of the First and Fourteenth Amendments and for a state claim of intentional infliction of emotional distress. The plaintiff alleged that the defendants had punished him for filing internal grievances and would continue to do so if not restrained. The defendants' motions for summary judgment were granted for all the issues except the plaintiff's invasion of privacy and emotional distress claims. The court reasoned that, although the plaintiff's charges of persistent harassment and attempted coercion for filing union grievances were generalized, they were the type of contentions that a trier of fact might find to constitute extreme and outrageous conduct, as required under Pennsylvania law. Lynn v. Smith, 628 F.Supp. 283, 291, 292.

M.D.Pa.1983. Cit. in disc. The plaintiff brought suit alleging that he was threatened and coerced into signing an agreement admitting liability and agreeing to pay a debt in full. The federal district court granted the defendants' motion to dismiss in part and denied in part, holding, inter alia, that the plaintiff's assertion that the defendant constable held him in a closed room by threat of force until he settled his debt was sufficient to state a cause of action for false imprisonment under Pennsylvania law and that the plaintiff may have stated a claim against the defendant constable for intentional infliction of emotional distress, since Pennsylvania law was unclear as to whether bodily harm was an element of that tort. Horne v. Farrell, 560 F.Supp. 219, 226.

M.D.Pa.1982. Cit. in disc., com. (d) quot. in case quot. in disc. The plaintiff brought an action in federal court alleging legal malpractice, breach of contract, and intentional infliction of emotional distress on the part of the defendants in connection with their representation of him in two prior federal court actions and one prior state court action. The court denied the defendants' motion to dismiss the legal malpractice claim. While accepting that intentional legal malpractice had been alleged by the plaintiff and that Pennsylvania law technical did not recognize such intentional conduct as a cause of action, the court stated that availability of a remedy for negligent conduct but not for intentional conduct would be illogical; it further held that since the plaintiff was proceeding pro se, his pleadings would be construed as to do justice. The court also noted that while the plaintiff had an extremely heavy burden of proof in establishing intentional infliction of emotional distress, it could not rule as a matter of law that there was insufficient evidence to support such a claim, and therefore denied a motion to dismiss this claim. Next, the court ruled that exemplary damages sought by the plaintiff on all his claims were not generally available for breach of contract, though they were awardable on the other two claims. Finally, the court granted the defendants' motion to dismiss the plaintiff's claims for treble damages, noting that specific statutory authorization was required for the awarding of such damages, and was lacking. Bangert v. Harris, 553 F.Supp. 235, 238.

M.D.Pa.1980. Quot. in part in disc. Prison inmates brought an action under the Federal Tort Claims Act for assaults, batteries, and emotional distress allegedly inflicted on them on their arrival at a federal prison. This court held that the alleged assaults and batteries were privileged,

either as incidental and necessary touchings by correctional officers in the performance of their duties, or as reasonable uses of force necessary to maintain control. There was no evidence that the officers' conduct was extreme or outrageous, or that any plaintiff suffered severe emotional distress. However, the unreasonable confinement of one inmate in restraints in his cell for three days was a battery, and the United States, as principal, could not available itself of the good-faith immunity of its agents. The court found the United States liable to this plaintiff in the amount of $200, but granted judgment to the United States on all other claims. Picariello v. Fenton, 491 F.Supp. 1026, 1042.

M.D.Pa.1978. Cit. in sup. Plaintiff, who was on tour in Ireland, fell as she was stepping from a hotel bathroom and was injured. Plaintiff brought this diversity action and alleged that defendant, the tour operator, with its principal place of business in New York, was negligent in failing to inspect the hotel facilities, and that such negligence was the proximate cause of her injuries. She further alleged that a purported agent or employee of defendant, a tour guide who was a resident of Ireland, intentionally inflicted emotional distress upon her. The court entered judgment for defendant, holding on the issue of negligence that neither the tour guide nor the hotel was a direct employee or under the exclusive control of defendant. The court stated that even if they were agents of defendant, liability could not be premised on any act or omission on the party of the guide or the hotel that may have amounted to negligence. Furthermore, the instances of the tour guide's conduct proven by plaintiff at trial did not meet the strict standard required for a finding that the tort of intentional infliction of emotional distress had been committed. McDermott v. Travellers Air Services, Inc., 462 F.Supp. 1335, 1342.

M.D.Pa.Bkrtcy.Ct.

M.D.Pa.Bkrtcy.Ct.2013. Cit. in sup. Judgment creditors brought an adversary proceeding against Chapter 7 debtor, seeking a determination that their claim based on their prior state-court judgment against debtor was nondischargeable on grounds of willful and malicious injury. This court denied in part creditors' motion for summary judgment, holding that it could not conclude at this stage that the state court's decision met the standard for determining the dischargeability of the portion of the judgment that was awarded for debtor's intentional infliction of emotional distress upon creditors. While the state court found that debtor committed the intentional tort of infliction of emotional distress by making phone calls complaining about creditors to police and township officials, it made no finding that debtor took the acts with the purpose of producing injury, and it could not be said that the acts in and of themselves had a substantial certainty of producing injury. In re Mauz, 496 B.R. 777, 783.

W.D.Pa.

W.D.Pa.2019. Com. (h) cit. in case quot. in sup. Minor elementary-school student who had been diagnosed with attention-deficit-hyperactivity disorder and oppositional-defiance disorder filed a putative class action against, among others, school principal and school police officer in connection

with allegations that defendants unlawfully handcuffed or restrained students with disabilities. This court granted principal and officer's motion to dismiss, holding, among other things, that student's allegations—that principal confined student to a small room for the purpose of keeping him and other kids safe and that officer restrained student from further harming himself or others by handcuffing him—were insufficient to state a claim against them for intentional infliction of emotional distress. The court noted that, under Restatement Second of Torts § 46, the court was to decide as an initial matter whether the conduct at issue could reasonably be regarded as sufficiently extreme to constitute outrageousness as a matter of law. D.C. v. Pittsburgh Public Schools, 415 F.Supp.3d 636, 665.

W.D.Pa.2019. Cit. in case cit. in sup.; com. (d) quot. in case quot. in disc. Former employee brought a lawsuit against former employer, claiming, inter alia, intentional infliction of emotional distress (IIED) based on allegations that her supervisors allowed her to leave defendant's premises after her employment was terminated, even though she was clearly distraught and referenced committing suicide, and that she attempted to commit suicide after leaving defendant's premises. This court granted in part defendant's motion for summary judgment, holding that termination from employment did not rise to the level of outrageousness necessary to sustain an IIED claim under Restatement Second of Torts § 46, and that plaintiff could not base her IIED claim on the supervisors' failure to act, because such a claim had to be based on affirmative actions. Sabo v. UPMC Altoona, 386 F.Supp.3d 530, 557.

W.D.Pa.2013. Com. (d) quot. in case cit. in sup. Former police chief for borough brought various claims against borough, borough manager, and others, alleging, among other things, that he suffered severe emotional and physical distress as a result of manager's repeated instances of harassment and discrimination. Granting defendants' motion to dismiss plaintiff's claim for intentional infliction of emotional distress, this court held that, although manager's alleged conduct could be construed as unprofessional and even purposeful, the discrimination and harassment alleged in the complaint was not so outrageous as to go beyond all possible bounds of decency tolerable in a civilized society and therefore did not rise to the level of outrageous conduct required to state such a claim. The court pointed out that the standard was not satisfied by allegations of insults, indignities, threats, or other similar conduct, and that it was extremely rare to find conduct in the employment context that would rise to the level of outrageousness necessary to provide a basis for recovery for intentional infliction of emotional distress. Ross v. Borough of Dormont, 937 F.Supp.2d 638, 655.

W.D.Pa.2012. Cit. in sup., com. (d) quot. in sup. Parents, on behalf of their minor son, sued county office of children and youth (OCY), among others, for intentional infliction of emotional distress (IIED), inter alia, alleging that son suffered extreme emotional distress as a result of OCY's decision to place in plaintiffs' home a minor foster child who sexually abused son. Granting summary judgment to defendant on this claim, this court held that the alleged conduct fell short of the very high bar required for the successful prosecution of an IIED claim under Pennsylvania law. The court explained that, while defendant's acts could reasonably be viewed as deliberately indifferent, the record could not support a finding that defendant placed foster child in plaintiffs'

home with the intent that he assault son and the expectation that son would suffer severe emotional distress as a result. Bryan v. Erie County Office of Children & Youth, 861 F.Supp.2d 553, 585, 586.

W.D.Pa.2011. Cit. and quot. in sup., subsec. (1) cit. in sup., com. (d) quot. in sup., illus. (7) and (8) cit. and quot. in sup. Business owner sued mortgage lender for, inter alia, intentional infliction of emotional distress, alleging that lender intentionally misstated business owner's indebtedness by proceeding with collection activities based upon false delinquencies. Granting in part defendant's motion for judgment on the pleadings, this court held that defendant's alleged harassment of plaintiff by barraging her with annoying phone calls, sending a male agent to her home to place a calling card in her mailbox, sending two inaccurate letters concerning her account, and sending her an apparent notice of foreclosure, although offensive, did not rise to the level of being shocking and so outrageous that it exceeded the levels of decency tolerated by a civilized society. Wilson v. American General Finance Inc., 807 F.Supp.2d 291, 301, 302, 304.

W.D.Pa.2006. Subsec. (1) quot. in sup., com. (d) quot. in case quot. in sup. Former deputy sheriff, who was employed at a courthouse where she was required to search individuals and their personal effects, brought various claims against sheriff's office and others for suspending her without pay, terminating her, and filing criminal charges against her that were later withdrawn, in connection with an incident in which an individual alleged that plaintiff tried to steal money from her purse. This court, inter alia, granted defendants' motion to dismiss plaintiff's claim for intentional infliction of emotional distress, holding that defendants' alleged failure to reemploy plaintiff after the criminal charges against her were withdrawn was not conduct that was so outrageous in character, or so extreme in degree, as to support this claim. Benard v. Washington County, 465 F.Supp.2d 461, 467.

W.D.Pa.2005. Com. (d) quot. in case quot. in disc. Former student and her mother sued school district and its administrators, alleging that they knew about but did not prevent student from being stalked and otherwise harassed for several years by a male special-education student. Granting in part defendants' motion for summary judgment, this court held, inter alia, that school administrators' failure to adequately address such ongoing harassment did not rise to the level of outrageousness necessary to support plaintiffs' claim for intentional infliction of emotional distress. Additionally, the allegation that defendants subjected student's mother, who worked for an agency employed by school district, to intentional infliction of emotional distress by requesting that she be transferred to another position in retaliation for her complaints about defendants' handling of her daughter's harassment was also not sufficiently severe to support this claim. Jones v. Indiana Area School Dist., 397 F.Supp.2d 628, 657.

W.D.Pa.1998. Cit. in sup., cit. in case quot. in ftn., subsec. (1) and com. (d) quot. in sup. Former employee sued employer for intentional infliction of emotional distress, among other claims, alleging that her coemployees committed sexually offensive conduct towards her and forced her to participate in fraudulent and unlawful mortgage-lending practices. This court granted in part defendant's motion for summary judgment, holding, inter alia, that, although plaintiff's claims

established a deeply unpleasant workplace, defendant's conduct was not extreme and outrageous. Kotlinski v. Mortgage America, Inc., 40 F.Supp.2d 298, 304, 305.

W.D.Pa.1993. Cit. in disc., subsec. (1) cit. in disc. Laid-off mine worker brought an emotional distress claim, inter alia, against former employer. Granting defendant's motion for summary judgment, the court held that plaintiff's allegations that defendant laid off plaintiff in a reduction in force and failed to recall him to service when there was rehiring for a different position did not state the kind of outrageous behavior required for an emotional distress claim under Pennsylvania law. Bernard v. Bethenergy Mines, Inc., 837 F.Supp. 714, 715.

W.D.Pa.1992. Cit. in sup., cit. in ftn., com. (j) cit. in sup. Employee sued employer alleging that she was fired due to age discrimination and seeking damages for intentional infliction of emotional distress. The court granted partial summary judgment to employer, holding that the state workers' compensation act provided the exclusive remedy for plaintiff employees seeking to recover from defendant employers for intentional infliction of emotional distress. Rejecting plaintiff's argument that emotional distress was not a compensable injury under workers' compensation because it did not rise to the level of a mental illness, the court said that any emotional distress not severe enough to be an injury under workers' compensation also would not be severe enough under the Restatement (Second) of Torts § 46. Gilmore v. Manpower, Inc., 789 F.Supp. 197, 199.

W.D.Pa.1992. Cit. in disc. A reporter fraudulently promised a mother that no names or personal facts would be used in the publication of a silhouette picture of her and her daughter, which was used in connection with a story about their sexual abuse case against the girl's father, a former police chief. The mother and her children sued the newspaper, its employees, and its parent corporation for invasion of privacy, fraudulent misrepresentation, and intentional infliction of emotional distress. Entering judgment for the defendants, this court held, inter alia, that the plaintiffs had failed to prove the elements of the tort of invasion of privacy under state law. The court also held that the publication of the article was not outrageous in character, or so extreme in degree, as to go beyond all possible bounds of decency in a civilized community, as required to prove intentional infliction of emotional distress. Morgan By and Through Chambon v. Celender, 780 F.Supp. 307, 310.

W.D.Pa.1990. Cit. in disc. An employee sued her employer for intentional infliction of emotional distress, inter alia, alleging that her supervisor made her work environment hostile, abusive, and intimidating. The court granted the defendant's motion to dismiss, holding that the plaintiff did not allege facts that were sufficient to show the egregious behavior that would support her intentional infliction of emotional distress claim. McWilliams v. AT & T Information Systems, Inc., 728 F.Supp. 1186, 1194.

W.D.Pa.1990. Cit. and quot. in disc., cit. in cases cit. in disc., com. (d) quot. in disc., coms. (f) and (h) cit. in disc. An emotionally unstable woman committed suicide after her sister, on whom she relied for support and advice, withdrew all her support and guidance. The administrator of the decedent's estate sued the sister on behalf of the decedent's retarded daughter alleging intentional

infliction of emotional distress and wrongful death. This court granted the sister's motion to dismiss for failure to state a claim upon which relief could be granted, holding, inter alia, that the sister's conduct was not legally outrageous. The court found that the sister's bad counsel and advice, even if malicious, was simply not the kind of conduct she would have known exposed her to liability for the intentional infliction of emotional distress. It also noted its belief that Pennsylvania would allow some recovery for suicide caused by intentional acts, even absent a special duty to prevent suicide, where the plaintiff could prove that the underlying intentional tort was a substantial factor in causing the suicide. Rowe v. Marder, 750 F.Supp. 718, 720, 724-726, affirmed 935 F.2d 1282 (3d Cir.1991).

W.D.Pa.1988. Subsec. (1) and coms. (d) and (h) cit. in disc. An employee sued his former employer for discharging him in violation of the Age Discrimination in Employment Act and for emotional distress resulting from the discharge. The defendant moved for summary judgment on several grounds, including a claim that the plaintiff failed to state a cause of action for negligent and intentional infliction of emotional distress. The court granted the defendant's motion for summary judgment on this claim, but denied the motion regarding the others, holding that the mere loss of employment failed to satisfy the threshold evidentiary requirement of outrageousness necessary for the "extreme and outrageous conduct" element of the tort, and that the plaintiff failed to allege that the defendant's conduct caused him severe emotional distress, also an element of the tort. Miller v. State Chemical Mfg. Co., 706 F.Supp. 1166, 1171.

W.D.Pa.1988. Com. (d) cit. in case quot. in sup. A unit supervisor who was demoted to product technician and then terminated because of her poor performance sued her former employer, alleging, inter alia, that her employer engaged in favoritism, unjustified criticism, and adverse employment actions and that the employer's conduct amounted to intentional infliction of emotional distress. Granting the defendant's motion for summary judgment, the court held that the defendant's conduct was not extreme and outrageous enough to support a claim for intentional infliction of emotional distress. Miller v. Aluminum Co. of America, 679 F.Supp. 495, 507, judgment affirmed 856 F.2d 184 (3d Cir.1988).

W.D.Pa.1986. Quot. in disc. The plaintiff employee filed a complaint with OSHA alleging that he had been placed on layoff by the defendant in retaliation for complaining to OSHA about welding fumes at his workplace. He later filed this action alleging wrongful discharge and intentional infliction of emotional distress. The district court granted defendant's motion for summary judgment, holding that neither case law nor the OSHA statute created a private right of action for wrongful discharge, and that the plaintiff had an administrative remedy in its place. The court dismissed the claim for intentional infliction of emotional distress, noting that firing under the guise of a layoff was insufficient to state a cause of action, and that no evidence was found from which it could be reasonably inferred that the defendant deliberately established and concealed hazardous working conditions. Holmes v. Schneider Power Corp., 628 F.Supp. 937, 942, judgment affirmed 806 F.2d 252 (3d Cir.1986).

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W.D.Pa.1985. Subsec. (1) cit. in sup. A former employee sued his former employer alleging age discrimination, breach of contract, intentional infliction of emotional distress, and negligent infliction of emotional distress after he and five other workers were laid off as a result of poor sales. This court granted defendant's motion for summary judgment on all counts, holding, inter alia, that the defendant's conduct was not sufficiently outrageous to constitute intentional infliction of emotional distress. Brieck v. Harbison-Walker Refractories, 624 F.Supp. 363, 367, judgment affirmed in part, reversed in part 822 F.2d 52 (3d Cir.1987).

W.D.Pa.1985. Com. (d) cit. in sup. Plaintiffs initiated an antitrust action against defendants. In response, defendants filed a counterclaim on behalf of a plaintiff's former employee, alleging that he was wrongfully discharged from his position. The federal district court granted plaintiffs' motion to dismiss the counterclaim, holding that the employee could not state a claim for tortious interference with an employment contract or for wrongful discharge. Additionally, defendants' allegations that plaintiffs forced the employee into quitting his job and taking early retirement were not sufficiently outrageous in character and extreme in degree to support a cause of action for intentional infliction of emotional distress. Sharon Steel Corp. v. VJR Co., 604 F.Supp. 420, 422.

W.D.Pa.1984. Subsec. (1) quot. in part in sup. The plaintiffs were a mother and daughter who were joint tenants of an options account held with a brokerage firm. The mother relied heavily on the advice of the broker-dealer employed by the firm. When the plaintiffs' account balance of $125,000 was wiped out, they alleged misrepresentation by the broker about the risks involved and churning to generate commissions. They sought damages under federal securities acts and RICO and for intentional infliction of emotional distress. Ruling on various motions by the plaintiffs and the defendants, this court held on the latter claim that the conduct alleged by the plaintiffs in their complaint, even if fully proven, was not sufficiently extreme and outrageous to permit recovery. Pennsylvania courts and federal courts applying Pennsylvania law, said the court, have consistently refused to extend this tort to anything other than the most extreme and outrageous conduct. Jacabson v. Merrill Lynch Pierce Fenner & Smith, 605 F.Supp. 510, 512-513.

W.D.Pa.1983. Subsec. (1) quot. in sup., coms. (d) and (h) quot. in part in sup. Plaintiff brought this action for breach of contract and intentional infliction of emotional distress against a financial institution which failed to fulfill an agreement to underwrite a bond issue for the plaintiff's project. The defendant's motion to dismiss the emotional distress claim was granted. The court held that, as a matter of law, the defendant's failure to underwrite a bond issue could not be considered conduct beyond all reasonable bounds tolerated by society, the alleged contract breach did not cause bodily harm, and the breach was not one from which serious emotional distress was likely to result. Price v. Blyth Eastman Paine Webber, Inc., 576 F.Supp. 431, 433, 434.

W.D.Pa.1979. Cit. and quot. in disc. The plaintiff, a motion picture writer, sued the host, his guest and the radio station, among others, after a guest on a radio show made allegedly defamatory remarks concerning the plaintiff's involvement with the Communist party. The plaintiff alleged that the defendants had violated a legal duty to take reasonable care to avoid invading the protected interests of others. The plaintiff argued that the talk show host was negligent and his conduct, by

permitting a guest whose credibility was allegedly questionable, was so outrageous that he should be able to recover for emotional distress. The plaintiff moved for summary judgment on all counts. The court stated that summary judgment could be granted only where the defendant's conduct was so outrageous that it went beyond all bounds of decency and that no other determination concerning such conduct could be made. The court did not find that to be the situation herein and held that the determination of outrageous conduct was a question of fact for the jury. The court held that the plaintiff's motion for summary judgment could not be granted with regard to the plaintiff's claim for invasion of privacy because there was a question of fact as to whether the publication was made with knowledge of or in reckless disregard of its falsity. Lorentz v. Westinghouse Elec. Corp., 472 F.Supp. 946, 948, 950.

D.P.R.

D.P.R.1998. Cit. in headnote, cit. in case cit. in disc. Corporation that was certified to provide mail-processing services to bulk-rate customers of United States Postal Service (USPS) sued government for violations of the Federal Tort Claims Act (FTCA) after USPS official made public remarks suggesting that plaintiff lacked certification to do business with USPS. Defendant moved to dismiss. Granting the motion in part and denying it in part, the court held that to the extent plaintiff alleged tortious interference with its existing and prospective contractual relationships, the claim was barred by the FTCA's "interference with contract rights" exception to liability; that plaintiff could not recover based on inaccurate statements official made about plaintiff's certification, since defendant did not waive sovereign immunity for the tort of misrepresentation; that plaintiff, a corporation, could not maintain an action for intentional infliction of emotional distress; and that the claim that USPS negligently supervised its employees survived the motion to dismiss. Dynamic Image Technologies, Inc. v. U.S., 18 F.Supp.2d 146, 147, 151.

D.R.I.

D.R.I.2016. Com. (d) quot. in case quot. in disc. Former student brought an action alleging various contract and tort claims against private university and its employees who punished plaintiff for violating the university's academic code after she was caught and admitted to cheating. Granting summary judgment for defendants, this court held that plaintiff's tort claims were unsupported by law, and that there were no material facts suggesting defendants breached the academic code, given that defendants adhered to the code in pursuing their investigation, holding the academic-dishonesty hearing, imposing sanctions, and handling plaintiff's appeal of the decision. The court noted that plaintiff failed to plead facts that could rise to the high standard of extreme and outrageous conduct articulated in Restatement Second of Torts § 46, Comment *d*, that was necessary for succeeding on a claim of intentional infliction of emotional distress. Doe v. Brown University, 209 F.Supp.3d 460, 478.

D.R.I.2013. Cit. in sup. Former patient sued physician, alleging that, while he was still treating her and without her knowledge or permission, physician wrote and published a book about her battle

with her addiction to prescription drugs, using numerous confidential disclosures that she had made to him during treatment sessions. Granting in part defendant's motion to dismiss, this court held that, even if every fact asserted in the complaint was taken as true, plaintiff failed to state a claim for intentional infliction of emotional distress, given the complete absence of any assertions that defendant's conduct resulted in physical symptomatology. While plaintiff repeatedly emphasized that the facts published about her were offensive or objectionable and that the publication of the book had caused her to suffer severe emotional distress, she did not refer to any physical manifestations of her alleged distress, a required element of such a claim. Lisnoff v. Stein, 925 F.Supp.2d 233, 241.

D.R.I.2006. Com. (d) quot. in case quot. in disc. Landowners sued gas company, alleging that, approximately 50 years earlier, hazardous substances that were the by-product of a coal-gasification process utilized by gas company's predecessor, were deposited as fill on their land. This court, inter alia, granted in part gas company's motion to dismiss a claim for intentional infliction of emotional distress brought by one set of landowner plaintiffs. The court held that these plaintiffs could not prevail on their intentional-infliction claim because their complaint indicated that the coal-gasification waste was deposited before they acquired their property, and thus defendants' actions could not have been intended to cause emotional distress to them in particular. Gail v. New England Gas Co., Inc., 460 F.Supp.2d 314, 326.

D.R.I.2003. Com. (d) quot. in case quot. in sup. Probationary police officer sued town, alleging, inter alia, intentional infliction of emotional distress, in connection with town's refusal to provide health insurance for officer's child and common-law wife pursuant to "full family coverage" provision of labor contract. Granting town summary judgment, this court held, inter alia, that defendant's decision did not rise to the level of extreme and outrageous conduct required to support a claim for intentional infliction of emotional distress. Adams v. Town of Burrillville ex rel. Mainville, 249 F.Supp.2d 151, 155.

D.R.I.2003. Adopted in case cit. in disc., com. (d) cit. in sup. After sexual-assault charges against high-school teacher were dismissed, teacher sued city, police department, police chief, and police officers for, in part, intentional infliction of emotional distress. Granting defendants' motion for summary judgment, the court held, inter alia, that plaintiff failed to show requisite intentional, extreme, and outrageous conduct causing him to suffer severe emotional distress. Defendants' arrest of plaintiff did not support his claim, because the arrest was made pursuant to a warrant based on probable cause. Forest v. Pawtucket Police Dept., 290 F.Supp.2d 215, 232, affirmed 377 F.3d 52 (1st Cir.2004).

D.R.I.2003. Adopted in case quot. in sup., cit. in case quot. in disc., com. (d) quot. in sup. and quot. in case cit. in disc., coms. (e) and (f) quot. in sup., com. (g) quot. in case quot. in sup. Woman whose adulterous 23-year relationship broke up sued former lover for, in part, intentional infliction of emotional distress. Granting defendant's motion for summary judgment, the court held, inter alia, that plaintiff's claim for intentional infliction of emotional distress failed because defendant's conduct in engaging in an adulterous affair, ending the affair, and refusing to divorce his wife was

neither extreme nor outrageous, the parties' relationship was founded in significant part on deceit, and there was no evidence that defendant was aware that plaintiff was particularly susceptible to emotional injury. Norton v. Hoyt, 278 F.Supp.2d 214, 220-223.

D.R.I.1996. Com. (d) quot. but dist., cit. in disc. Terminated corrections officer who believed his race was the reason his union grievance official failed to appeal his discharge sued union and official for, inter alia, breach of the duty of fair representation and intentional infliction of emotional distress. Defendants moved for summary judgment. Granting in part and denying in part the motion, the court held that material factual issues existed as to whether official received notice of the impending appeal and, thus, whether his failure to appear was motivated by racial discrimination; official was immune from liability for breach of the duty of fair representation, but, under basic agency principles, union would be liable, even if the failure to appear was the result of official's purposeful discrimination, as long as official was acting within the scope of his employment; and official's failure to provide adequate representation, even if racially motivated, did not rise to the level of outrageousness required to support a claim for intentional infliction of emotional distress. Forbes v. R.I. Broth. of Correctional Officers, 923 F.Supp. 315, 329, 330.

D.R.I.1986. Cit. and quot. in disc., cit. in case quot. in disc., com. (d) quot. in sup. A student sued a college for discrimination, intentional and negligent infliction of emotional distress, and invasion of privacy when she was expelled because of her obesity. Partially denying the college's motion for summary judgment, this court held that, although Rhode Island law had expressly rejected the viability of any cause of action for negligent infliction of emotional distress, a trier of fact could reasonably find the college's actions to be so atrocious as to state an actionable claim for intentional infliction of emotional distress. Russell v. Salve Regina College, 649 F.Supp. 391, 400-404.

D.R.I.Bkrtcy.Ct.

D.R.I.Bkrtcy.Ct.1981. Quot. in sup. This suit was brought by the plaintiff, a tenant of the defendant, to have her claims for damages against the defendant declared non dischargeable. These claims were for damages for conversion, assault, and the intentional infliction of emotional harm allegedly incurred during the defendant's attempted self-help eviction of the plaintiff. The court held that plaintiff was entitled to damages for the intentional infliction of emotional harm and that this claim was nondischargeable. The defendant was found to have acted with full knowledge of the emotional upset which would be experienced by the plaintiff, and to have forcibly broken open the plaintiff's door without regard for the emotional well-being or physical safety of the plaintiff in an attempt to harass and intimidate. In re Berberian, 12 B.R. 465, 469.

D.S.C.

D.S.C.2015. Com. (d) quot. in case quot. in sup. African American customer who suffered from Post-Traumatic Stress Disorder and related agoraphobia brought an action for intentional infliction of emotional distress (IIED) against, among others, manager of a convenience-store chain, alleging

that, after plaintiff requested permission to shop at the store after hours as part of his course of treatment, defendant laughed while denying his request, became irritated, started talking to him in a loud and aggressive tone, insulted him with a racial slur, and threatened to call the police. This court granted in part defendant's motion to dismiss, holding that plaintiff failed to state an IIED claim. While plaintiff's allegations suggested crudeness on the part of defendant, defendant's conduct did not rise to the level of extreme and outrageous conduct necessary to state a claim under Restatement Second of Torts § 46. Callum v. CVS Health Corporation, 137 F.Supp.3d 817, 857.

D.S.C.2013. Adopted in case cit. in sup. Female university soccer player brought various claims against, among others, female head coach and male assistant coach in connection with allegations that defendants treated her improperly, by, among other things, sexually harassing her. Granting summary judgment for defendants, this court held that plaintiff's claim for intentional infliction of emotional distress failed as a matter of law, because plaintiff's allegations that female head coach asked her how she could live with herself knowing that she would not be played, and that male assistant coach touched her leg during a private conference and later threatened that "bad things would happen" if she appealed from her scholarship reduction for the coming year were not enough to establish the extreme and outrageous conduct required to support such a claim. DeCecco v. University of South Carolina, 918 F.Supp.2d 471, 519.

D.S.C.2007. Coms. (d), (i), and (j) quot. in case quot. in ftn. Insured driver who was injured in an automobile accident sued his underinsured-motorist (UIM) carrier after defendant refused to pay plaintiff the benefits he sought, asserting tort claims for bad faith and outrage, inter alia. This court dismissed plaintiff's tort causes of action as premature, concluding that, since, at the time plaintiff filed his complaint, he had not yet brought suit against the at-fault driver and served defendant with process, defendant's duty of good faith to plaintiff regarding the payment of UIM benefits had not arisen and thus could not have been violated. In addition, noting that the merits of plaintiff's outrage claim were inherently dependent on the merits of his bad-faith claim, the court concluded that, since it had ruled that defendant was acting within its rights, plaintiff failed to show that defendant's conduct was extreme and outrageous for purposes of proving his outrage claim. Halmon v. American Intern. Group, Inc. Ins. Co., 586 F.Supp.2d 401, 408.

D.S.C.1991. Coms. (d), (j), and (l) cit. in disc. A black employee who claimed that he was demoted because of his race and as a result suffered severe emotional distress brought an employment discrimination suit against his employer, alleging civil rights violations and intentional infliction of emotional distress. The district court accepted the report of a magistrate judge, who recommended, inter alia, that the emotional distress claim be dismissed because the plaintiff failed to present any evidence that the defendant intended to inflict severe emotional distress or that the defendant's conduct was extreme and outrageous. Glover v. Lockheed Corp., 772 F.Supp. 898, 906.

D.S.C.1987. Quot. in disc., coms. (d), (i), (j), and (k) cit. in case quot. in disc. A police officer assisted a motorist who had driven off the road by contacting a wrecker to return the vehicle to the road. Neither the officer nor the wrecker driver observed any evidence that the motorist was intoxicated. Approximately 45 minutes after the motorist left the area, he was involved in a fatal

collision with another vehicle while driving on the wrong side of a divided interstate highway. Post-accident tests of the motorist revealed a high blood alcohol level. Surviving occupants of the other vehicle sued the police officer for, inter alia, intentional infliction of emotional distress and negligence. This court granted the defendant's motion for summary judgment, holding, inter alia, that the defendant's conduct was not so outrageous as to exceed all possible bounds of decency. Patel by Patel v. McIntyre, 667 F.Supp. 1131, 1144, 1145, judgment affirmed 848 F.2d 185 (4th Cir.1988).

D.S.C.1985. Cit. in sup., quot. in sup. An occupational health nurse sued her employer for intentional infliction of emotional distress, alleging that she had been wrongfully terminated. The court granted judgment n.o.v. in favor of the employer, holding that, although the tort of intentional infliction of emotional distress was applicable in an employer-employee relationship, the elements had not been met in this case. There was no evidence, said the court, that anyone knew that the nurse was susceptible to emotional distress. Moreover, the employer's act of terminating the nurse did not constitute "outrageous conduct" sufficient to impose liability on the employer in tort; this was an ordinary, industrial firing. Meierer v. E.I. du Pont de Nemours and Co., 607 F.Supp. 1170, 1175, 1176.

D.S.C.1985. Coms. (d), (e), (f), (i) and (j) quot. in case quot. in sup. An electronics missile technician was terminated from his employment when his urine drug screening test indicated a positive result. The technician sued his employer for, inter alia, intentional infliction of emotional distress. The district court granted the defendants' motion for summary judgment, holding, inter alia, that the plaintiff failed to demonstrate that the defendant's conduct was extreme and outrageous. The court noted that the Restatement's insistence that the conduct be outrageous was no mere happenstance because there was a perceived need to limit the boundaries of liability for the tort of intentional infliction of distress. Satterfield v. Lockheed Missiles & Space Co., Inc., 617 F.Supp. 1359, 1365.

D.S.C.1983. Com. (k) cit. in disc. Plaintiff parents successfully brought an action in wrongful birth against the defendant hospital for failing to advise the plaintiffs of the risk that their child might be afflicted with Downs Syndrome and for failure to diagnose a cardiac disorder. The only issue was the proper amount of damages. The court awarded the parents economic damages equaling their expenses for the duration of the child's life. The court also awarded damages for the parents' emotional suffering, following the trend to abandon the presence of physical manifestation of the emotional harm as an absolute prerequisite to recovery. In addition, the court applied the "benefits rule," holding that the benefits flowing from the child's birth amounted to 50 percent of the damages for mental anguish, and entered the award accordingly. Phillips v. United States, 575 F.Supp. 1309, 1318.

D.S.C.1977. Cit. in disc. and quot. in part in ftn. and com. (d) quot. in sup. The plaintiff sustained a back injury which was compensable under the South Carolina Workmen's Compensation Act. The defendant, the plaintiff's compensation carrier, had failed to make the weekly compensation payments and the plaintiff filed this suit to recover for the alleged emotional distress he suffered as

a result. The plaintiff argued that he became nervous and upset and subject to mental and emotional distress which was caused by the defendant's malicious and wilful refusal to make the weekly payments. The defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted. The court found that the plaintiff's allegations did not establish a claim because the complaint failed to allege that the defendant's conduct was outrageous as required in order to recover for the infliction of emotional distress. The plaintiff had alleged that the defendant's failure to make payments was malicious but the court found that this was not sufficient to satisfy the element of outrageous conduct which was required. The court stated that the conduct would have to be of such nature as to be atrocious and beyond human decency in order to be the basis for recovery. The court added that the plaintiff failed to allege bodily injury or other physical manifestations of illness and although some authorities did not require manifestations of bodily illness, South Carolina case law did and in their absence, recovery was precluded. The complaint was therefore dismissed. Whitten v. American Mut. Liability Ins. Co., 468 F.Supp. 470, 479, affirmed 594 F.2d 860 (4th Cir.1979).

D.S.C.1973. Subsec. (1) quot. in sup. This action for, inter alia, the alleged tort of intentional interference with the right to attend the funeral of a member of one's immediate family was brought by the father and sisters of deceased children against the sister of the father's estranged wife. When the sister-in-law moved for summary judgment, this court denied the motion holding that Georgia had recognized the principles of recovery for torts not involving bodily injury and specifically as they pertain to intentional interference with proper burial, proper funeral, etc., and that although there was no offer of proof of outward manifestation of the plaintiffs' alleged severe emotional distress, there was still a genuine issue of fact as to whether there was, sufficient distress to warrant an award of damages both actual and punitive. Tully v. Pate, 372 F.Supp. 1064, 1075.

D.S.D.

D.S.D.2014. Com. (d) quot. in sup. and quot. in case quot. in sup. After criminal charges for inhumane treatment of animals against dog breeder were dismissed, breeder sued executive director of nonprofit corporation that provided animal-control services to county and state's attorney for county, who were responsible for initiating the charges against him, alleging, among other things, that defendants conspired to commit the tort of intentional infliction of emotional distress (IIED) by illegally searching and seizing his property. This court granted defendants' motion for summary judgment on plaintiff's IIED claim, holding that, while defendants' actions were questionable and possibly tortious, they did not go beyond all possible bounds of decency, as required to state such a claim under Restatement Second of Torts § 46. Christensen v. Quinn, 45 F.Supp.3d 1043, 1091.

D.S.D.2014. Com. (h) quot. in case quot. in sup. Sixty-two-year-old guidance counselor brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against employer, alleging that employer engaged in extreme and outrageous behavior by, among other things, asking plaintiff about his retirement plans, failing to renew his employment contract, and hiring a younger

employee in his place. Granting in part defendant's motion for summary judgment, this court held that, even if the nonrenewal of the contract was done on an illegitimate basis, defendant's alleged conduct did not give rise to the level of extreme and outrageous conduct necessary for a viable IIED claim. Quoting Restatement Second of Torts § 46, Comment *h*, the court pointed out that whether defendant's conduct was sufficiently extreme and outrageous to result in liability was a question for the jury only in circumstances where reasonable men could differ. Dunn v. Lyman School Dist. 42-1, 35 F.Supp.3d 1068, 1092.

D.S.D.2014. Com. (h) cit. in case quot. in sup. Patient and her husband filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against physician's medical-practice insurer, alleging that defendant's prevention of patient's treating doctor, who was also insured by defendant, from acting as an expert witness in patient's malpractice action against physician was extreme and outrageous. This court denied in part defendant's motion to dismiss, holding that plaintiffs sufficiently pleaded a claim for IIED. Citing Restatement Second of Torts § 46, Comment *h*, the court acknowledged that plaintiffs would be required to show that defendant's conduct was extreme and outrageous, but, at this stage, plaintiffs' allegations were taken as true and were sufficient to state an IIED claim. Nichols v. MMIC Ins. Inc., 68 F.Supp.3d 1067, 1084.

D.S.D.2009. Com. (h) cit. in case quot. in sup. Employee sued employer for age discrimination and intentional infliction of emotional distress (IIED). This court granted in part employer's motion for a protective order prohibiting employee from deposing its corporate designee as to certain subjects of examination, holding, inter alia, that discovery of punitive damages information was premature. The court, in discussing whether an evidentiary hearing prior to any discovery related to punitive damages would be required, noted that the state supreme court had cited the Restatement for the proposition that it was for the court to determine in the first instance whether a defendant's conduct could reasonably regarded as so extreme and outrageous as to permit recovery on an IIED claim. Murphy v. Kmart Corp., 255 F.R.D. 497, 517.

D.S.D.2002. Com. (h) quot. in sup. Tribal police dispatcher who alleged that tribal police officer twice placed an air pistol to the back of her head and pulled the trigger sued the United States under the Federal Tort Claims Act, asserting a claim for, in part, intentional infliction of emotional distress. Granting defendant's motion to dismiss, the court held, inter alia, that officer's workplace horseplay was silly and childish, and did not rise to the level of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress. Locke v. U.S., 215 F.Supp.2d 1033, 1043, 1044, judgment affirmed 63 Fed.Appx. 971 (8th Cir.2003).

E.D.Tenn.

E.D.Tenn.2020. Com. (d) quot. in case quot. in sup. (general cite). Arrestee brought, among other things, claims of intentional infliction of emotional distress (IIED) against city, police chief, and arresting officers, alleging that after she was arrested for driving under the influence, withdrew her consent to a blood-alcohol test, and began suffering from a panic attack, which caused officers

to believe she was acting in a hostile manner, officers used excessive force to place her in a police car. This court granted in part defendants' motion for summary judgment, holding that officers' use of force, such as striking plaintiff in the knee, applying a clavicle pressure-point tactic, and using a jugular-notch pressure technique, did not constitute outrageous conduct under the standard set forth in Restatement Second of Torts § 46, Comment *d*, as required to support an IIED claim. The court reasoned that, while excessive use of force could constitute outrageous behavior under § 46, officers' use of force in this instant case was not outrageous, because the court had already determined that their conduct was reasonable under the circumstances for the purposes of her Fourth Amendment claim. Colson v. City of Alcoa, 458 F.Supp.3d 887, 935.

E.D.Tenn.2011. Com. (d) quot. in sup. Victims of a motor-vehicle accident brought, inter alia, a state-law claim for intentional infliction of emotional distress (IIED) against county sheriff in his individual capacity, alleging that they had been beaten and tasered by deputy sheriffs while being interrogated about the accident at the accident scene. Dismissing the IIED claim with prejudice, this court held that the claim failed because plaintiffs admittedly never had contact with defendant; thus, defendant clearly was not responsible for any outrageous conduct, let alone any conduct, for purposes of the IIED claim. Dillingham v. Millsaps, 809 F.Supp.2d 820, 855, 856.

E.D.Tenn.2011. Com. (d) quot. in case quot. in sup. African-American retail-store customer brought a claim for, inter alia, intentional infliction of emotional distress (IIED) against store, arising from an incident during which plaintiff shoved and knocked down a white 71-year-old door greeter employed by defendant after plaintiff set off the door alarm while leaving the store and greeter touched his shoulder, asking to check his receipt; while plaintiff did not sustain any physical injury as a result of greeter's contact with his shoulder, he allegedly experienced substantial embarrassment and humiliation after a video of the incident was picked up by local and national media, and he was suspended for 28 days by city police department that employed him as a police officer. Granting summary judgment for defendant, this court held that defendant's failure to issue a public statement apologizing to plaintiff for the incident, and its decision to remain silent in the face of a media fracas not of its own making did not constitute intentional outrageous conduct that could give rise to IIED liability to plaintiff. Freeman v. Wal-Mart Stores East, LP, 781 F.Supp.2d 661, 670.

E.D.Tenn.2010. Com. (d) quot. in sup. City employee who was allegedly sexually harassed by a co-worker sued city, employee's direct and indirect supervisors, co-workers, and others. Granting summary judgment for defendants on plaintiff's claims for intentional infliction of emotional distress, this court held that no reasonable jury could find that any of the individual defendants' conduct rose to the level of "outrageousness" required to state such a claim under Tennessee law. While supervisor's conduct in allegedly encouraging plaintiff to falsify an accident and injury report may have impeded the investigation into his allegations, it did not rise to the level of being "outrageous." Reagan v. City of Knoxville, 692 F.Supp.2d 891, 905, 906.

E.D.Tenn.2002. Quot. in case quot. in sup., com. (d) quot. in case quot. in sup. Employee who was terminated following medical leave sued employer and supervisor, alleging, among other things,

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intentional infliction of emotional distress. Granting in part defendants' motion for summary judgment, this court held, inter alia, that defendants' alleged violation of federal law was not sufficiently outrageous, nor did employee present evidence of severe emotional distress so as to support claim for intentional infliction of emotional distress. Richardson v. CVS Corp., 207 F.Supp.2d 733, 746.

E.D.Tenn.1978. Subsec. (2)(a) quot. in sup. Husband and wife brought an action against a corporation for malicious prosecution and outrageous conduct causing severe emotional distress. Defendant moved to dismiss the claim of the wife on the ground that she could recover only under the tort of outrageous conduct, and that the complaint failed to state a cause of action under that tort. The court denied the motion, stating that while it was not entirely clear which, if any, actions had allegedly taken place in the presence of the wife, the allegation that the arrest of the husband on a charge of having passed a bad check took place at plaintiffs' home, along with the continuing nature of the alleged conduct, was sufficient for purposes of the motion. Foster v. Trentham's Inc., 458 F.Supp. 1382, 1384.

E.D.Tenn.1974. Quot. in part, and coms. quot. in part, and fol. The plaintiff sought to recover for mental anguish ensuing from his being arrested after having cashed, in a bank, a check he had won from the defendant in a contest, said check containing a legend providing that it could only be used for the purchase of a sewing machine. The court dismissed the complaint for failing to state a claim upon which relief could have been granted, finding that the plaintiff failed to allege any extreme and outrageous conduct on the part of the defendant. Hutson v. Shackelford, 390 F.Supp. 997, 999.

E.D.Tenn.Bkrtcy.Ct.

E.D.Tenn.Bkrtcy.Ct.2013. Com. (d) quot. in case quot. in sup. Chapter 13 debtors brought an adversary proceeding against mortgage lenders, alleging, among other things, that lenders' failure to modify their mortgage forced them to enter into bankruptcy in order to save their home and caused them to suffer loss of credit, foreclosure notices, emotional harm, and embarrassment. This court granted in part lenders' motion for summary judgment, holding that debtors failed to state a claim for intentional infliction of emotional distress under Tennessee law. The court reasoned that, while debtors alleged conduct by lenders that could be perceived as reckless, the running of foreclosure notices that might have caused embarrassment to debtors was not sufficiently outrageous to support a claim for intentional infliction of emotional distress, and a breach of contract, even if clear, was not by itself actionable under the tort of outrageous conduct, nor would a negligent or inadvertent act give rise to such a claim. In re Jenkins, 488 B.R. 601, 617.

E.D.Tenn.Bkrtcy.Ct.2009. Com. (d) quot. in case quot. in sup. Chapter 13 debtor brought adversary proceeding against creditor, alleging that creditor, by filing its proof of claim without redacting her personal information, intentionally made such information public to any and all parties with Internet access, opening the door for identity theft. Granting in part creditor's motion to dismiss, this court held, inter alia, that plaintiff failed to state a claim for intentional infliction

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of emotional distress under Tennessee law, because she failed to allege facts sufficient to establish that defendant engaged in conduct so outrageous as to be outside the bounds of decency or that she suffered a serious or severe mental injury as a result. In re French, 401 B.R. 295, 319.

M.D.Tenn.

M.D.Tenn.2019. Cit. in ftn. (general cite); com. (d) cit. in cases cit. in sup.; com. (e) quot. in sup. Husband and wife brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against husband's ex-girlfriend, alleging that defendant published a defamatory document accusing plaintiffs of being psychotic and sending her multiple bothersome or threatening messages over email and voicemail. This court granted in part defendant's motion to dismiss, holding that defendant's actions did not rise to the level of extreme and outrageous conduct necessary for an IIED claim under Restatement Second of Torts § 46. Finley v. Kelly, 384 F.Supp.3d 898, 912-914.

M.D.Tenn.2018. Com. (d) quot. in sup., quot. in case quot. in sup. Former employee who used her work laptop both for work and to access her private electronic email and accounts sued former employer and former co-worker, alleging that co-worker downloaded her personal files, including nude photographs, from her private accounts through her work laptop without her knowledge or consent, and then shared those files with other employees. This court granted co-worker's motion for summary judgment on employee's claim for intentional infliction of emotional distress, holding that the alleged conduct, even if true, was not so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community, as required to state such a claim under Restatement Second of Torts § 46. Billiter v. SP Plus Corp., 329 F.Supp.3d 459, 471.

M.D.Tenn.2018. Cit. in case quot. in sup.; com. (d) quot. in sup. Female laborer who formerly worked as a foreman for a construction company sued former employer, alleging, among other things, sexual discrimination, sexual harassment, and intentional infliction of emotional distress based in part on allegations that her supervisor told her co-workers that she had a "stinky vagina," and told her, in front of her co-workers, that she could "take a shovel two feet inside of her" and that he wanted to take her into the woods to have sex with her. This court granted defendant's motion for summary judgment on plaintiff's claim for intentional infliction of emotional distress, reasoning that plaintiff's allegations were insufficient to establish the outrageousness element required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. Cossairt v. Jarrett Builders, Inc., 292 F.Supp.3d 779, 789.

M.D.Tenn.2018. Com. (d) cit. in sup. Former student of private university, who was accused of sexual misconduct by a female student, brought an action for intentional infliction of emotional distress and other claims against university, after it concluded that he was not responsible for sexual misconduct, but punished him for not being truthful during the investigation and for violating university's residential-visitation policy. This court granted university's motion to dismiss student's emotional-distress claim, holding that, even if university's investigation was imperfect or unfair,

the alleged conduct was not so atrocious, so beyond the bounds of decency, or so utterly intolerable to society that it met the demanding standard for such a claim under Tennessee law and Restatement Second of Torts § 46. The court pointed out that student did not make any specific allegations regarding university's actions, other than that they were done intentionally or recklessly, and noted that removal from academic programs and frustration of earning academic degrees, even if humiliating, depressing, or distressful, were not sufficiently egregious to support a claim for intentional infliction of emotional distress. Doe v. Belmont University, 334 F.Supp.3d 877, 903.

M.D.Tenn.2017. Com. (d) quot. in case quot. in sup. Guest at an off-campus fraternity party filed, among other things, a claim of intentional infliction of emotional distress (IIED) against fraternity member who invited her to the party, alleging that defendant had a sexual encounter with her without her consent, and took a photograph of her while she was sleeping fully clothed in his bed and sent it to his ex-girlfriend along with a statement indicating that he had had sex with plaintiff. This court denied in part defendant's motion to dismiss, holding that plaintiff alleged sufficient facts to support her IIED claim. Quoting Restatement Second of Torts § 46, Comment *d*, the court determined that a reasonable jury could find that defendant's conduct was so outrageous it could not be tolerated by a civilized society, given plaintiff's argument that defendant acted out of spite toward his ex-girlfriend. Doe v. Andrews, 275 F.Supp.3d 880, 888.

M.D.Tenn.2011. Com. (d) quot. in case quot. in sup. After wife was unwittingly filmed for a television program while visiting her husband in a maximum security prison, she brought an intentional infliction of emotional distress (IIED) claim, inter alia, against television network and producer, alleging that the program caused her to suffer severe emotional distress. Granting in part defendants' motion to dismiss, this court held that plaintiff's IIED claim failed as a matter of law, because even if plaintiff was distressed when some of her family and friends thought that the program portrayed her as a drug dealer, defendants' actions in producing and airing the program were not something beyond all bounds of decency and utterly intolerable in a civilized community, particularly in light of the fact that the program could have been understood to suggest that the drug smuggling allegations against plaintiff were proven false. Battle v. A & E Television Networks, LLC, 837 F.Supp.2d 767, 777.

M.D.Tenn.2011. Com. (d) adopted and quot. in case quot. in sup., coms. (h) and (j) quot. in cases quot. in sup. Lebanese former employee sued his former employer, asserting discrimination claims under federal and state law, and a pendent state-law claim for outrageous conduct/infliction of emotional distress. Granting in part defendant's motion for summary judgment, this court held that plaintiff failed to prove that defendant's conduct was sufficiently outrageous to support a judgment under Tennessee law for outrageous conduct or intentional infliction of emotional distress. The court reasoned that, while plaintiff was exposed to comments based upon his national origin and was later terminated from his job, the record revealed that defendant's branch manager did take some corrective action, and there was no evidence of any physical touching or hostile threats in conjunction with the name-calling; discriminatory conduct did not automatically give rise to the imposition of liability for intentional infliction of emotional distress. Nijem v. Alsco, Inc., 796 F.Supp.2d 883, 898, 899.

M.D.Tenn.2001. Com. (d) quot. in case quot. in sup. Arrestee who was kicked and struck with butt of shotgun sued municipality, police sergeant, and several police officers, alleging excessive force, intentional infliction of emotional distress, and Fourth Amendment violations in connection with arrest. Granting in part defendants' motion for summary judgment, this court held, inter alia, that plaintiff failed to present evidence of outrageous conduct necessary to sustain claim for intentional infliction of emotional distress. Fromuth v. Metropolitan Government of Nashville, 158 F.Supp.2d 787, 796.

M.D.Tenn.1999. Com. (d) cit. in headnotes and sup. Elderly and disabled Medicare beneficiaries who received home health-care services sued the services provider for intentional infliction of emotional distress, among other claims, after the provider stopped furnishing the services. Plaintiffs alleged that defendant's refusal was based simply upon the fact that plaintiffs were all heavy service users and economically undesirable patients. This court denied defendant's motion to dismiss, holding, inter alia, that fact issues existed as to whether defendant's behavior constituted outrageous conduct. Winkler v. Interim Services, Inc., 36 F.Supp.2d 1026, 1026, 1027, 1031.

M.D.Tenn.1997. Com. (d) quot. in disc. Mentally disturbed individual was shot and killed by deputy sheriff who was called to individual's home because he was threatening his family with two machetes; administrator of decedent's estate sued deputy sheriff for, inter alia, wrongful death, assault and battery, negligence, and intentional infliction of emotional distress. Granting in part and denying in part deputy sheriff's motion for summary judgment, the court held that material factual issues existed as to whether deputy sheriff was justified in using excessive force under the circumstances, and therefore summary judgment was inappropriate on the wrongful-death claim, and that summary judgment was also inappropriate on the claims for assault and battery and negligence; however, deputy sheriff's conduct was not so extreme and outrageous as to give rise to liability for intentional infliction of emotional distress. Thompson v. Williamson County, Tenn., 965 F.Supp. 1026, 1038, affirmed 219 F.3d 555 (6th Cir.2000).

W.D.Tenn.

W.D.Tenn.2010. Com. (h) cit. in case cit. in sup. Customer and her husband brought various claims against retailer and issuer of retailer's credit cards after defendants refused to let customer return several pieces of expensive jewelry that she purchased from retailer using one of retailer's credit cards. Granting summary judgment for defendants, this court held, among other things, that plaintiffs failed to state a claim for intentional infliction of emotional distress based on allegations that retailer was responsible for an altercation that occurred when customer attempted to redeem certain gift certificates at one of retailer's stores, and that defendants wrongfully refused to accept plaintiffs' attempted returns, increased plaintiffs' credit limit, and reported plaintiffs' debt to credit agencies; even accepting such allegations as true, they did not approach the level of outrageousness that Tennessee required to state such a claim. Holt v. Macy's Retail Holdings, Inc., 719 F.Supp.2d 903, 916.

W.D.Tenn.2010. Com. (d) quot. in sup. African-American female employee of county sheriff's office sued office, asserting claims for sex discrimination, race discrimination, hostile work environment, retaliation, and intentional infliction of emotional distress (IIED). Granting summary judgment for defendant, this court held, as to plaintiff's IIED claim, that, even taking as true plaintiff's allegations that, among other things, she was "continually harassed" by one supervisor, subjected to unwanted and unwelcomed sexual advances from another supervisor, "verbally attacked" by a co-worker, and retaliated against as a result of her complaints, defendant's actions were not so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, as required to state such a claim under Tennessee law. Verges v. Shelby County Sheriff's Office, 721 F.Supp.2d 730, 749.

W.D.Tenn.2006. Com. (d) cit. in case quot. in disc. Terminated African-American employee brought various claims against former employer and others, alleging racial discrimination. Denying defendants' motion for summary judgment as to plaintiff's claim for intentional infliction of emotional distress, this court held, inter alia, that defendants' conduct could be considered extreme and outrageous, in light of plaintiff's allegations that he was subjected to repeated racial slurs and was physically assaulted by defendants in his workplace. The court further held that plaintiff's failure to seek professional treatment for his alleged sleeplessness, cold sweats, and anger was not dispositive, particularly since plaintiff argued he could not afford such treatment. Wagner v. Merit Distribution, 445 F.Supp.2d 899, 917.

W.D.Tenn.2004. Com. (d) quot. in sup. Arrestee sued police officers for, in part, intentional infliction of emotional distress, alleging that defendants repeatedly struck him after accusing him of breaking into a building. This court denied in part defendants' motion to dismiss, holding, inter alia, that plaintiff stated a claim for intentional infliction of emotional distress, because unprovoked beatings by officials who were hired to protect and serve the community could be deemed intolerable in a civilized community. Plaintiff alleged that defendants told him repeatedly that they were going to "beat his ass," that defendants hit him with no provocation when he tried to answer their questions, and that defendants repeatedly struck and kicked him after he stopped resisting their authority. Alexander v. Newman, 345 F.Supp.2d 876, 887-888.

W.D.Tenn.2003. Com. (d) quot. in case quot. in sup. In racial-discrimination suit against restaurant chain, supervisor brought claim for intentional infliction of emotional distress. Granting in part chain's motion for summary judgment, this court held, inter alia, that conduct of chain's manager in addressing supervisor as "Princess Diana" due to his sexual orientation, and referring to him as "the little black sheep," was not so extreme and outrageous as to satisfy tort of intentional infliction of emotional distress. Brack v. Shoney's, Inc., 249 F.Supp.2d 938, 956.

W.D.Tenn.2002. Com. (d) quot. in case quot. in disc. Former postdoctoral research associate at a hospital sued hospital for federal civil-rights violations and intentional infliction of emotional distress, inter alia, alleging that she was fired due to her attempts to bring to light medical mistreatment of patients by hospital staff members. This court granted hospital summary judgment,

holding, inter alia, that hospital's conduct in allegedly discharging plaintiff because of her complaints regarding patient mistreatment did not rise to the level of atrocious or utterly intolerable conduct required for an emotional-distress claim. Caruso v. St. Jude Children's Research Hosp., Inc., 215 F.Supp.2d 930, 939.

W.D.Tenn.1997. Com. (b) cit. in headnote and quot. in sup., quot. in case quot. in disc. Former employees of a shoe company sued the company, her supervisor, and the company's general manager for Title VII violations and intentional infliction of emotional distress. This court granted defendants summary judgment, holding, inter alia, that the supervisor's giving a former employee a bad reference, even if it was false, did not rise to the level of outrageous conduct. The court also determined that these alleged acts of the supervisor did not constitute outrageous conduct: displaying little sympathy to one plaintiff's complaints that she was sexually harassed by a co-worker; whispering to a co-worker that she was a lesbian; acting as though he was going to run over her with a case of shoes; and calling another employee a liar and refusing to give her a day off. Scarborough v. Brown Group, Inc., 972 F.Supp. 1112, 1114, 1125.

W.D.Tenn.1995. Com. (b) quot. in case quot. in sup. Employees who alleged that they were sexually harassed by their supervisor and their general manager brought action for, inter alia, intentional infliction of emotional distress and invasion of privacy. Defendants moved to dismiss. Granting the motion in part and denying it in part, the court held that plaintiffs failed to state a claim against general manager; that plaintiffs stated a claim for outrageous conduct against supervisor; and that supervisor did not commit the tort of "false light" invasion of privacy when he allegedly provided a prospective employer with false information about one of the plaintiffs; however, the plaintiff who alleged that supervisor followed her home and attempted to enter her home through a window stated a claim for intrusion upon seclusion. Scarborough v. Brown Group, Inc., 935 F.Supp. 954, 962.

E.D.Tex.

E.D.Tex.2003. Subsec. (1) quot. in case quot. in sup. and cit. in case cit. in sup. After gas-station customer accidentally pumped more gas than he paid for, station manager called police and insisted that customer either pay for excess gas or siphon excess gas from car. Customer siphoned gas by sucking through a hose and became sick by swallowing gas and inhaling fumes. He sued station and manager for intentional infliction of emotional distress and for violating 42 U.S.C. § 1983. This court granted defendants summary judgment on emotional-distress claim, holding, inter alia, that, even assuming that defendants' conduct was reckless and outrageous, there was no evidence that customer actually suffered any emotional distress. Customer did not consult a psychologist, and his allegation that he was emotionally distressed by siphoning experience was unsupported. Hutchison v. Brookshire Bros., Ltd., 284 F.Supp.2d 459, 473, 474.

E.D.Tex.2002. Coms. (d) and (h) quot. in cases quot. in sup. Former employee sued employer for, in part, intentional infliction of emotional distress, after he was discharged for being in violation of

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company policy by failing to divulge on his employment application his previous employment with another company where he had been accused of sexual harassment. Granting defendant's motion for summary judgment, the court held, inter alia, that plaintiff's claim for intentional infliction of emotional distress failed because defendant's conduct was not extreme and outrageous. Ehrhardt v. Electrical & Instrumentation Unlimited of Louisiana, 220 F.Supp.2d 649, 660, 661.

E.D.Tex.2002. Com. (d) quot. in case quot. in sup. Motorist sued gasoline station and police officer for violations of state and federal law, alleging that he was forced to siphon gas from his car after the pump failed to stop automatically. Denying in part defendants' motion for summary judgment, district court held, inter alia, that motorist's allegation that officer and station manager forced him to siphon 10 buckets of gasoline from his car by mouth, causing him to swallow gasoline and inhale noxious fumes, sufficiently stated claim for intentional infliction of physical and emotional distress. Hutchinson v. Brookshire Bros., Ltd., 205 F.Supp.2d 629, 642.

E.D.Tex.2002. Com. (d) quot. in case quot. in disc. Gas-station customer who was unable to pay for extra gasoline that had mistakenly been pumped into his car's gas tank sued city, city police officer, and gas-station manager and its employees for, in part, intentional infliction of emotional distress, alleging that police officer had forced him to orally siphon out the extra gasoline. Granting police officer's motion for summary judgment on the emotional-distress claim, the court held that plaintiff failed to prove that he had suffered severe emotional distress as a result of officer's conduct. Hutchison v. Brookshire Bros., Inc., 225 F.Supp.2d 719, 729, appeal dismissed 71 Fed.Appx. 441 (5th Cir.2003).

E.D.Tex.2000. Cit. in disc. Survivors of motorcyclist who was killed in a collision with vehicle driven by employee of local university sued driver, university, and police officers who responded to the accident for, inter alia, intentional infliction of emotional distress, alleging that defendants engaged in a cover-up in order to protect driver. Granting defendants' motion to dismiss, the court held, in part, that plaintiffs had failed to establish that defendants participated in the alleged cover-up for the purpose of causing plaintiffs to suffer severe mental distress. LaBarbara v. Angel, 95 F.Supp.2d 656, 667.

E.D.Tex.2000. Cit. in headnote, com. (d) quot. in case quot. in disc. Employee sued employer for "hostile work environment" sexual harassment and retaliation under Title VII and intentional infliction of emotional distress, alleging that a supervisor and a coemployee made comments and gestures toward plaintiff suggesting that plaintiff was engaging in homosexual conduct with a male co-worker. This court granted defendant summary judgment, holding, inter alia, that the teasing, obscenities, and other unpleasantness endured by plaintiff did not constitute intentional infliction of emotional distress. Mims v. Carrier Corporation, 88 F.Supp.2d 706, 720.

E.D.Tex.2000. Cit. in case cit. in disc. Former employee sued former employer under the Age Discrimination in Employment Act (ADEA), also alleging intentional infliction of emotional distress. Granting in part employer's motion for summary judgment, this court held that plaintiff failed to meet two of the four prongs necessary to establish intentional infliction of emotional

distress, finding that defendant's actions were not extreme and outrageous and that plaintiff did not suffer severe emotional distress. Yelverton v. Graebel/Houston Movers, Inc., 121 F.Supp.2d 604, 612.

E.D.Tex.1999. Cit. in headnote, com. (d) cit. in case cit. in sup. After being fired by her employer hospital, a respiratory therapist sued the hospital's operator for intentional infliction of emotional distress, among other claims, alleging that she was forced to work in conditions that were inimical to patients' welfare as well as to her own professional and ethical standards. This court granted defendant summary judgment, holding, inter alia, that plaintiff's emotional-distress claim failed, because even if defendant's conduct as to the patients violated some level of care or was malicious or even criminal, that, standing alone, did not constitute extreme and outrageous conduct. Cole v. Sisters of Charity of the Incarnate Word, 79 F.Supp.2d 668, 673.

E.D.Tex.1999. Com. (d) quot. in case cit. in disc. Salesman sued former employer for violations of the Americans with Disabilities Act (ADA), alleging that he was terminated when defendant learned that he suffered from fibromyalgia. Plaintiff also asserted a state-law claim for intentional infliction of emotional distress. Entering summary judgment for defendant, the court held that plaintiff's failure to establish that a physical impairment substantially limited a major life activity was fatal to his ADA claim, and that the manner in which he was discharged was not sufficiently extreme or outrageous to give rise to a claim for intentional infliction of emotional distress. Garrett v. Autozone, Inc., 71 F.Supp.2d 617, 622.

E.D.Tex.1998. Cit. in case cit. in ftn., com. (d) quot. in case quot. in ftn. Subcontractor's employees who were fired from a construction project because they took en masse breaks in contravention of the general contractor's directive sued oil company and its general contractor for intentional infliction of emotional distress, among other claims. This court granted defendants summary judgment, holding, inter alia, that it was not extreme and outrageous conduct for an employer to fire employees who were engaged in activity for which they could be legitimately discharged. Volentine v. Bechtel, Inc., 27 F.Supp.2d 728, 737, 739.

E.D.Tex.1993. Com. (d) quot. in case cit. in sup. Former employee and Equal Employment Opportunity Commission sued employer, alleging various claims arising from employee's discharge, including intentional infliction of emotional distress. Granting in part and denying in part employer's motion for summary judgment on employee's emotional distress claim, the court held, inter alia, that, under Texas law, a supervisor's labeling of an employee as “not trainable” could be outrageous behavior that would support an emotional distress claim, particularly when employer was aware that employee had, by her own initiative, obtained computer training from a local university to upgrade her skills. E.E.O.C. v. Fina Oil & Chemical Co., 835 F.Supp. 330, 333.

N.D.Tex.

N.D.Tex.2011. Com. (d) cit. in sup. and quot. in case quot. in sup., com. (h) cit. in sup. Former employee brought, among other things, a pendent state-law claim for intentional infliction of emotional distress (IIED) in her Title VII sexual harassment/discrimination case against employer and supervisor. This court, inter alia, denied supervisor's motion to dismiss and/or for summary judgment as to plaintiff's IIED claim, holding that a genuine issue of material fact existed as to whether supervisor's alleged conduct in attempting to force plaintiff to have sex with him following a dinner meeting was sufficiently extreme and outrageous to result in liability for IIED. Howe v. Yellowbook, USA, 840 F.Supp.2d 970, 982.

N.D.Tex.2006. Com. (e) cit. in case quot. in disc. Terminated employee sued former employer and former supervisor in state court, asserting claims for statutory employment discrimination and intentional infliction of emotional distress. After removal to federal court, this court granted plaintiff's motion to remand to state court, holding that supervisor was not improperly joined to defeat diversity jurisdiction because plaintiff could potentially prove a set of facts, consistent with the general allegation that supervisor repeatedly harassed plaintiff and subjected him to demeaning behavior while engaging in a campaign to destroy his reputation within the company, that would meet all the elements of his claim for intentional infliction of emotional distress. Dixon v. State Farm Mut. Auto. Ins. Cos., 433 F.Supp.2d 785, 790.

N.D.Tex.2002. Com. (d) quot. in case cit. in disc. Private-corrections-facility employee whose demotion and reduction in pay were part of a disciplinary action taken against her for mistreating an inmate sued employer, asserting, in part, a pendent state-law claim for intentional infliction of emotional distress. Granting summary judgment for defendant, the court held, inter alia, that plaintiff's claim failed because the conduct alleged was within the realm of an ordinary employment dispute, and did not rise to the level of extreme and outrageous conduct. Proctor v. Wackenhut Corrections Corp., 232 F.Supp.2d 709, 714.

N.D.Tex.2000. Com. (d) cit. in sup. Former employer challenged arbitration award in favor of former employee and her spouse on employee's claim for intentional infliction of emotional distress. Entering judgment for employer, this court held that employer's conduct in returning employee to her normal job duties upon her return to work after extended absence, with no restrictions placed on employee by her physician, did not constitute extreme and outrageous conduct. Hughes Training, Inc. v. Cook, 148 F.Supp.2d 737, 744, affirmed 254 F.3d 588 (5th Cir.2001).

N.D.Tex.1999. Com. (d) quot. in case quot. in disc., com. (j) cit. in disc. A school board trustee and others sued a neighbor who taped the trustee's cordless phone conversations, a television station, and a reporter, alleging intentional infliction of emotional distress, among other claims. This court granted in part and denied in part the parties' cross-motions for summary judgment, holding, inter alia, that plaintiffs failed to show that their emotional distress was severe, as they were not required to seek psychiatric help and their anxiety and insomnia failed to meet the requisite standard. Peavy v. Harman, 37 F.Supp.2d 495, 522, 523, affirmed in part, vacated in part, reversed in part 221 F.3d 158 (5th Cir.2000).

N.D.Tex.1998. Com. (d) quot. in case quot. in disc. and cit. generally in headnote. A former employee sued her employer, her supervisor, and the personnel manager for sexual harassment and intentional infliction of emotional distress, among other claims. This court granted defendants summary judgment, holding, inter alia, that plaintiff failed to present evidence that the actions of the employer or the personnel manager stated an emotional-distress claim. There was no evidence that these defendants ratified the supervisor's behavior, as the employer did not authorize or direct the supervisor's acts of sexual harassment. The employer made every effort to inform its employees of its sexual harassment policy, and it provided them several avenues to report any such harassment. Colbert v. Georgia-Pacific Corp., 995 F.Supp. 697, 697, 704.

N.D.Tex.1998. Cit. in disc. After she was fired, a female personnel recruiter sued her former employer for sexual harassment, retaliatory discharge, and intentional infliction of emotional distress, among other claims. Plaintiff's supervisors subjected plaintiff to continued, abusive, and severe sexual harassment by conduct such as grabbing her blouse, sticking a camera between her legs and taking a picture of her crotch, and calling her "little Ms. Big Tits." This court awarded plaintiff damages, holding, inter alia, that plaintiff had proved all the elements of intentional infliction of emotional distress. Plaintiff's harassers acted intentionally, the degree of harassment was unusual, and the emotional distress suffered by plaintiff went far beyond mere worry and embarrassment. Scribner v. Waffle House, Inc., 14 F.Supp.2d 873, 932, vacated 62 F.Supp.2d 1186 (N.D.Tex.1999).

N.D.Tex.1998. Cit. in headnote and disc. A gynecologist at a university hospital sued abortion-rights protesters who picketed the doctor's home, his office, his wife's office, and the church where they worshipped, alleging intentional infliction of emotional distress and invasion of privacy, among other claims. The jury found several of the defendants liable for intentional infliction of emotional distress. This court granted in part and denied in part defendants' motion for judgment as a matter of law, holding, inter alia, that a reasonable jury could find that four of the defendants engaged in extreme and outrageous conduct. These defendants followed plaintiffs' cars on numerous occasions, spied on plaintiffs' home from a parked car, physically confronted the doctor at a restaurant, trespassed on plaintiffs' property, and repeatedly made harassing phone calls to plaintiffs. Two of the individual defendants were not liable on the emotional-distress claim, because their conduct was limited to nonfocused residential picketing. Tompkins v. Cyr, 995 F.Supp. 664, 667, 682.

N.D.Tex.1997. Com. (d) cit. in case cit. in ftn. A store employee sued her former employer, alleging, among other claims, violations of the Americans with Disabilities Act and intentional infliction of emotional distress after the employer filled her position while she was on medical leave recovering from brain surgery. Her applications for seven other positions with the employer were rejected, and she alleged that she was not hired into any of those positions because she was disabled, or, in the alternative, because the employer regarded her as being disabled. This court granted defendant summary judgment, holding, inter alia, that plaintiff's emotional distress claim was preempted by the Texas Commission on Human Rights Act and was barred by the exclusive

remedy provision of the Texas Workers' Compensation Act. No competent summary-judgment evidence had been adduced to establish that defendant's conduct was extreme and outrageous, or that plaintiff suffered severe emotional distress. Cannizzaro v. Neiman Marcus, Inc., 979 F.Supp. 465, 479.

N.D.Tex.1997. Cit. in headnote, cit. in sup. Female employee who was terminated after she complained to her supervisor of sexual harassment by other executives and officers of employer brought an action against employer for, in part, intentional infliction of emotional distress. After a nonjury trial, the court entered judgment for plaintiff, awarding her compensatory and punitive damages. The court held that, although plaintiff established the elements of the tort of intentional infliction of emotional distress set forth in the Restatement (Second) of Torts § 46, any damages award under this emotional-distress claim would be identical to the mental-anguish damages award made for her sexual-harassment claim plus the mental-anguish damages award made in her defamation claim; thus, the court made no additional award for intentional infliction of emotional distress. Scribner v. Waffle House, Inc., 976 F.Supp. 439, 441, 500, vacated 62 F.Supp.2d 1186 (N.D.Tex.1999).

N.D.Tex.1997. Com. (d) quot. in case quot. in disc. African-American former plant supervisor sued employer for violations of 42 U.S.C. § 1983 and Title VII, and for the common law tort of intentional infliction of emotional distress, alleging that his dismissal was motivated by race. Granting defendant's motion for summary judgment, the court held that plaintiff had failed to state a § 1983 claim because defendant was a private corporation, not a state actor; that plaintiff had failed to present evidence from which a finder of fact could conclude that defendant's stated reasons for discharge were a pretext for discrimination; and that plaintiff had not shown that defendant's conduct was so extreme or outrageous as to subject it to liability for the tort of intentional infliction of emotional distress. Steele v. SGS-Thomson Microelectronics, Inc., 962 F.Supp. 972, 980.

N.D.Tex.1996. Cit. generally in disc. Resident of apartment complex sued complex's security firm for, inter alia, negligence, gross negligence, and intentional infliction of emotional distress after she was raped on the premises. Resident also asserted a claim for negligence against complex's mortgage holder. Firm moved to dismiss the claim for intentional infliction of emotional distress, and both defendants moved for summary judgment on the negligence claims. Granting the motions, the court held, in part, that firm's conduct, which allegedly included assuring resident that the apartment complex was peaceful and safe and then failing to warn her of the potential for criminal activity, was not so outrageous and extreme as to be considered intolerable in a civilized community; that firm did not owe resident a duty of care on the ground that it was an occupier or possessor of the complex; and that, while mortgage holder was under a duty to protect resident from the criminal acts of third parties, it did not breach this duty. Washington v. U.S. Dept. of Housing & Urban Dev., 953 F.Supp. 762, 768.

N.D.Tex.1995. Subsec. (1) adopted in case cit. in sup. Employee who was discharged, after a substantial investigation, for violating employer's policy against sexual harassment sued employer, alleging race discrimination and retaliation as well as a pendent state law claim for intentional

infliction of emotional distress, inter alia. Granting defendant's motion for summary judgment, the court held, in part, that plaintiff's termination did not constitute intentional infliction of emotional distress, where plaintiff made no allegations that the individuals involved in his termination acted unprofessionally, extremely, or outrageously. Johnson v. J.C. Penney, Co., Inc., 876 F.Supp. 135, 140.

N.D.Tex.1995. Subsec. (1) adopted in case cit. in sup. Trainee police officers who were terminated following their implication in a robbery asserted, in their § 1983 action, a pendent state law claim for intentional infliction of emotional distress, inter alia, against the police detectives who investigated the robbery. Granting defendants' motion for summary judgment, the court held, in part, that plaintiffs failed to state a claim for intentional infliction of emotional distress, since they failed to produce any evidence that defendants acted intentionally or recklessly or that their conduct during their investigation was extreme and outrageous. Scott v. City of Dallas, 876 F.Supp. 852, 860.

N.D.Tex.1993. Cit. and quot. in case quot. in sup., subsec. (1) cit. in case quot. in sup., com. (d) quot. in part in case quot. in sup. A zoologist sued animal rights activists and others for conspiracy to deprive him of his professional reputation and employment, intentional infliction of emotional distress, and defamation. This court granted summary judgment for one defendant but denied it for the others, holding, inter alia, that under Texas law a fact issue existed over whether the defendants' conduct in engaging in a letter-writing campaign and taking other actions to prevent the zoologist's use of animals in his work rose to the level of outrageousness necessary to support an emotional distress claim. Chevalier v. Animal Rehabilitation Center, Inc., 839 F.Supp. 1224, 1236, 1237.

N.D.Tex.1993. Com. (d) quot. in case quot. in sup. and cit. in ftn. Employee discharged by employer-defense contractor for refusing to take a drug test pursuant to Department of Defense regulations sued employer and employer's consultant for intentional infliction of emotional distress, inter alia. Denying plaintiff's motion for partial summary judgment and granting motions by employer and consultant for partial summary judgment and summary judgment, respectively, the court held that, since plaintiff had no written employment contract and employer's "key employee" extension plan did not modify plaintiff's at-will status, employer could, without fear of liability for the emotional distress that might result, exercise its legal right to terminate plaintiff without cause and at will. The court also held that neither consultant's characterization of plaintiff as a "dragon" nor employer's alleged suggestion to others that plaintiff had a drug problem rose to the level of extreme and outrageous conduct necessary to support plaintiff's claim. Kipp v. LTV Aerospace & Defense, 838 F.Supp. 289, 293.

N.D.Tex.1993. Com. (d) quot. in case quot. in sup. Police officer who was on restricted duty following a suicide attempt sued city employees for intentional infliction of emotional distress, inter alia, for requiring her to authorize release of all her mental health records as they were created in her treatment as a condition for considering her for reinstatement to regular duty. Granting in part defendants' motion to dismiss, the court held, inter alia, that, as a matter of law, the conduct alleged by plaintiff did not reach the level of being utterly intolerable in a civilized community so

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as to state a claim for intentional infliction of emotional distress. Thompson v. City of Arlington, Tex., 838 F.Supp. 1137, 1154.

S.D.Tex.

S.D.Tex.2011. Com. (d) cit. in sup. and quot. in case quot. in sup. Former employee of contractor that provided support services to the United States military in Iraq sued former employer, former co-worker, and others, alleging, among other things, that co-worker raped her in her barracks room and former employer tried to "hide" her rape. Granting summary judgment for defendants on plaintiff's claim for intentional infliction of emotional distress, this court held that the tort of false imprisonment, the Texas Commission on Human Rights Act cause of action for retaliation, and the Title VII cause of action for retaliation covered plaintiff's allegations in support of her emotional-distress claim, namely, that defendants confined her to a guarded container, refused to allow her to telephone her parents, demanded that she write down her story prior to contacting the Department of State, interrogated her at the Department of State facility, accompanied her back to the United States and unnecessarily documented her actions and words, issued her an ultimatum regarding her continued employment, and destroyed her rape kit. Jones v. Halliburton Co., 791 F.Supp.2d 567, 600.

S.D.Tex.2005. Com. (d) quot. in case quot. in sup. After their child was removed from their home based on a teacher's report of suspected sexual abuse, parents of child sued employees of state department of protective and regulatory services and others, asserting constitutional and common-law claims. The court, inter alia, granted summary judgment for department's employees on plaintiffs' claim for intentional infliction of emotional distress, holding that plaintiffs could not satisfy the outrageousness element of the claim under Texas law; all three employees had obtained reports of sexual abuse from child's teacher and obtained corroboration from a medical examiner before acting. Martin v. Texas Dept. of Protective and Regulatory Services, 405 F.Supp.2d 775, 798.

S.D.Tex.2005. Coms. (d) and (j) quot. in sup. Neurosurgeon practicing at hospital sued hospital and its staff members under various theories, including intentional infliction of emotional distress, alleging harassment and other offensive behavior, including discriminatory actions intended to block him from gaining privileges at hospital. This court granted defendants' motion for summary judgment, holding, inter alia, that it was questionable at best whether the offensive behavior alleged rose to the level of the extreme and outrageous conduct required to maintain such a claim under Texas law and, in any event, plaintiff failed to allege, much less establish, that he experienced the required element of severe emotional distress. Pisharodi v. Valley Baptist Medical Center, 393 F.Supp.2d 561, 576, 577.

S.D.Tex.2005. Quot. in case quot. in sup., coms. (d) and (h) cit. in sup. Employee sued former employer and former supervisor in state court, alleging age discrimination and harassment. After defendants removed the action, in part on grounds that supervisor had been fraudulently joined

to destroy diversity jurisdiction, this court denied plaintiff's motion to remand, holding, among other things, that plaintiff was unable to establish a claim for intentional infliction of emotional distress against supervisor. Noting that whether a defendant's conduct was extreme and outrageous was a question of law, the court concluded that the facts alleged, which the court likened to those associated with an employment dispute, did not rise to the level of the extreme or outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Swafford v. Bank of America Corp., 401 F.Supp.2d 761, 765.

S.D.Tex.2004. Com. (d) cit. in disc. Former employee sued employer and two of its employees for, in part, intentional infliction of emotional distress, alleging that she experienced harassment and ethnic discrimination and that she was wrongfully terminated after informing defendants of her pregnancy. This court granted defendant employee summary judgment, holding that defendants' conduct did not rise to level of outrageousness necessary to prove emotional-distress claim, and that there was insufficient evidence to support the tort's "intent" element. While plaintiff's petition showed that she perceived a pattern of ethnic-and gender-motivated unfairness in how she was treated, she did not meet elevated standards of emotional-distress tort. Termination alone was not outrageous conduct. Prather v. Utiliquest, L.L.C., 313 F.Supp.2d 666, 669.

S.D.Tex.2003. Com. (d) quot. in case quot. in sup. Employees of academic medical center brought various employment-discrimination claims against center and its administrator. This court granted administrator's motion for summary judgment as to plaintiffs' claims for intentional infliction of emotional distress, holding that plaintiffs failed to allege that administrator engaged in extreme and outrageous conduct, and that none of the behavior attributed to him qualified as intentional infliction of emotional distress as a matter of law. The court stated that plaintiffs' allegations, which were within the range of ordinary employment disputes, were based on little more than the impression that, because administrator was head of their department, he must have been responsible for every unpleasant thing that happened to them. Bates v. University of Tex. Medical Branch, 425 F.Supp.2d 826, 850.

S.D.Tex.2001. Com. (d) quot. in case quot. in sup., com. (j) cit. in case quot. in sup. After being fired for abusing alcohol, employee sued employer for violations of the Americans with Disabilities Act and intentional infliction of emotional distress, among other claims. This court granted employer summary judgment, holding, inter alia, that plaintiff's emotional-distress claim failed, because employer's conduct was not extreme and outrageous. Employer treated plaintiff in a professional manner and tried to assist him in overcoming his alcoholism, and there was no indication that employer or its employees engaged in offensive or hostile behavior or that they denigrated or demeaned plaintiff. Furthermore, plaintiff did not show that his emotional distress was severe, as he did not suffer serious psychiatric problems. Lottinger v. Shell Oil Co., 143 F.Supp.2d 743, 778, 780.

S.D.Tex.2000. Com. (d) quot. in case quot. in sup., com. (j) cit. in case quot. in disc. Tenant sued landlord for violations of the Fair Housing Act (FHA) and intentional infliction of emotional distress, alleging that he was discriminated against because he was of Lebanese descent. Entering

partial summary judgment for defendant, the court held, in part, that plaintiff had raised a triable issue with respect to retaliation in violation of the FHA, and that, while defendant's conduct could be considered outrageous, plaintiff had failed to show that he experienced severe emotional distress. Texas v. Crest Asset Management, Inc., 85 F.Supp.2d 722, 734, 735.

S.D.Tex.1999. Com. (d) quot. in case quot. in disc. Discharged employee sued former employer for age discrimination, defamation, and intentional infliction of emotional distress. This court granted employer summary judgment, holding, inter alia, that plaintiff's emotional-distress claim failed, because employer's conduct was not extreme and outrageous, but was merely an ordinary employment dispute. Grogan v. Savings of America, Inc., 118 F.Supp.2d 741, 757.

S.D.Tex.1999. Com. (d) cit. in headnote and quot. in case quot. in sup., com. (j) cit. in headnote and cit. in case quot. in sup. A prospective airline passenger who missed his connecting flight was arrested, incarcerated, and charged with making a terroristic threat, after he angrily implied to a ticket agent that there might have been a bomb in his luggage that was on the connecting flight. After the charges were dismissed, the passenger sued the airline and the ticket agent, among others, for, in part, intentional infliction of emotional distress. This court granted the ticket agent and the airline summary judgment, holding, inter alia, that plaintiff's emotional-distress claim failed because plaintiff had not alleged extreme or outrageous conduct. The ticket agent merely summoned security to defuse a potentially disruptive situation, and there was no evidence that the agent or the airline assaulted, abused, threatened, or demeaned him. Plaintiff also failed to prove severe distress. Lewis v. Continental Airlines, Inc., 80 F.Supp.2d 686, 690, 703, 704.

S.D.Tex.1998. Com. (d) quot. in case quot. in sup., com. (j) cit. in case quot. in sup. A hospital nurse who was diagnosed with bipolar disorder sued the county hospital after she was fired from her job, alleging violation of the Americans with Disabilities Act (ADA) and intentional infliction of emotional distress. This court granted the county summary judgment, holding, inter alia, that plaintiff's emotional-distress claim failed because she did not prove extreme conduct and severe distress. The hospital treated plaintiff in a polite and professional manner, and there was no indication that the hospital engaged in offensive or hostile behavior or that it denigrated, belittled, or degraded plaintiff. Plaintiff did not experience psychiatric problems due to defendant's conduct, because she was already experiencing depression and had been diagnosed with bipolar disorder before she was fired. Dupre v. Harris County Hosp. Dist., 8 F.Supp.2d 908, 925, 926.

S.D.Tex.1998. Subsec. (1) cit. in case cit. in disc. A man brought a 42 U.S.C. § 1983 action against police officers, alleging that they unlawfully arrested him and used excessive force in the course of the arrest. Plaintiff also brought state law claims of assault and battery and intentional infliction of emotional distress. This court granted in part and denied in part defendants' motion for summary judgment, holding, inter alia, that plaintiff's emotional-distress claim failed, because defendants' acts did not rise to the level of outrageous conduct. While not reflecting well upon at least one officer, the facts regarding the initial police stop described at most the heat generated by a stressful and potentially dangerous situation. Kellough v. Bertrand, 22 F.Supp.2d 602, 609.

S.D.Tex.1998. Com. (d) quot. in case quot. in disc. Emergency Medical Technician who injured her back while attempting to lift a patient sued former employer for violations of the Americans with Disabilities Act (ADA), intentional infliction of emotional distress, and negligence. Defendant moved for summary judgment. Granting the motion, the court held that, while material factual issues existed as to whether plaintiff was disabled under the ADA, she had nonetheless failed to satisfy the "reasonable accommodation" element of her prima facie case; that defendant's decision to assign plaintiff to light duties and not make her a dispatcher was not extreme and outrageous as a matter of law; and the plaintiff failed to establish that she injured her back as a result of having been negligently trained by defendant. Leger v. Texas EMS Corp., 18 F.Supp.2d 690, 696.

S.D.Tex.1998. Cit. in headnote, com. (d) quot. in case quot. in disc. Employee who was terminated after failing a random drug test sued former employer for, inter alia, intentional infliction of emotional distress. Granting defendant's motion to dismiss, the court held, in part, that where an employer had reason to suspect a worker was using illegal drugs, it was neither extreme nor outrageous to terminate him. Quintanilla v. K-Bin, Inc., 993 F.Supp. 560, 561, 564.

S.D.Tex.1997. Com. (d) quot. in case quot. in disc. Tenured state-university professor who allegedly suffered from a weakness of voice and loss of vocal stamina as a result of radiation treatments sued university for, inter alia, violations of the Americans with Disabilities Act (ADA) in connection with university's demand that he teach consecutive class periods, something professor claimed his medical condition prevented him from doing. Professor also asserted a claim for intentional infliction of emotional distress. Granting university's motion for summary judgment, the court held, in part, that professor failed to satisfy the prerequisites for a claim based on the ADA because he did not file a charge of discrimination with either the EEOC or the Texas Commission on Human Rights, and that university's alleged conduct was not extreme or outrageous. Decker v. University of Houston, 970 F.Supp. 575, 580.

S.D.Tex.1997. Com. (d) cit. in headnote and quot. in case quot. in disc. After she was fired, an employee filed an EEOC complaint and sued her employer for sex discrimination, sexual harassment, and intentional infliction of emotional distress, among other claims. This court granted defendant summary judgment, holding, inter alia, that plaintiff could not establish that her termination or the conduct by defendant's employees towards plaintiff gave rise to an emotional-distress claim. There was no evidence of outrageous conduct by defendant, plaintiff's supervisor, or others at the workplace. At best, there was inappropriate profanity or vulgar language used by co-workers, anger expressed by plaintiff's supervisor on occasion, or shunning by co-workers. Gazda v. Pioneer Chlor Alkali Co., Inc., 10 F.Supp.2d 656, 659, 676.

S.D.Tex.1997. Com. (d) quot. in case quot. in sup. and cit. in headnote. A mother, individually and as next friend of her minor son, sued a city and two police officers for civil rights violations and intentional infliction of emotional distress, among other claims. Plaintiff alleged that the officers' actions of forcing open the door to her home, throwing her and her son to the ground, and coercing the son to confess to committing a fatal arson were intentional, extreme, and outrageous, and caused plaintiff and her son to suffer severe mental distress. This court dismissed

plaintiff's emotional-distress claims, holding that plaintiff's allegations did not rise to the level of outrageousness required to state an emotional distress cause of action. The allegations showed, at most, two police officers who were perhaps overly aggressive in the manner of arresting plaintiff and interrogating her son. The court assumed that almost all arrests were noisy, unpleasant affairs, and that physical manipulation of the arrestee occurred frequently. Thompson v. City of Galveston, 979 F.Supp. 504, 505, 512.

S.D.Tex.1996. Coms. (d) and (j) cit. in cases quot. in disc. Woman who consented to the videotaping of her therapy sessions sued organization responsible for the video series for, inter alia, intentional infliction of emotional distress after she learned that the tapes had been aired on a nationally syndicated television talk show. Defendant moved for summary judgment. Granting the motion, the court held that, in order to sustain a claim for intentional infliction of emotional distress based on a publication, plaintiff was required to prove the falsity of the statement, which she failed to do, and that, even without the falsity element, plaintiff could not prevail where she was unable to show that defendant's conduct was outrageous or utterly intolerable and her emotional distress severe. To the extent that plaintiff attempted to state a claim for negligent misrepresentation in her response to defendant's motion for summary judgment, recovery was unavailable in the absence of pecuniary damages. Bass v. Hendrix, 931 F.Supp. 523, 531, 532.

S.D.Tex.1996. Quot. in case cit. in ftn. Female former employee sued co-worker, among others, for, inter alia, violations of Title VII and intentional infliction of emotional distress, alleging that defendant harassed her by writing her personal notes in the workplace, attempting to establish an intimate relationship with her, calling and visiting her at home, and embarrassing her professionally. Defendant moved for summary judgment. Granting the motion, the court held, in part, that Title VII did not impose individual liability on co-workers, and that the conduct complained of was not so extreme and outrageous as to go beyond all possible bounds of decency such that it could support an action for intentional infliction of emotional distress. Carlson v. Rockwell Space Operations Co., 985 F.Supp. 674, 683.

S.D.Tex.1996. Cit. in case quot. in disc. Former employee sued former employer for, inter alia, intentional infliction of emotional distress. Defendant moved for summary judgment. Granting in part and denying in part the motion, the court held that the conduct complained of, which included the strict enforcement of company rules against plaintiff but not against other employees, was not so outrageous as to support a claim for intentional infliction of emotional distress. Dade v. Southwestern Bell Tel. Co., 942 F.Supp. 312, 320-321.

S.D.Tex.1996. Com. (d) quot. in case quot. in sup., com. (j) cit. in case quot. in sup. Former parole officer who was accused of releasing confidential information in violation of her former employer's policy and was terminated sued former employer for, inter alia, intentional infliction of emotional distress. Granting defendant's motion for summary judgment, the court held, in part, that, even if plaintiff's termination was in violation of the Texas Whistleblower Act, plaintiff failed to show that defendant's conduct was extreme and outrageous and that any emotional distress plaintiff suffered

was sufficiently severe to support a claim for intentional infliction of emotional distress. Hockaday v. TDCJ, 914 F.Supp. 1439, 1448, 1449.

S.D.Tex.1996. Cit. in headnote, com. (d) quot. in case quot. in disc. Expert in the field of near-infrared spectroscopy who had six patent applications on his work and was a member of a research consortium sued two other consortium members for libel and intentional infliction of emotional distress after defendants wrote a letter in which they implied, among other things, that expert had lied about the pending patents. Defendants moved for summary judgment. Granting the motion in part and denying it in part, the court held that, while material factual issues existed as to whether defendants acted with malice and thereby abused the conditional privilege to which the letter was entitled, their conduct was not sufficiently extreme to support an action for intentional infliction of emotional distress. Maggard v. ARCO Products Co., 933 F.Supp. 653, 654, 660.

S.D.Tex.1996. Coms. (d) and (j) quot. in cases quot. in sup. Oil-delivery driver whose employment was terminated after he suffered a back injury on the job sued his former employer for intentional infliction of emotional distress, inter alia. Granting in part defendant's motion to dismiss, the court held, in part, that defendant's conduct in discharging plaintiff did not approach the level of extreme and outrageous conduct required to support recovery for intentional infliction of emotional distress under Texas law; plaintiff did not allege that he was subjected to insults, degraded, or treated with disrespect. The court also stated that plaintiff failed to prove that the emotional distress he suffered was severe. Munoz v. H & M Wholesale, Inc., 926 F.Supp. 596, 612.

S.D.Tex.1996. Com. (d) cit. in headnote and cit. in case quot. in sup. Medical-college professor at a state university sued, among others, the dean and the head of department for intentional infliction of emotional distress, inter alia, alleging that he was subjected to humiliation and public ridicule by defendants and suffered severe emotional distress following his accusations of misconduct against another professor in the department. Granting in part defendants' motion for summary judgment, the court held that plaintiff failed to show extreme and outrageous conduct on the part of defendants within the limitations period to support his claim for intentional infliction of emotional distress. The court said that liability did not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities and that there was no occasion for the law to intervene in every case where someone's feelings were hurt. Wagner v. Texas A & M University, 939 F.Supp. 1297, 1303, 1326.

S.D.Tex.1996. Quot. in case quot. in disc. Former employee sued former employer for, inter alia, violations of Title VII, alleging that his termination was racially motivated. Plaintiff also asserted a claim for intentional infliction of emotional distress. Defendant moved for summary judgment, arguing that plaintiff was actually discharged because he had falsified his resume. Granting the motion in part and denying it in part, the court held that material factual issues existed on the issue of pretext and defendant's intent in deciding to terminate plaintiff, and thus summary judgment was inappropriate on the claim for discriminatory discharge under Title VII; however, the other acts complained of, which included denying plaintiff a larger office and failing to promote him

quickly, were not so extreme and outrageous as to give rise to a claim for intentional infliction of emotional distress. Weeks v. Coury, 951 F.Supp. 1264, 1278.

S.D.Tex.1996. Quot. in case quot. in disc. Former employee who believed that her termination was both race- and gender-based sued former employer for, inter alia, intentional infliction of emotional distress. Defendant moved for summary judgment. Granting the motion, the court held, in part, that the conduct complained of, which included scheduling a meeting to discuss plaintiff's charge of discrimination immediately after she returned from her father's funeral, joking about a possible settlement, and altering plaintiff's employment records, did not rise to the level of outrageousness necessary to support a claim for intentional infliction of emotional distress. Williams v. E.I. du Pont de Nemours & Co., 955 F.Supp. 711, 726.

S.D.Tex.1995. Com. (d) quot. in sup., com. (h) quot. in cases quot. in sup. Plaintiffs sued United States under Federal Tort Claims Act, alleging that it was liable for, inter alia, assault and intentional infliction of emotional distress resulting from their arrest by two border-patrol agents. Granting defendant's motion for summary judgment, the court held that no assault occurred since the agents were privileged to draw and aim their weapons at plaintiffs while plaintiffs were still in their car and considered dangerous. In addition, the agents' use of profanity and felony-stop tactics in capturing plaintiffs they knew had just eluded another agent on a stretch of highway used for drug and alien smuggling was not so repugnant or abhorrent as to give rise to a claim for intentional infliction of emotional distress but, rather, entirely reasonable under the circumstances. Garza v. U.S., 881 F.Supp. 1103, 1107, 1108.

S.D.Tex.1995. Com. (d) cit. and quot. in sup. and cit. in headnotes. An eyewear specialist sued her former employer for hostile-work-environment sexual harassment and intentional infliction of emotional distress. This court granted employer's motion for summary judgment, holding, inter alia, that plaintiff's emotional-distress claim failed because she failed to establish extreme and outrageous conduct and severe emotional distress. The isolated remarks, i.e., that she would have to sleep with the boss to be promoted, that she should wear light panty hose, and a description of a magazine article showing a nude woman taking a shower were at worst sexual innuendo and mere annoyances. Plaintiff did not allege that she contracted any type of mental disorder or sought medical, psychological, or psychiatric treatment as a result of defendants' conduct. Gearhart v. Eye Care Centers of America, Inc., 888 F.Supp. 814, 815, 819, 823.

S.D.Tex.1995. Com. (d) cit. in sup. and cit. in case quot. in sup. Office-building manager sued her employer and her supervisor, among others, for intentional infliction of emotional distress, inter alia. Granting in part defendants' motion for summary judgment, the court held that plaintiff did not state a claim for intentional infliction of emotional distress, since she failed to adduce specific facts sufficient to support the elements of extreme and outrageous conduct and severe emotional distress necessary for her claim; most of the derogatory statements attributed to her supervisor and another employee were mere insults, indignities, threats, annoyances, or petty oppressions, to which liability did not attach, and, while an incident in which the other employee allegedly threw a metal paperweight at her, if proven, might have approached the level of extreme and outrageous

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conduct, plaintiff's claim based on that incident was time-barred. Humphreys v. Medical Towers, Ltd., 893 F.Supp. 672, 679, 681.

S.D.Tex.1995. Com. (d) quot. in disc., com. (j) cit. in case quot. in disc. A white shipping-company employee and his wife sued his employer and co-workers, alleging civil rights violations, invasion of privacy, and intentional infliction of emotional distress, among other claims, after employee was demoted and subsequently resigned. Plaintiffs alleged that the company's representatives hollered at, insulted, and harassed the employee for his failing to explain how a 99-cent "UPS souvenir" stolen baseball was found in his office. This court granted defendants summary judgment, holding, inter alia, that defendants' behavior did not approach the level of extreme and outrageous conduct required to support a recovery for intentional infliction of emotional distress. Plaintiffs did not allege that the employee was accused of criminal conduct, physically assaulted, restrained, or subjected to profane language. Furthermore, plaintiffs failed to show that any emotional distress the employee suffered, i.e., headaches, nausea, and insomnia, was severe. Patton v. United Parcel Service, Inc., 910 F.Supp. 1250, 1270, 1272.

S.D.Tex.1993. Cit. in case cit. in sup., com. (d) cit. in case quot. in sup. A white male employee sued his employer, asserting reverse discrimination based on race, intentional infliction of emotional distress, and other claims. Granting the employer's motion for summary judgment, this court held, inter alia, that under Texas law the employee's claims of excess criticism by his supervisors for tardiness and poor grammar, lack of recognition for accomplishments, failure of supervisors to review his work, being mistakenly accused of absenteeism, and being characterized as having an "attitude problem" did not state a cause of action for intentional infliction of emotional distress. These were typical complaints voiced by most workers across the nation and did not show outrageous behavior, as there was no showing that plaintiff was demoted, discharged, or degraded by defendants. Ulrich v. Exxon Co., U.S.A., A Div. of Exxon Corp., 824 F.Supp. 677, 686.

S.D.Tex.1992. Cit. in sup., com. (d) quot. in sup. and cit. in case cit. in sup. Employee brought action against former employer, asserting, inter alia, a claim for intentional infliction of emotional distress arising from employer's criticisms and discipline of employee, sometimes in the erroneous belief that employee had done something wrong, and efforts by the employer to elicit comments from other employees that were critical of employee's performance or that questioned his work-related injury. Employee also claimed to suffer from a spell of headaches resulting from employer's conduct. Granting partial summary judgment to employer, this court held that although employer's behavior may have been rude, accusatory, and suspicious, it was not so reprehensible as to go beyond all possible bounds of decency. Moreover, the court held that employee's headache spells could not be linked to employer's conduct. Clayton v. Nabisco Brands, Inc., 804 F.Supp. 882, 885, 886.

S.D.Tex.1992. Com. (d) cit. in case quot. in sup. Employee who was terminated six months before she was to be vested for renewal commissions brought action against employer, alleging, inter alia, intentional infliction of emotional distress. Granting employer summary judgment, this court held that even if employee's claim for intentional infliction of emotional distress was cognizable

under Texas law, employer's conduct, although perhaps not compassionate, was not extreme or outrageous, and that employee did not encounter difficulties any more onerous than those suffered by others who had lost their jobs. Rayburn v. Equitable Life Assur. Soc. of the U.S., 805 F.Supp. 1401, 1410.

S.D.Tex.1990. Com. (d) quot. in case quot. but dist. A discharged female employee sued her former employer alleging Title VII sex discrimination, wrongful discharge, intentional and negligent infliction of emotional distress, breach of contract, tortious interference with business, slander, and libel. Granting the employer's motion for summary judgment, the district court held, inter alia, that plaintiff failed to prove that her discharge was discriminatory or retaliatory where she was allegedly fired for obtaining and reproducing an employee manual without proper authorization, and plaintiff could not recover for negligent or intentional infliction of emotional distress where her suspension and termination were not accompanied by any extreme or outrageous conduct on the employer's part. Taylor v. Houston Lighting and Power Co., 756 F.Supp. 297, 302.

S.D.Tex.1989. Com. (d) cit. but dist. Plaintiff sued his employer, an airline owned by a foreign government, and another airline employee for violations of federal employment discrimination laws and intentional and negligent infliction of emotional distress. Defendants moved for summary judgment. Granting defendants' motion in part, the district court held, inter alia, that plaintiff's allegations did not amount to the outrageous conduct necessary to sustain a claim for intentional infliction of emotional distress where plaintiff alleged that the defendant employee caused him embarrassment by calling travel agencies to verify if plaintiff actually made the calls he listed on his work itinerary, and where defendant once quarrelled with plaintiff in front of another employee. Starrett v. Iberia Airlines of Spain, 756 F.Supp. 292, 296.

W.D.Tex.

W.D.Tex.2008. Adopted in case cit. in ftn. in sup. (general cite). After Good Samaritan motorist stopped to aid victims of a highway accident but later became embroiled in a heated argument with responding police officers and was arrested by them, motorist sued officers for false arrest, false imprisonment, and intentional infliction of emotional distress (IIED), inter alia. Finding that defendants acted reasonably under the circumstances, this court held that defendants were entitled to qualified and official immunity on all of plaintiff's claims, and therefore granted their motion for summary judgment. The court additionally noted that, because it found defendants' conduct reasonable, plaintiff's IIED claim would have failed in any event for lack of the extreme and outrageous conduct required for this tort under Texas law. Spencer v. Rau, 542 F.Supp.2d 583, 596.

W.D.Tex.2007. Com. (d) quot. in case quot. in sup. (cit. as § 46). Widower brought various claims against decedent's purported daughter and another individual who allegedly assaulted him at decedent's funeral in connection with a dispute over the funeral arrangements. Granting defendants' motion to dismiss plaintiff's claim for intentional infliction of emotional distress, this court held, inter alia, that the behavior described in the complaint did not meet the outrageousness standard

required under Texas law. The court found that the blows allegedly suffered by plaintiff at his wife's graveside could not cause emotional suffering so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. Von Beck-Lutes v. Arning, 484 F.Supp.2d 585, 588.

W.D.Tex.2001. Adopted in case quot. in sup., cit. in sup. Female former bartender brought claims for sexual harassment and intentional infliction of emotional distress, inter alia, against former employer. Denying employer summary judgment, this court held, inter alia, that fact issues existed as to whether supervisor's conduct in harassing, assaulting, and threatening plaintiff satisfied extreme and outrageous elements of tort of intentional infliction of emotional distress. Verhelst v. Michael D's Restaurant San Antonio, Inc., 154 F.Supp.2d 959, 965.

W.D.Tex.1999. Com. (d) quot. in case quot. in disc. Psychologist sued nonprofit professional organization for, inter alia, intentional infliction of emotional distress after defendant terminated plaintiff's membership for ethics violations. Entering summary judgment for defendant, the court held, among other things, that defendant's expulsion of plaintiff, which came about as a result of plaintiff's establishing a potentially harmful dual relationship with one of her clients, did not amount to extreme and outrageous conduct, and that, even if it did, defendant was acting within its legal rights. Campbell v. American Psychological Ass'n, 68 F.Supp.2d 768, 777.

W.D.Tex.1997. Adopted in case cit. in disc. Mexican company that contracted to provide food services to Mexican factory workers sued factory owner and its American parent corporation for, inter alia, breach of contract, negligent misrepresentation, and intentional infliction of emotional distress after defendants terminated the parties' agreement. Granting defendants' motion for summary judgment, the court held, in part, that the law of Texas, rather than the law of Mexico, applied to plaintiff's claims; that the parol-evidence rule prevented enforcement of the alleged agreement for employee food subsidies that gave rise to plaintiff's contract claim; that the claim for negligent misrepresentation failed for lack of a showing of a misstatement of existing fact; and that defendants' conduct was neither extreme nor outrageous. Perez v. Alcoa Fujikura, Ltd., 969 F.Supp. 991, 1010.

W.D.Tex.1995. Cit. in disc. Travelers to Mexico sued the United States under the Federal Tort Claims Act, alleging excessive use of force by a Customs Service officer and intentional infliction of emotional distress during a search of their car at a border crossing. While one officer was searching the car, one traveler began pacing back and forth near the officer. The officer's fellow officer instructed the traveler to step away and he placed traveler in a wrist/arm lock when she failed to comply. This court granted defendant's motion to dismiss, holding, inter alia, that plaintiff failed to state an emotional-distress claim, because the officer's detention of plaintiff was not motivated by malice; rather, the detention was motivated by the officer's obligation and desire to protect the safety of his fellow officer. Rivera v. U.S., 907 F.Supp. 1027, 1030.

W.D.Tex.1993. Quot. in part in sup., com. (d) cit. in case quot. in sup. An employee discharged for poor attendance and safety violations sued his employer, alleging wrongful termination, breach

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of contract, and intentional infliction of emotional distress. This court granted the employer's motion for summary judgment, holding, inter alia, that, under Texas law, plaintiff's allegations that supervisors treated the employee differently because the employee's father had authority over the supervisors, altered the employee's time cards to make his attendance appear worse than it actually was, sought out old occurrences to use against him, and fired him even though co-workers who were not as good employees were not fired did not meet the definition of extreme and outrageous conduct sufficient to state a claim for intentional infliction of emotional distress. Badgett v. Northwest Resource Co., 818 F.Supp. 998, 1003.

W.D.Tex.1990. Com. (d) quot. in part in sup. An attorney sued his former employer alleging, inter alia, racial discrimination and intentional infliction of emotional distress. The district court denied in part the employer's motion for summary judgment, holding that there existed genuine issues of material fact as to whether the employer's failure to promote the attorney to two available positions was racially motivated, and whether the employer's conduct was sufficiently extreme to permit recovery for intentional infliction of emotional distress where the attorney alleged that on account of his race and national origin he was subjected to harangues and verbal assaults from supervisors, he was threatened and denied privileges afforded to others, he did not receive comparable support staff services or office furniture, he was left off organizational charts and distribution lists, and he was excluded from management functions. Guzman v. El Paso Natural Gas Co., 756 F.Supp. 994, 1002.

W.D.Tex.1988. Quot. in case quot. in disc. A former bank employee claimed, inter alia, that the bank committed federal civil rights age and sex discrimination violations against her, and also brought a pendent claim of intentional infliction of emotional distress. This court granted the bank's motion for partial summary judgment as to the claim for intentional infliction of emotional distress. Noting the plaintiff's admission that she had not required any treatment, from either a physician or a psychologist, the court determined that the plaintiff's injuries did not rise to a level sufficient to support the emotional distress cause of action. Also, no evidence was presented to prove that the bank had intentionally fired the plaintiff to cause her extreme emotional distress. The court further stated that when an employer does no more than exercise its legal right to terminate an employee, that employer cannot be charged with liability for intentional infliction of emotional distress. Laird v. Texas Commerce Bank-Odessa, 707 F.Supp. 938, 941.

W.D.Tex.1988. Cit. in ftn. Two employees were terminated from their employment with the defendant fast-food corporation. One of the employees, a fast-food worker, brought an action for assault, retaliation, and sexual harassment. The other worker, an assistant manager, brought an action for violation of implied contract, national origin discrimination, and retaliation. The district court awarded the fast-food worker damages on the assault claim and the assistant manager damages on the discrimination claim. The court disallowed the assistant manager's attempt to add a state law tort claim for extreme and outrageous conduct, because the plaintiff failed to raise the claim during the trial. Valdez v. Church's Fried Chicken, Inc., 683 F.Supp. 596, 622.

D.Utah

D.Utah, 2021. Com. (f) quot. in sup.; com. (j) quot. in case quot. in sup. Former employee brought, among other things, a claim for intentional infliction of emotional distress (IIED) against employer, alleging that defendant's district manager inflicted severe emotional distress upon her when he described her mistaken usage of a store coupon as an ethical lapse and fraudulent behavior, despite knowing that she had recently gone on leave under the Family and Medical Leave Act for her mental health. This court granted defendant's motion to dismiss, holding that plaintiff failed to state a claim for IIED. Citing Restatement Second of Torts § 46, the court explained that, although plaintiff alleged she was uniquely vulnerable to defendant's conduct because of her underlying health issues, defendant's conduct, as alleged, did not rise to the level of outrageousness necessary to sustain an IIED claim. Porter v. Staples the Office Superstore, LLC, 521 F.Supp.3d 1154, 1161, 1162.

D.Utah, 2010. Com. (j) quot. in case quot. in sup. and cit. in ftn. Female employees who allegedly were sexually harassed by employer's male president sued president, asserting, among other things, a state-law claim for intentional infliction of emotional distress. Denying defendant's motion for summary judgment as to that claim, this court held, inter alia, that plaintiffs' allegations of weight gain, trouble sleeping, edginess, crying, mood swings, and depression, as well as other reactions to defendant's conduct, were sufficient to create a genuine issue of material fact on the requirement that the emotional distress be so severe that no reasonable person could be expected to endure it. James v. Frank's Westates Services, Inc., 747 F.Supp.2d 1264, 1278.

D.Utah, 2002. Com. (j) quot. in sup. Widow sued bank that administered decedent's pension plan and bank's chief executive officer for, in part, intentional infliction of emotional distress, alleging that her continued receipt of mail addressed to decedent from defendants after she requested defendants to stop the mailings caused her to suffer severe emotional distress. Granting defendants' motion to dismiss, the court held, inter alia, that plaintiff failed to plead facts to support her conclusory allegation that she suffered severe emotional distress as a result of the mailings. Nester v. Bank One Corp., 224 F.Supp.2d 1344, 1348.

D.Utah, 1997. Com. (d) quot. in case quot. in sup. and quot. in ftn., com. (f) quot. in sup. com. (h) quot. in case quot. in sup. After a professional basketball player placed his hand on a female usher's buttocks and pinched her during a game, she sued the player for battery and intentional infliction of emotional distress. Plaintiff argued that defendant's conduct was outrageous because of its context: it occurred not only in front of the arena's spectators, but also in front of a local and national television audience. This court granted defendant's motion to dismiss, holding, inter alia, that defendant's alleged conduct was not so outrageous as to support an emotional-distress claim. It stated that the alleged conduct constituted an insult, indignity, or unkind act that did not rise to a level warranting imposition of liability. Ankers v. Rodman, 995 F.Supp. 1329, 1335, 1336.

D.Utah, 1997. Coms. (d) and (j) quot. in sup. Employees sued their employer and management-level employees for, in part, intentional infliction of emotional distress, based on hostile-environment sexual harassment. Granting in part defendants' motion for summary judgment, the court held, inter alia, that plaintiffs failed to state a claim for intentional infliction of emotional distress, since one alleged harasser's conduct in retaliating against plaintiffs was not outrageous and there was no evidence that a second alleged harasser deliberately intended to inflict emotional distress on one of the plaintiffs, as required to avoid the exclusive-remedy provision of the workers' compensation act. Metcalf v. Metropolitan Life, Inc., 961 F.Supp. 1536, 1545.

D.Utah, 1995. Cit. in headnotes, coms. (g) and (j) quot. in cases quot. in sup. Petroleum distributor, victorious in its breach-of-contract action against gas-station owner, sought to enforce its judgment by levying and selling owner's property. Owner, who did not appeal the judgment, sued distributor and distributor's law firm for abuse of process and intentional infliction of emotional distress, alleging that the value of the property seized exceeded that authorized in the judgment and that the resulting emotional distress was obvious. Granting defendants' motion for summary judgment, the court held that where, as here, the property levied upon was sold for less than the amount of the judgment, the seizure was not considered excessive. Furthermore, owner failed to prove that he experienced any emotional distress, much less that it was severe. Finally, liability could not attach where defendants were merely attempting to enforce their legal rights under an undisputed and unappealed judgment. Keller v. Ray, Quinney & Nebeker, 896 F.Supp. 1563, 1564, 1565, 1573, 1574, affirmed 78 F.3d 597 (10th Cir.1996).

D.Utah,1989. Com. (d) quot. in sup. and cit. generally in case cit. in sup. An employee was fired by his supervisor after their relationship had deteriorated and it was discovered that the employee had taped several of their conversations relating to his job performance. The employee sued his employer for breach of implied covenant of good faith, breach of contract, violation of ERISA, and intentional infliction of emotional distress. This court granted the defendant's motion for summary judgment on all claims, holding, inter alia, that allegations that the supervisor mandated that the plaintiff sell 120% of his previous sales quota and then threatened to disrupt the plaintiff's ability to meet this quota did not rise to the level of outrageous conduct needed to sustain the emotional distress claim. Maxfield v. N. Amer. Phillips Consumer Electronics, 724 F.Supp. 840, 844.

D.Utah, 1988. Com. (d) quot. in case quot. in disc. An engineer who was employed by the manufacturer of the solid rocket motors used on the Space Shuttle Challenger sued the manufacturer, following the accident in which the space shuttle exploded, alleging various common law and statutory causes of action including defamation, intentional infliction of emotional distress, antitrust, witness tampering, and civil conspiracy. Pursuant to the defendant's motion for judgment on the pleadings, this court dismissed all claims with prejudice. The court held, inter alia, that the plaintiff's allegation that the manufacturer launched the space shuttle contrary to his recommendation and with the manufacturer's knowledge that its action would be injurious to his mental health could not support an action for intentional infliction of emotional distress absent the manufacturer's knowledge that the shuttle would explode. In regard to the alleged conduct of the employer in attempting to discredit the plaintiff, threatening his

employment, and removing him from a position of importance, the court held that, as a matter of law, these actions were not sufficiently outrageous to support a claim for emotional distress. Boisjoly v. Morton Thiokol, Inc., 706 F.Supp. 795, 801.

D.Utah, 1984. Cit. in ftn., com. (d) quot. in sup. The plaintiffs, who worked for certain businesses operated by the defendant religious corporations, were fired from their positions because each was unable or refused to satisfy the Mormon Church worthiness requirements for a temple recommend. The plaintiffs filed this suit, arguing that requiring them to be interviewed by clergymen concerning their eligibility for temple recommends was an intentional infliction of emotional distress. The defendants moved to dismiss the claim for failure to state a cause of action. This court granted the motion, noting that the action causing the distress must be outrageous to be actionable. This court concluded as a matter of law that questions about employees' sexual activities and religious propriety did not rise to the level of outrageous and intolerable conduct. Amos v. Corporation of Presiding Bishop, 594 F.Supp. 791, 831.

D.Utah, 1982. Quot. in sup., cit. in sup., coms. (a), (d), (g), and (i) quot. in sup. Parents withdrew their children from public school for religious reasons but were not permitted by the local school authorities to teach the children at home. Proceedings were instituted against the parents, and warrants were issued for their arrest. The parents barricaded their home and resisted all arrest attempts. One final attempt resulted in the husband being shot and killed by one of the arresting officers. In the family members' resulting suit for intentional and negligent infliction of emotional harm, this court granted the defendants' motion for summary judgment. The court held that no intent existed and that the officers were not liable because they had been legally justified in their actions. Singer v. Wadman, 595 F.Supp. 188, 298-299, affirmed 745 F.2d 606 (10th Cir.1984), certiorari denied 470 U.S. 1028, 105 S.Ct. 1396, 84 L.Ed.2d 785 (1985).

D.Vt.

D.Vt.2015. Com. (d) quot. in case quot. in sup. Former prisoner, who was convicted of murdering his wife and incarcerated for over 17 years before the conviction was vacated, filed a claim for intentional infliction of emotional distress (IIED) against detectives who conducted his investigation and re-investigation before the charges against him were ultimately dropped. This court granted defendants' motion to dismiss prisoner's IIED claim as to detective who oversaw the re-investigation, reasoning that his allegedly inadequate re-investigation did not support such a claim, but denied it as to detective who led the original investigation, reasoning that his alleged fabrication of evidence might be extreme and outrageous enough to state such a claim under Restatement Second of Torts § 46. Grega v. Pettengill, 123 F.Supp.3d 517, 550.

D.Vt.1996. Com. (e) quot. in disc.; com. (f) quot. in sup., cit. in disc., and cit. in case cit. in disc.; illus. 9 quot. in ftn. Employee who was discharged sued his former employer for intentional infliction of emotional distress, inter alia. Granting employer's motion for summary judgment, the court held that, although employer knew of employee's depression, none of the actions taken

by employer to improve employee's work habits, inquire about when he would return to work, and gather information necessary to provide employee with benefits rose to the level of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress. Costello v. Gannett Satellite Info. Network Inc., 939 F.Supp. 313, 315-317, affirmed in part, appeal dismissed in part 112 F.3d 503 (2d Cir.1997).

D.Vt.1994. Com. (h) cit. in headnote and in sup. Student sued college, alleging, inter alia, that college intentionally inflicted emotional distress by charging him with rape and disrespect for persons, finding him guilty of disrespect of persons, and by affirming that finding in the college appeals process. Granting in part defendant's motion for summary judgment, the court held that defendant's decision, when confronted with a female student's accusation of rape, to confront plaintiff with the charges, hold a hearing, and support the findings of the initial tribunal on appeal was not, as a matter of law, such extreme and outrageous conduct as would support a claim for intentional infliction of emotional distress, even where various procedural errors were alleged. Fellheimer v. Middlebury College, 869 F.Supp. 238, 239, 247.

D.Vt.1993. Adopted in case cit. in disc., com. (d) quot. in sup. and cit. in case cit. in disc., com. (f) quot. in sup. A discharged employee sued his employer for breach of an alleged contract of employment and intentional infliction of emotional distress. This court granted the employer's motion for summary judgment, holding, inter alia, that, under Vermont law, a supervisor who directed verbal abuse at the employee, ignored him at times, and other times paid unusually close attention to his work habits did not engage in the level of extreme and outrageous conduct required to support an emotional distress claim, even if the supervisor knew the employee had emotional problems. Mancini v. General Elec. Co., 820 F.Supp. 141, 148, 149.

D.Vt.1993. Com. (d) quot. in sup., quot. in case quot. in disc. Discharged employee sued former employer for, inter alia, intentional infliction of emotional distress, promissory estoppel, and tortious interference with prospective contractual relations. Granting in part and denying in part employer's motion to dismiss, the court held that employer's allegedly abusive behavior, including regularly searching for infractions for which employee could be terminated, did not constitute outrageousness for purposes of a claim for intentional infliction of emotional distress. Employee's promissory estoppel theory failed since his supervisor's vague offer to transfer him to another department was not the type of promise that could serve as the basis for this claim, and because employee's reliance on subsequent oral assurances was not reasonable under the circumstances. Employee's tortious interference claim survived the motion to dismiss, since material factual issues existed as to employer's intent in informing a bank to which employee applied for home financing that his chances of continued employment were 50-50, thereby causing bank to deny his application. Marcoux-Norton v. Kmart Corp., 907 F.Supp. 766, 773.

D.Vt.1979. Cit. in ftn. in sup. An insured individual sued his insurance company to recover consequential and punitive damages for the defendant's allegedly bad faith refusal to honor explicit policy provisions. A jury found for the plaintiff and the defendant moved in the alternative for judgment notwithstanding the verdict r for a new trial. The court denied the defendant's motion.

The court found that Vermont law would, in a contract action, only allow those consequential damages which were foreseeable at the time the contract was formed, and would not generally allow punitive damages. However, in tort actions consequential damages, whether foreseeable or not, would be awarded and punitive damages would be allowed if the circumstances indicated malice under Vermont law. The question then was whether Vermont law would find the breach of a fiduciary's duty of good faith conduct as tortious or as contractual. The court determined that such a breach would be classified as a tortious wrong and therefore both consequential and punitive damages could be awarded and were awarded properly in this instance. Phillips v. Aetna Life Ins. Co., 473 F.Supp. 984, 990.

E.D.Va.

E.D.Va.2020. Com. (d) quot. in case quot. in sup. Nurse who was assigned to work at a jail while employed by a staffing agency filed a claim for, among other things, intentional infliction of emotional distress against operator of the jail and correctional officers who worked at the jail, after officers subjected her to a strip search as she entered the jail on her first day of work. This court denied a motion to dismiss filed by correctional officer who controlled the intake of inmates, holding that nurse alleged sufficient facts for a reasonable person to find that he acted outrageously under Restatement Second of Torts § 46. The court pointed out that nurse personally notified officer that she was a nurse assigned to work at the jail and that, while officer possessed information and resources to confirm the identity of those legally committed to the jail, he ignored nurse's assertions as to her employment and sought out confirmation as to his mistaken assumptions only after forcing her to undergo a highly intrusive search of her naked body. Amisi v. Riverside Regional Jail Authority, 469 F.Supp.3d 545, 579.

E.D.Va.2016. Coms. (d), (e), and (f) cit. and quot. in cases quot. in sup. (erron. cite as § 146). Defense attorney filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against commonwealth attorney, alleging that defendant interrupted a DUI proceeding in which plaintiff was defending a client, demanded that plaintiff give him a DUI manual that he claimed she had taken from his office, shoved her, grabbed the manual, and subsequently filed a criminal complaint for larceny against plaintiff and attracted the attention of local news. This court denied in part defendant's motion to dismiss, holding that plaintiff stated a plausible claim for relief. Citing Restatement Second of Torts § 46, the court determined that a reasonable jury could find that defendant's conduct rose to the level of extreme and outrageous conduct that was necessary to support an IIED claim. Daniczek v. Spencer, 156 F.Supp.3d 739, 760, 761.

E.D.Va.2013. Com. (d) quot. in case quot. in sup. Employee who allegedly was assaulted by his supervisor while they were both working for a government contractor at a military base in Iraq sued contractor, among others, claiming, inter alia, that defendant was liable for intentional infliction of emotional distress (IIED) for failing to provide plaintiff with timely medical care following the assault. Granting defendant's motion to dismiss, this court held that the Defense Base Act (DBA) provided plaintiff's exclusive remedy against defendant, but, even accepting that plaintiff's IIED

claim could fall within the intentional-injury exception to the DBA, plaintiff failed to state facts that defendant's conduct was sufficiently outrageous as to meet the high standard of Restatement Second of Torts § 46, Comment *d*. Mason v. Sallyport Global Holdings, Inc., 987 F.Supp.2d 707, 710.

E.D.Va.2009. Subsec. (2) cit. in disc. Surviving family members of sailors who were killed in a terrorist bombing of an American navy vessel sued the Republic of Sudan, alleging that it knowingly and willfully provided material support and resources to the perpetrators of the attack. After dismissing plaintiffs' claims for intentional infliction of emotional distress, this court denied plaintiffs' motion for leave to supplement their complaint to reassert such claims under a newly enacted provision of the Foreign Sovereign Immunities Act. The court held that the provision could not be retroactively applied in this case, and thus the Death on the High Seas Act, under which nonpecuniary losses were not recoverable, was plaintiff's exclusive cause of action. Rux v. Republic of Sudan, 672 F.Supp.2d 726, 729.

E.D.Va.2009. Com. (j) cit. in case quot. in sup. Arrestee brought § 1983 action against county and its police officers, as well as a state-law claim for intentional infliction of emotional distress (IIED) against one arresting officer. Granting summary judgment for defendants, this court held, inter alia, that plaintiff could not establish that he had suffered the severe emotional distress required to support an IIED claim under Virginia law; while plaintiff alleged that he visited a medical professional on one occasion, that he took medication prescribed for him by that professional for two days, and that he had "emotional issues" as a result of his experience, such facts would not allow a reasonable jury to find by clear and convincing evidence that he had experienced emotional distress so severe that no reasonable person could be expected to endure it. Ware v. James City County, Virginia, 652 F.Supp.2d 693, 714.

E.D.Va.2007. Com. (d) quot. in cases quot. in disc. and sup. Holder of business credit card brought Fair Debt Collection Practices Act suit, including an additional claim for intentional infliction of emotional distress, against attorney and his firm that represented credit-card company in its state-court collection action against holder. This court denied defendants' motion to dismiss, holding, inter alia, that attorney's alleged conduct in not only using abusive language with plaintiff on the phone and knowingly filing state actions against her in an incorrect venue, but also blatantly lying to her in order to secure a default judgment against her when he knew that she was actively contesting the debt were actions that a jury could find extreme or outrageous enough to ground liability for intentional infliction of emotional distress under Virginia law. Perk v. Worden, 475 F.Supp.2d 565, 570.

E.D.Va.2005. Com. (d) quot. in ftn. Tow-truck driver who was detained by police officers on suspicion of towing a car in violation of county ordinance sued officers for intentional infliction of emotional distress and violation of her Fourth Amendment rights. Granting officers' motion for summary judgment, the court held, inter alia, that no genuine issue of material fact existed as to driver's tort claim, as she failed to sufficiently demonstrate that she suffered from severe distress

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or that officers' conduct was so outrageous as to go beyond all bounds of decency or be considered intolerable in a civilized society. Poole v. Pass, 351 F.Supp.2d 473, 482.

E.D.Va.2004. Com. (d) cit. in case quot. in disc. Passenger of vehicle stopped for traffic violation brought suit against police officers, alleging that he was falsely arrested and that officers used excessive force during the arrest. Granting in part officers' summary-judgment motion, the court held, inter alia, that no genuine issue of material fact existed as to plaintiff's claim of intentional infliction of emotional distress, because plaintiff failed to adduce evidence showing that he suffered severe emotional trauma, or that officers engaged in requisite outrageous conduct. Veney v. Ojeda, 321 F.Supp.2d 733, 748.

E.D.Va.2000. Cit. in case quot. in disc. Insurance applicant whose HIV test results came back as indeterminate sued insurer and its in-house physician for negligence, intentional infliction of emotional distress, and defamation in connection with insurer's refusal to retest and its disclosure of the results to Medical Information Bureau (MIB), an association of life insurance companies. Granting defendants' motions for summary judgment, the court held, in part, that refusal to retest and reconsider plaintiff for coverage was not so egregious as to give rise to an action for intentional infliction of emotional distress, and that plaintiff's claim for defamation failed where the information disclosed was true, its disclosure was protected by statute, and plaintiff signed an express authorization for publication of the test results to MIB. Goddard v. Protective Life Corp., 82 F.Supp.2d 545, 557.

E.D.Va.1997. Com. (d) quot. in case cit. in disc., com. (j) quot. in case cit. in disc. A doctor who had AIDS sued the doctor with whom he shared a practice for intentional infliction of emotional distress and defamation after defendant told a patient that plaintiff had AIDS, and that he would not want a physician with AIDS treating him if he were a patient. Defendant also wrote a letter to ten patients stating that he was leaving the practice because he had learned that plaintiff had AIDS and was continuing to perform invasive procedures. This court denied plaintiff's motion for summary judgment as to the emotional-distress claim, holding, inter alia, that a reasonable trier of fact could differ as to whether defendant's conduct was outrageous and intolerable. Defendant had read an article about the transmission of HIV by a dentist in Florida and was genuinely concerned about the well-being of plaintiff's patients. Tolman v. Doe, 988 F.Supp. 582, 587.

E.D.Va.1995. Com. (d) quot. in case quot. in sup. Employees, who were of Hispanic origin, brought an action for intentional infliction of emotional distress, inter alia, against their employer, which had instituted a policy requiring them to speak only English at the work place. Granting defendant's motion for summary judgment, the court held that, under Virginia law, defendant's English-only policy was not sufficiently extreme and outrageous to support plaintiffs' claim; the policy was implemented in response to a perceived need, and plaintiffs, who were bilingual, could continue speaking to each other in English for the duration of the prohibition. Long v. First Union Corp. of Virginia, 894 F.Supp. 933, 945, judgment affirmed 86 F.3d 1151 (4th Cir.1996).

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E.D.Va.1991. Com. (d) quot. in ftn. Former employees brought sex discrimination claims as well as various state law claims against their former employer. The court dismissed the pendent state claims based on lack of jurisdiction and the court's discretion. The court dismissed, inter alia, the claim of intentional infliction of emotional distress to be pursued, if at all, in state court. Otherwise, based on the divergent theories of relief between a claim for sex discrimination under Title VII and the state claims, the court said that the pendent claims might predominate the lawsuit. Nicol v. Imagematrix, Inc., 767 F.Supp. 744, 749.

E.D.Va.Bkrtcy.Ct.

E.D.Va.Bkrtcy.Ct.2003. Com. (d) quot. in case quot. in sup. Judgment creditors filed complaint to determine dischargeability of debtor's debt to creditors. This court granted creditors' motion for summary judgment for declaration that state court's judgment was not discharged pursuant to § 523(a)(6) of the Bankruptcy Code. The court determined that there was sufficient evidence that debtor's actions were willful and malicious as defined by Bankruptcy Code, that parties or privies in original suit were same parties in this suit, that mutuality existed, that factual issues contained in prior order were actually litigated, and that factual issues were essential to prior judgment. The court noted that, in order to prevail in their claim for intentional infliction of emotional distress in state court, creditors would have shown that debtor's conduct was extreme and outrageous. In re Bundick, 303 B.R. 90, 112.

W.D.Va.

W.D.Va.2015. Com. (d) quot. in case quot. in sup. Former employee of cleaning business brought claims for assault and battery, wrongful discharge, and intentional infliction of emotional distress (IIED) against business and its owner/sole officer in connection with allegations that owner sexually harassed her. This court denied defendants' motion to dismiss plaintiff's IIED claim, holding that plaintiff's allegations—that owner solicited sexual favors from plaintiff, offered her money for sexual acts, engaged in repeated and unwanted physical contact with plaintiff, and wrote her a series of notes affirming his advances and solicitations—were sufficient to state such a claim under Restatement Second of Torts § 46. The court noted that the Fourth Circuit had acknowledged that, under some circumstances, sexual harassment could give rise to an IIED claim, and that plaintiff's allegations described a pervasive course of sexual harassment by owner that a jury could find was sufficiently egregious to establish liability. Faulkner v. Dillon, 92 F.Supp.3d 493, 501.

W.D.Va.1997. Com. (d) quot. in case quot. in sup. A store clerk sued her employer and supervisors for sexual harassment, hostile work environment, and intentional infliction of emotional distress, among other claims. Plaintiff alleged that she was repeatedly the recipient of unwelcome physical touching by the supervisors, that one supervisor sexually stimulated himself by the pornographic magazine rack and forced plaintiff to clean up the mess, and that defendants made inappropriate comments about plaintiff's physical appearance. This court, among other dispositions, denied defendants' motions for summary judgment on the emotional-distress claim. The court held,

inter alia, that fact issues existed as to whether the supervisors' conduct constituted extreme and outrageous behavior. A reasonable jury could find that defendants' conduct constituted a campaign of sustained cruelty and harassment, and the employer could be found liable for the supervisors' conduct under the doctrine of respondeat superior. The court also determined that a fact issue existed regarding a connection between defendants' behavior and plaintiff's distress. Young v. Sheetz, Inc., 987 F.Supp. 496, 504.

W.D.Va.1990. Com. (d) quot. in sup. A railroad employee sued his employer under the Federal Employers' Liability Act (FELA), alleging that he was publicly harassed on the job and that this alleged harassment constituted intentional infliction of emotional distress. The defendant moved to dismiss the plaintiff's claim for failure to state a claim for which relief may be granted or, in the alternative, for summary judgment. The court granted the defendant's motion to dismiss on the ground, inter alia, that the plaintiff's allegations did not rise to the level of outrageousness required by Virginia law. Simmons v. Norfolk & Western Ry. Co., 734 F.Supp. 230, 232.

W.D.Va.1989. Com. (d) cit. in case quot. in disc. A former employee sued her employer for sex discrimination and negligent and intentional infliction of emotional distress. This court granted in part and denied in part the defendant's motion to dismiss, holding that the defendant's announcement at a personnel meeting of the plaintiff's demotion and replacement did not constitute outrageous and extreme conduct sufficient to maintain an action for negligent or intentional infliction of emotional distress under the Federal Employers' Liability Act. Harris v. Norfolk and Western Ry. Co., 720 F.Supp. 567, 568.

W.D.Va.1989. Com. (d) cit. but dist. (Erron. cit. as § 46d.) An employee of her employer's wholly-owned subsidiary was terminated following a divestiture of the employer's stock in the subsidiary company. The former employee sued the employer for, inter alia, intentional infliction of emotional distress arising from her discharge. The employer's motion for summary judgment as to the intentional infliction of emotional distress claim was granted by this court. The court held that the employer's conduct did not approach the required extreme and outrageous conduct because the requirements of ERISA precluded the employee from continuing to work for the subsidiary company while being on the employer's payroll, and only when the employee failed to respond to the employer's offer of continuing her employment as a subsidiary company employee did the employer terminate her. It also noted that the employee's emotional distress claim would have been barred by the exclusivity provision of the state workers' compensation statute. Owens v. Ashland Oil, Inc., 708 F.Supp. 757, 760.

W.D.Va.1986. Cit. in disc., quot. in disc., quot. in case quot. in disc., caveat and com. (c) quot. in disc. Two parents sued a doctor for intentional infliction of emotional distress and medical malpractice arising out of severe injuries suffered by their daughter during the birth process. In a decision for the plaintiffs, this court held that the father could recover for intentional infliction of emotional distress despite the fact that he was not present at the time of the injury. The court stated that a jury verdict for the father could be sustained because of the developing nature of the tort, that limits were put on the tort to ensure that claims were genuine, and that if a jury was convinced

that the claim was genuine, the jury should be permitted to find for the claimant. Boyd v. Bulala, 647 F.Supp. 781, 791, remanded in part 905 F.2d 764 (4th Cir.1990).

W.D.Va.1986. Com. (h) quot. in case quot. in disc. An employee sued his employer and a security company for statutory libel and slander, emotional distress, and tortious interference with an economic opportunity and/or contractual relations, alleging that the defendants acted together to fire the plaintiff from his job and to deny him the opportunity to obtain unemployment benefits. After the case was transferred from the bankruptcy court due to its lack of subject matter jurisdiction, this court dismissed the libel and slander claims, but denied the defendants' motions to dismiss the remaining claims. The court held that the plaintiff had successfully stated a cause of action for tortious interference even though he was an at-will employee, because the plaintiff was seeking damages not for the act of firing but for the employer's alleged intentional interference, by way of false statements made by the security company, with the plaintiff's right to collect unemployment benefits. The court further held that it was for a jury to determine whether the defendants' conduct in allegedly preventing the plaintiff from obtaining the unemployment benefits was sufficiently outrageous to support an emotional distress claim. Welch v. Kennedy Piggly Wiggly Stores, Inc., 63 B.R. 888, 895.

W.D.Va.1984. Com. (h) quot. in disc. Plaintiff sued automobile manufacturer for breach of warranties and included a claim alleging damages for severe emotional distress. Defendant moved to dismiss the emotional distress claim, arguing that under Virginia law no cause of action for emotional distress exists in a breach of warranty action unless actual bodily injury results. The court granted defendant's motion to dismiss. Noting that Virginia follows the Restatement standard for emotional distress in torts cases, the court concluded that the state would also follow the Restatement rule that damages for emotional distress are excluded in breach of warranty actions except in cases where there is bodily impact or where serious emotional distress is a likely consequence of a breach of contract, such as in contracts for burial services. Wise v. General Motors Corp., 588 F.Supp. 1207, 1209.

W.D.Va.1983. Com. (d) quot. in part in sup. Insureds brought actions seeking compensatory and punitive damages from an insurer for the insurer's refusal to pay insurance benefits. The plaintiffs alleged that the insurer issued the insurance policy with no intention or performing or interpreting promises therein in good faith. They further alleged that the insurer's refusal to pay the benefits due under the policy was willful and malicious and done with bad faith and reckless disregard for the insureds' rights, and that as a result, the insureds suffered mental and emotional distress. The insurer moved to dismiss. The court responded that damages for emotional distress were generally not recoverable in Virginia unless they resulted directly from tortiously caused physical injury. Virginia recognized the tort of intentional infliction of emotional distress as an exception to this general rule, however. According to the court, Virginia also followed the rule that punitive damages were not reasonable for breach of contract unless the conduct constituting the breach amounted to criminal indifference or an independent willful tort, due to malicious, wanton or oppressive behavior by the breaching party. The court stated that the relevant inquiry was whether the allegations in the complaints were sufficient to state a cause of action for intentional infliction

of emotional distress under Virginia law. The court questioned whether the insurer's alleged bad faith failure to pay insurance benefits, without more, would be sufficient to show the extreme and outrageous conduct required to prevail under this theory, but found that the allegations of bad faith and malice suggested that facts could be proven which would justify recovery for emotional distress. The court noted that even if the emotional distress claim were not sufficiently supported by the plaintiffs' allegations, this count could be construed to state a claim for the tort of a bad faith failure by an insurer to pay an insured's claim. Although it had not been decided whether Virginia recognized such a cause of action, the court found the rationale that every contract imposes a duty of good faith upon each party persuasive. Thus the court found that the possibility of such a cause of action being recognized in Virginia further supported its holding not to dismiss the count above. The defendant's motions to dismiss were denied. Morgan v. American Fam. Life Assur. Co. of Columbus, 559 F.Supp. 477, 482.

D.V.I.

D.V.I.2014. Subsec. (1) quot. in sup. and quot. in case quot. in sup.; com. (d) cit. in sup. and quot. in case quot. in sup.; com. (j) quot. in case quot. in sup. Former union employees of contractor that provided services at a refinery, who were arrested for stealing an air-conditioning unit from the refinery, brought claims for intentional or negligent infliction of emotional distress against refinery's owner, after the charges against them were dropped, alleging, among other things, that defendant's employees made false statements implicating them in the theft to police, contractor, union, and a local newspaper. This court granted summary judgment for defendant, holding that plaintiffs had not shown the requisite harm necessary to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. While plaintiffs reported that, as a result of defendant's actions, they continued to experience regular headaches, sleeplessness, stress, anxiety, backaches, or stomachaches, such symptoms could not properly be characterized as so severe that no reasonable person could be expected to endure them. Illaraza v. HOVENSA LLC, 73 F.Supp.3d 588, 614.

D.V.I.2002. Cit. in sup., cit. generally in ftn., subsec. (1) quot. in sup. Former employee sued employer for, in part, wrongful discharge and intentional infliction of emotional distress. The territorial court struck the claim for intentional infliction of emotional distress, and entered judgment on a jury verdict awarding plaintiff $50,000 for lost wages. Affirming in part, this court held, inter alia, that supervisor's act of hitting plaintiff on the leg with his cane and subsequently firing him did not rise to the level of outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Thomas Hyll Funeral Home, Inc. v. Bradford, 233 F.Supp.2d 704, 714.

D.V.I.1999. Subsec. (1) and coms. (d) and (h) quot. in disc. Hotel manager sued hotel and its minority shareholder for wrongful termination, breach of the implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. Granting in part and denying in part defendants' motions for summary judgment, the court held, inter alia, that the Virgin Islands

Wrongful Discharge Act was preempted by § 7 of the National Labor Relations Act and that, even if the doctrine of preemption were inapplicable, plaintiff had failed to establish an exception to the general rule of at-will employment; that a reasonable juror could conclude that defendants created such an unpleasant work environment that their actions amounted to a breach of the covenant of good faith and fair dealing; and that defendants' conduct could not be considered extreme or outrageous. Claytor v. Chenay Bay Beach Resort, 79 F.Supp.2d 577, 583, 584.

D.V.I.1999. Cit. in headnotes, cit. and quot. in disc., cit. in ftn. Former government employee sued a union for intentional infliction of emotional distress, among other claims, alleging that the union failed to represent employee properly in her attempt to obtain the correct classification and corresponding higher salary. This court dismissed the emotional-distress claim, holding, inter alia, that the union's failure to pursue a remedy for plaintiff did not constitute outrageous conduct. Seafarers Intern. Union of North America v. Thomas, 42 F.Supp.2d 547, 549, 557.

D.V.I.1998. Quot. in disc., com. (d) quot. in disc. Individual who was assaulted by employee of port authority sued port authority for negligent hiring or retention and intentional infliction of emotional distress. Plaintiff also alleged that defendant was vicariously liable for employee's actions. Entering partial summary judgment for defendant, the court held that material factual issues existed as to whether defendant retained employee with knowledge of employee's habit of misconducting himself; that defendant's conduct in hiring and retaining employee was not extreme and outrageous, such that plaintiff could maintain an action for intentional infliction of emotional distress; and that defendant was not vicariously liable for the assault. Chase v. Virgin Islands Port Authority, 3 F.Supp.2d 641, 643.

D.V.I.1997. Quot. in case quot. in sup., com. (d) cit. in case quot. in sup. Electric-company employee who was severely injured when he tried to change a switch that was energized with over 14,000 volts of electricity sued his employer for, inter alia, intentional infliction of emotional distress, alleging that his supervisor threatened him with disciplinary action if he refused to do the work. Defendant moved to dismiss the complaint on a variety of grounds. Granting the motion in part and denying it in part, the court held, among other things, that the facts alleged were sufficient to show that supervisor recklessly caused plaintiff to suffer severe emotional distress, and that defendant could be found liable for supervisor's actions if it was determined that supervisor was defendant's alter ego. Eddy v. Virgin Islands Water and Power Authority, 955 F.Supp. 468, 478.

D.V.I.1997. Cit. in headnote, cit. generally in ftn., subsec. (1), com. (d) cit. in disc. In action brought pursuant to the Federal Tort Claims Act and the Virgin Islands Tort Claims Act, firearms licensees sued United States federal officers, the government of the Virgin Islands, and Virgin Islands officers for, inter alia, intentional infliction of emotional distress and defamation in connection with a narcotics search of their home and the initial denial of their license renewal. Entering summary judgment for defendants, the court held, in part, that, under the FTCA, federal defendants were immune from suit for common law torts; that Virgin Islands defendants, having acted reasonably and reasonably relied on a warrant in executing the search, were entitled to qualified immunity; and, moreover, that plaintiffs had failed to state a claim upon which relief could be granted under

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theories of defamation or intentional infliction of emotional distress. Intern. Islamic Com. of Masjid Baytulkhaliq v. U.S., 981 F.Supp. 352, 357, 369-370.

D.V.I.1997. Cit. in headnote, quot. in sup. A former employee of a company sued the company and its sole owner and operator for, in part, intentional infliction of emotional distress. Granting defendants' motion to dismiss, the court held, inter alia, that plaintiff failed to state a claim for intentional infliction of emotional distress, since defendant owner's alleged statements concerning plaintiff's poor job performance and misconduct did not rise to the level of extreme and outrageous behavior necessary to support plaintiff's claim. Manns v. The Leather Shop Inc., 960 F.Supp. 925, 926, 927, 930, 931.

D.V.I.1996. Cit. in headnotes and quot. in disc., com. (d) quot. in disc., com. (k) cit. in headnote and disc. Port Authority employee sued the authority and her supervisor, alleging sexual harassment and intentional infliction of emotional distress, among other claims. This court, among other dispositions, held that plaintiff could seek compensatory and punitive damages from the supervisor for intentional infliction of emotional distress, but not from the authority. The court stated that an employer cannot be held liable for the tort of a person who intentionally injures an employee when that person is merely a supervisor or manager and not the employer in person or a person who is realistically the corporation's alter ego. However, the supervisor's alleged behavior of attempted rape, unwanted touching, kissing, and sexual propositions was outrageous enough to support an emotional-distress claim. Codrington v. Virgin Islands Port Authority, 911 F.Supp. 907, 909, 910, 915, 918.

D.V.I.1994. Cit. in headnote and in sup., subsec. (1) quot. in sup., com. (d) cit. and quot. in sup. and cit. in ftn. Borrower brought a claim for intentional infliction of emotional distress, inter alia, against lender that sought to collect on a note in connection with which lender had asserted default by borrower. Granting defendant's motion for summary judgment, the court held that plaintiff's allegations that defendant improperly dishonored checks, damaged plaintiff's credit ratings, tortiously interfered with plaintiff's company's business relationship with a supplier, and improperly wrote off a car note did not describe conduct that rose to the level of extreme and outrageous conduct and plaintiff's symptoms of stress, sleeplessness, and hypertension did not reach the requisite level of severity. Pemberton Sales & Serv. v. Banco Popular de P.R., 877 F.Supp. 961, 962, 967.

D.V.I.1991. Quot. in disc., com. (b) cit. in sup., com. (d) quot. in sup. A dissatisfied home buyer sued in tort, inter alia, the seller's broker and the seller on a theory that the seller was liable for his broker's acts, contending that the broker misrepresented the location of an easement on the property and made various other misrepresentations causing her physical and emotional harm. The court granted the defendants summary judgment, holding that the plaintiff had not made a viable claim for intentional or reckless infliction of emotional distress. The court noted that it had no reason to believe that the alleged misrepresentations, if any occurred, were not completely innocent. Moreover, regarding the plaintiff's claim that the defendants' misrepresentations resulted in physical illness, the court said that misrepresentations concerning the condition, boundaries, and

encumbrances of a piece of real property were not the sort that ordinarily involved an unreasonable risk of bodily harm, nor had the plaintiff presented evidence that the defendants knew or should have known that she was unusually sensitive to emotionally induced physical illness. Lempert v. Singer, 766 F.Supp. 1356, 1367.

D.V.I.1985. Subsec. (1) cit. in disc. and quot. in ftn. A 15-year at-will bank employee was terminated as branch manager after the bank refused to comply with her demands for improvements to the branch office. The employee sued the bank for breach of contract and of good faith and fair dealing, unfair labor practices, and infliction of severe emotional distress. The district court held that the plaintiff had a cause of action under contract theory for breach of an implied obligation of good faith and fair dealing. However, the court dismissed the claim of intentional infliction of emotional distress, holding that the bank's refusal to comply with the employee's demands for branch improvements, and the requirements that she work late hours without remuneration, walk to other banks with large sums of money, and use her personal car to pick up computer prints did not constitute conduct so extreme and outrageous as to permit recovery under this theory. Petersen v. First Federal Sav. & Loan Ass'n of P.R., 617 F.Supp. 1039, 1042.

D.V.I.1983. Subsec. (1) quot. in disc., com. (d) cit. in disc. A woman who claimed to have been wrongfully arrested in connection with a bank robbery brought an action for damages against various law enforcement officials and the governments of the Virgin Islands and the United States. The plaintiff alleged, inter alia, the torts of intentional infliction of emotional distress, abuse of process, and malicious prosecution. Motions for dismissal were granted on the grounds that, since the arrest was valid, the conduct of the officials was not outrageous and thus did not establish an action for emotional distress; that since there was probable cause for the plaintiff's arrest, the defendants' decision not to release the plaintiff immediately after questioning did not constitute abuse of process; and that, again because probable cause existed, there was insufficient basis for a claim of malicious prosecution. Deary v. Evans, 570 F.Supp. 189, 200.

D.V.I.1977. Cit. in op. but not fol. In an action claiming damages due to defendant's outrageous conduct causing emotional distress to plaintiff, defendant moved to dismiss on the ground that the conduct alleged was not of such an outrageous character as to constitute the tort. In denying the motion, the court held that the parties should be allowed to proceed to trial and present the irrespective evidence before its determination of the nature of defendant's conduct. Sullivan v. de-Coligny, 432 F.Supp. 689, 690.

D.V.I.1977. Cit. in op. but not fol. In an action claiming damages due to defendant's outrageous conduct causing emotional distress to plaintiff, defendant moved to dismiss on the ground that the conduct alleged was not of such an outrageous character as to constitute the tort. In denying the motion, the court held that the parties should be allowed to proceed to trial and present their respective evidence before its determination of the nature of defendant's conduct. Sullivan v. de-Coligny, 432 F.Supp. 689, 690.

D.V.I.1970. Quot. but not fol. A wife brought an action against her husband based on Sec. 46 of the Restatement for "fraud and wilful hurt." The court dismissed the complaint, holding that it was barred by interspousal disability and declaring that change from such an outmoded rule must come from the legislature. Paiewonsky v. Paiewonsky, 315 F.Supp. 752, 753, aff'd 446 F.2d 178 (3d Cir.1971).

E.D.Wash.

E.D.Wash.2015. Com. (d) cit. in case cit. in sup. Terminated employee brought a claim for intentional infliction of emotional distress (IIED) against former employer and supervisors, alleging, among other things, that supervisors forged her initials on a performance-improvement-plan form and then used that form to justify her termination. This court granted defendants' motion to dismiss, holding that, even if supervisors forged plaintiff's initials on the form with the intent to create a false basis for discharging her, such conduct was insufficient as a matter of law the rise to the level of being atrocious and utterly intolerable to a civilized community, as required to support a claim for IIED under Restatement Second of Torts § 46. Richards v. Healthcare Resources Group, Inc., 131 F.Supp.3d 1063, 1074.

E.D.Wash.2012. Cit. in sup., com. (d) cit. in case quot. in sup. Former financial counselor at hospital brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against hospital, after she was terminated from her job. Granting defendant's motion to dismiss this claim, this court held that defendant's alleged conduct in discharging plaintiff from employment with discriminatory or retaliatory motive, and in leaving her diary writings open on top of her personal belongings when they were returned to her, was not sufficiently outrageous to state a claim for IIED under the high bar set for this tort by the Washington Supreme Court. Armijo v. Yakima HMA, LLC, 868 F.Supp.2d 1129, 1135, 1136.

E.D.Wash.1998. Cit. in disc. Former prisoners sued physician for, in part, violations of international law's prohibition of "crimes against humanity," alleging that they were subjected to nonconsensual medical experimentation involving radiation while they were prisoners in the custody of the State of Washington. Granting defendant's motion to dismiss the international-law cause of action for lack of subject-matter jurisdiction, the court declined to imply from the law of nations, as incorporated into the laws of the United States, the existence of a private right of action for the alleged violations of international law. The court stated that adequate domestic remedies existed for the alleged conduct underlying plaintiffs' "crimes against humanity" cause of action, including state-law causes of action for battery, assault, and intentional infliction of emotional distress. White v. Paulsen, 997 F.Supp. 1380, 1384.

E.D.Wash.1995. Com. (d) quot. in case quot. but dist. County district court administrator who was terminated after her position was eliminated sued county and her supervising judges for, inter alia, intentional infliction of emotional distress, alleging that defendants' maintenance of a retaliatory and sexually harassing workplace environment constituted outrageous

conduct. Granting defendants' motion for summary judgment, the court held that plaintiff's direct supervisor's temper tantrums, rude and insulting comments, and greater tolerance for a coemployee's errors did not amount to atrocious or loathsome behavior that was intolerable in civilized society. Furthermore, plaintiff failed to prove severe emotional distress. Keenan v. Allan, 889 F.Supp. 1320, 1389.

W.D.Wash.

W.D.Wash.2022. Com. (j) cit. in case quot. in sup. Customer sued bank for, among other things, intentional infliction of emotional distress (IIED), after bank's manager and security guard allegedly accosted customer and customer's family in the bank's parking lot, falsely accused them of trespassing, refused to close customer's accounts, and made unauthorized transfers from those accounts. This court granted bank's motion to dismiss, holding that bank's alleged conduct was not sufficiently outrageous in character and extreme in degree to support a claim for IIED. The court cited Restatement Second of Torts § 46 in explaining that the law intervened only where the distress inflicted was so severe that no reasonable person could be expected to endure it. Lemelson v. Wells Fargo Bank, N.A., 641 F.Supp.3d 1005, 1014.

W.D.Wash.2021. Illus. 2 cit. and quot. in sup. Former teacher brought, among other things, a claim for intentional infliction of emotional distress (IIED) against school district and principal, alleging that principal confronted him in a hostile and aggressive manner that implied she would terminate him for wearing a "Make America Great Again" hat to a professional development course. This court granted in part defendants' motion for summary judgment, holding that principal's conduct did not constitute extreme or outrageous conduct, which was necessary to support a claim for IIED. The court rejected plaintiff's comparison to Restatement Second of Torts § 46, Illustration 2, because, unlike in Illustration 2, the record did not indicate that principal used public intimidation or threatened violence against plaintiff or his property during the confrontation to subject plaintiff to duress. Dodge v. Evergreen School District, 513 F.Supp.3d 1286, 1301, 1302.

W.D.Wash.2020. Cit. in sup. After two police officers who were responding to a report of a domestic dispute shot and killed suspect while he was brandishing multiple knives, suspect's mother sued officers and others, alleging, among other things, claims for outrage under Washington law. This court granted defendants' motion for summary judgment on plaintiff's outrage claim, holding that no reasonable jury could find that officers' interactions with suspect or his family approached the high threshold required for a plaintiff to recover on a claim for outrage. The court noted that, under Restatement Second of Torts § 46, the conduct in question had to be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Hernandez v. Federal Way, 456 F.Supp.3d 1228, 1248, 1249.

W.D.Wash.2019. Com. (h) quot. in case quot. in sup. After malnourished minor child was removed from his mother's home subject to dependency proceedings, parents of child brought, among other

things, a claim for intentional infliction of emotional distress (IIED) against state department of social and health services, investigator, and social worker, alleging that plaintiffs suffered severe emotional distress as a result of defendants' mistakes and oversights during dependency proceedings that followed child's removal, including defendants' failure to ensure that child was doing well after placing him in foster care, which resulted in child regressing in development. This court granted in part defendants' motion for summary judgment, holding that plaintiffs' IIED claim failed as a matter of law, because plaintiffs did not demonstrate how defendants could have better performed their jobs such that a reasonable jury could find their actions were outrageous and extreme, as to go beyond all possible bounds of decency. The court observed that, under Restatement Second of Torts § 46, Comment *h*, whether or not severe emotional distress could be found based on the record was a matter of law for the court to decide, while the finder of fact determined whether or not distress actually existed. Chen v. D'Amico, 428 F.Supp.3d 483, 514.

W.D.Wash.2019. Com. (j) quot. in case quot. in sup. Hospital patient brought, among other things, a claim for intentional infliction of emotional distress (IIED) against police officers, alleging that she suffered emotional distress after defendants photographed her bare body while she was lying unconscious in a hospital pursuant to a police investigation into an altercation involving her and her father. This court rejected and modified in part the recommendation of a magistrate judge and granted in part defendants' motion for summary judgment, holding that plaintiff failed to allege sufficient facts establishing her IIED claim. The court explained that plaintiff failed to demonstrate that she suffered severe emotional distress, as defined by Restatement Second of Torts § 46, Comment *j*, because the evidence she presented of her emotional distress—that she became upset during a deposition and requested a break during questioning about the content of the photographs—did not demonstrate the level of severe emotional distress necessary to sustain an IIED claim. Young v. Pena, 428 F.Supp.3d 474, 481.

W.D.Wash.2016. Com. (d) quot. in case quot. in disc. (quoting com. (g) of § 46 of Restatement of Torts, Supplement, which is now com. (d) of § 46 of Restatement Second of Torts). Public-school teachers and counselor filed, inter alia, a claim of the tort of outrage against school district and administrators, alleging that, in retaliation for plaintiffs' reports to the media and the district that a high school was providing preferential services to select students, manipulating graduation rates, and otherwise creating a second-tier education system for underachieving minorities, defendants initiated a false lawsuit against plaintiffs and publicized in the media false accusations of plaintiffs' lack of professionalism and criminal misconduct. This court denied defendants' motion to dismiss plaintiffs' outrage claim, holding that plaintiffs pleaded a plausible claim for relief. In evaluating the sufficiency of plaintiffs' claim, the court defined outrageous conduct as that which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim "outrageous," as set forth in Restatement Second of Torts § 46. Pete v. Tacoma School District No. 10, 198 F.Supp.3d 1206, 1217.

W.D.Wash.2012. Cit. in sup. Suspect who was stopped on suspicion of armed robbery but released brought federal civil-rights claims and state law tort claims against city and police officers who stopped him, alleging, among other things, that officers, who ordered him to the ground at

gunpoint, verbally insulted him and forcefully stepped on his hand and right calf during the stop without justification. Granting defendants' motion for summary judgment on plaintiff's claim of outrage, this court held that reasonable jurors could not conclude that officers' conduct was so unconscionable as to rise to the level of outrage. In addition, plaintiff failed to allege emotional distress beyond nightmares and general anxiety. Monetti v. City of Seattle, 875 F.Supp.2d 1221, 1231.

W.D.Wash.2011. Quot. in case quot. in sup. Six adult men who claimed that they were sexually abused as children by their scout leaders in connection with their participation in a scouting organization for boys brought various claims against organization, alleging that, long before the abuse, defendant knew that it had a problem with pedophiles and other sexual deviants infiltrating its ranks, but deliberately concealed its knowledge from police, scouts, scouts' parents, and the general public. Granting defendant's motion to dismiss with leave to amend, this court held that, absent allegations that defendant had some specific knowledge that plaintiffs might be in danger of sexual assault by their scout leaders, defendant's conduct in not warning plaintiffs of the existence and contents of its "ineligible volunteer" files, and in failing to take measures to protect plaintiffs from abuse, did not rise to the level of extreme, outrageous behavior required to state a claim for intentional infliction of emotional distress under Washington law. Boy 1 v. Boy Scouts of America, 832 F.Supp.2d 1282, 1289.

W.D.Wash.2005. Cit. in disc. Individual who had been observed by police officers walking dangerously close to traffic and making peculiar gestures brought, inter alia, claim for intentional infliction emotional distress against defendant city and its police officer, arising from officer's use of excessive force in preventing her from going into her handbag after she voluntarily entered an ambulance taking her to a hospital for mental evaluation. The court granted summary judgment for defendants on this claim, holding that although there was some medical evidence regarding plaintiff's physical injuries, there was none showing that she experienced any mental suffering as a result of the officer's conduct so as to establish the severe emotional distress necessary to prove the tort of outrage under Washington law. Thomas v. City of Seattle, 395 F.Supp.2d 992, 1000.

W.D.Wash.1992. Cit. in case cit. in sup., com. (l) cit. generally but not fol. Father and fiancee of deceased driver sued corporation whose agent was driving the car that collided with driver's truck, killing driver and injuring his fiancee. Granting corporation's motion for partial summary judgment, this court held, inter alia, that although fiancee was sitting next to the deceased when he was killed, was a friend and lover of the deceased for two and one-half years, and had lived with the deceased for nearly one year, she was not entitled to recover for the tort of outrage or negligent infliction of emotional distress under Washington law since she was not a closely related or immediate family member as set forth in the state's wrongful death statute. Lindsey v. Visitec, Inc., 804 F.Supp. 1340, 1344.

N.D.W.Va.

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N.D.W.Va.2016. Cit. in case quot. in sup.; com. (j) cit. in case quot. in sup. Special-education student who suffered from attention deficit/hyperactivity disorder, impulse-control disorder, bipolar disorder, mild mental retardation, mild hearing loss, and asthma brought a claim for intentional infliction of emotional distress (IIED) against teacher following an incident in which teacher, in response to a comment student made to or about a classmate, grabbed student by the neck, choked him, pushed him into a bookcase, and forbade him from leaving the classroom. This court denied teacher's motion to dismiss student's IIED claim, holding that student sufficiently pleaded facts that gave rise to an inference that teacher engaged in outrageous conduct that was inflicted intentionally or with reckless disregard for the likelihood that emotional distress would result. The court reasoned, in part, that, under Restatement Second of Torts § 46, extreme or outrageous character of conduct could arise from the actor's knowledge that the other was particularly susceptible to emotional distress, by reason of some mental condition. Conklin v. Jefferson County Board of Education, 205 F.Supp.3d 797, 817.

N.D.W.Va.2014. Com. (d) quot. in sup. After mechanic was injured by an exploding truck tire at work, mechanic and his parents sued, among others, two owners of the trucking business that employed mechanic, alleging, among other things, that defendants committed the tort of outrage by attempting to contact mechanic in order to dissuade him from bringing suit even after parents directed them not to. This court granted summary judgment for defendants, holding that their conduct was not "outrageous" under the definition of such conduct set forth in Restatement Second of Torts § 46 and West Virginia law. The court reasoned that the undisputed evidence demonstrated that most of plaintiffs' allegations were unsubstantiated; although one owner went to the hospital to visit mechanic before plaintiffs' counsel sent defendants a cease-and-desist letter, and a hospital employee visited mechanic's room at the request of the other owner's wife, those actions could not reasonably be called "outrageous," given the first owner's undisputed care for mechanic and the lack of a connection between the actions of defendants and the second owner's wife. Long v. M & M Transp., LLC, 44 F.Supp.3d 636, 649.

N.D.W.Va.2013. Cit. in sup. and ftn., subsec. (1) cit. in case cit. in sup., com. (d) cit. and quot. in sup. (erron. cit. as § 46(1), com. (d)), com. (e) quot. in sup. Member-managers of housing-rental company brought an action for intentional infliction of emotional distress (IIED), inter alia, against various city employees, alleging, among other things, that defendants abused their official power and acted deliberately, with a shared intent to deprive plaintiffs of a rental property and drive company to bankruptcy, through actions such as issuing stop-work orders during construction, condemning the property, and giving plaintiffs inadequate time to address purported code violations. Granting defendants' motion for summary judgment, this court held that none of the alleged conduct rose to the requisite level of outrageousness for an IIED claim under West Virginia law, nor had plaintiffs provided a scintilla of proof that the series of enforcement actions about which they complained were part of a deliberate campaign by defendants to ruin them. Warner v. Boroff, 921 F.Supp.2d 513, 521-527.

N.D.W.Va.1989. Quot. in case quot. in disc., com. (d) quot. in case quot. in disc. Employees accepted promotions from union positions to nonunion management positions after the company

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made representations that each employee could return to the union position if the employee desired and that layoffs would be based on date of hire seniority. After various layoffs based upon management seniority date, the plaintiffs sued the company claiming breach of contract, fraud, and intentional infliction of emotional distress. Granting summary judgment for the defendant in part, this court held, inter alia, that: 1) all contract and tort claims relating to return to union positions, which were covered by a collective bargaining agreement, were preempted by federal law; 2) the company was not liable for constructive fraud because it did not owe a duty of disclosure to the employees of the parameters of the right to return; and 3) the company's actions were not so outrageous as to constitute infliction of emotional distress. The court stated that there was no evidence of malice, or even of a deliberate attempt to mislead the plaintiffs into accepting the promotions from which they were later laid off. White v. National Steel Corp., 742 F.Supp. 312, 342, affirmed in part reversed in part 938 F.2d 474 (4th Cir.1991), certiorari denied 502 U.S. 974, 112 S.Ct. 454, 116 L.Ed.2d 471 (1991).

N.D.W.Va.1983. Com. (j) quot. in ftn. An insured brought an action against his insurer alleging various causes of action arising out of the placement by an employee in the insurer's claim file of a memorandum stating that the insured was “heavily involved in the Mafia.” The district court entered judgment in favor of the insured on the Unfair Trade Practices Act cause of action, the insurer moved for a new trial, for judgment notwithstanding the verdict and for remittitur. The district court denied the insurer's motions, holding that the memorandum was not protected by the First Amendment, and a private cause of action existed under sections of the West Virginia Unfair Trade Practice Ace which made it unlawful for an insurance company to knowingly place false information in an insured's file. Testimony unequivocally demonstrated that two employees responsible for production of the memorandum placed in the file had no basis whatsoever for stating that the insured was connected in any way with the Mafia, thereby supporting judgment in favor of the insured under the Unfair Trade Practices Act. The plaintiff was properly awarded compensatory damages for actual damages suffered. The plaintiff's uncontradicted testimony established the anguish, embarrassment, shame, anger, and depression which she suffered as a result of the insurer's conduct. Recovery for emotional distress unaccompanied by physical injury was proper in cases involving an intentional tort. Mutafis v. Erie Ins. Exchange, 561 F.Supp. 192, 203.

S.D.W.Va.

S.D.W.Va.2016. Subsec. (1) quot. in case quot. in sup. Arrestee whose girlfriend called 911 to report domestic violence filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against town police officer that responded to the call, alleging that, even though plaintiff did not resist, defendant kicked him, knocked his legs out from under him, and continued to kick and stomp on him while he was on the ground. This court denied in part defendant's motion for summary judgment, holding that plaintiff pleaded sufficient facts to give rise to an IIED claim. The court noted that, in West Virginia, the IIED tort followed Restatement Second of Torts § 46, and concluded that, here, a reasonable jury could find that defendant's alleged conduct was outrageous. Honaker v. Town of Sophia, 184 F.Supp.3d 319, 327.

S.D.W.Va.2015. Subsec. (1) cit. in case quot. in sup.; com. (d) quot. in case quot. in sup. Arrestee who pleaded guilty to two misdemeanor drug offenses filed, inter alia, a claim for the tort of outrage against county prosecutor in plaintiff's criminal case and lawyer that represented plaintiff in his criminal case and an unrelated civil case, alleging, among other things, that prosecutor threatened him and lawyer failed to obtain his release from home confinement after he had served his sentence and convinced him to settle the civil case. This court granted in part defendants' motion to dismiss, holding that plaintiff failed to state a claim for intentional or reckless infliction of emotional distress. Citing Restatement Second of Torts § 46, the court explained that plaintiff's complaint contained only legal conclusions and he failed to provide sufficient allegations to support the assertion that defendants' conduct was outrageous. Conley v. Ryan, 92 F.Supp.3d 502, 517.

S.D.W.Va.2015. Subsec. (1) cit. in case quot. in sup. After arrestee's conviction for obstructing a police officer was overturned, arrestee brought a claim for outrage against arresting officers. This court denied in part officers' motion for summary judgment, holding that arrestee stated a claim for outrage predicated on officers' conduct leading up to and during his arrest, reasoning that arrestee alleged that one officer needlessly used an electroshock weapon on him, and that a number federal courts had held that the unnecessary use of such a weapon by law-enforcement officers could be the basis for a state-law claim for outrage or intentional infliction of emotional distress. The court noted that, under Restatement Second of Torts § 46, to qualify as legally outrageous, a defendant's conduct had to truly offend community notions of acceptable conduct; liability did not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Weigle v. Pifer, 139 F.Supp.3d 760, 777.

S.D.W.Va.2014. Com. (d) quot. in case quot. in sup. Consumer brought, inter alia, a state-law claim for intentional infliction of emotional distress (IIED) against law firm that engaged in debt collection, alleging that, although he notified defendant that he was represented by an attorney, defendant made numerous telephone calls to plaintiff's residence in an attempt to collect certain debts. This court granted summary judgment for defendant, holding that plaintiff failed to prove that defendant's conduct was sufficiently extreme and outrageous to maintain a claim for IIED. The court concluded that 27 unanswered phone calls over the course of eight months at regular hours of the day could not be regarded as atrocious or utterly intolerable in a civilized community, pursuant to Restatement Second of Torts § 46, Comment *d*. Bourne v. Mapother & Mapother, P.S.C., 998 F.Supp.2d 495, 507.

S.D.W.Va.2014. Com. (d) quot. in case quot. in sup. Female employee brought, inter alia, a state-law claim for intentional infliction of emotional distress against employer, alleging that employer was liable for certain sexual comments made by her male supervisor. Granting defendant's motion for summary judgment, this court held that the supervisor's alleged conduct in making a comment about plaintiff's breasts in front of plaintiff and several coworkers, in asking another coworker how he should respond to a text from another female coworker, and in discussing another female coworker's one-night stand could not reasonably be considered so extreme and outrageous as to constitute intentional or reckless infliction of emotional distress under West Virginia law. The

court cited Restatement Second of Torts, Comment *d*, for the proposition that liability clearly did not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Penn v. Citizens Telecom Services Co., LLC, 999 F.Supp.2d 888, 905.

S.D.W.Va.2010. Com. (d) quot. in case quot. in sup., com. (e) cit. in case quot. in sup. Detainee brought, inter alia, a state-law claim for intentional infliction of emotional distress (IIED) against state-police superintendent and officers, alleging that, during the execution by officers of a warrant to search her home, two officers discovered her naked in the shower, and one of them grabbed her by the hair and forcibly removed her to the living room, where she was compelled to kneel or lie naked on the floor in the presence of 11 men for 30 to 45 minutes while one or more officers made demeaning comments to her and touched her buttocks before she was provided with a towel or blanket to cover herself. Denying defendants' motion for summary judgment as to plaintiff's IIED claim, this court held that plaintiff's allegations, as well as defendants' obvious power and authority over plaintiff, created a triable issue as to the outrageousness of defendants' conduct. Hutchinson v. West Virginia State Police, 731 F.Supp.2d 521, 549, 550.

S.D.W.Va.2009. Com. (d) quot. in case quot. in sup. Beneficiaries of life-insurance policy sued insurer after it refused to pay their claim for benefits upon the death of policyholder/son. This court, while ruling that defendant was estopped from raising, as grounds for rescission of the policy, certain questions and answers in the policy application concerning son's prior health history, granted defendant's motion for summary judgment on plaintiffs' claim for the tort of outrage under West Virginia law. The court held that an insurance company's denial of a $50,000 claim for life-insurance benefits, without more, did not constitute intentional or reckless conduct that was sufficiently outrageous to sustain such a claim. White v. American General Life Ins. Co., 651 F.Supp.2d 530, 549.

S.D.W.Va.2003. Com. (g) quot. generally in case quot. in disc. After hotel employee, who suffered from coronary artery disease and was fired due to absenteeism, became depressed and died due to inability to pay for health insurance and medication, employee's daughter sued hotel corporation for violating collective-bargaining agreement and for intentional infliction of emotional distress, inter alia. This court granted in part plaintiff's motion to amend complaint, holding, inter alia, that her claims for outrage and intentional infliction of emotional distress were not preempted by § 301 of Labor Management Relations Act, since plaintiff did not base the claims on defendant's failure to abide by terms of collective-bargaining agreement, but instead on age and disability discrimination in violation of West Virginia Human Rights Act. Harless v. CSX Hotels, Inc., 265 F.Supp.2d 640, 652.

S.D.W.Va.2002. Com. (j) cit. in case cit. in sup. After political organization mailed a pamphlet containing a picture of a rival candidate and his neighbor alongside a headline stating that candidate as an attorney had represented sex offenders, neighbor sued organization for, in part, intentional infliction of emotional distress. Denying defendant's motion for summary judgment, this court held, inter alia, that a genuine issue of material fact existed as to the intensity of plaintiff's

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emotional distress caused by the pamphlet's implication that he was a sex offender. Bell v. National Republican Congressional Committee, 187 F.Supp.2d 605, 618.

S.D.W.Va.2000. Quot. in case quot. in disc. Former employees who believed that their termination was based on age, race, and disability sued employer for, inter alia, intentional infliction of emotional distress. Granting defendant's motion to dismiss on this point, the court held, in part, that even if plaintiffs were wrongfully discharged, they had failed to show that defendant's conduct in effecting the discharge was extreme or outrageous. Hoops v. Elk Run Coal Co., Inc., 95 F.Supp.2d 612, 620.

S.D.W.Va.1998. Quot. in case quot. in sup., com. (d) quot. in disc. Television-station account executive sued former employer for, inter alia, breach of contract and intentional infliction of emotional distress. Entering summary judgment for defendant, the court held, in part, that the parties' oral employment agreement based on plaintiff's promise to violate the confidentiality provision of his employment contract with another television station was unenforceable on public policy grounds, and that defendant's actions in teasing plaintiff about his speech impediment and his failure to meet budgetary requirements did not constitute conduct sufficiently extreme and outrageous as to support a claim for intentional infliction of emotional distress. Burgess v. Gateway Communications, Inc., 26 F.Supp.2d 888, 893-894.

S.D.W.Va.1996. Quot. in case cit. in disc., cit. in ftn., coms. and illus. cit. generally in sup. and in cases quot. in disc., com. (d) quot. in sup. and in ftn., com. (j) quot. in ftn. and cit. and quot. in cases quot. in disc., illus. 1 and 2 cit. in ftn. Plaintiffs, who were exposed to a cloud of toxic substances when a fire broke out at a chemical plant, brought a class action against the plant's owner, seeking, in part, to recover damages for emotional distress. Denying in part defendant's motion to dismiss, the court held, inter alia, that plaintiffs' allegation that defendant acted consciously in not doing certain types of maintenance that a reasonable person would do who was primarily concerned with safety rather than simply greedy for profits asserted outrageous conduct and was minimally sufficient to state a claim for intentional infliction of emotional distress. McClenathan v. Rhone-Poulenc, Inc., 926 F.Supp. 1272, 1277, 1279.

S.D.W.Va.1995. Com. (d) quot. in case quot. in sup., com. (h) quot. in sup. Correctional officer at a county jail brought, in part, a claim for intentional infliction of emotional distress against police officers, arising from their investigation of charges against plaintiff of assisting in the escape of prisoners from the jail and of transporting contraband into the jail. Granting defendants' motion for summary judgment, the court held, inter alia, that, as a matter of law, defendants' conduct in participating in the prosecution of plaintiff, if wrongful in any manner, was not so extreme as to support a claim for intentional infliction of emotional distress, where defendants' conduct did not rise to a level supporting either a § 1983 or a common law claim for malicious prosecution. Rhodes v. Smithers, 939 F.Supp. 1256, 1281, affirmed 91 F.3d 132 (4th Cir.1996).

S.D.W.Va.1994. Cit. in headnote, cit. in sup., coms. (d) and (g) quot. in case quot. in sup. Former husband sued his ex-wife, seeking damages for intentional infliction of emotional distress for

allegedly preventing him from visiting the parties' children. Granting defendant's motion for summary judgment, the court held that, under West Virginia law, defendant was not liable to plaintiff, despite the fact that defendant, after the parties' divorce, removed the children from West Virginia to Florida and obtained a court order requiring plaintiff to post $5,000 bond prior to taking the children for summer visits, after plaintiff had refused to return the children from a summer visitation. Settle v. Settle, 858 F.Supp. 610, 611, 613, 614.

S.D.W.Va.1990. Quot. in case quot. but dist., coms. (d) and (j) quot. but dist. Workers exposed to toxic chemicals at their employer's plants in Virginia and West Virginia sued their employer for damages alleging that they suffered emotional distress due to their increased risk of developing various diseases. Noting that West Virginia courts generally adhered to the principle of lex loci delicti in cases of physical injury, the district court applied Virginia law to the exposures that occurred in Virginia, and West Virginia law to those exposures occurring in West Virginia; it then determined that neither Virginia's nor West Virginia's workers' compensation statutes would bar plaintiffs from bringing a civil suit for damages from their occupational exposure to toxic chemicals. However, the court granted the employer's motion for summary judgment, holding that plaintiffs could not recover damages for emotional distress from mere exposure to toxic chemicals without evidence of a physical manifestation of injury, or evidence that the employer's intentional and outrageous conduct caused them severe emotional distress without physical injury. Ball v. Joy Mfg. Co., 755 F.Supp. 1344, 1369, affirmed 958 F.2d 36 (4th Cir.1991), cert. denied 502 U.S. 1033, 112 S.Ct. 276, 116 L.Ed.2d 780 (1992).

S.D.W.Va.1986. Com. (h) cit. in disc. An employee sued her former employer for slander, outrageous conduct, and breach of contract after she was accused of wrongdoing following a cash shortage discrepancy. Awarding the employer summary judgment, this court held that the facts were insufficient to support a theory of outrage because the defendant's conduct did not fall below generally accepted standards of decency and morality. McKinney v. K-Mart Corp., 649 F.Supp. 1217, 1220.

S.D.W.Va.1974. Cit. but not fol. In this diversity action a coal mine operator was sued for emotional and mental disturbance to the plaintiffs after flooding, due to dam failures, resulted in the deaths of the plaintiffs' decedents and damage to the plaintiffs' property, although the plaintiffs themselves were absent from the area at the time of the flooding. The trial court denied defendant's motion for partial summary judgment because material issues off act were found to exist as to whether the injuries were the result of intentional and wanton wrongful conduct of the defendant and also whether federal and state safety regulations were violated. Applying the substantive law of West Virginia, the court noted that the general rule of that state was similar to the Restatement in denying recovery for emotional and mental suffering alone, without physical injuries sustained by the party bringing the action. However the court followed cases allowing recovery for mental disturbance where no physical injury to the plaintiff was involved, so long as the defendant's conduct went beyond simple negligence, constituting rather an intentional or wanton wrongful act, as was alleged here. Prince v. Pittston Co., 63 F.R.D. 28, 33.

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W.D.Wis.

W.D.Wis.1994. Cit. in headnotes, cit. in sup., com. (d) quot. in sup., com. (j) cit. in sup. An African-American woman with a § 8 voucher sued a landlord who rejected her rental application. After the jury awarded plaintiff compensatory damages for emotional distress and judgment was entered for plaintiff, the court granted defendant's postverdict motion for judgment as a matter of law with respect to the compensatory damages award, which was vacated. The court concluded that a denial of a lease to a § 8 beneficiary was unfortunate, unpleasant, and an undermining of the goals of the federal housing programs, but it was not an invidious act that in and of itself rose to the level of tortious infliction of emotional distress, since it could not be characterized as extreme and outrageous conduct causing a person of ordinary sensibilities to experience severe emotional distress. Knapp v. Smiljanic, 847 F.Supp. 1428, 1430, 1435, 1436, affirmed 54 F.3d 1272 (7th Cir.1995).

D.Wyo.

D.Wyo.1997. Cit. But dist., com. (a) cit. but dist. Farmer whose pinto bean crops were insured at 805 pounds per acre sued insurer for, inter alia, negligent misrepresentation, alleging that an assignment of proceeds form sent from insurer to farmer's creditor contained a 999-pound-per-acre guarantee. Farmer, whose crops were damaged but not destroyed in a hail storm, also asserted a claim for intentional infliction of emotional distress. Insurer moved for summary judgment. Granting the motion, the court held, in part, that the claim for negligent misrepresentation failed because the assignment-of-proceeds form was not provided to farmer for his use, and because farmer did not rely on the information contained therein or suffer pecuniary loss as a result, and that insurer's conduct throughout its dealings with farmer was not sufficiently outrageous to support a claim for intentional infliction of emotional distress. Meyer v. National Farmers Union Prop. and Cas. Co., 957 F.Supp. 1492, 1504, affirmed 162 F.3d 1264 (10th Cir.1998). See above case.

D.Wyo.1994. Cit. in case quot. in sup. Former railroad employee sued railroad, asserting various claims arising from alleged sexual harassment and hostile working conditions, including one for intentional infliction of emotional distress. Denying in part defendant's motion to dismiss for failure to state a claim, the court held, inter alia, that, under Wyoming law, plaintiff had stated an emotional-distress claim by alleging that she was subjected to a hostile work environment that constantly degraded women, that she was required to work in an environment that included propositions for sexual favors, physical attack, verbal catcalls, and vulgarity as well as written comments of a sexual and perverted nature, and that she was subjected to pictures and sexual graffiti on defendant's facility walls, using plaintiff's name and suggesting her participation in lewd and lascivious acts. Bintner v. Burlington Northern, Inc., 857 F.Supp. 1484, 1492.

D.Wyo.1994. Cit. in case quot. in sup. Former employee sued employer under the Age Discrimination in Employment Act and asserted a claim for intentional infliction of emotional distress, inter alia, arising from his discharge. Granting defendant's motion for summary judgment,

the court held, in part, that plaintiff was not entitled to recovery for intentional infliction of emotional distress under a standard requiring proof of extreme and outrageous conduct causing severe emotional distress that no reasonable person could be expected to endure, where plaintiff alleged only that defendant caused him severe mental, physical, and emotional injuries and that plaintiff suffered a loss of reputation and was unable to find another job. Duart v. FMC Wyoming Corp., 859 F.Supp. 1447, 1464, judgment affirmed 72 F.3d 117 (10th Cir.1995).

D.Wyo.1993. Cit. in ftn., cit. in case quot. in sup. A discharged employee sued her former employer for outrage damages, among other claims. Denying the employer's motion to dismiss, this court held, inter alia, that as the allegations stated a claim under Wyoming law for intentional infliction of emotional distress, not retaliatory discharge, the claim was not preempted by the Mine Safety and Health Act. The court noted plaintiff's assertions that defendant's employees set about on a course to discredit her and make her life so miserable that she would terminate employment, and that the job environment was so stressful that her physician precluded her from going to work. Gustafson v. Bridger Coal Co., 834 F.Supp. 352, 354, 355.

Ala.

Ala.2023. Com. (d) quot. in case quot. in sup. Father of children who were in foster care and employer of father who assisted in caring for the children sued social worker, alleging that defendant conspired with the owner of a drug-screening laboratory to falsify the results of a drug test taken by plaintiffs, such that plaintiffs' ability to see the children was restricted. The trial court granted defendant's motion to dismiss. This court reversed in part and remanded, holding that plaintiffs stated a claim for outrage under Alabama law because, under Restatement Second of Torts § 46, Comment *d*, their allegations went beyond asserting that they suffered insults and indignities. The court explained that plaintiffs alleged that defendant maliciously colluded with the laboratory owner to smear them as drug addicts unfit to be around children, that this caused them severe emotional distress by stripping plaintiffs of their parental and caretaking rights, and that defendant damaged their reputation in the community. Avendano v. Shaw, 371 So.3d 278, 286.

Ala.2017. Com. (d) quot. in diss. op. Patient's daughter brought claims for intentional infliction of emotional distress (IIED) against doctors and hospital, alleging that doctors made callous remarks regarding patient's terminally-ill status. The trial court granted defendants' motion to dismiss. This court reversed and remanded, holding that the trial court erred by finding that IIED claims were recognized in only three situations. The dissent argued that, although the trial court had erred, plaintiff's claims failed as a matter of law, because doctors' remarks were mere insults and indignities as defined by Restatement Second of Torts § 46, Comment *d*, and did not constitute extreme or outrageous conduct necessary to establish an IIED claim. Wilson v. University of Alabama Health Services Foundation, P.C., 266 So.3d 674, 678.

Ala.2012. Com. (g) quot. in case quot. in sup. Widow of employee who died in a workplace accident brought a tort-of-outrage claim against decedent's employer and third-party administrator

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of employer's workers' compensation program, alleging that defendants unlawfully discontinued death-benefit payments to her with the intent to cause her severe emotional distress and force her to settle her claims against a third party. The trial court entered judgment on a jury verdict in favor of plaintiff. Vacating and dismissing, this court held, among other things, that the court in plaintiff's prior workers' compensation action against employer had exclusive jurisdiction over this action, because the issue in this action was whether employer's cessation of payments was lawful under an order issued in the prior action. The court cited the principle that an actor was never liable where he or she had done no more than to insist on his or her legal rights in a permissible way. Attenta, Inc. v. Calhoun, 97 So.3d 140, 147.

Ala.2012. Subsec. (1) and com. (d) quot. in case quot. in sup. Pastor emeritus of church sued lay member who was asked to organize church's financial records, alleging that defendant falsely accused him of misappropriating church funds. The trial court denied defendant's motion to dismiss. Granting defendant's petition for a writ of mandamus directing the trial court to grant the motion, this court held that the trial court lacked subject-matter jurisdiction over the action, because any legal inquiry by the court into the claims at issue would constitute an unconstitutional entanglement into matters of church governance in violation of the First Amendment's Establishment Clause and Free Exercise Clause. The court reasoned, in part, that plaintiff's claims for defamation, invasion of privacy, and intentional infliction of emotional distress were not limited to statements that defendant made after church issued its resolution removing plaintiff from the church, but were intertwined with church's investigation of plaintiff and its decision to remove plaintiff from the church. Ex parte Bole, 103 So.3d 40, 52.

Ala.2011. Com. (d) cit. and quot. in case quot. in sup. Black member of city council brought outrage claim against white city mayor in connection with a screaming match between the parties at city hall. The trial court granted defendant's motion to dismiss. Affirming, this court held that plaintiff's allegations that defendant referred to plaintiff's funeral during the confrontation, voted along racial lines in matters before the city council, and "regularly engaged in hate speech against African Americans," did not amount to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society. Little v. Robinson, 72 So.3d 1168, 1172, 1173.

Ala.2011. Com. (d) cit. in case quot. in conc. op. Patient sued physician who allegedly provided him with prescriptions for addictive medicines in exchange for sex, claiming the tort of outrage, inter alia. The trial court entered judgment on a jury verdict in favor of patient. Affirming, this court held that patient's tort-of-outrage claim was properly supported by substantial evidence that physician's conduct toward patient began when patient was a minor, that it was intentional and for physician's sexual gratification, that it took place both within and outside the doctor-patient relationship, and that it caused patient severe distress and profoundly impaired his ability to live a normal life. The concurring opinion agreed that patient's outrage claim was viable, since the conduct alleged and supported by substantial evidence was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society. O'Rear v. B.H., 69 So.3d 106, 124.

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Ala.2010. Com. (d) quot. in case quot. in sup. Former tenants of apartment complex sued landlord, entity that managed the complex, and others, alleging intentional infliction of emotional distress and other claims, after defendants sent plaintiffs 10-day notices of the termination of their leases, and threatened certain plaintiffs that they would be arrested, that their personal property would be forcibly removed from their apartments, and/or that their credit would be ruined by the process of eviction. The trial court granted summary judgment for defendants. Affirming as to the dismissal of plaintiffs' emotional-distress claims, this court held that, while defendants' conduct may have made plaintiffs' lives more difficult—and, in some cases extremely difficult—the 10-day termination notice and the threats towards some plaintiffs that accompanied it did not constitute conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society. Horne v. TGM Associates, L.P., 56 So.3d 615, 630.

Ala.2007. Com. (j) cit. in case quot. in sup. Former employee brought an action for breach of contract and outrage against former employer, after he was terminated as general counsel after more than 25 years of service in employer's legal department. The trial court, inter alia, granted judgment as a matter of law for defendant on plaintiff's outrage claim. This court affirmed as to that portion of the decision, holding that, while being discharged from his employment was certainly a personal crisis for plaintiff, a professional who had devoted his entire career to a company that decided it no longer needed his services, the circumstances of his discharge, including being asked to leave the premises immediately, not being able to say goodbye to his co-workers, and having his effects piled up in the hall outside his office, were not so shocking that they went beyond all bounds of decency. Carraway Methodist Health Systems v. Wise, 986 So.2d 387, 401.

Ala.2003. Com. (d) quot. generally in case quot. in sup. After stepfather sexually molested his stepdaughter's teenage friend during a sleepover, the friend's mother sued stepfather for assault and battery and intentional infliction of emotional distress. Trial court entered judgment on jury verdict for plaintiff. This court affirmed, holding, inter alia, that plaintiff produced substantial evidence from which a jury could determine that her daughter suffered severe emotional distress as a result of defendant's conduct. Plaintiff's evidence included daughter's testimony that she had been traumatized by the event, daughter's poems expressing her feelings of fear and guilt after the assault, and plaintiff's own description of daughter's emotional and angry behavior after the assault. Harrelson v. R.J., 882 So.2d 317, 321-322, 322.

Ala.2001. Com. (d) cit. generally in case quot. in sup. Nurse sued doctor for assault and battery, negligence or wantonness, and the tort of outrage, after doctor used profanity during surgery and threw a surgical drape containing patient's blood and surgical refuse at nurse, which required her to undergo blood tests for HIV for one year. Trial court granted defendant partial summary judgment on the outrage claim. This court affirmed in part, holding, inter alia, that plaintiff's allegations did not state conduct rising to level required to constitute tort of outrage. The mere fear of contracting a disease, without actual exposure to it, could not be sufficient to cause level of emotional distress

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necessary for this claim. Every blood test returned a negative result, and there was no evidence that plaintiff carried a communicable disease. Grantham v. Vanderzyl, 802 So.2d 1077, 1081.

Ala.2001. Cit. in case quot. in disc., cit. in diss. op., com. (d) cit. in case quot. in disc. After employee settled his workers' compensation claim, he brought suit for, in part, outrageous conduct against employer, insurer, and claims administrator. The trial court entered judgment on a jury verdict against insurer and administrator on the outrage claim. Affirming, this court held that the evidence was sufficient to find that defendants' conduct was outrageous, since defendants acknowledged that they were contractually obligated to provide medical care to plaintiff, but they withheld reasonable and necessary items ordered by authorized treating physicians. The dissent argued that the evidence was insufficient to show that defendants' handling of plaintiff's insurance-benefit claims amounted to outrageous conduct. Travelers Indemnity Co. of Illinois v. Griner, 809 So.2d 808, 810, 816.

Ala.2000. Cit. generally in case quot. in disc. Hospital nurse sued hospital and its administrator for, inter alia, the tort of outrage, based upon their submission of a letter to the state board of nursing. Trial court entered judgment on a jury verdict for plaintiff on her outrage claim. This court reversed, holding that the trial court erred in denying defendants' motion for judgment as a matter of law on the claim, because the evidence did not show the requisite level of outrageous conduct. The only evidence that plaintiff offered to show possible malice on the administrator's part was testimony by the hospital's business controller stating that the administrator never liked plaintiff. Potts v. Hayes, 771 So.2d 462, 465.

Ala.1997. Cit. in sup.; com. (d) cit. generally in headnote, quot. in sup., and cit. in case quot. in disc. A workers' compensation claimant sued a claims adjuster that had contracted with the claimant's employer's workers' compensation insurance carrier to handle ongoing medical-expense claims made by injured workers, asserting, in part, a claim for the tort of outrageous conduct. The trial court granted summary judgment for defendant, and the court of appeals reversed as to the outrage claim. Reversing and remanding, this court held that claimant did not produce sufficient evidence to avoid summary judgment on his claim, since he failed to show that defendant's conduct in delaying payment of his medical bills was so extreme and outrageous as to constitute the tort of outrage. Ex parte Crawford & Co., 693 So.2d 458, 458, 460, 461, on remand 693 So.2d 462 (Ala.Civ.App.1997).

Ala.1997. Com. (d) cit. generally in headnote and quot. in case quot. in disc. An insurer issued life insurance policies to a woman, as beneficiary, on the lives of the woman's sister and her son. The woman's brother then killed the son, and the son's estate filed a wrongful-death action against the insurer. Nine months after the insurer learned that the woman had forged the signature of her sister and the son on the insurance policy applications, the insurer notified the sister that the policy was canceled. The sister then sued the insurer for the tort of outrage, alleging that the insurer issued policy to a beneficiary in violation of its own rules and that it acted in spite by allowing the policy to remain in effect for nine months. Trial court granted defendant summary judgment but the appellate court reversed. This court reversed and remanded, holding that defendant's conduct

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was not sufficiently outrageous to substantiate an outrage claim. While there was some delay in defendant's decision to cancel the policy, a delay that some might view as unreasonable, defendant's conduct did not go beyond the bounds of decency. Moreover, plaintiff failed to present substantial evidence that defendant's delay caused her to suffer extreme emotional distress. Ex Parte Mutual Sav. Life Ins. Co., 698 So.2d 772, 773, 774, on remand 698 So.2d 775 (Ala.Civ.App.1997).

Ala.1995. Com. (g) quot. in case quot. in disc. Lumber company employee who was injured at work filed workers' compensation claim against employer and trial court granted employee permanent total disability benefits. Employer appealed and the administrator of employer's insurance plan discontinued making weekly workers' compensation payments. The appellate courts affirmed the disability finding. Employee then sued employer and insurer for intentional infliction of emotional distress, among other claims, alleging that defendants were guilty of wrongful conduct by failing to continue making weekly workers' compensation payments during the time required for appellate review and had caused him to suffer economic loss and severe mental anguish. Insurer petitioned the state supreme court for a writ of mandamus directing trial court to dismiss. This court denied insurer's petition, holding that it was unable to determine whether insurer had a clear legal right to have employee's outrage claim against it dismissed. It noted that insurer may have been acting within its legal rights when, in reliance on a stay obtained by employer, it discontinued the benefits. Ex Parte Lumbermen's Underwriting Alliance, 662 So.2d 1133, 1136.

Ala.1994. Com. (d) cit. in case quot. in disc. Crane operator who injured his back while at work sued his employer's workers' compensation carrier, alleging that defendant's failure to provide him with vocational rehabilitation benefits constituted outrageous conduct. Affirming the trial court's grant of summary judgment for defendant, this court held that considering that defendant's medical evaluation of plaintiff revealed that he was unable to perform 68% of the jobs to which he would have had access but for his injury, a denial of the claimed benefits was not atrocious or intolerable. The court believed that the evidence supported defendant's refusal to provide the requested benefits. McAfee v. Shredders, Inc., 650 So.2d 871, 873.

Ala.1993. Cit. but dist., com. (g) quot. in sup. Insured husband and wife sued insurer for tort of outrage for delay in settling auto accident claim. The trial court entered judgment on verdict for insureds. Reversing and rendering judgment for defendant, this court held that delay was not extreme and outrageous, since insurer did no more than permissibly insist upon its legal rights where insurer was not required to pay insureds until other driver's coverage was exhausted and insurer was required to defend other driver against insureds' action. The court noted that even had insurer's conduct satisfied requirements of the tort, insureds produced no evidence that wife suffered emotional distress so severe that no reasonable person could be expected to endure it. State Farm Auto. Ins. Co. v. Morris, 612 So.2d 440, 444.

Ala.1993. Com. (d) quot. in part in case quot. in sup. An independent contractor's employee sued the project engineer for the owner of the building in which he worked, the independent contractor, and another contractor after being exposed to asbestos during a remodeling project in the building,

alleging outrage, among other claims. Affirming summary judgment for the defendants, this court held, inter alia, that employee's generalized fear of contracting cancer from exposure to asbestos did not rise to the level of severe emotional distress necessary to support his claim of outrage, absent clinical evidence that he suffered some actual injury from the alleged exposure. It noted that, although owner may have failed to comply with certain regulations, there was evidence that owner's engineer personally warned independent contractor's project supervisor of the presence of asbestos in plaintiff's work area; therefore, engineer's conduct was not sufficiently reprehensible to support an outrage claim. Thomas v. BSE Indus. Contractors, Inc., 624 So.2d 1041, 1043-1044.

Ala.1992. Com. (d) quot. in case quot. in disc. Injured employee sued workers' compensation carrier for outrageous conduct, inter alia, after disputes arose between them regarding the amount of his weekly average wage and defendant's refusal to authorize back surgery. Affirming the trial court's granting of defendant's motion for summary judgment, this court held that defendant's conduct, without proof of improper motive on defendant's part, was not so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. Gibbs v. Aetna Cas. & Sur. Co., 604 So.2d 414, 417.

Ala.1992. Com. (d) quot. in case quot. in sup. An employee who was served alcohol at his employer's holiday party was injured in an accident caused by his intoxication while driving home. Employee sued employer for negligence and intentional infliction of emotional distress, claiming that his condition was caused by employer's pressuring him to drink and serving him alcohol even after he was visibly drunk. The trial court granted defendant summary judgment. This court dismissed the appeal, in part, on other grounds and affirmed that plaintiff did not have a cause of action for emotional distress. It concluded that defendant's conduct was not so extreme as to go beyond all possible bounds of decency, especially due to the fact that plaintiff voluntarily became intoxicated. Mohacsy v. Holiday Inns, Inc., 603 So.2d 956, 959.

Ala.1991. Cit. in case quot. in disc., com. (d) cit. in case quot. in disc. A worker was injured on the job when her hand was crushed between two steel doors. The worker sued the workers' compensation insurance carrier seeking workers' compensation benefits and alleging negligence, wantonness, bad faith, and outrageous conduct. The trial court granted the insurer's motion for summary judgment as to the claim of bad faith, and entered a directed verdict for the insurer on the claim of outrageous conduct. Affirming, this court held that the bad faith claim was barred by the exclusivity provisions of the state workers' compensation statute, and that the evidence presented was not sufficient to meet the standard of outrageous conduct. The court found that while the insurer's claims adjustment agents had an unsympathetic attitude toward the worker and gave her "the runaround" by sending her to various doctors and failing to pay her medical bills on time, the evidence did not rise to the level of outrageous conduct. Farley v. CNA Ins. Co., 576 So.2d 158, 159.

Ala.1990. Com. (l) quot. in sup. A doctor at a family planning clinic performed an abortion on a 15-year-old girl, in violation of a state statute requiring parental consent for abortions for minors,

when the girl misrepresented her age to be 18. The minor and her parents sued, among others, the family planning clinic, alleging the torts of outrage, trespass, and assault and battery. The trial court entered summary judgment for the defendants, holding that the minor's claim was barred by reason of her willful, affirmative misrepresentations and the parents' claim, being derivative in nature, was also barred by the minor's misrepresentations. Affirming, this court held, inter alia, that, based on the affirmative defense of in pari delicto, the minor was estopped from raising her claims because she had the capacity to be responsible for her misrepresentations. The court also determined that the parents could not recover for the tort of outrage because they were not present when the abortion was performed and they did not discover the fact of the abortion until several months after the abortion had been performed. Boykin v. Magnolia Bay, Inc., 570 So.2d 639, 643.

Ala.1990. Com. (d) quot. generally in case quot. in disc., com. (e) cit. in case quot. in disc. and quot. in disc., com. (f) quot. in disc. com. (g) cit. in case quot. in disc., com. (j) cit. generally in case quot. in disc. An injured worker sued his workers' compensation carrier for intentional infliction of emotional distress after the carrier allegedly delayed benefit payments in attempt to coerce him into settling for a small lump-sum settlement of his medical claim. The trial court entered judgment on the jury verdict for the plaintiff. Affirming, this court held that the trial court's instructions properly bore on the question of whether the carrier had insisted on its legal rights in a permissible way by contesting whether certain medical expenses were reasonably necessary. The court also rejected the defendant's argument that the evidence did not support a claim for intentional infliction of emotional distress, stating that the evidence supported a finding that the carrier systematically withheld payments in order to cause the plaintiff anguish over the possibility of the cessation of medical treatments for his pain and thereby to cause him to accept a method of payment that would not subject him to the carrier's "aggravation." Continental Cas. Ins. Co. v. McDonald, 567 So.2d 1208, 1211, 1217, 1219-1220.

Ala.1990. Com. (d) cit. in case quot. in sup. While a husband and wife were undergoing counseling by a social worker, the wife told the social worker that she wanted to have an affair with him. The social worker declined, but after he had stopped counseling the couple, did begin an affair with the wife. The husband sued the social worker for, inter alia, outrage, and the trial court granted summary judgment for the social worker. This court affirmed, holding that consensual sexual relations between adults within the context of an extramarital affair, absent any professional relationship or duty and without a malicious intent to inflict harm on another, may well be morally or socially repugnant but did not constitute outrageous conduct. Perkins v. Dean, 570 So.2d 1217, 1219.

Ala.1990. Cit. in case quot. in disc., cit. generally in case quot. in disc., coms. (d), (e) and (f) quot. in case quot. in disc. A doctor determined that a bartender, who was injured when she slipped and fell at work, had aggravated an earlier preexisting condition. The bartender sued her employer and its insurance carrier for, inter alia, the torts of outrageous conduct and bad faith refusal to pay a claim, when the carrier terminated the workmen's compensation claim after making several payments. The trial court denied the defendants' motions for summary judgment on the outrageous conduct count and dismissed the bad faith claim. Reversing in part as to the denial of the summary

judgment motions and rendering judgment for the defendants, this court held that the carrier's conduct of stopping the payment of the claim did not qualify as outrageous. The court found that the denial of the claim with no arguable reason for doing so, shortly before the bartender's scheduled hip surgery, was not so outrageous as to go beyond all possible bounds of decency. Wooley v. Shewbart, 569 So.2d 712, 715-717.

Ala.1989. Com. (d) cit. in case quot. in disc., com. (g) quot. in case cit. in disc. A woman sued a married man with whom she had had an affair for outrage, inter alia, claiming that the defendant enticed her with promises of marriage to move to another city, had a sexual affair with her, causing her to become pregnant, convinced her to have an abortion, and then informed her that he intended to end their business and personal relationships. The trial court granted the defendant summary judgment. Affirming, this court held that the defendant's illicit relationship with the plaintiff, though not encouraged by the law, and even though they were initially in an employer-employee relationship, did not constitute outrageous conduct. Further, the defendant did not force the woman to have an abortion, since she was a mature adult and could have decided otherwise. The court also said that the defendant's termination of the affair and the business relationship was not outrageous conduct and that the defendant had the legal right to attempt to save his marriage, even if the plaintiff was distressed thereby. Harris v. McDavid, 553 So.2d 567, 570.

Ala.1989. Cit. in disc. An injured employee who entered into a settlement agreement for medical care reimbursement with her former employer's workers' compensation insurer sued the insurer for outrageous conduct when it refused to make reimbursements on any new medical bills after it learned that the employee was injured at her new job. The trial court entered summary judgment for the defendant. Affirming, this court held that, even when viewed in a light most favorable to the plaintiff, the evidence created no genuine issue that the defendant's conduct was outrageous or extreme. Nabors v. Travelers Ins. Co., 551 So.2d 308, 310.

Ala.1988. Com. (d) quot. in part in case quot. in disc., subsec. (1) quot. in case quot. in disc. A decedent's father sued the physicians who cared for his daughter, alleging fraud, wrongful death, breach of contract, and outrage. The trial court granted the defendants' motion for summary judgment. This court affirmed, holding in part that the defendants were entitled to summary judgment on the plaintiff's claim of outrage. The court described the tort of outrage as intentional or reckless outrageous conduct that caused severe emotional distress. Gallups v. Cotter, 534 So.2d 585, 588.

Ala.1988. Cit. in case quot. in disc., com. (d) cit. in disc. and in sup., com. (j) cit. in disc. A medical insurance company, on discovering that the insured had misstated his medical condition at the time he applied for insurance, sought a declaratory judgment that the insurance contract was properly rescinded and that there was no coverage for the insured's hospitalization expenses. The insured counterclaimed that the insurer's outrageous conduct had caused him severe emotional distress. The trial court granted summary judgment to the defendant. Affirming, this court held that there was no evidence that the insurer intended to cause the insured severe emotional distress, and that the insurer's rescission of the policy and denial of coverage were insufficient conduct to meet

the standard of extreme and outrageous conduct required for a cause of action for intentional or reckless infliction of severe emotional distress. Kizziah v. Golden Rule Ins. Co., 536 So.2d 943, 948.

Ala.1987. Cit. in disc., com. (d) cit. in disc. A mother sued a hospital for intentional infliction of emotional distress, alleging that its employees had taken and held her baby until the hospital bill was paid. The trial court granted the defendant's motion to dismiss on the ground that the statute of limitations had run. Affirming, this court held that a two-year statute of limitations for trespass on the case and other torts not elsewhere specified under the statute providing a six-year statute of limitations for trespass to the person applied to bar the plaintiff's claim. The court reasoned that the tort of intentional infliction of emotional distress was not enumerated under the six-year statute and, furthermore, that it was indirect, thus coming within the trespass-on-the-case class of torts. Archie v. Enterprise Hosp. & Nursing Home, 508 So.2d 693, 694, 695.

Ala.1987. Com. (d) cit. in case quot. in disc. A buyer received a certificate for a 20% discount on funeral services rendered by a particular funeral home in exchange for purchasing a cemetery plot and a burial vault. After the funeral home refused to honor the 20% discount certificate, the buyer sued the cemetery and the funeral home, alleging fraud and outrageous conduct. The trial court granted the defendants' motions for summary judgment on both claims. Affirming in part, reversing in part, and remanding, this court held that the trial court did not err in granting the defendants' motions for summary judgment on the claim for outrageous conduct. The court reasoned that the conduct of the funeral home and the cemetery in refusing to honor the certificate for discount funeral services was not so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized society. Crowder v. Memory Hill Gardens, Inc., 516 So.2d 602, 606.

Ala.1986. Com. (d) quot. in sup. and cit. in case quot. in disc. A male radio station president/owner requested a female employee to have an affair with him; after she refused, he continued to make minor advances toward her for several months. When the business went up for sale, the employee was told by her immediate manager that she would be fired for refusing the president/owner's advances. The employee sued the president and the station for intentional infliction of emotional distress and invasion of privacy. The trial court granted summary judgment for the defendants. This court affirmed, holding that, as a matter of law, the behavior complained of constituted only mere insults, indignities, threats, and annoyances, and was not actionable in tort as extreme and outrageous conduct. McIsaac v. WZEW-FM Corp., 495 So.2d 649, 651.

Ala.1986. Cit. in case quot. in disc., com. (d) cit. in case quot. in disc. An injured insured sued her insurance company for outrageous conduct in handling and denying her claim for personal injuries resulting from an automobile accident. The trial court granted summary judgment for the defendant for the tort of outrageous conduct. Affirming, this court held that there was nothing in the record that showed the defendant's conduct to be so extreme in degree as to go beyond all bounds of decency, which is the standard required for recovery under this tort. Nabors v. St. Paul Ins. Co., 489 So.2d 573, 574.

Ala.1986. Com. (d) quot. in sup. An employee sued his employer and another employee for assault and battery, defamation, conspiracy, and outrageous conduct after he was allegedly harassed on the job and during grievance proceedings resulting from a disagreement with the project superintendent. The trial court found for the plaintiff on all counts, except that a verdict was directed against the plaintiff on the outrageous conduct claim. This court affirmed the directed verdict for the defendant on the outrageous conduct charge, since the plaintiff failed to carry his burden of proof. The court reasoned that the standard for outrageous conduct was conduct so extreme as to go beyond all bounds of decency; the incidents alleged by the plaintiff of pushing and name-calling did not support this theory. Surrency v. Harbison, 489 So.2d 1097, 1105, 1106.

Ala.1985. Cit. in sup. During a telephone conversation, the defendant's employee told a third person that the plaintiff, an admitted homosexual, was as queer as a three-dollar bill. The plaintiff sued for intentional infliction of emotional distress. The trial court granted the defendant summary judgment, and this court affirmed. It held that the defendant's conduct was not so extreme and outrageous as to be considered atrocious in a civilized community. Logan v. Sears, Roebuck & Co., 466 So.2d 121, 122.

Ala.1985. Com. (d) quot. in conc. and diss. op., cit. in case quot. in conc. and diss. op., com. (h) quot. in conc. and diss. op. The plaintiff suffered a miscarriage one week after her employment was terminated, allegedly for her refusal to take disability leave. The plaintiff sued for intentional infliction of emotional distress. The trial court dismissed the complaint. This court affirmed in part, reversed in part, and remanded, holding that the plaintiff could prove facts that supported an intentional infliction of emotional distress. The concurring and dissenting opinion argued that the defendant's conduct was not so extreme and outrageous as to be considered intolerable in a civilized community. It noted that liability for the tort of outrage does not extend to mere insults, threats, or other trivialities and that the court determines in the first instance if the defendant's conduct is so extreme and outrageous. Rice v. United Ins. Co. of America, 465 So.2d 1100, 1104.

Ala.1984. Com. (d) quot. in sup., and quot. in case quot. in sup. Plaintiffs sued defendant bank, alleging fraud, conversion, and outrage in a transaction involving the payment of a check for the proceeds of an insurance policy. Plaintiffs appealed summary judgments on all three counts. This court reversed the summary judgments on the counts of fraud and conversion, noting the existence of issues of material fact. The court affirmed the summary judgment on the count of outrage, finding that defendant's behavior at most extended to insults, indignities, or annoyances, for which it could not be held liable in tort. Barrett v. Farmers & Merchants Bank, 451 So.2d 257, 262, 263-264.

Ala.1984. Subsec. (1) quot. in sup., com. (d) quot. in part in sup. A construction company brought an action against the insured and the insurer for repair work done on the insured's property. The insured appealed from a summary judgment granted in favor of his codefendant insurer on his cross-claim for damages for outrage and bad faith. This court affirmed the summary judgment, holding, on the outrage claim, that the trial court properly withheld that count from the jury because

nothing in the insurer's actions amounted to conduct so outrageous and extreme as to have been utterly intolerable in a civilized society. Tyson v. Safeco Ins. Companies, 461 So.2d 1308, 1311.

Ala.1983. Quot. in case quot. in sup., coms. (d) and (g) cit. in case cit. in disc., com. (g) and illus. 14 cit. but dist. The plaintiffs brought an action under the torts of invasion of privacy and outrage, alleging that 30 minutes before the scheduled funeral, the defendants wrongfully refused to allow the plaintiffs to bury their father in a cemetery lot which the defendants orally gave for that purpose. As a result of the refusal, the graveside services had to be conducted at an undug grave. The trial court granted the defendants' motion for summary judgment and the plaintiffs appealed. After this court found the plaintiffs' claim for invasion of privacy to be without merit, it stated that to be actionable under the tort of outrage, the conduct involved here had to be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society. The court held that if the facts alleged by the plaintiffs were found to be true, they stated a cause of action for outrageous conduct, because the defendants' actions 30 minutes before the funeral and the consequent disruption of the funeral fit the description of outrageous conduct. The defendants argued that they were not liable because they were asserting a legal right in a permissible way, even though the assertion was certain to cause emotional distress. The court responded that even if the oral gift did not effectively pass legal title, or was properly revoked, the defendants could not bring about the plaintiffs' predicament and then seek to shield themselves behind their claim of legal title to the disputed lot. Thus the court held that the defendants were not protected by the principle they asserted. The judgment was affirmed in part, reversed in part, and the case remanded. Cates v. Taylor, 428 So.2d 637, 640, 641.

Ala.1983. Cit. in sup., quot. in case quot. in sup., cit. and quot. in conc. and diss. op. A gas company customer sued a gas company under several theories, including conversion and outrageous conduct, after the company failed to return an LP gas regulator it had removed from her tank. The lower court entered judgment for the customer and denied the company's motion for directed verdicts, and the company appealed. This court held that the question of whether the removal of the regulator from the customer's tank constituted conversion was properly submitted to the jury. However, the gas company's failure to deliver the regulator for nine days during bitterly cold weather did not constitute outrageous conduct. The case was reversed and remanded with directions. A concurring and dissenting opinion maintained that there was sufficient evidence to submit the outrageous conduct claim to the jury. Empiregas, Inc. of Gadsden v. Geary, 431 So.2d 1258, 1261, 1262.

Ala.1980. Cit. and quot. in disc., com. (d) cit. in sup., coms. (b), (d) and (g) quot. in part in sup. and com. (j) quot. generally in sup. The plaintiff was employed by the defendant who accused the plaintiff of dishonest conduct, such an the mishandling of certain files. The plaintiff's employment was terminated and the plaintiff subsequently sued alleging that the defendant had engaged in extreme and outrageous conduct intentionally or recklessly causing severe emotional distress to the plaintiff. The trial court found in favor of the plaintiff and the defendant appealed. This court stated that one who causes severe emotional distress, by extreme and outrageous conduct intentionally or recklessly engaged in, is liable for any emotional distress caused to another. The rule applies only

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to extreme and outrageous conduct, not to petty oppressions, indignities, threats or trivialities. The court held that the facts in this case were not so outrageous as to warrant the application of the rule. The court found that the defendant did not intend to cause such distress in the plaintiff. The court therefore held that the trial court erred by overruling the defendant's motion for a directed verdict and, accordingly, reversed and remanded. American Road Serv. Co. v. Inmon, 394 So.2d 361, 362-365, 368.

Ala.1980. Cit. in disc. and com. (d) cit. in sup. The plaintiffs were told that their son, who was under arrest, had attempted suicide while in his jail cell and had been sent to a hospital. At the hospital, the plaintiffs were told that their son had died. One hour later, when members of the family went to identify the body, it was discovered that a mistake had been made and that their son was alive and still in jail. The plaintiffs then brought this action against the defendants claiming damages on the basis of emotional stress and mental anguish incurred as the result of the defendants' extreme and outrageous conduct. The lower court awarded a directed verdict for the defendants on the ground that the plaintiffs had not met the notice provisions of this state's statute. On appeal, this court held that the lower court's reliance on the statute was erroneous but nevertheless affirmed the directed verdict for the defendant. The court found that although the plaintiffs had suffered some degree of emotional stress from the alleged incident, the defendants' conduct was neither so outrageous nor extreme as to be regarded as atrocious and utterly intolerable. The court also found that there was no evidence that the defendants did anything but commit an unintentional mistake. Additionally, the plaintiffs failed to demonstrate any knowledge on the part of defendants as to plaintiffs' susceptibility to distress. The court therefore held that, in the absence of any of these elements, the trial court was justified in granting the defendants a directed verdict on the outrageous conduct claim. Peddycoart v. City of Birmingham, 392 So.2d 536, 537, 538, 540.

Ala.1972. Quot. in sup. in diss. op. In this action plaintiff sued for damages resulting from ill effects she alleged were caused by rough and abusive language used towards her by defendant in her own home. Defendant had charged that she lied on an insurance application. The court held that words alone do not give plaintiff a cause of action unless connected with some traditional tort such as assault or slander. The dissent maintained that the intentional or reckless infliction of mental distress is a separate actionable tort. Hammer v. Bradley, 289 Ala. 624, 270 So.2d 81, 87.

Ala.App.

Ala.App.2019. Quot. in sup.; coms. (e), (f), and (g) quot. in cases quot. in sup. After suffering severe physical, mental, and emotional damages from a workplace accident, employee brought claims of intentional infliction of emotional distress (IIED) against, among others, workers' compensation insurer and case manager, alleging that defendants callously abused his vulnerable state in order to coerce him into accepting fewer workers' compensation benefits than he was entitled to by, among other things, refusing to refer him to psychiatric treatment and controlling the course of his treatments with his assigned physician. The trial court granted defendants' motion to dismiss. This court reversed and remanded, holding that plaintiff alleged sufficient facts that

defendants' conduct was extreme and outrageous under Restatement Second of Torts § 46, as required to sustain his IIED claim. Swain v. AIG Claims, Inc., 295 So.3d 1072, 1093-1095, 1097.

Ala.App.2017. Coms. (d) and (g) quot. in case quot. in conc. op. Former employee who was terminated after she suffered a work-related injury sued former employer, seeking workers' compensation benefits and damages for the tort of outrage and retaliatory discharge. The trial court granted employer's motion to dismiss employee's claim asserting the tort of outrage and certified that dismissal as final and appealable. This court dismissed employee's appeal, finding that the trial court erred in certifying the order as final, because the tort-of-outrage claim was so closely intertwined with the retaliatory-discharge claim that there was a probability of repeated appellate review of the same underlying facts. The concurring opinion cited Restatement Second of Torts § 46 in noting that, while the tort of outrage did not require as part of its elements proof of a work-related injury, it was employee's work-related injury and employer's alleged refusal to provide her with medical benefits that formed the factual basis of her tort-of-outrage claim. Kirby v. Jack's Family Restaurants, LP, 240 So.3d 607, 615.

Ala.App.2008. Com. (d) quot. in case quot. in sup. Wife sued her late husband's doctor for, among other things, intentional infliction of emotional distress, alleging that doctor improperly caused her employer to terminate her employment after a jury returned a verdict in her favor in her prior wrongful-death and medical-malpractice action against doctor concerning her husband's death. The trial court granted defendant's motion to dismiss. Affirming in part, this court held, inter alia, that plaintiff's tort-of-outrage claim failed because defendant's alleged conduct in causing plaintiff to lose her job was not so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community. Thomas v. Williams, 21 So.3d 1234, 1238, 1239.

Ala.App.2007. Com. (d) quot. in case quot. in sup. Owners of home brought quiet-title action against the home's occupiers, former friends whom owners had allowed to live in the home, until their relations with these friends turned sour; occupiers counterclaimed for intentional infliction of emotional distress (IIED), inter alia. The trial court granted summary judgment for owners on the IIED counterclaim. This court affirmed as to that claim, holding that, even if owners maliciously and falsely filed a police report asserting that occupiers forged a document evidencing a promised life estate, such actions would not provide a proper basis for an IIED claim; additionally, even if owners' alleged conduct in burgling the house reached the level of outrageousness required by this tort, occupiers did not show that they suffered severe emotional distress. Hurst v. Cook, 981 So.2d 1143, 1157.

Ala.App.1999. Com. (d) cit. in case quot. in sup. A woman and her family sued a police officer, the city, and others for the tort of outrage, among other claims, alleging that she had received obscene telephone calls from the officer. Trial court granted defendants summary judgment. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that the trial court erred in entering summary judgment on plaintiffs' outrage claim. Because defendant was a police officer, the public placed its trust in him to an extent far greater than it did in almost any other individuals

in any other profession. If a jury determined that the officer was making obscene phone calls to plaintiffs, then it should determine whether the officer's breach of public trust was so outrageous that it went beyond the bounds of decency. Woodley v. City of Jemison, 770 So.2d 1093, 1096.

Ala.App.1998. Com. (d) quot. in case quot. in sup. and cit. in headnote. A waste service employee who was injured on the job was fired after he unsuccessfully attempted to get his employer to reimburse him for workers' compensation benefits. The employee sued the employer and two co-workers for, among other claims, the tort of outrage. Plaintiff alleged that one of the co-workers constantly watched him to validate the suspicion that plaintiff was faking his injury. The trial court granted defendants summary judgment. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that plaintiff failed to state an emotional-distress claim, because defendants' conduct was not extreme and outrageous. Buzbee v. Alabama Waste Services, Inc., 709 So.2d 61, 61, 67.

Ala.App.1998. Com. (d) cit. in case quot. in disc. Customer and his wife sued a store for intentional infliction of emotional distress, inter alia, alleging that store employees yelled at them and detained them in the belief that the customers were price checkers for a competing store. Trial court entered judgment for the store. This court agreed with the trial court that the conduct of the store's employees, though possibly insulting and embarrassing to plaintiffs, did not amount to outrageous conduct, but reversed and remanded on other grounds. DeLeon v. Kmart Corporation, 735 So.2d 1214, 1216, 1217.

Ala.App.1997. Com. (d) quot. in cases quot. in disc. Former employee sued former employer for intentional infliction of emotional distress, alleging that defendant made racially derogatory comments about her. The trial court granted defendant's motion for summary judgment. Affirming, this court held that whatever mental distress plaintiff might have suffered was insufficient to support recovery under a theory of intentional infliction of emotional distress. Johnson v. Fambrough, 706 So.2d 739, 741, 742.

Ala.App.1997. Com. (g) quot. in case cit. in ftn. Passenger who was injured in an automobile being driven by a drunk driver sued her insurer to recover underinsured-motorist (UIM) benefits. Defendant moved for summary judgment on the ground that plaintiff's decision to settle with driver's insurer for an amount less than the available limits of driver's coverage defeated her claim for UIM benefits. The trial court denied the motion and entered judgment on a jury verdict for plaintiff. Affirming, this court held that where, as here, a policy exclusion was more restrictive than the uninsured-motorist statute, it was void and unenforceable. To the extent defendant relied on an earlier case in which it was a party for the proposition that it had no duty to pay plaintiff UIM benefits, its reliance was misplaced, as that case was an action for outrage where defendant was doing no more than insisting upon its legal rights in a permissible way. State Farm Mut. Auto Ins. Co. v. Scott, 707 So.2d 238, 243.

Ala.App.1995. Com. (d) cit. in case quot. in disc., com. (j) cit. generally in case quot. in disc. A workers' compensation claimant sued a claims adjuster that had contracted with the claimant's

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employer's workers' compensation insurance carrier to handle ongoing medical expense claims made by injured workers, asserting, in part, a claim for the tort of outrageous conduct. Reversing in part the trial court's grant of summary judgment for defendant, this court held, inter alia, that a fact question as to whether defendant's delay in paying claimant's medical bills was unreasonable and was an attempt to coerce claimant into settling his claim for future medical benefits precluded summary judgment on claimant's outrage claim. Jones v. Crawford & Co., 693 So.2d 454, 456, reversed 693 So.2d 458 (Ala.1997). See case above.

Ala.App.1985. Cit. in disc., cit. in sup., quot. in case quot. in sup., coms. (d) and (h) quot. in disc. A contractor sued a homeowner for work he performed under contract that the homeowner did not pay for because of dissatisfaction. The homeowner filed a counterclaim, alleging, inter alia, that the contractor intentionally inflicted the homeowner and her children with severe emotional distress. The trial court dismissed the homeowner's emotional distress claim, and rendered judgment for the contractor. The court of appeals affirmed the dismissal of the emotional distress claim, holding that the homeowner's allegations of tar and water damage to her home, and of improper wiring that caused electricity balls to fly through her home were related to breach of contract and negligent performance claims, and therefore were not sufficient to satisfy the requirement of extreme and outrageous conduct on the part of the contractor. Collins v. Henderson, 480 So.2d 1246, 1247, 1248.

Ala.Civ.App.

Ala.Civ.App.1982. Subsec. (1) quot. in sup. and com. (j) cit. in sup. The plaintiff, a former employer, brought an action against former employees, husband and wife, alleging failure on the part of the husband to pay for delivered products and fraud on the part of the wife, the employer's former bookkeeper. The employer asserted that the wife failed to record product deliveries made to the husband and purposely recorded payment for the husband's bills when no payment had actually been received. The wife was relieved of her employment and was later threatened with criminal prosecution. Such criminal prosecution never occurred. The employer filed this civil action, and the wife filed a counterclaim in which she contended, under the tort of outrage, that she had suffered severe emotional distress due to the conduct of the employer in dismissing her and threatening her with criminal prosecution. The wife cited her nervousness, lost sleep, and crying spells as evidence of her emotional distress. The employer's motion for a directed verdict on the wife's counterclaim was denied, and a jury trial resulted in a substantial damages award for the wife. The employer's motions for judgment n.o.v. or a new trial were also denied, and the employer appealed. This court reversed the trial court's judgment and ruled for the employer. Quoting the Restatement, this court ruled as a matter of law that the wife had failed to satisfy the elements of the tort of outrage. The wife did not offer sufficient evidence to prove that the employer's conduct caused her emotional distress. Neither was the emotional distress complained of severe enough to trigger the employer's liability. Finally, this court questioned whether the employer's conduct was sufficiently outrageous to be tortious. The employer prevailed because of a failure of proof of the wife's case. U.S.A. Oil, Inc. v. Smith, 415 So.2d 1098, 1100, 1101, writ denied 415 So.2d 1102 (1982).

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Alaska

Alaska, 2016. Com. (d) quot. in case cit. in ftn.; com. (g) quot. in sup. and cit. in ftn. Employee and his wife filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against law firm of employee's employer's workers' compensation insurer, based on defendant's conduct during a workers' compensation hearing on employer's petition to terminate employee's benefits. The trial court granted defendant's motion for judgment on the pleadings. Citing Restatement Second of Torts § 46, Comment *d*, this court reversed, holding that plaintiffs' allegations were sufficient to plead an IIED claim. The court noted that, although, under § 46, Comment *g*, a defendant's conduct could be absolutely privileged if the defendant did no more than to insist upon the defendant's rights in a permissible way, plaintiffs alleged actions on the part of defendant that were impermissible under the law and therefore not privileged. Cornelison v. TIG Insurance, 376 P.3d 1255, 1278, 1279.

Alaska, 2007. Subsec. (1) cit. in ftn. and adopted in case cit. in ftn., com. (d) quot. in case cit. in ftn. Radio listener brought, in part, claim for intentional infliction of emotional distress (IIED) against radio host and his producer, after host read listener's letter of complaint on the air while making derogatory and sexually explicit remarks about her. The trial court, inter alia, entered judgment on a jury verdict for defendants on the IIED claim. This court reversed and remanded for a new trial on the claim, holding, inter alia, that the trial court erred by instructing the jury that plaintiff was required to prove that host's speech fell under one of two exceptions to protected speech—the "fighting words" exception or the exception for publication of private factual information, both equally inapplicable; conduct consisting of speech could satisfy the "extreme and outrageous" element of an IIED claim if a jury found that the speaker intended to harass by provoking a widespread audience to react with hostility toward the target of humiliating and demeaning comments. State v. Carpenter, 171 P.3d 41, 58, 60.

Alaska, 2005. Com. (j) cit. in ftn. to conc. op., com. (d) quot. in ftn. to conc. op. Inmate brought claims for intentional infliction of emotional distress and unlawful termination against correctional officer and state corrections department after he was fired from his job as a prison barber by means of a racially and sexually offensive memo from officer. The trial court, inter alia, dismissed the emotional-distress claim. This court affirmed, holding, inter alia, that any error that occurred in the dismissal was harmless. The concurring opinion argued that the trial court properly dismissed the claim based on plaintiff's failure to show he experienced any emotional distress beyond a vague, generalized fear or annoyance that was insufficient to meet the claim's threshold requirement of severe emotional distress. Jones v. State, Dept. of Corrections, 125 P.3d 343, 351, 353.

Alaska, 2001. Quot. in ftn., subsec. (1) cit. in case cit. in ftn., com. (d) quot. in sup. and cit. in ftn. Employee sued employer for constructive discharge and intentional infliction of emotional distress, among other claims, alleging that after he sued employer to recover unpaid overtime and pension plan payments, employer engaged in a pattern of harassment and retaliation designed to

force his resignation. Trial court granted employer summary judgment. This court affirmed in part, holding, inter alia, that employee failed to make out a viable emotional-distress claim, because employer's conduct was not extreme and outrageous. The record revealed no more than insults, indignities, threats, annoyances, and petty oppressions. Finch v. Greatland Foods, Inc., 21 P.3d 1282, 1288, 1289.

Alaska, 2001. Cit. in case cit. in ftn., com. (d) cit. and quot. in ftn. Woman sued her neighbors for intentional infliction of emotional distress, alleging that neighbors painted Biblical passages and citations in large print on their roof for vexatious and retaliatory purposes. Trial court dismissed, and this court affirmed, holding, inter alia, that neighbors' conduct was not sufficiently outrageous to give rise to an emotional-distress claim. The court distinguished other cases that involved multiple, concerted efforts to seriously damage a plaintiff's well-being and reputation. Lybrand v. Trask, 31 P.3d 801, 803-805.

Alaska, 1999. Cit. generally in sup. Employee sued employer for, inter alia, "intrusion upon seclusion" invasion of privacy and intentional infliction of emotional distress, alleging that defendant's searches of certain employees' personal property were based exclusively on race. The trial court entered judgment on a jury verdict for plaintiff. Affirming, this court held, in part, that the evidence supported the finding that the searches were performed for an unlawful reason and in an unreasonable manner, that plaintiff was not required to establish the existence of an independent illegal motive, and that a reasonable factfinder could have found that defendant's conduct was extreme and outrageous. Wal-Mart, Inc. v. Stewart, 990 P.2d 626, 634-635.

Alaska, 1997. Com. (g) quot. in disc. The owners of a liquor store sued the deceased manager's wife, seeking an accounting of the management fee. The wife counterclaimed for fraud, inter alia, alleging that the agreement between the parties was not a management agreement but a sales agreement. The jury returned a verdict for the wife. This court reversed, holding, inter alia, that no reasonable juror could find that the parties entered into an agreement to sell the store. The court also held that the wife could not recover damages for intentional infliction of emotional distress. Since the owners did not agree to sell the store to the manager and his wife, the wife's contractual rights to run the store ended upon her husband's death. Therefore, the owners could not be held liable for the wife's emotional distress, because the owners were legally entitled to inform her that the contract with her husband ended upon his death and to protect their interests regarding the management of their store. Nome Commercial Co. v. Nat. Bank of Alaska, 948 P.2d 443, 449.

Alaska, 1996. Subsec. (1) cit. in case quot. in ftn. Individual whose personal photographs and videotapes were seized by city police during a drug raid and subsequently destroyed brought action against city to recover damages for the loss. The trial court excluded evidence of the items' sentimental and emotional value, then entered judgment on a jury verdict awarding plaintiff $771. Vacating and remanding, this court held that evidence of sentimental and emotional value was properly excluded, but that the correct measure of damages was the value of the items to plaintiff, as judged by his cost of reproduction and replacement. The court noted that, while a minority of jurisdictions factored in the sentimental value of converted or destroyed chattels, Alaska did not

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award sentiment-based damages absent an allegation of intentional infliction of emotional distress. Landers v. Municipality of Anchorage, 915 P.2d 614, 619.

Alaska, 1995. Quot. in case quot. in disc., com. (d) quot. in case quot. in disc. Woman sued her doctor for, among other claims, intentional infliction of emotional distress for misdiagnosis of AIDS, alleging that doctor failed to acquire her consent for the HIV test and informed her husband of the test results without her authorization. Trial court directed a verdict against plaintiff. This court affirmed in part and reversed in part, holding, inter alia, that plaintiff could not recover for intentional infliction of emotional distress, because no reasonable juror could find defendant's actions to be extreme, outrageous, or reckless. Although doctor could have emphasized that the positive test result did not prove anything and that further testing was necessary, his failure to do so was not outrageous. It could not be said that conducting a blood test on a hospitalized patient and informing patient's husband of the test results created a high probability of causing severe emotional distress. Chizmar v. Mackie, 896 P.2d 196, 208, appeal after remand 965 P.2d 1202 (Alaska 1998).

Alaska, 1995. Subsec. (1) quot. in case quot. in sup. The mother of a murder victim sued the state for intentional and negligent infliction of emotional distress, alleging that if the police had been more diligent in pursuing the victim's medical records and the mother's identification of the victim's jewelry, and had more carefully scrutinized the information available about the victim, the clothing site, and the remains, they could have more quickly identified the remains as the victim's. Trial court granted the state summary judgment. This court affirmed, holding, inter alia, that the state's conduct was not so outrageous in character or extreme in degree as to constitute intentional infliction of emotional distress. The state's conduct of the investigation exhibited, at most, a lack of diligence and organization that perhaps could be characterized as negligent. Hawks v. State, Dept. of Public Safety, 908 P.2d 1013, 1015.

Alaska,1990. Cit. in case quot. in disc., cit. generally in disc. and in ftn., com. (d) cit. and quot. in ftn., com. (h) quot. in ftn. A former security officer at a university sued his supervisor for intentional infliction of emotional distress, alleging that he suffered stress-induced depression and post-traumatic stress reaction disorder as a result of the defendant's harassment. The university was permitted to intervene. The trial court granted the defendants' motion for summary judgment. Reversing and remanding, this court held that the evidence that the defendant supervisor unjustifiably pursued a two-year private vendetta that caused the plaintiff substantial emotional distress raised an issue of fact as to whether the defendant's conduct could reasonably be regarded as sufficiently outrageous to permit recovery for intentional infliction of emotional distress. King v. Brooks, 788 P.2d 707, 710, 711.

Alaska,1989. Cit. in case cit. in disc., cit. generally in sup., com. (d) quot. in sup. Lessees who operated a marina sued the lessors as the result of a family dispute over the terms of the lease and claimed intentional infliction of emotional distress, inter alia, alleging that the colessees' lessor-father had harassed the lessees about the operation of the marina. The trial court entered judgment for the lessees. Affirming in part, this court held that the conduct of the lessor-father in intentionally

driving recklessly and skidding into the front of the lessee-daughter's car after an argument and in throwing temper tantrums in the marine office satisfied the element of outrageous behavior, even in the context of intrafamily relations. Oaksmith v. Brusich, 774 P.2d 191, 200.

Alaska, 1988. Subsec. (1) quot. in sup. and cit. in ftn. in sup.; coms. (d), (i), and (k) quot. in ftn. in sup.; illus. 1 and 2 quot. in ftn. in sup. and cit. in case cit. in ftn. A former union member sued the local union for, inter alia, intentional infliction of emotional distress as a result of threats on his life if he did not force his wife either to quit her job as the employer's supervisor or to give him confidential information about her employer. The trial court entered judgment for the plaintiff, finding that the local union had threatened his life. Affirming, this court held, inter alia, that this claim was not preempted by the National Labor Relations Act because it was based on extreme and outrageous conduct. Because it was not necessary to prove bodily harm, the plaintiff's evidence as to his emotional state was sufficient to sustain the claim. Teamsters Local 959 v. Wells, 749 P.2d 349, 356-358, 360.

Alaska, 1987. Subsec. (1) quot. in disc., com. (d) quot. in disc. A discharged employee sued his supervisor, claiming that the supervisor had behaved outrageously in terminating the employee's job after the employee allegedly molested the supervisor's 14-year-old daughter. The supervisor filed a complaint and a counterclaim on theories of assault and negligent and intentional infliction of emotional distress. The trial court ordered the two cases to be consolidated and later entered an order granting the employee's motion to dismiss. Reversing, this court held that the supervisor had stated a cause of action for intentional infliction of emotional distress. The court extended the doctrine by allowing a third person who is foreseeably harmed by the extreme and outrageous conduct to state a cause of action for intentional infliction of emotional distress. The court stated that the employee's conduct was of the brand that our society labels as "outrageous." Croft by Croft v. Wicker, 737 P.2d 789, 792, 793.

Alaska, 1987. Subsec. (1) cit. in case cit. in ftn. After a man was severely injured in the course of his employment, his four minor children sued certain defendants for loss of parental consortium. The trial court dismissed the claim. This court reversed and remanded, holding that minor children have an independent cause of action for loss of parental consortium resulting from injuries tortiously inflicted on their parent by a third person. The court noted that it had recently recognized another cause of action for negligently inflicted, intangible injuries to family members: a parent bystander could recover damages for negligent infliction of emotional distress caused by injury to another member of his family. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 993.

Alaska, 1987. Cit. in case cit. in sup. A contractor's son and three of his employees were injured while attempting to repair a drain pipe on a college campus when the trench in which they were working, which had been excavated by college employees, collapsed. The contractor sued the college for lost income and profits, medical expenses, and other damages. The trial court dismissed the complaint. This court affirmed in part and reversed in part, holding, inter alia, that regarding the contractor's claims for intentional infliction of emotional distress and punitive damages, the trial court correctly ruled that the plaintiff failed to allege anything that, construed liberally, would

support a finding of intentional, reckless, extreme, or malicious conduct by the college sufficient to support the claims. Mattingly v. Sheldon Jackson College, 743 P.2d 356, 364.

Alaska, 1986. Quot. in disc., coms. (d) and (i) quot. in sup. After an initial appeal and rehearing of the appeal involving the intoxication of a tortfeasor as a proximate cause of an accident and the impact of the finding of proximate cause on a liquor licensee, this court considered several issues raised on cross-appeal at the original trial. The court concluded, inter alia, that a father was entitled to an instruction to a jury for negligent infliction of emotional distress arising from his arriving at the scene of a car accident in which his daughter was mortally injured, since it was reasonably foreseeable that he would appear at the scene of the accident. The court disallowed the father and mother's claim for intentional infliction of emotional distress, however, stating that it was not highly probable that an intoxicated tavern patron would cause a serious accident causing their emotional distress. Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038, 1043, 1044.

Alaska, 1985. Subsec. (1) cit. in sup., com. (d) cit. in ftn. in sup. Pet owners sued borough when their pet dog was mistakenly killed by an employee of the borough animal shelter. The trial court awarded the plaintiffs the dog's market value. On appeal, the owners argued that the proper amount of damages should include compensation for their mental and emotional suffering. Affirming the original award, this court recognized a cause of action for intentional infliction of emotional distress for the intentional or reckless killing of a pet animal, where the offensive conduct was very similar to that which would sustain a claim for punitive damages. However, this court would not overturn the trial court's threshold determination that the severity of the owner's distress in this case did not warrant a claim for intentional infliction of emotional distress. Richardson v. Fairbanks North Star Borough, 705 P.2d 454, 456.

Ariz.

Ariz.2005. Cit. in sup. Two Islamic Americans sued a newspaper that published a letter to the editor that allegedly insulted and threatened Muslims regarding the Iraq war, alleging assault and intentional infliction of emotional distress. The trial court dismissed the assault claim, but it did not dismiss the emotional-distress claim and it rejected defendant's First Amendment defense. Although assuming arguendo that the trial court correctly held that plaintiffs stated a claim for intentional infliction of emotional distress, this court reversed and remanded, holding that the letter did not fall within one of the narrow exceptions to the general rule of First Amendment protection for political speech. Given the content and context of the statement, the court determined that the letter was not a constitutionally proscribable true threat, and therefore defendant could not be held liable under tort law for publishing it. Citizen Publishing Co. v. Miller, 210 Ariz. 513, 115 P.3d 107, 110.

Ariz.1989. Cit. and quot. in disc., coms. (b), (d), and (f) cit. in disc., com. (d) quot. in disc. A former sheriff, among others, sued a newspaper publisher for libel and false light invasion of privacy, after the defendant published more than 50 articles stating that the plaintiffs had engaged

in illegal activities and were generally incompetent at law enforcement. The trial court dismissed the invasion of privacy claims but refused to dismiss the other counts. The intermediate appellate court affirmed. Vacating, this court affirmed the trial court's dismissal and remanded. Although the court recognized the tort of false light invasion of privacy without requiring the plaintiffs to prove all of the elements of the tort of intentional infliction of emotional distress, it held that false light was not available in this case because not only did the publications discuss matters of public interest, but the plaintiffs had no right of privacy with respect to the manner in which they performed their official duties. Godbehere v. Phoenix Newspapers, Inc., 162 Ariz. 335, 783 P.2d 781, 785, 786.

Ariz.1987. Subsec. (1) and com. (b) cit. in sup., com. (d) quot. in part in sup. An employee of a corporation who was sexually harassed by a manager sued the manager and the corporation for assault and battery and for intentional infliction of emotional distress. The trial court entered judgment against the corporation for intentional infliction of emotional distress but not for assault and battery. The intermediate appellate court reversed, holding that the corporation could not be held liable on either claim. This court vacated the intermediate appellate court's decision and reinstated the decision of the trial court, holding that the corporation's failure to take appropriate action in response to the employee's complaints of sexual harassment constituted intentional infliction of emotional distress. The court reasoned that the corporation had acted outrageously when it ignored the employee's numerous complaints and dragged the matter out for months. Ford v. Revlon, Inc., 734 P.2d 580, 585.

Ariz.1986. Coms. (d), (e), and (f) cit. in disc., com. (h) quot. in sup. The plaintiff sued a doctor for damages resulting from the simultaneous birth and decapitation of her premature child. The trial court granted the doctor's motion for summary judgment as to the infliction of emotional distress claim, and the intermediate appellate court affirmed. Reversing, this court reasoned that, to establish a claim for intentional infliction of emotional distress, the plaintiff must prove that the conduct was outrageous. Since reasonable men could differ as to the outrageousness of the doctor's conduct before, during, and after the birth of the child, the court said, a jury should have had the opportunity to determine the matter and decide whether the plaintiff had suffered severe emotional distress, using factors such as the doctor's position and knowledge of the plaintiff's susceptibility to emotional distress by reason of a physical or mental condition. Lucchesi v. Frederic N. Stimmell, M.D., Ltd., 149 Ariz. 76, 716 P.2d 1013, 1015, 1016.

Ariz.1984. Cit. in disc. A mother whose daughter was sexually molested at a day-care center recovered against the center's owners for infliction of emotional distress, even though she did not witness the assault, then filed a declaratory action against the center's insurer, seeking a declaration of coverage under the policy. This court affirmed the decision for the mother. The court held that a court having jurisdiction adjudicated the claim, and that court's decision could not be attacked collaterally. Because the mother was not in the care, custody, or control of the day-care center, the exclusion clause—which places persons in the care, custody and control of the center outside the insurance coverage—did not apply to her. Gilbreath v. St. Paul Fire and Marine Ins., 141 Ariz. 92, 685 P.2d 729, 733-734.

Ariz.1984. Cit. in sup., com. (h) cit. in sup. The plaintiff's injured son was rushed to a private hospital's emergency room. The defendant transferred the patient for financial reasons, to a county hospital for vascular surgery. The patient suffered residual leg impairment, and the plaintiff sued the private hospital and its physicians for malpractice and intentional infliction of emotional distress. The trial court and intermediate appellate court found for the defendant. This court affirmed in part, reversed in part, and remanded. It held that the defendant's conduct was not sufficiently outrageous to allow damages for the intentional infliction of emotional distress. Thompson v. Sun City Community Hosp. Inc., 141 Ariz. 597, 688 P.2d 605, 617.

Ariz.1980. Coms. (d) and (h) quot. in sup. The plaintiff placed her 83-year-old husband in the defendant nursing home. The husband had difficulty walking and had to be assisted. The plaintiff visited her husband daily and often found him unkempt and neglected. The plaintiff was injured while she was helping her husband to the restroom. He slipped and fell onto the plaintiff causing injuries which required hospitalization. While the plaintiff was hospitalized her husband fell again and broke his hip. No one had been with him at the time. The husband was hospitalized and the plaintiff paid all medical bills. The husband returned to the home and the plaintiff visited him daily. The husband contracted pneumonia but the plaintiff was not notified until two days later when he was hospitalized. The husband died shortly thereafter. The plaintiff sued alleging that the defendant's negligence had caused her injury and her husband's injuries which resulted in an intentional infliction of emotional distress to her. The lower court directed a verdict in favor of the defendant on the intentional infliction of emotional distress claim. The jury awarded the plaintiff damages for her injuries and those of her husband and awarded $56,000 in punitive damages. The trial court granted remittitur and reduced the punitive damage award to $10,000. Both parties appealed. This court stated that punitive damages are personal to the victim and, because the plaintiff was suing in her own right and not as the representative of the victim, held that punitive damages owed to the victim were void upon his death. The court then stated that there were three elements to a claim of intentional infliction of emotional distress. The court stated that the distress must result from the defendant's conduct, that the act must have been intentional or performed with reckless disregard and that the conduct must be extreme and outrageous. The court held that the defendant's conduct was not so outrageous as to fall within this definition. The judgment of the trial court was affirmed except as to punitive damages which were set aside. Watts v. Golden Age Nursing Home, 127 Ariz. 255, 619 P.2d 1032, 1035.

Ariz.1978. Cit. in disc. and coms. gen. cit. in disc. A trustor entered into a contract with a third party to sell property that was subject to a trust deed under which the bank that had made a loan to the trustor was beneficiary. The contract stated that the beneficiary's loan under the trust deed was to remain the trustor's obligation. The trustor brought an action against the beneficiary and the trustee under the trust deed because the trustee, pursuant to the beneficiary's instructions, had issued a Notice of Trustee's Sale on the subject property, even though the trustor had never been in default on the loan until the beneficiary refused to accept payments. The trial court granted summary judgment for the defendants, and the plaintiff trustor appealed. The plaintiff contended that the defendants' conduct during the original loan transaction and in the course of events leading

up to the scheduled trustee's sale constituted the intentional infliction of emotional distress. The court found that the fact that the beneficiary under the deed of trust, which had refused to give the trustor a loan unless she pledged a $2,000 savings account to it for two years, informed the trustor, after she had entered into a contract to sell the subject property to a third party, that it would force her to pay off the entire balance of the loan due under the "due on sale" provision of the trust deed unless it received a transfer fee and an interest rate increase on the loan and thereafter instructed the trustee of the trust deed to issue a Notice of Trustee's Sale on the subject property even though the trustor had never been in default until the beneficiary had refused to accept payments did not constitute intentional infliction of emotional distress. The court noted that it is the duty of the court, as society's conscience, to determine whether the acts complained of can be considered sufficiently extreme and outrageous to state a claim for relief. The court also noted that one can recover for intentional infliction of emotional distress only where the defendant's acts are so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. Since the court did not believe that the defendants' acts would be viewed as unacceptable in the community or outrageous enough to justify submission to the jury the question of intentional infliction of emotional distress, the court held, inter alia, that the trial court's granting of summary judgment on the intentional infliction of emotional distress claim was proper. Patton v. First Fed. Sav. & Loan Ass'n of Phoenix, 118 Ariz. 473, 578 P.2d 152, 155.

Ariz.App.

Ariz.App.2019. Cit. in case cit. in sup.; com. (d) quot. in sup. Prescription- drug purchaser brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against wholesaler, alleging, inter alia, that, after plaintiff repeatedly canceled an erroneously-ordered prescription of erectile-dysfunction treatment drugs, defendant's employee made jokes at his expense with plaintiff's ex-wife when she discovered the erroneous prescription. The trial court granted defendant's motion to dismiss. This court affirmed in part, holding that, under Restatement Second of Torts § 46, defendant's jokes regarding the prescription did not constitute extreme and outrageous conduct necessary for a successful IIED claim. Shepherd v. Costco Wholesale Corporation, 441 P.3d 989, 994, 995.

Ariz.App.2016. Cit. in case cit. in sup.; subsec. (2) cit. in sup.; com. (*l*) quot. in sup. Mother of firefighter who died while fighting a forest fire brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against state and state's forestry division, alleging that defendants caused plaintiff emotional harm by their reckless and negligent actions that led to firefighter's death and their negligent misrepresentation of facts in an effort to avoid blame for firefighter's death. The trial court granted defendants' motion to dismiss for failure to state a claim. This court affirmed, holding that plaintiff failed to allege sufficient grounds for an IIED claim. Citing Restatement Second of Torts § 46, the court concluded that plaintiff did not allege that she was present at the time of the alleged extreme and outrageous conduct or that any of defendants' conduct was directed at her. McKee v. State, 388 P.3d 14, 20, 21.

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Ariz.App.2014. Adopted in cases cit. in sup., cit. in sup.; coms. (e)-(g) cit. in case quot. in sup. Family of passenger who was injured in a single-car accident brought, inter alia, a claim for intentional infliction of emotional distress against state, alleging that plaintiffs suffered severe emotional distress after officers with the state department of public safety erroneously informed them that passenger had been killed, when another passenger had been killed instead. The trial court granted summary judgment for defendant. Affirming as to the emotional-distress claim, this court held, as a matter of law, that the officers' conduct was not so extreme or outrageous as to be utterly intolerable in a civilized society. The court reasoned that plaintiffs failed to present any evidence illustrating that the officers acted in anything other than good faith based on what the charge nurse had told them in attempting to provide next-of-kin notification for the passenger who died. Guerra v. State, 323 P.3d 765, 773.

Ariz.App.1999. Subsec. (1) cit. in case quot. in sup., com. (d) quot. in case quot. in sup. Sponsors of unsuccessful bill to extend the statute of limitations for lawsuits filed by adults who had been sexually abused as minors sued accused abuser and his attorney for, in part, intentional infliction of emotional distress. Affirming in part the dismissal of the complaint, this court held, inter alia, that attorney's reiteration of allegedly defamatory statements to legislators about one of the plaintiffs was not sufficiently outrageous to state a claim for relief, where the allegations that plaintiff had embezzled money from her father and that she had accused him of sexually molesting her were already a matter of public record. Johnson v. McDonald, 197 Ariz. 155, 3 P.3d 1075, 1080.

Ariz.App.1996. Cit. in sup. After an escaped inmate broke into a home and shot the homeowner in the presence of his wife, the wife and her children sued the county for wrongful death, false imprisonment, and emotional distress. Trial court awarded plaintiffs damages, but the trial court granted the county's motion for judgment n.o.v., holding that the wife had failed to prove the required legal element of physical injury as a result of witnessing the murder of her husband. This court reversed the grant of judgment n.o.v. and reinstated the jury's verdict awarding the wife damages for emotional distress, holding, inter alia, that the acts of the escaped inmate were unquestionably extreme and outrageous and were imputed to the county by its own admissions, whether or not the county's conduct was intentional or negligent. Requiring the wife to prove physical injury in order to recover for emotional distress would, in effect, relieve the county of its admitted liability for all fault and liability attributable to the escapee. Duke on Behalf of Joy v. Cochise County, 189 Ariz. 35, 938 P.2d 84, 87, 89.

Ariz.App.1995. Subsec. (1) and com. (d) cit. and quot. in cases quot. in sup., com. (e) quot. in diss. op. (erron. cit. as com. 3(e)), com. (f) cit. in case cit. in disc. and quot. in diss. op., com. (g) quot. in sup., illus. 12 cit. in diss. op. After employee failed to receive an expected promotion, she suffered an emotional breakdown and later sued her employer, alleging, in part, intentional infliction of emotional distress. Affirming the trial court's grant of defendant's motion to dismiss, this court held, inter alia, that, because of defendant's legitimate business purpose in seeing that plaintiff's work was done, defendant's alleged conduct in calling plaintiff back to work sooner than her doctor recommended and hand-delivering a letter to plaintiff in the hospital

informing her that her job duties were being reassigned was not so extreme and outrageous as to state a claim for intentional infliction of emotional distress, even in light of plaintiff's known susceptibility to emotional problems. The partial dissent argued that defendant's knowledge of plaintiff's vulnerability to emotional distress made the conduct outrageous. Mintz v. Bell Atlantic Systems Leasing, 183 Ariz. 550, 905 P.2d 559, 563, 566.

Ariz.App.1994. Cit. in but dist., com. (d) quot. but dist. Parents of 18-year-old student tour participant who died in a fall from a balcony in Mexico, intoxicated from liquor provided by tour host, sued host for, inter alia, intentional misrepresentation and intentional infliction of emotional distress. Applying the "most significant relationship" test, the court first determined that Arizona law applied to all tort issues. Affirming the trial court's dismissal of these counts but remanding in part, this court held that defendant's alleged misrepresentation concerning adult supervision and alcohol consumption on these tours did not rise to the level of extreme conduct needed to support a claim for intentional infliction of emotional distress. Knoell v. Cerkvenik-Anderson Travel, Inc., 181 Ariz. 394, 891 P.2d 861, 871, vacated 185 Ariz. 546, 917 P.2d 689 (1996).

Ariz.App.1994. Cit. in headnotes and in sup. A former chief financial officer for a resort sued the resort for breach of implied covenant of good faith and fair dealing, intentional infliction of emotional distress, and breach of written employment contract. Security officers had escorted plaintiff from the office in the middle of the night to prevent disruption and sabotage. After granting defendant summary judgment on plaintiff's good-faith and emotional-distress claims, trial court entered judgment for plaintiff. Affirming in part, reversing in part, and remanding, this court held, inter alia, that trial court properly granted defendants summary judgment on plaintiff's emotional distress claim. In reviewing the evidence concerning the manner in which plaintiff was fired, the court concluded that plaintiff did not provide evidence of outrageous and extreme conduct. Nelson v. Phoenix Resort Corp., 181 Ariz. 188, 888 P.2d 1375, 1386.

Ariz.App.1987. Coms. (b) and (h) cit. in disc. A physician whose medical license was revoked sued the state board of medical examiners and its individual members for unlawful interference with contractual relations and intentional infliction of emotional distress, inter alia. The trial court granted the defendants' motion for summary judgment, holding that the claims against the defendants were a collateral attack on the board's decision and must be dismissed for failure to exhaust administrative remedies. Affirming, this court held that the plaintiff was precluded from maintaining a civil action against the defendants because the plaintiff failed to seek judicial review of his license revocation. The court also held that, since the revocation of the plaintiff's medical license was justified, the defendants' conduct could not be deemed extreme and outrageous and, therefore, the trial court properly determined that the acts complained of did not state a claim for intentional infliction of emotional distress. Gilbert v. Bd. of Medical Examiners, 155 Ariz. 169, 745 P.2d 617, 625.

Ariz.App.1987. Com. (d) cit. in disc. A sheriff and several employees of the sheriff's office sued for libel and false light invasion of privacy a newspaper that published articles portraying the plaintiffs as improperly and ineffectively performing their duties. The trial court denied the

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defendant's motion to dismiss the libel claims but granted the defendant's motion to dismiss the invasion of privacy claim. Affirming in part, reversing in part, and remanding, this court held that the newspaper articles published by the defendant did not constitute the outrageous conduct necessary to state a cause of action for intentional infliction of emotional distress and therefore did not state a claim for false light invasion of privacy. The court said that the tort of invasion of privacy was concerned with the hurt feelings or emotional distress of another. Godbehere v. Phoenix Newspapers, Inc., 155 Ariz. 389, 746 P.2d 1319, 1321, vacated 162 Ariz. 335, 783 P.2d 781 (1989). See above case.

Ariz.App.1987. Com. (h) quot. in disc. A college basketball coach who was fired after one season sued the athletic director and college president for intentional interference with contract and intentional infliction of emotional distress, alleging that he had a four-year contract, that the athletic director had recommended to the president that the plaintiff's employment not be continued after the first year, and that the athletic director had discussed the plaintiff's personal problems with others. The trial court granted summary judgment to the defendants. Affirming, the court stated that, when intentional infliction of emotional distress had been alleged, the court determined whether the defendant's conduct might reasonably be regarded as so extreme and outrageous as to permit recovery. Here, the court could find nothing in the record that constituted sufficiently outrageous conduct to warrant submission of the issue to the jury. Lindsey v. Dempsey, 115 Ariz. 230, 735 P.2d 840, 844.

Ariz.App.1987. Cit. in disc., cit. in ftn., coms. (e), (f), (g), and (k) cit. in disc., com. (g) quot. in disc. After the disappearance of a mother and her child, the father sued the mother's parents for intentional infliction of emotional distress, alleging that the grandparents aided in the disappearance. The trial court awarded judgment for the father on the ground that the grandparents engaged in conduct that they realized would result in injury to the father. Affirming, this court held that the intentional separation of a child from its parent was sufficiently extreme and outrageous conduct to create distress of the requisite proportion for a claim of intentional infliction of emotional distress. Pankratz v. Willis, 155 Ariz. 8, 744 P.2d 1182, 1183-1184, 1186, 1187, 1189-1193, 1195, 1196.

Ariz.App.1986. Quot. in sup. An automobile passenger who was injured in a collision sued an insurance company and its claims superintendent, alleging, among other things, breach of contract and fiduciary duty and intentional infliction of emotional distress. The passenger alleged that the claims superintendent had told him that he would recommend that the insurance company sue the passenger for money that had already been paid by the company. The superintendent also allegedly told the passenger to get an attorney as soon as possible. After the trial court granted summary judgment against the passenger on all counts, the passenger appealed the judgment on the intentional infliction of emotional distress claim only. Affirming, this court held that the acts by the claims superintendent were not sufficiently extreme and outrageous to support a claim for relief on a theory of intentional infliction of emotional distress. Helfond v. Stamper, 149 Ariz. 9, 716 P.2d 70, 72.

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Ariz.App.1986. Com. (d) quot. in case quot. in disc. An ophthalmologist sued another ophthalmologist for slander, libel, false light invasion of privacy, conspiracy to defame, intentional infliction of emotional distress, and intentional interference with medical practice on the basis of some comments made and a letter written by the defendant questioning the plaintiff's competence and ethical standards. The trial court granted summary judgment to the defendant. Affirming in part and reversing in part, this court found that summary judgment on the claim of intentional infliction of emotional distress was proper because the defendant's conduct was not sufficiently outrageous in character and extreme in degree as to go beyond all possible bounds of decency. Hirsch v. Cooper, 153 Ariz. 454, 737 P.2d 1092, 1098.

Ariz.App.1986. Com. (d) quot. in disc., com. (h) cit. in disc. The plaintiffs, who had been involved in a controversial lawsuit, sued a newspaper after an article portrayed them as litigation mongers. The plaintiffs alleged intentional and negligent infliction of emotional distress, invasion of privacy, and liability for intentional consequences. The trial court granted summary judgment for the newspaper. Affirming, this court held that the publication of the article was not extreme and outrageous conduct, reasoning that to hold otherwise would open a floodgate of litigation. The court also held that, to prove invasion of privacy based on false light, the elements of intentional infliction of emotional distress had to be shown to prevent the invasion of privacy theory from being used to circumvent the stringent standards necessary to establish a claim for intentional infliction of emotional distress. Moreover, the claim of liability for intended consequences was not a recognized cause of action in the state, said the court, since the plaintiffs had adequate redress in other forms of action. Rutledge v. Phoenix Newspapers, Inc., 148 Ariz. 555, 715 P.2d 1243, 1244, 1245.

Ariz.App.1985. Quot. but dist., cit. in conc. and diss. op., com. (d) cit. in conc. and diss. op., com. (h) cit. in disc. and cit. and quot. in conc. and diss. op. The plaintiff sued a doctor for damages resulting from the simultaneous birth and decapitation of her premature child. The trial court granted the doctor's motion for summary judgment as to the infliction of emotional distress claim. Affirming, this court held that the evidence was insufficient to support a claim of outrage. The court reasoned that the elements of outrage were intentional or reckless conduct, extreme and outrageous conduct, a causal connection between the wrongful conduct and the emotional distress, and severe emotional distress. In this case, the court said, there was no evidence that the doctor had intended to inflict emotional distress on the parents, and one could reasonably infer that revealing the traumatic nature of the delivery, rather than withholding it, would have caused severe emotional distress. The concurring and dissenting opinion argued that, when reasonable men might differ as to whether the actor's conduct was outrageous, it was for the jury, subject to the control of the court, to determine if the conduct had been sufficiently extreme to result in liability. Lucchesi v. Frederic N. Stimmell, M.D., Ltd., 149 Ariz. 85, 716 P.2d 1022, 1026-1029. See above case.

Ariz.App.1982. Quot. in sup. and com. (d) quot. in sup. The plaintiffs brought suit against a police officer, seeking damages for false arrest, assault and battery, and civil rights violations. The police officer went to the plaintiff's residence in response to a noise complaint. The plaintiffs were subsequently arrested. The defendant failed an answer and a counterclaim; the

counterclaim alleged libel, slander, and intentional infliction of emotional distress. According to the counterclaim, the basis for these allegations was that the plaintiffs made false statements of police brutality against the defendant by leading a demonstration around the city council building. In response to the defendant's counterclaim, the plaintiffs filed a motion for judgment on the pleadings. The lower court granted the plaintiff's motion, and the defendant appealed. This court stated that a person was liable for intentional infliction of emotional distress if that person's conduct had been so outrageous in character and so extreme as to go beyond all possible bounds of decency. The court found that the plaintiffs' conduct in conducting a demonstration failed to meet the test necessary to state a claim for intentional infliction of emotional distress. This court added that, were it to hold otherwise, every demonstration would give rise to a claim alleging the intentional infliction of emotional distress. The judgment was affirmed. Duhammel v. Star, 133 Ariz. 558, 653 P.2d 15, 18.

Ariz.App.1982. Coms. (h) and (j) cit. in sup., com. (d) quot. in sup. The defendants purchased a muffler from the plaintiff muffler shop. The defendants made payment with a check which was returned by the bank for insufficient funds, and the plaintiff forwarded the check to a collection agency. After being contracted by the agency, the defendants paid the debt in full but the plaintiff neglected to make the proper notification in its accounts book. The plaintiff later turned its overdue accounts over to a new collection agency, and the agency made a series of telephone calls to the defendants in an effort to collect the debt which had already been paid. The defendants alleged that the calls were abusive. The plaintiff finally brought suit to recover the debt and the defendants counterclaimed against the plaintiff and the agency for intentional infliction of emotional distress. The trial judge entered summary judgment for the defendants on the plaintiff's complaint, and the jury returned a verdict for the defendants on their counterclaim. The trial judge granted the plaintiff's and agency's motion for judgment n.o.v. and the defendants appealed. This court affirmed on the ground that the agency's calls were not sufficiently outrageous enough, nor was the defendants' distress sufficiently severe enough, as a matter of law, to support a claim of intentional infliction of emotional distress. Midas Muffler Shop v. Ellison, 133 Ariz. 194, 650 P.2d 496, 499-501.

Ariz.App.1982. Com. (d) quot. in part in sup. The plaintiff employee requested a leave of absence from work, recommended by his personal physician because of a positive reaction to a valley fever skin test. The employee did not tell his doctor that he had had valley fever three years before. When personnel records revealed that the employee had previously been granted a leave of absence for valley fever, the employer's personnel supervisor contacted the company doctor to ask if it was likely that a person could have the disease twice. He responded that it was not likely. The supervisor then identified the employee and his doctor, and the company doctor offered to speak with the employee's doctor. After their discussion, the employee's doctor withdrew his recommendation for sick leave. The employee returned to work, but complained that he was still ill. He was asked to provide medical verification and was fired when he failed to do so. The employee sued his employer, the personnel supervisor and the company doctor for invasion of privacy, and summary judgment was granted for all defendants. On appeal, this court affirmed, holding that to maintain a claim for invasion of privacy, the defendant's conduct must be extreme and outrageous. That test

was not met here where the only information disclosed by the defendants was not confidential, but already appeared in the plaintiff's employment record. Valencia v. Duval Corp., 132 Ariz. 348, 645 P.2d 1262, 1264.

Ariz.App.1981. Cit. in disc. Mexican citizen brought an action against a railroad for personal injuries sustained when railroad employees caused train cars to jerk when the plaintiff was attempting to board, causing him to fall under the wheels of the train. The lower court dismissed certain claims in the complaint, and the plaintiff appealed. The question before the court on appeal was whether the railroad did in fact owe the plaintiff a duty to render aid after he was seriously injured by the train. The court stated that, since there was no Arizona case law to the contrary, it would follow the position taken by Section 322 of the Restatement (Second) of Torts that if the actor knows, or has reason to know, that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such harm. The comments to Section 322 clarified the existence of a separate and distinct duty to render aid regardless of whether the defendant's original misconduct was intentional or innocent in causing the plaintiff's injuries or whether it was the legal cause of any further harm suffered by the plaintiff. The court held, inter alia, that the plaintiff's complaint stated a claim for relief under Section 322 for failure to render reasonable aid and assistance, and also stated a claim under Section 46 of the Restatement (Second) of Torts for intentional infliction of emotional distress. However, the court found that the complaint did not state a claim for intentional interference with a savior or for breach of statutory duty to report an accident. The judgment of the lower court was affirmed in part and reversed in part. Maldonado v. Southern Pacific Transp. Co., 129 Ariz. 165, 629 P.2d 1001, 1005.

Ariz.App.1981. Quot. in sup. and com. (j) quot. in sup. The plaintiff and his two minor sons moved into a town where the residents were trying to maintain it exclusively for retirees. The citizens of this town formed an organization to help pass an ordinance which would prohibit families with minor children from settling there. The plaintiff alleged that the president and the secretary of that organization harassed him and his sons by telling him that he could not live in his house, by sending him an eviction notice, by threatening him over the telephone, and by attempting to run his sons off the road. The plaintiff sued the president and the secretary of the town's organization for intentional infliction of emotional distress. The lower court entered a judgment against the defendants and they appealed, arguing that the lower court should have entered a directed verdict in their favor. This court stated that four elements were necessary to establish liability for intentional infliction of emotional distress: the conduct must be intentional or reckless, the conduct must be extreme and outrageous, there must be a causal connection between the wrongful conduct and the emotional distress, and the emotional distress must be severe. The court concluded that the defendant's conduct was intentional, but that the plaintiff's emotional distress was not sufficiently severe. The court stressed that severe emotional distress is necessary for recovery, and held that because there was insufficient evidence of the plaintiff's distress to constitute severe emotional distress, as a matter of law, a directed should have been entered. The court therefore reversed the lower court. Venerias v. Johnson, 127 Ariz. 496, 622 P.2d 55, 58, 59.

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Ariz.App.1980. Subsec. (1) quot. in ftn. and com. (e) cit. in ftn. The plaintiffs, a husband and wife, filed suit for breach of contract against the defendant health spa and for invasion of privacy against the defendant assignee of the health spa's contract with the plaintiffs. The defendant assignee counterclaimed for the balance due under the plaintiffs' membership contract with the health spa. The trial court found that the health spa had breached its contract by failing to maintain the premises in a suitable condition and that the conduct of the assignee constituted an invasion of privacy based upon harassment and misrepresentations in its collection practices. The lower court also found against the assignee on its counterclaim. The assignee argued on appeal that there was insufficient evidence at trial to support a finding of invasion of privacy. This court recognized the general principle that a creditor has the right to take reasonable steps to pursue his debtor and to persuade payment, even though such steps may result in some invasion of the debtor's privacy. However, unreasonable steps taken by a creditor in an attempt to collect a debt may be an invasion of privacy. The court noted that the plaintiffs could also have asserted a claim for intentional infliction of emotional distress against the defendant, but the plaintiffs chose to rely solely on an invasion of privacy theory. The defendant's threats to repossess the plaintiffs' car for failure to pay the $100 debt and the numerous telephone calls made by the defendant to the plaintiffs' neighbors and place of employment led the court to conclude that the defendant's conduct was unreasonable and constituted an invasion of privacy. Fernandez v. United Acceptance Corp., 125 Ariz. 459, 610 P.2d 461, 463.

Ariz.App.1979. Com. (d) cit. and quot. in part in sup. The plaintiff was suspended from a social club so she sued the club alleging that she had been deprived of her rights as a member of the club. The trial court directed a verdict for the defendant holding that the evidence was not sufficient to support the plaintiff's claim. The appellate court affirmed. This court stated that the plaintiff could not recover in tort unless a legally protected right had been invaded and although a contract providing the plaintiff with an opportunity to play bridge had been breached, such a breach would be tortious only if the law provided protection for the plaintiff's membership in the voluntary association. The court concluded that the courts had not been willing to extend legal protection against ostracism and generally, in cases where one suffers insults or indignities, the court will not step in and permit compensation. The court held that a cause of action in tort could not be sustained on the basis of a suspension from a voluntary club. Aspell v. American Contract Bridge League Etc., 122 Ariz. 399, 595 P.2d 191, 195.

Ariz.App.1979. Subsec. (1) cit. and quot. in ftn. and coms. (d) and (h) cit. in sup. The plaintiff was injured before an insurance company accepted or rejected her application for health insurance so she sued the company for negligence in processing her application. She sought recovery of medical expenses and damages for mental distress and punitive damages. A jury returned a general verdict and assessed damages. The appellate court reversed the judgment and remanded the case. The court found that the evidence that the company's agent told the plaintiff that the insurance would take effect immediately was admitted in violation of the parol evidence rule. The court also held that, although there was a question as to whether the company was negligent by not acting on the plaintiff's application for more than eighty days, there was no evidence that the company

committed an act so extreme and outrageous as to substantiate a claim for intentional infliction of emotional distress. Continental Life & Acc. Co. v. Songer, 124 Ariz. 294, 603 P.2d 921, 931.

Ariz.App.1979. Cit. and fol., com. (d) quot. in sup., and com. (h) cit. in sup. Plaintiffs filed this action against defendant bank and insurance company alleging four claims for relief. The first claim was for intentional infliction of emotional distress resulting from: defendants' attempts to rescind a loan contract on the plaintiffs' trailer, subsequent delays in payment of disability benefits, late charges by the bank, and attempts to restrict coverage of disability insurance. Another claim alleged that defendants had breached an agreement, under which plaintiffs had fully performed, to provide disability insurance for six years. Another alleged fraud based on the representation that the disability insurance would be provided for six years when in actuality it was only to be for five years. The last claim, for invasion of privacy, was directed solely against the bank and alleged that the bank had obtained confidential medical information about one of the plaintiffs without his consent. The lower court granted defendants' motion for summary judgment, and plaintiffs appealed. This court affirmed the trial court's action in granting defendants' motion for summary judgment. In regard to the claim for intentional infliction of mental distress, the court stated that none of the conduct complained of by the plaintiffs qualified as extreme or outrageous as is required in the Restatement (Second) of Torts to make out a valid cause of action. Davis v. First National Bank of Arizona, 124 Ariz. 458, 605 P.2d 37, 41.

Ariz.App.1979. Cit. in ftn. in disc. Plaintiff insured, who had undergone surgery, filed a claim under a health insurance policy issued by the defendant insurer. After the defendant insurer failed to pay the medical expenses, plaintiff brought an action to recover against the insurer. The plaintiff's theory was that the insurer breached its duty to pay the just claims of its insureds and had breached the implied warranty of good faith and fair dealing with insureds. The trial court dismissed the count raising such a claim, and the plaintiff appealed. The plaintiff contended that tort liability should be imposed on the insurer for failure to deal in good faith with the insured, and the appellate court agreed. The court held that a cause of action in tort will lie for breach by the insurer of its duty to deal fairly and in good faith. The judgment of the lower court was reversed. Noble v. Nat. Am. Life Ins. Co., 128 Ariz. 196, 624 P.2d 874, 875, opinion vacated 128 Ariz. 188, 624 P.2d 866 (1981).

Ariz.App.1978. Com. (d) and (h) cit. in disc. A statutory agent for a corporation brought an action against a city and county for, inter alia, alleged abuse of process and against the city for intentional and/or negligent infliction of emotional distress and the tort of outrage. After plaintiff had been stopped in his car by a police officer for alleged speeding, he was delayed for an hour until he was finally notified that a bench warrant had been issued for his arrest on a charge of the corporation's failure to pay city taxes. Plaintiff complained that he had been stereotyped as a “Mafiosi,” detained with his family for an hour without explanation, searched and handcuffed outside of his car in full view of motorists on a street frequently used by his neighbors and friends, treated as a dangerous criminal for the crime of failing to file a tax return, and falsely arrested. Nevertheless, the court held that the record failed to indicate any conduct on the part of the arresting officer which could be classified as “outrageous.” Rondelli v. Pima County, 120 Ariz. 43, 586 P.2d 1295, 1301, 1302.

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Ariz.App.1976. Cit. in sup. and com. (d) quot. in sup. When a medical malpractice action was brought by a patient against a member of a medical partnership and an associate of the partners, a third-party complaint was filed against another partner alleging a right to indemnity from that partner, under the partnership agreement, for twenty percent of any judgment exceeding insurance policy limits. After the malpractice action was disposed of favorably to defendants, the physician against whom the third-party complaint had been filed brought an action against the original defendants, alleging that the filing of the third party complaint constituted malicious prosecution, abuse of process, and intentional infliction of emotional distress. The doctor's liability insurance carrier was also sued for attorney's fees for the defense of the third-party claim. The lower court granted summary judgment in favor of defendants, and plaintiff and insurer filed cross-appeals. Plaintiff contended that the filing of the third-party complaint against him, with the acquiescence of his own insurance carrier, and the fact the Liberty Mutual paid the attorney's fees of defendant's lawyers (defendants in this action) including those involved in filing against plaintiff constituted conduct so extreme and outrageous as to support a cause of action for intentional infliction of emotional distress against all three defendants. The court held that filing of the third-party complaint seeking indemnity against plaintiff was not within the purview of extreme and outrageous conduct as defined, and, therefore, not within the scope of the tort, infliction of emotional distress. Affirmed. Joseph, M.D. v. Markowitz, M.D., 27 Ariz.App. 122, 551 P.2d 571, 575.

Ariz.App.1975. Quot. and fol., com. (d) quot., com. (g) quot., com. (h)cit. in case cit. in disc., com. (j) quot. Plaintiff administrator brought this wrongful death action alleging damages caused by defendant's malicious prosecution, abuse of process, wrongful attachment, and intentional infliction of mental anguish. Decedent was killed when a sheriff's deputy, who had been sent to decedent's mobile home to levy a writ of attachment thereon, shot him after decedent shot and killed a second deputy. The appellate court affirmed the granting of defendant's motions for summary judgment, holding that plaintiff failed to state a cause of action insofar as he failed to establish that defendant's conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. Bendalin v. Valley Nat. Bank, 24 Ariz.App. 575, 540 P.2d 194, 196.

Ariz.App.1975. Com. (d) cit. in sup. Plaintiff, the inventor of a brassiere, brought this action for damages alleging that defendant, as the alter ego of a corporation, caused her to suffer monetary loss and physical and emotional damage by foocing her to relinquish control of the corporation which produced her invention and to lose her patent on the invention. At trial, the jury returned a verdict for plaintiff. The issue raised on appeal by defendant was whether an issue submitted to the jury, without objection at the first trial, may be objected to at the second trial for damages only. After finding that there was sufficient evidence that defendant's conduct was “outrageous and beyond the bounds of decency so that the average member of the community would find it outrageous” so as to permit the question of defendant's liability for the tort of intentional infliction of emotional distress to be submitted to the jury, the court held that defendant's failure to object

to the submission at the first trial precluded such objection at the trial on the measure of damages. Linsenmeyer v. Hancock, 23 Ariz.App. 444, 533 P.2d 1181, 1184.

Ariz.App.1969. Quot. com. (d) and cit. com. (h) in sup. This was an action for alleged intentional infliction of mental distress and invasion of privacy. The court held that the complaint alleging that the insurance adjuster had willfully, intentionally and maliciously with purpose of inflicting mental suffering upon plaintiff so as to cause her to settle her claim for the wrongful death of her son, threatened and cajoled plaintiff to accept settlement, in that he informed her that she probably could not recover damages under the laws of the state where the death occurred failed to state a cause of action for intentional distress and invasion of privacy. Cluff v. Farmers Ins. Exchange, 10 Ariz.App. 560, 460 P.2d 666, 668, 39 A.L.R.3d 731.

Ark.

Ark.2007. Com. (j) cit. in case quot. in sup. Boy and his mother sued paternal grandmother for the tort of outrage, after grandmother picked boy up after school in violation of a court order and drove him to a home where he stayed for several days; boy was returned to mother's home when grandmother was jailed on contempt charges. The trial court entered judgment on a jury verdict for plaintiffs, awarding substantial punitive damages to boy and mother. This court reversed and dismissed, holding that there was insufficient evidence of severe emotional distress suffered by boy or mother to support the jury's verdict; while boy might have suffered embarrassment and a dip in his grades, no evidence indicated that he suffered distress so severe that no reasonable person could have been expected to endure it, and while mother was upset, she did not seek medical or psychological treatment. Kiersey v. Jeffrey, 369 Ark. 220, 253 S.W.3d 438, 442.

Ark.2003. Com. (d) cit. in case cit. in disc. Female former employee who alleged that she had been sexually harassed by a supervisor sued former employer and supervisor for, in part, the tort of outrage. The trial court granted summary judgment for defendants. Affirming in part, this court held, inter alia, that plaintiff failed to offer proof that, as a result of supervisor's behavior, she suffered damages or emotional distress sufficiently severe to support an action for the tort of outrage. Island v. Buena Vista Resort, 352 Ark. 548, 103 S.W.3d 671, 681.

Ark.2001. Com. (d) quot. in case quot. in sup. Terminated employee sued employer and others for tort of outrage, among other claims arising from termination. Trial court granted defendants summary judgment. This court affirmed, holding, inter alia, that plaintiff's allegations that she disagreed with employer's director and chairman over use of employer's funds, that she was improperly written up for performance problems, that she was improperly placed on probation, and that she was wrongfully fired failed to state claim for tort of outrage. Palmer v. Arkansas Council on Economic Educ., 344 Ark. 461, 472-474, 40 S.W.3d 784, 791-792.

Ark.1996. Cit. in headnote, cit. in disc., coms. (d) and (f) quot. in part in disc. Former employee sued her former employer for the tort of outrage, alleging that employer constantly insulted her

and subjected her to veiled threats of bodily harm. The trial court granted employer's motion for summary judgment. Affirming, this court held that the tort of outrage in the employment context was construed very narrowly in Arkansas, and that, where employee failed to show that employer was on notice of the fact that she was not a person of ordinary temperament, or that she was particularly susceptible to emotional distress because of some physical or mental condition, employee's allegations were insufficient as a matter of law to state a cause of action for the tort of outrage. Hollomon v. Keadle, 326 Ark. 168, 931 S.W.2d 413, 414, 415, 417.

Ark.1993. Com. (d) quot. in part in case quot. in sup. Department store customer sued store and its manager for outrage and malicious prosecution after customer was accused of theft and not convicted. Reversing the trial court's entry of judgment on a jury verdict for customer and remanding, this court held, inter alia, that, since the incident lasted less than one hour, customer was not physically touched, and manager had initially confronted customer in a professional manner and in such a way as not to draw the attention of other customers, defendants could not be liable for intentional infliction of emotional distress. Dillard Dept. Stores, Inc. v. Adams, 315 Ark. 303, 305, 867 S.W.2d 442, 443.

Ark.1990. Com. (d) quot. generally in disc., com. (g) quot. in sup., com. (h) cit. in disc. After a wife had delivered a stillborn fetus, the hospital delivered the body of the fetus to the husband, who was intoxicated. The wife sued the hospital's insurer alleging negligent and intentional infliction of emotional distress, after the father was arrested for driving while intoxicated and was held in jail with the fetus. Treating the insurer's motion to dismiss as a motion for summary judgment, the trial court held that the actions of the hospital failed to support a claim for the tort of outrage. Affirming, this court held that the hospital had the authority and the right to release the fetal remains to the father without first obtaining the consent of the mother. The court did not consider the actions of the hospital to be outrageous because the hospital had the legal right to release the fetus to either parent, absent notice to the contrary. Further, the nurse's relaying to the wife of the husband's arrest and the advice to her to recover the body was not atrocious, outrageous, and intolerable behavior. Neff v. St. Paul Fire & Marine Ins. Co., 799 S.W.2d 795, 796, 797.

Ark.1989. Quot. in case, quot. in disc., subsec. (2) cit. generally in disc. A widower and children of a deceased mortgagor sued a mortgagee and a listing agent for, inter alia, inflicting outrage by allegedly improperly forcing payment of interest on a note when the mortgagor was dying of cancer by withholding a certificate of deposit (CD) in which the widower had an interest. The trial court granted summary judgment for the defendants as to the claims of the children, finding that the children lacked standing to sue for outrage resulting from enforcement of a contract to which they were not parties. It also directed a verdict for the defendants as to the widower's outrage claim. This court affirmed the summary judgment and directed verdict orders rendered on the outrage claim, but reversed in part on other grounds. The court held that even though the mortgagor may have been wrong in refusing to honor the CD, the defendants' conduct fell far short of the requisite extreme and outrageous behavior. It also noted that the plaintiffs may not have had standing because Arkansas had not adopted the Restatement's language referring to conduct

toward third persons. Deason v. Farmers & Merchants Bank, 229 Ark. 167, 771 S.W.2d 749, 753, appeal after remand 300 Ark. 30, 775 S.W.2d 909 (1989).

Ark.1986. Com. (h) cit. in disc. An employee who had served as a warehouse manager was discharged for unsatisfactory performance. There was no written employment contract, although he had been assured by a previous partner-owner that he would have the job for many years. The trial court directed a verdict against the employee on his claim of intentional infliction of emotional distress. Affirming, this court held that the trial court was unquestionably correct in granting the directed verdict because the termination of an at-will employee was not conduct that was so extreme and outrageous as to permit recovery. Harris v. Arkansas Book Co., 287 Ark. 353, 700 S.W.2d 41, 43.

Ark.1985. Com. (d) cit. in case quot. in disc. A police officer sued a city director for intentional infliction of emotional distress as a result of allegedly outrageous conduct by the director, which included threatening the officer's employment, having the officer followed, and lodging false accusations against the officer. A jury awarded both compensatory and punitive damages to the officer, and the city director appealed. Affirming, this court found substantial evidence to meet the requirements necessary to establish liability for the tort of outrage. Hess v. Treece, 286 Ark. 434, 693 S.W.2d 792, 795, cert. denied 475 U.S. 1036, 106 S.Ct. 1245, 89 L.Ed.2d 354 (1986).

Ark.1984. Com. (d) quot. in case quot. in conc. and diss. op., com. (h) cit. in case quot. in conc. and diss. op. An insured sued its insurer after the insurer offered to settle the disputed claims under the policy with a lump sum. The lower court found, inter alia, that the insurer had acted in bad faith. This court remanded for a new trial because the lower court gave an erroneous jury instruction on the issue of bad faith. This court also held that a finding of bad faith could be made only upon evidence of affirmative malicious, dishonest, or oppressive misconduct. In a concurring and dissenting opinion, one justice preferred to label the tort at issue as that of outrage. He contended that the conduct must be determined to be very outrageous, while the term bad faith only gave a connotation of mere negligence. Aetna Cas. and Sur. v. Broadway Arms, 281 Ark. 128, 664 S.W.2d 463, 468.

Ark.1984. Com. (d) cit. in case cit. in disc. The manager of the defendant's store quit or was fired as the result of an investigation of his business by the defendant. The manager sued the defendant for intentional infliction of emotional distress, and the defendant counterclaimed for loss of inventory. The jury returned a verdict for plaintiff, and both parties appealed. This court reversed and remanded because improper jury instructions were given, but held that, where defendant was on notice that plaintiff had a nervous condition and that investigators intended to subject him to stress, yet denied his request for permission to take his medication, the evidence was sufficient to support a verdict against defendant for outrage. Tandy Corp. v. Bone, 283 Ark. 399, 678 S.W.2d 312, 314.

Ark.1982. Com. (d) quot. in sup. and com. (h) cit. in sup. The owner of a farm hired the plaintiff to manage his property. The owner, dissatisfied with the plaintiff's work, discharged the plaintiff.

The plaintiff then brought an action seeking to recover damages for severe emotional distress, which allegedly resulted from the owner's sudden discharge of the plaintiff. The owner was granted summary judgment and the plaintiff appealed. This court held that the defendant's conduct was not so atrocious as to go beyond all bounds of decency, as required to permit recovery for emotional distress. The summary judgment in favor of the defendant was affirmed. Givens v. Hixson, 275 Ark. 370, 631 S.W.2d 263, 264.

Ark.1981. Cit. in disc. A debtor sued the defendant collection agency for wrongful invasion of her right of privacy and for causing her severe emotional distress. The lower court awarded the plaintiff compensatory and punitive damages. This court stated that the jury could have found a wrongful invasion of privacy. The court maintained that when, as here, the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, then that becomes a substantial burden to his existence and his privacy is invaded. Affirmed. CBM of Central Arkansas v. Bemel, 274 Ark. 223, 623 S.W.2d 518, 519.

Ark.1980. Cit. and coms. (d), (g) and (j) cit. in sup. Plaintiff was employed as a cashier in defendant's store under an employment agreement that she could be discharged at any time without notice. After a shortage in her cash register was discovered, she was told she was laid-off because the store had too much counter help. Defendant refused to pay her for the last pay period she had worked until she took a polygraph test. The polygraph operator told her she had passed and that defendant would have to release her paycheck. When she was paid, she found defendant had withheld about one-third of the amount by which her cash register was short. After an investigation by the Labor Department, the withheld amount was paid to plaintiff. No one ever said that she had stolen the missing money. At the time she was discharged, allegedly because of an excess of counter help, defendant was advertising for additional counter help. Plaintiff was denied state unemployment benefits because defendant said that she was laid-off because of numerous customer complaints, a bad attitude, and violation of company rules and policies. Plaintiff sued defendant to recover damages for wrongful discharge and for intentional infliction of emotional distress. The lower court gave summary judgment for defendant, and plaintiff appealed. The court of appeals reversed. On certiorari, the supreme court of Arkansas held: (1) that plaintiff had failed to establish a cause of action for breach of contract; (2) that one who by extreme and outrageous conduct willfully or wantonly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from the distress (apparently first adoption of this tort as basis for liability in the state); and (3) that a fact issue existed as to whether the employer's conduct following plaintiff's discharge was so extreme and outrageous as to constitute intentional infliction of emotional distress, thereby precluding summary judgment. M.B.M. Co., Inc. v. Counce, 268 Ark. 269, 596 S.W.2d 681, 687, 688.

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Ark.App.1979. Quot. in sup. The plaintiff sued her former employer for the breach of a contract of employment at will, and for intentional infliction of emotional distress, claiming that she had been

wrongfully discharged in retaliation for an alleged theft of money from the register at work. The trial court dismissed the complaint, but this court reversed on the claim for intentional infliction of emotional distress. The court adopted the Restatement approach and concluded that the plaintiff presented sufficient allegations to sustain a cause of action. The plaintiff's complaint alleged that her discharge was under the circumstances, an outrageous course of conduct, designed and intended to cause the plaintiff severe emotional distress, and that the actions were in retaliation for alleged stealing, despite the lack of evidence of any theft by the plaintiff. The plaintiff stated in her deposition that the defendant's conduct caused her great harm, made her nervous, provoked headaches and led to the plaintiff's humiliation in the community. Counce v. M.B.M. Company, Inc., 266 Ark. 1064, 597 S.W.2d 92, 94.

Cal.

Cal.2009. Com. (d) quot. in case quot. in sup. Former wife of decedent sued trustee of decedent's estate, alleging causes of action for sexual harassment under a state statute and intentional infliction of emotional distress (IIED). The trial court granted summary judgment for defendant, and the court of appeals affirmed. Affirming, this court held that plaintiff failed to establish the elements of outrageous conduct and severe emotional distress for her IIED claim. The court explained that, viewed in the context of plaintiff's legal battles over a five-year period with defendant and the other two trustees regarding their allocation of trust funds, defendant's harsh and inappropriate language directed at plaintiff during a social event did not rise to the level of outrageous conduct under California case law; in addition, plaintiff's assertions that she suffered discomfort, worry, anxiety, upset stomach, concern, and agitation as the result of defendant's comments failed to establish the requisite degree of emotional distress. Hughes v. Pair, 46 Cal.4th 1035, 95 Cal.Rptr.3d 636, 209 P.3d 963, 976.

Cal.1993. Quot. in conc. and diss. op., com. (i) quot. in conc. and diss. op., com. (j) quot. in sup. Landowners who lived adjacent to a landfill and were subjected to prolonged exposure to certain carcinogens brought an action for intentional infliction of emotional distress, inter alia, against tire manufacturer whose hazardous wastes were disposed of at the landfill. The trial court entered judgment for plaintiffs, and the intermediate appellate court affirmed in part. Reversing in part and remanding, this court held, inter alia, that liability was precluded in the absence of a determination that defendant's extreme and outrageous conduct was directed at plaintiffs or undertaken with knowledge of their presence and consumption of the ground water, and with knowledge of a substantial certainty that they would suffer severe emotional injury on discovery of the facts. The court also held that plaintiffs must establish that their fear of cancer was reasonable. A concurring and dissenting opinion argued that there should be no requirement that plaintiffs show that defendants were aware of their individual existence or that defendants directed their hazardous conduct against identifiable persons in particular. Potter v. Firestone Tire and Rubber Co., 6 Cal.4th 965, 1006, 1014, 25 Cal.Rptr.2d 550, 576, 583, 863 P.2d 795, 821, 828.

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Cal.1989. Subsecs. (1) and (2) cit. and quot. in conc. op., coms. (e), (f), (l) and caveat quot. in conc. op., com. (k) and subsec. (2)(a) cit. in conc. op. Two mothers sued a psychotherapist, a psychiatric clinic, and the clinic's owner and director for negligent infliction of emotional distress, alleging that the therapist, who treated plaintiffs and their sons for family emotional problems, sexually molested the boys at the clinic. The trial court sustained defendants' demurrer, and the court of appeal affirmed, holding that the mothers could not state a claim because they were neither "bystander witnesses" to the torts nor the immediate objects of the tortious conduct. Reversing, this court held that the mothers, as the therapist's patients, had standing to assert a claim of negligent infliction of emotional distress because the therapist's misconduct breached a duty of care to them and further disrupted their family relationship. A concurring justice argued that the facts also supported a claim for intentional infliction of emotional distress because the therapist committed atrocious, outrageous, and offensive conduct within a relationship of trust. Marlene F. v. Affiliated Psychiatric Med. Clinic, 48 Cal.3d 583, 257 Cal.Rptr. 98, 104-108, 770 P.2d 278, 284-288.

Cal.1987. Com. (d) quot. in ftn., coms. (e) and (f) cit. in ftn. A firefighters' union representative was the object of repeated harassment by management personnel. After numerous attempts by management to dismiss the representative on false disciplinary charges or to force his retirement, the representative suffered a massive, debilitating stroke. He sued his employer for intentional infliction of emotional distress. The trial court dismissed the case on the ground that it was in the jurisdiction of the workers' compensation board. The intermediate appellate court and this court affirmed, holding that since the plaintiff's disability was compensable under the workers' compensation statute, there was no public policy interest in holding the employer civilly liable, even if its conduct was outrageous enough for liability to attach in the absence of physical injury. Cole v. Fair Oaks Fire Protection Dist., 43 Cal.3d 148, 233 Cal.Rptr. 308, 312, 729 P.2d 743, 747.

Cal.1985. Com. (i) cit. in ftn. to conc. and diss. op. Parents sued a county after their child died in a juvenile hall infirmary. The trial court dismissed several counts of the complaint, and the parents sought a writ of mandate to compel the court to set aside that order. This court held that the parents' witnessing of the neglect of their son's pressing medical needs by the infirmary personnel stated a cause of action for negligent infliction of emotional distress. The court stated, however, that no cause of action existed for intentional infliction of emotional distress. A concurring and dissenting opinion argued that a cause of action for intentional infliction of emotional distress should have been allowed, since reckless disregard of the probability of causing emotional distress was a sufficient standard for the tort. Ochoa v. Superior Court (Santa Clara County), 39 Cal.3d 159, 216 Cal.Rptr. 661, 703 P.2d 1, 27.

Cal.1984. Com. (k) cit. in case quot. in ftn. Homeowners who sued a chemical company for intentional infliction of emotional distress caused by water contamination sought a writ of mandate ordering the lower court to vacate its order compelling one homeowner to answer certain questions at her deposition. This court issued the writ of mandate, holding that the information sought was covered by the attorney-client privilege, which the homeowner had not waived by putting those communications directly at issue. The communications were not necessary to a fair adjudication of the claim, said the court, since evidence of the chemical company's outrageous conduct guaranteed

that the homeowner's claim for emotional distress was genuine, and that such evidence would not focus on the homeowner's confidential communications with her attorney. Mitchell v. Superior Court (Shell Oil Co.), 37 Cal.3d 591, 208 Cal.Rptr. 886, 896, 691 P.2d 642, 652.

Cal.1982. Coms. (d) and (g) cit. in sup. The plaintiff was assaulted by a man who, at the time of the assault, was under surveillance by police. The police were watching a laundromat after several other staffing incidents had taken place there. Eventually they saw a man who they thought might be the attacker enter the laundromat. The plaintiff was the only customer in the laundromat at the time, and the police did not warn her of their suspicions. The suspect subsequently stabbed the plaintiff four times, and the plaintiff brought an action against the defendant city alleging negligence, as well as intentional and negligent infliction of emotional distress. At trial, the court sustained the city's demurrer and the plaintiff appealed. This court affirmed the trial court. The court held that the mere fact that the police may have recognized the suspect as a possible assailant did not establish a "special relationship" which would impose a duty on the police to control his conduct. Recognition of the assailant did not impose a duty on the police to warn the plaintiff. As to the emotional distress claim, the police had not acted with the intent to cause emotional distress, nor was their behavior so extreme or outrageous as to be considered reckless. Davidson v. City of Westminster, 32 Cal.3d 197, 185 Cal.Rptr. 252, 259, 649 P.2d 894 (1982).

Cal.1979. Com. (d) quot. in part in disc. coms. (e) and (f) cit. in disc. Former employee sued former employer and certain supervisory employees to recover compensatory and punitive damages for intentional infliction of emotional distress. The plaintiff, a highly qualified professional, was employed by the defendant as a scheduling engineer. The plaintiff, a native of East India, held this position for approximately one year, when he was terminated. The incident precipitating the plaintiff's dismissal involved a confrontation between the plaintiff and his supervisor in which the supervisor shouted a racial epithet at the plaintiff and accused him of being unskilled and uncooperative. The trial court entered judgment in favor of the plaintiff, and the defendants appealed. The defendants argue that the evidence was insufficient to support the verdict on emotional distress, and punitive damages against the employer. The court acknowledged that ordinarily mere insulting language, without more, does not constitute outrageous conduct, but it affirmed the lower court's finding that the plaintiff presented substantial evidence that the supervisor's use of the racial epithet was outrageous, and that the supervisor acted knowingly and unreasonably with the intention to inflict mental distress and abused his position to humiliate plaintiff and also to recommend plaintiff's termination for reasons that were not true. The court held that an appropriate basis for the employer's liability is the rule that an employer is liable for the willful misconduct of his employees acting in a managerial capacity. Agarwal v. Johnson, 25 Cal.3d 932, 160 Cal.Rptr. 141, 150, 603 P.2d 58, 67, 68.

Cal.1979. Coms. (d) and (g) cit. in sup. The plaintiff had been shopping in a retail store when he was arrested by the defendant's security guard. The plaintiff sued the store, and others, on several grounds including the intentional infliction of emotional distress. The lower court sustained the defendant's motion for nonsuit on this claim. This court stated that the elements of a prima facie case for this tort were extreme and outrageous conduct by the defendant and emotional suffering

by the plaintiff which was caused by the defendant's outrageous conduct. The court stated that the defendant's outrageous conduct must not have been privileged and so outrageous that it exceeded all bounds of civilized conduct. The court held that there was sufficient evidence to support the inference that the defendant had arrested the plaintiff knowing that he had not committed any crime and this evidence could have supported a possible jury verdict in favor of the plaintiff. The lower court's grant of nonsuit was held to have been error. Cervantez v. J. C. Penney Co., Inc., 24 Cal.3d 579, 156 Cal.Rptr. 198, 595 P.2d 975, 983.

Cal.1973. Quot. in part but dist. and coms. (a) and (b) quot. in part insup. The plaintiff sued the defendant insurance companies in tort to recover the benefits due on his fire insurance policies and for punitive damages. The plaintiff had been arrested for arson after his business was destroyed by fire. An agent of the defendants told the fire department inspector that the plaintiff had excessive insurance and also so testified at a hearing on the arson charge, which was later dismissed for lack of probable cause. While the charge was pending, the defendants asked the plaintiff to testify under oath; the plaintiff refused on account of the criminal charge. When the plaintiff later offered to testify, after the arson charge had been dismissed, the defendants refused this offer, and denied their liability because of the plaintiff's prior failure to appear. The plaintiff charged that the defendants thereby maliciously deprived him of his insurance benefits by encouraging the criminal charges and by requiring that he testify while knowing that he would not. The trial court sustained the demurrers of the insurance companies and their agents. The court reversed the trial court only with respect to the companies, holding that the plaintiff alleged a breach of their duty of good faith and fair dealing, and that the plaintiff would still be stating a valid cause of action even if he had breached his own duties under the policies, and even if the agent's statements had been privileged. However, the court upheld the trial court with respect to the companies' agents, since they were strangers to the insurance contracts and thus did not have the duty of good faith and fair dealing. The court also held that the plaintiff could recover punitive damages for his mental distress. Gruenberg v. Aetna Insurance Company, 9 Cal.3d 566, 108 Cal.Rptr. 480, 489, 510 P.2d 1032.

Cal.1970. Com. (h) quot. in sup. and com. (d) quot. in ftn. in sup. The court reversed a dismissal of a cause of action and instructed the trial court to overrule a demurrer where the plaintiff alleged that in a work dispute he suffered humiliation, mental anguish, and emotional and physical distress as a result of defendant's intentional and malicious conduct in using vituperative language and racial epithets toward the plaintiff, but the court affirmed a dismissal of a second cause of action for discharge solely because of race, holding that the state's equal accommodations statute did not extend to employment discrimination, which was covered by a separate statute that the plaintiff had waived in favor of union arbitration. Alcorn v. Anbro Engineering, Inc., 2 Cal.3d 493, 86 Cal.Rptr. 88, 468 P.2d 216, 219.

Cal.App.

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Cal.App.2019. Com. (d) cit. and quot. in sup.; com. (f) and illus. (1) and (3) quot. in sup. Victim of sexual assault brought a claim for intentional infliction of emotional distress (IIED) against nonprofit corporation, alleging that defendant's director, who was plaintiff's grandmother, caused plaintiff extreme distress by flying into a tirade and blaming plaintiff for being sexually assaulted by defendant's employee. The trial court entered judgment on a jury verdict for plaintiff. This court affirmed, holding, inter alia, that the director's conduct constituted extreme and outrageous conduct as defined by Restatement Second of Torts § 46, because flying into a tirade against a child who had been drugged and raped, blaming her for the assault, and calling her "stupid," went beyond the bounds of decency tolerated in civilized communities, and the fact that the director knew about plaintiff's susceptibility to emotional distress increased the outrageousness of her conduct. The court rejected defendant's assertion relying on § 46, Comment *d*, that the director needed a special relationship with plaintiff for plaintiff to recover, because IIED claims under California law did not require such a relationship. Crouch v. Trinity Christian Center of Santa Ana, Inc., 253 Cal.Rptr.3d 1, 13-15.

Cal.App.2017. Com. (d) quot. in case quot. in disc. Ex-girlfriend of former boxing champion sued boxer claiming, inter alia, intentional infliction of emotional distress arising in substantial part from a series of social-media postings and public-radio comments about plaintiff. The trial court denied defendant's motion to strike plaintiff's claims under California's anti-SLAPP statute, finding that although defendant's conduct was protected by the anti-SLAPP statute, plaintiff had established a likelihood of prevailing on her claims and raised questions of fact for the jury to decide. This court affirmed in part as to plaintiff's intentional infliction of emotional distress claim, noting that it was based upon the entire range of defendant's conduct, not just the social-media postings and radio comments protected under California law. The court, quoting Restatement Second of Torts § 46, Comment *d*, cautioned that liability for intentional infliction of emotional distress has been found only where conduct was so extreme and outrageous to be intolerable in a civilized society. Jackson v. Mayweather, 217 Cal.Rptr.3d 234, 257.

Cal.App.2015. Com. (d) quot. in sup. Caregiver for an elderly woman who suffered from dementia brought claims for defamation and intentional and negligent infliction of emotional distress against conservator of the woman's person and estate, case manager hired by conservator, and registered nurse who worked for case manager in connection with allegations that defendants sent emails to the woman's two daughters and other caregivers, falsely claiming that plaintiff was responsible for severe bruising and physical and mental injuries suffered by the woman. The trial court denied defendants' special motion to dismiss under the state's anti-SLAPP statute. Reversing and remanding, this court held that plaintiff failed to meet his burden to show that his complaint was legally sufficient and supported by a sufficient prima facie showing to support a favorable judgment. The court reasoned, in part, that plaintiff failed to allege outrageous conduct that was beyond all bounds of reasonable decency, as required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. Barker v. Fox & Associates, 192 Cal.Rptr.3d 511, 529.

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Cal.App.2012. Cit. in sup. Employee brought sexual-harassment and other claims against co-worker, supervisor, and employer, alleging that co-worker and supervisor tried to get her drunk and convince her to have sex with them at and after a business-related social gathering; co-worker filed a cross-complaint against employee, alleging that she falsely reported to a nurse and to employer that he had sexually assaulted her. The trial court granted employee's special motion to strike co-worker's cross-complaint as meritless under a state statute prohibiting strategic lawsuits against public participation. Affirming, this court held, among other things, that co-worker failed to state a claim against employee for intentional infliction of emotional distress; employee's actions in allegedly reporting a sexual assault could not be considered extreme and outrageous. Aber v. Comstock, 212 Cal.App.4th 931, 954, 151 Cal.Rptr.3d 589, 607.

Cal.App.2012. Com. (d) quot. in sup. Volunteer coach of a fourth-grade basketball team brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against parent-teacher organization (PTO) and three other volunteers, after his services were terminated over a discipline problem with one of the players. The trial court denied PTO's motion to strike the complaint as a strategic lawsuit against public participation (SLAPP). While reversing and remanding the order denying the SLAPP motion, this court held that plaintiff failed to state an IIED claim, since there was no evidence that the complained-of conduct was outrageous, that it resulted in severe emotional distress, or that it was intentional or, at least, reckless. Hecimovich v. Encinal School Parent Teacher Organization, 203 Cal.App.4th 450, 476, 137 Cal.Rptr.3d 455, 476.

Cal.App.2012. Cit. in case quot. in sup., com. (d) quot. in sup. Customer sued store and others, after a criminal prosecution against her for shoplifting terminated in her favor. The trial court sustained store's demurrer without leave to amend on customer's claim for intentional infliction of emotional distress. Affirming, this court held that a security guard's comment that he needed to make a "collar," and his actions in yelling "that's what you get" and "you're not welcome to shop here anymore" at customer as she was escorted out of the store, were insufficient to state a claim for intentional infliction of emotional distress as a matter of law. The court noted that, ordinarily, merely insulting language, without more, did not constitute outrageous conduct. Johnson v. Ralphs Grocery Co., 204 Cal.App.4th 1097, 1108, 1109, 139 Cal.Rptr.3d 396, 406.

Cal.App.2010. Com. (j) cit. in sup. Pediatric dentist sued parents of patient, along with website, alleging libel per se and intentional and negligent infliction of emotional distress in connection with a review that parents posted on website, allegedly containing false assertions criticizing the services dentist had provided to patient. The trial court denied defendants' anti-SLAPP motion to strike plaintiff's claims. This court reversed and remanded, holding, as to plaintiff's claim for intentional infliction of emotional distress, that plaintiff's alleged emotional reaction, including loss of sleep and stomach upset, in response to being professionally criticized in a review on a website, however unjustified or defamatory that criticism might have been, did not constitute the sort of severe emotional distress of such lasting and enduring quality that no reasonable person should be expected to endure. Wong v. Tai Jing, 189 Cal.App.4th 1354, 1376, 117 Cal.Rptr.3d 747, 767.

Cal.App.2007. Com. (d) cit. in case quot. in sup., com. (f) quot. in case quot. in sup. Former wife of decedent sued trustee of decedent's estate, alleging causes of action for sexual harassment under state law and intentional infliction of emotional distress (IIED). The trial court granted summary judgment for defendant. Affirming, this court held that, because plaintiff had no cause of action for sexual harassment due to the lack of severe or pervasive conduct required by the state sexual-harassment statute, there was no outrageous conduct that would support an IIED claim; moreover, in the context of the legal battles between the parties over the trust, defendant's harsh and inappropriate language directed at plaintiff during a social event did not rise to the level of outrageous conduct under California case law. Hughes v. Pair, 154 Cal.App.4th 1469, 1486, 1487, 65 Cal.Rptr.3d 619, 631, 632.

Cal.App.2006. Com. (d) quot. in case quot. in disc. Recipients of threatening e-mail messages ultimately traced back to employee of interactive-computer-service provider sued provider for, in part, intentional infliction of emotional distress. The trial court granted summary judgment for defendant. This court affirmed, holding, inter alia, that while employee's repeated threats of physical harm directed to plaintiffs, stated in graphic terms, were acts of extreme and outrageous conduct intended to cause emotional distress that were sufficient to sustain an intentional-infliction claim, plaintiffs did not make a prima facie showing sufficient to support liability against provider for these acts. Delfino v. Agilent Technologies, Inc., 145 Cal.App.4th 790, 809, 52 Cal.Rptr.3d 376, 392, certiorari denied 552 U.S. 817, 128 S.Ct. 98, 169 L.Ed.2d 22 (2007).

Cal.App.2002. Com. (d) quot. in case quot. in disc. Sister of nursing-facility patient brought suit for, in part, reckless infliction of emotional distress against facility's operator and administrator to recover for emotional distress she suffered as the result of sexual assault of patient while in defendants' facility. The trial court sustained a demurrer to plaintiff's claims. Affirming, this court held that plaintiff failed to state a cause of action for reckless infliction of emotional distress, since defendants' alleged nonfeasance in failing to provide adequate security was neither directed primarily at plaintiff nor calculated to cause plaintiff emotional distress, and plaintiff was not present at the time of the injury-causing event. Ess v. Eskaton Properties, Inc., 97 Cal.App.4th 120, 130, 118 Cal.Rptr.2d 240, 247.

Cal.App.1999. Com. (j) quot. in disc. and cit. in sup. Criminal defendant challenged his conviction under state's anti-stalking law. Reversing, this court held that the law was not unconstitutionally vague, but that the victim, who testified that defendant's actions caused her to feel afraid for herself and her children and to suffer sleepless nights, had failed to establish that she had experienced substantial emotional distress, as was required under the applicable statutory section. People v. Ewing, 76 Cal.App.4th 199, 90 Cal.Rptr.2d 177, 184.

Cal.App.1998. Com. (d) cit. and quot. in sup. and cit. in headnotes, com. (f) cit. in sup. A wife sued her former husband for breach of a palimony agreement and intentional infliction of emotional distress, among other claims. The husband had left a threatening phone message sarcastically indicating that he was delivering the wife a vacation package on an airline that recently suffered a publicized crash. The trial court dismissed. This court affirmed, holding, inter alia, that the phone

message was not so extreme and outrageous so as to constitute intentional infliction of emotional distress. Absent evidence that defendant tried to follow through on any of his purported threats, defendant's statements were mere insults, threats, annoyances, or petty oppressions. Cochran v. Cochran, 65 Cal.App.4th 488, 76 Cal.Rptr.2d 540, 541, 543, 545-547.

Cal.App.1996. Com. (e) cit. and quot. in disc. Husband and wife retained a collection agency to enforce a judgment in the principal amount of $150,000. Based on agency's advice, couple gave the judgment debtor a full satisfaction of judgment in exchange for $40,000. Later, couple sued agency for, among other claims, intentional infliction of emotional distress, alleging that defendant had engaged in wrongful conduct in attempting to collect on the judgment. Trial court sustained a demurrer as to the fiduciary-duty and emotional-distress claims. This court reversed, holding, inter alia, that reasonable minds could differ as to whether defendant's conduct was sufficiently extreme and outrageous. Arguably, defendant abused a position that gave it power to adversely affect plaintiffs' interests. Defendant's alleged actions of affirmatively misrepresenting that an application to renew the judgment had been recorded, failing to inform plaintiffs that judgment debtor had transferred the property to his wife, and persuading plaintiffs to release judgment debtor from a judgment worth $250,000 for $40,000 may have been intentional and done with the foreseeable consequence that plaintiffs would suffer severe emotional distress once they discovered the truth. Cross v. Bonded Adjustment Bureau, 48 Cal.App.4th 266, 55 Cal.Rptr.2d 801, 811.

Cal.App.1996. Cit. and quot. in case quot. in sup., coms. (a) and (b) cit. in case quot. in sup. After a fire caused substantial damage to their home, insureds sued their homeowners' insurer to recover on a bad-faith theory for emotional distress resulting from a delay in resolving their claim for the restoration of their home after a fire. Trial court entered judgment on jury verdict for insureds. This court reversed and remanded, holding that emotional-distress damages were recoverable in a first-party bad-faith case only when the insured establishes financial loss, and that in this case there was no evidence of financial loss. There was no evidence in the record to support a claim that attorneys' fees were incurred by insureds or to suggest that insured wife incurred any financial obligation for her hospitalization. Waters v. United Services Auto. Ass'n, 41 Cal.App.4th 1063, 48 Cal.Rptr.2d 910, 916.

Cal.App.1995. Com. (d) cit. and quot. in sup. and cit. in headnotes. Parents sued television station on their children's behalf, alleging, in part, intentional infliction of emotional distress, after a station cameraman and employee informed the children that a neighbor had killed her children and then herself and then questioned the minors on camera to get their reaction to the news. Trial court denied defendants' motion for summary judgment. This court denied defendants' request for a writ of mandate directing trial court to vacate its decision, holding that a television reporter who attempts to deliberately manipulate the emotions of young children for some perceived journalistic advantage has engaged in extreme and outrageous conduct. It could be inferred that when defendants realized the minors were friends of the victims, they informed them of the news hoping that it would elicit an emotional response. KOVR-TV, Inc. v. Superior Court (Whittle), 31 Cal.App.4th 1023, 37 Cal.Rptr.2d 431, 431, 433, 435.

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Cal.App.1995. Cit. in headnote, cit. but dist., com. (b) cit. in disc., com. (i) quot. in case quot. in ftn. Father and son who were involved in automobile accident with drunk driver and who waited seven years for a $35,000 judgment from driver's insurer sued insurer to recover damages for the emotional distress they allegedly suffered while awaiting payment. The trial court entered judgment on a jury verdict for plaintiffs but this court reversed and remanded, holding that where the damage was purely financial, plaintiffs could not recover unless they showed a substantial injury other than the emotional distress or that the emotional distress itself was severe, substantial, or enduring. The court, distinguishing the instant action from one alleging intentional infliction of emotional distress, noted that plaintiffs failed to prove that they suffered any sort of emotional trauma beyond that normally associated with litigation. Torres v. Auto. Club of Southern Cal., 41 Cal.App.4th 468, 43 Cal.Rptr.2d 147, 147, 151, 153, review granted and opinion superseded 45 Cal.Rptr.2d 644, 902 P.2d 1297 (1995).

Cal.App.1994. Com. (e) quot. in diss. op. After automobile passengers who were injured in a rear-end collision settled their personal injury action against tortfeasor, they sued tortfeasor's insurer on a theory of intentional infliction of emotional distress, inter alia, to recover damages for insurer's alleged unfair settlement practices. This court affirmed the trial court's grant of defendant's motion for judgment on the pleadings on the ground that there was no preexisting relationship between the parties. The dissent argued that there was no requirement that there be a preexisting consensual relationship between the parties at the time defendant engaged in the tortious conduct alleged as intentional infliction of emotional distress in order that defendant's conduct might be considered to be outrageous. Krupnick v. Hartford, 28 Cal.App.4th 185, 34 Cal.Rptr.2d 39, 57.

Cal.App.1992. Com. (d) quot. in disc. and cit. in ftn., com. (g) cit. in disc. The plaintiff sued a savings and loan association, its president, and its attorneys for intentional infliction of emotional distress, inter alia, alleging that the defendants improperly initiated an interpleader action by naming the plaintiff as a claimant. The trial court dismissed the claim. Affirming, this court held that the defendants' wrongfully naming the plaintiff as a party to litigation did not rise to the level of outrageous conduct necessary to support a finding of intentional infliction of emotional distress. Cantu v. Resolution Trust Corp., 4 Cal.App.4th 857, 6 Cal.Rptr.2d 151, 169.

Cal.App.1990. Com. (d) quot. in disc. A schizophrenic woman of low intelligence was placed under the medical care of a doctor at a convalescent hospital. She became pregnant by another patient and was not given proper advice or care during her pregnancy, which led to the birth of an autistic and severely retarded son. The patient's conservator sued the doctor for medical malpractice and intentional infliction of emotional distress. The trial court entered judgment on a jury verdict in favor of the plaintiff, awarding her compensatory and punitive damages on both claims. This court affirmed, holding, inter alia, that the jury's determination that the doctor intentionally inflicted severe emotional distress through his outrageous actions was proven at trial. It reasoned that the doctor consciously disregarded his responsibilities as a physician by: failing to perform adequate medical examinations on the plaintiff; failing to protect the plaintiff while she was locked in a facility where sexual activity was rampant; ignoring the plaintiff's requests for birth control; failing to warn the plaintiff of the dangers associated with the drugs he prescribed;

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and, failing to conduct a timely pregnancy test. Adams v. Murakami, 228 Cal.App.3d 885, 268 Cal.Rptr. 467, 470, review granted and opinion superseded 270 Cal.Rptr. 816, 793 P.2d 22 (1990), reversed in part and remanded 54 Cal.3d 105, 284 Cal.Rptr. 318, 813 P.2d 1348 (1991).

Cal.App.1990. Cit. in sup. Family and friends of decedents whose organs and gold fillings were removed without authorization and whose decedents were subject to mass cremation and commingling of their remains sued mortuaries, funeral homes, and crematoriums to which the mortuaries and funeral homes delivered the decedents' remains for cremation, as well as a biological supply company purchasing body parts and organs from the crematory defendants. The plaintiffs sued the mortuary and crematory defendants on theories of intentional and negligent infliction of emotional distress and intentional and negligent interference with human remains, inter alia. This court granted the plaintiffs' petition for a writ of mandate seeking review of a pretrial order limiting the plaintiff class, and directed the trial court to vacate its order on standing. It held that all family members and close friends of the decedents had standing to sue for intentional mishandling of remains. However, where neither violent conduct against a living person nor the plaintiffs' immediate presence at the scene of the mishandling was alleged, the court agreed with the defendants that no member of the plaintiff class had standing to sue for negligent or intentional infliction of emotional distress. Christensen v. Superior Court, 230 Cal.App.3d 798, 271 Cal.Rptr. 360, 373.

Cal.App.1990. Com. (e) cit. in disc., com. (f) cit. in sup. A bank charged back a check on a customer's account and harassed the elderly customer to collect the amount of the charge back. The customer sued the bank alleging, among other things, conversion, negligence, and intentional and negligent infliction of emotional distress. The trial court sustained the defendants' demurrer without leave to amend. Reversing in part, this court held, inter alia, that the plaintiff had alleged sufficient facts to support her cause of action for intentional infliction of emotional distress, because a jury could reasonably find the defendants' conduct to have been outrageous. The court found that the conduct of the bank, including pressuring the client every day to sign a promissory note, threatening to attach her funds, and continuing to make threatening calls after being directed to speak only with her attorney could constitute outrageous behavior, especially where the defendant knew the plaintiff was elderly and the charge back placed her into a difficult financial situation. Symonds v. Mercury Sav. and Loan Ass'n, 225 Cal.App.3d 1458, 275 Cal.Rptr. 871, 878.

Cal.App.1990. Quot. in case quot. in sup., coms. (a) and (b) quot. in case quot. in sup. A client sued an attorney for professional negligence and breach of fiduciary duty seeking damages for financial losses and severe emotional distress, alleging that the attorney had failed to properly advise her regarding termination procedures, resulting in a suit for wrongful termination by former employees. The trial court granted summary judgment for the attorney on the issue of emotional distress damages because the client failed to allege any intentional wrongdoing or bad faith. This court granted the client's petition for a writ of mandate and ordered the trial court to vacate its order granting summary judgment. The court noted that the primary reason for limiting recovery of damages for emotional distress was to prevent fictitious and frivolous claims, and concluded that

the client, who had suffered substantial economic damages, did not need to demonstrate willful misconduct to recover emotional distress damages, as the existence of substantial economic loss and the already circumscribed liability of attorneys provided adequate safeguards. Tara Motors v. Superior Court (Jasper), 226 Cal.App.3d 640, 276 Cal.Rptr. 603, 608.

Cal.App.1989. Com. (h) cit. in disc. An employee who was told that she would be terminated, and subsequently told that she would be kept on, only to be terminated again within seven days, sued her employer for, inter alia, intentional infliction of emotional distress. The trial court entered summary judgment in favor of the employer. This court affirmed, holding, as a matter of law, that the conduct of the employer in offering and withdrawing a termination package, directing the employee to perform "menial" receptionist tasks, and ultimately providing the employee with a less advantageous termination package than was originally offered did not qualify as outrageous conduct necessary to support an action for intentional infliction of emotional distress. It noted that the plaintiff was not singled out in the companywide reduction in work force, and that the company had merely pursued its own economic interests and asserted its legal rights. Trerice v. Blue Cross of California, 209 Cal.App.3d 878, 257 Cal.Rptr. 338, 340.

Cal.App.1989. Com. (d) quot. in sup., com. (h) quot. in disc. The wife of an elderly and incompetent man, who had suffered from congestive heart failure and strokes that had rendered him ill for eight years, requested that no heroic measures be taken to prolong the man's life. After learning that a feeding tube had been inserted into her husband, the wife sued the responsible doctors for intentional infliction of emotional distress. The trial court sustained the defendants' demurrers to the complaint without leave to amend. Affirming, this court held that the defendants' actions were not sufficiently extreme or outrageous to warrant relief, especially since the plaintiff made no attempt to have the tube removed either directly or by court intervention. The court also noted that other physicians similarly situated would have recommended and performed the surgical procedure. Westhart v. Mule, 213 Cal.App.3d 542, 261 Cal.Rptr. 640, 645.

Cal.App.1988. Com. (g) cit. in disc. The former owner of a company alleged that she was fraudulently induced to sell her controlling stock interest in the company to a third-party buyer by a bank's promise of long-term financing for the company. She sued the bank for intentional infliction of emotional distress, inter alia. The trial court entered judgment on the jury's verdict for the plaintiff. Reversing, this court held that the bank was privileged to pursue its own legal interests in liquidating company properties and was not subject to liability for infliction of emotional distress. Kruse v. Bank of America, 202 Cal.App.3d 38, 248 Cal.Rptr. 217, 234, cert. denied 488 U.S. 1043, 109 S.Ct. 869, 102 L.Ed.2d 993 (1989).

Cal.App.1988. Com. (j) quot. in disc. A city police dispatcher was arrested by the state highway patrol for possession of drugs and driving under the influence of drugs or alcohol. Although the arrest had not resulted in any conviction, the highway patrol released information pertaining to the arrest to the city that employed the dispatcher, and the city terminated the dispatcher's employment, due in part to this information. The dispatcher sued the city for labor code violations and intentional infliction of emotional distress. The trial court dismissed the complaint. This court

affirmed, holding, inter alia, that the plaintiff failed to state a cause of action for intentional infliction of emotional distress because the mere allegation that he suffered shame, humiliation, and embarrassment without further factual explanation did not meet the required specificity of outrageous conduct by the defendant to support this claim, especially where the humiliation the plaintiff may have suffered was the result of his own unlawful conduct. Pitman v. City of Oakland, 197 Cal.App.3d 1037, 243 Cal.Rptr. 306, 311.

Cal.App.1987. Cit. in case cit. in disc., com. (h) quot. in disc. An employee sued his former employer for intentional infliction of mental distress after his alleged forced retirement. The trial court granted the employer's motion for summary judgment. Affirming, this court held that the challenged conduct could not reasonably be regarded as so extreme and outrageous to permit recovery, where the defendant's conduct consisted of abruptly presenting the plaintiff with an ultimatum concerning his continued employment, implying that the plaintiff was not working hard enough, making light of the plaintiff's importance to the firm, using offensive language, and making "impossible" demands. Duerksen v. Transamerica Title Ins. Co., 189 Cal.App.3d 647, 234 Cal.Rptr. 521, 526.

Cal.App.1987. Com. (h) quot. in case cit. in disc. A marketing manager sued his former employer for intentional infliction of emotional distress following the termination of his employment contract. The trial court granted summary judgment to the employer on the ground that the employer had had good cause to discharge the plaintiff. Affirming, this court held that the record did not contain any finding of outrageous conduct on the part of the employer necessary for the tort of intentional infliction of emotional distress. The court concluded that the alleged accusations by the defendant of the plaintiff's disloyalty did not raise a triable issue of fact as to outrageousness, because even if they were made, the accusations were an accurate description of the plaintiff's conduct and were not extreme or outrageous. Fowler v. Varian Associates, Inc., 196 Cal.App.3d 34, 241 Cal.Rptr. 539, 545.

Cal.App.1987. Com. (d) cit. in sup. A handbuilt, custom-made automobile was extensively damaged in an accident. When the car's owner sued the other driver involved in the collision, the defendant's insurer offered the plaintiff an amount far less than it would cost to repair or replace the car. The plaintiff then sued the insurer for intentional infliction of emotional distress, based on the unreasonable settlement offer. The trial court overruled the insurer's demurrer. This court, however, sustained the demurrer on the ground that the nonpayment of a single disputed claim, even if wholly unreasonable, did not constitute sufficiently outrageous conduct to support the plaintiff's cause of action. The court said that such conduct must be so extreme as to exceed the bounds of what was usually tolerated in a civilized community. Pacific Nat. Ins. Co. v. Superior Court (Liptak), 198 Cal.App.3d 274, 233 Cal.Rptr. 189, 193.

Cal.App.1986. Coms. (e) and (f) cit. in disc. A patient who involuntarily remained on a ventilator sued the hospital for failure to honor his living will, which requested that he not be kept alive by artificial measures. The trial court dismissed the complaint. Affirming, this court held, inter alia, that the trial court had properly dismissed the plaintiff's cause of action for intentional infliction of

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emotional distress because the outrageous conduct element necessary for a prima facie case was not present in this case where the evidence showed that the defendant had acted in reliance on what it believed to be prevailing community medical and legal standards, and had not used its superior position to intentionally harass or intimidate the plaintiff. Bartling v. Glendale Adventist Medical Center, 184 Cal.App.3d 961, 229 Cal.Rptr. 360, 365.

Cal.App.1986. Com. (j) cit. in disc. A doctor sued a malpractice attorney, alleging malicious prosecution, abuse of process, and intentional infliction of emotional distress. The trial court nonsuited the doctor on the intentional infliction and the abuse of process claims and entered judgment for the doctor on the malicious prosecution claim. Reversing the judgment on the malicious prosecution claim and affirming the rest of the judgment, this court held that the attorney's conduct in bringing an action against the doctor when he knew that the statute of limitations had already run was not the extreme and outrageous conduct necessary to constitute intentional infliction of emotional distress. Devlin v. Fishman, 178 Cal.App.3d 260, 224 Cal.Rptr. 6, 10.

Cal.App.1986. Cit. in disc. Former members of a religious organization sued the organization, alleging fraud and deceit, intentional infliction of emotional distress, and false imprisonment. The religious organization counterclaimed for violation of civil rights as the result of deprogramming activities. The trial court granted summary judgment for the religious organization but dismissed the counterclaim. This court affirmed the judgment but reversed and remanded the judgment on the counterclaim. The court held that the plaintiffs' contentions of fraudulent misrepresentations and use of mind control techniques by the religious organization did not support a claim for intentional infliction of emotional distress; there was no evidence that the former members had been compelled to join the religious organization or had been prevented from leaving. The court found that the techniques used to recruit and indoctrinate the members, which were not materially different from those employed by other organizations, were not so indecent nor so beyond the limits of social toleration that they provided the necessary element of outrageous conduct. Molko v. Holy Spirit Ass'n for Unification, 179 Cal.App.3d 450, 224 Cal.Rptr. 817, 831.

Cal.App.1985. Com. (d) cit. in disc., com. (j) quot. in disc. Insureds sued insurance company alleging breach of implied covenants of good faith and fair dealing, intentional infliction of emotional distress, and negligent infliction of emotional distress. The suit arose when defendant informed plaintiffs that counsel retained by defendant represented only defendant in settlement negotiations and advised plaintiffs to retain independent counsel. Defendant then refused to pay for plaintiff's counsel. The trial court dismissed the complaint without leave to amend. This court reversed, ruling that the trial court erred in denying leave to amend. Regarding the emotional distress claims, the court held that although defendant's conduct was outrageous, plaintiffs had failed to establish facts indicating the extent of any mental suffering, and therefore had not stated a claim. Bogard v. Employers Cas. Co., 164 Cal.App.3d 602, 210 Cal.Rptr. 578, 587, 588.

Cal.App.1985. Quot. in sup., cit. in case quot. in disc., com. (*l*) quot. in sup. The plaintiff brought an action for loss of consortium and negligent infliction of emotional distress against the defendant,

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who had stabbed the decedent. The plaintiff and the decedent had lived together for two years, had had an infant son, and had planned to be married. The plaintiff and the decedent had been driving together when the defendant's car encroached on their lane and the decedent swerved to avoid a collision. The two vehicles came to a stop and an altercation ensued, during which the defendant drew a knife and stabbed the decedent. The plaintiff witnessed the incident from the auto and rushed to the decedent's side, where he died in her arms. The trial court sustained the defendant's demurrer to the plaintiff's claims. This court reversed in part. It held that the plaintiff had a cause of action for mental distress, since it was foreseeable that the defendant's stabbing of the decedent a few feet from the vehicle where the plaintiff was sitting would cause the loved one to suffer emotional distress. Ledger v. Tippitt, 164 Cal.App.3d 625, 210 Cal.Rptr. 814, 822, 823.

Cal.App.1984. Com. (d) quot. in part in sup., coms. (e) and (f) cit. in case quot. in sup. A mother sued the sitter of her child, who died of injuries sustained while the child was in the sitter's care, for negligent infliction of emotional distress. The trial court sustained the sitter's demurrer. This court issued a peremptory writ of mandate directing the trial court to overrule the demurrer, holding that the mother stated a cause of action for intentional infliction of emotional distress. Although the complaint did not designate the sitter's conduct as outrageous, the court held, it alleged facts and circumstances that reasonably could have led an average community member to conclude that the sitter's conduct was extreme and outrageous and had a severe and traumatic effect on the mother's emotional tranquility. Miller v. Superior Court (Gondringer), 161 Cal.App.3d 1205, 208 Cal.Rptr. 25, 30.

Cal.App.1984. Cit. in disc., com. (d) cit. in case quot. in sup. (Erron. cit. as § 56, com. (d).) The plaintiff was injured in an accident negligently caused by the driver of the defendant's vehicle. When the plaintiff rejected the defendant's settlement offer, the defendant closed the claim, asserting the statute of limitations. The plaintiff alleged intentional infliction of emotional distress. The trial court ruled that the action was barred by the statute of limitations. This court affirmed in part and reversed in part. It noted that the defendant's actions were not taken for the purpose of causing emotional distress and the conduct was not sufficiently extreme and outrageous to constitute intentional infliction of emotional distress. Muraoka v. Budget Rent A Car, Inc., 160 Cal.App.3d 107, 206 Cal.Rptr. 476, 484.

Cal.App.1984. Com. (d) quot. in ftn. in case cit. in sup. A marketing manager, who was discharged as a result of her romantic involvement with a manager of a rival firm, sued her employer for wrongful discharge and intentional infliction of emotional distress. She was awarded compensatory and punitive damages. This court affirmed, holding that the evidence clearly supported the jury finding that the employer's conduct was so extreme and outrageous as to exceed all possible bounds of decency and was to be regarded as atrocious and utterly intolerable in a civilized society, so that the emotional distress cause of action was amply proved and supported the award of punitive damages. Rulon-Miller v. International Bus. Mach. Corp., 162 Cal.App.3d 241, 208 Cal.Rptr. 524, 534.

Cal.App.1984. Quot. in ftn. Wife sued hospital for negligent infliction of emotional distress, alleging that defendant knew or should have known that her husband would fall and be injured without the use of safety rails, and that she would suffer emotional distress as a result. This court affirmed the trial court's dismissal, holding that plaintiff could not recover when she did not witness the accident, and that she was not a direct victim of defendant's negligence. The court also rejected plaintiff's argument that she was entitled to emotional distress damages based on breach of contract, refusing to extend that theory beyond the negligent mishandling of a corpse. The dissent argued that plaintiff was a direct victim because her emotional distress was a foreseeable consequence of defendant's negligence, and that she should have been allowed to amend her complaint to include emotional distress based on breach of contract. The dissent also noted that courts had allowed negligent infliction of emotional distress claims where defendant's conduct was extreme and outrageous. Wiggins v. Royale Convalescent Hosp., 158 Cal.App.3d 914, 206 Cal.Rptr. 2, 7.

Cal.App.1983. Quot. in sup., com. (e) cit. in sup. and quot. in ftn. in sup., com. (f) quot. in ftn. in sup., illus. 8 cit. in sup., illus. 12 quot. in ftn. in sup. A hospital patient sought a writ of mandate to compel the trial court to vacate an order granting partial summary judgment for the hospital on the patient's cause of action against the hospital for intentional infliction of emotional distress. That action was based on a telephone call to the patient by a debt collector from the hospital's business office, made while the patient was still under the effects of her surgery, in which the debt collector allegedly persisted in demanding payment in a rude and offensive manner. This court held that material issues of fact existed as to whether the hospital's method of seeking payment was reasonable in light of the patient's alleged delicate physical and emotional state at the time of the call. The writ of mandate sought by the patient was issued. Bundren v. Superior Ct. of County of Ventura, 145 Cal.App.3d 784, 193 Cal.Rptr. 671, 674, 675.

Cal.App.1983. Cit. in disc., com. (d) quot. in disc. An employer and his wife appealed from an order of the lower court dismissing their fifth amended complaint against a union, its local, and several members. That complaint alleged intentional infliction of emotional distress and loss of consortium, based on constant harassment and threats made by union members to the employer, which conduct was allegedly so severe that it eventually caused that employer to suffer a heart attack, and his wife to suffer loss of consortium. This court reversed, holding, inter alia, that the fifth amended complaint sufficiently alleged outrageous conduct, and thus stated a cause of action against the defendants for intentional infliction of emotional distress, and the facts alleged were also sufficient to constitute a cause of action in favor of the employer's wife for loss of consortium. Kiseskey v. Carpenters' Trust For S. Cal., 144 Cal.App.3d 222, 192 Cal.Rptr. 492, 497.

Cal.App.1983. Com. (b) cit. in sup. An actor sued a television studio and two of its officers, and after the jury awarded damages to the actor on the theories of breach of contract, tortious breach of contract, and fraud, the defendants appealed. This court ruled that the jury verdict on the issue of tortious breach of contract was supported by substantial evidence of bad faith action on the part of the defendants which was extraneous to the contract and was intended to frustrate the actor's enjoyment of his contract rights. The court also held that the somewhat speculative nature of the damages suffered by the actor was a risk borne by the defendants who had breached the contract

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and caused those damages. The court further held that since the jury had determined that the actor had suffered actual damage through interference with his contractual rights, its award of damages for emotional distress under a fraud theory was appropriate. After rejection of a cross-appeal by the actor on the question of a trial court reduction in the amount of damages awarded to him, the court affirmed the lower court judgment in all respects. Smithers v. Metro-Goldwyn-Mayer Studios, 139 Cal.App.3d 643, 189 Cal.Rptr. 20, 24.

Cal.App.1980. Com. (d) quot. in part in disc. and coms. (e) and (h) quot. in disc., com. (e) quot. in ftn. in disc. The plaintiff, an investigative reporter, brought an action against his publisher, alleging that comments by the publisher to an outside journalist were slanderous. The plaintiff also brought an action against two officials of the newspaper, alleging intentional infliction of emotional distress. Both causes of action were dismissed, and the plaintiff appealed. The appellate court found that comments made by the plaintiff's employer constituted an opinion and were not actionable. As to the second cause of action, the court stated that a plaintiff can recover for emotional distress that was intentionally inflicted where there was an extreme and outrageous invasion of plaintiff's mental and emotional tranquility. The judgment of dismissal of the first cause of action was affirmed, and the judgment of dismissal as to the second cause of action was reversed. Lagies v. Copley, 110 Cal.App.3d 958, 168 Cal.Rptr. 368, 377, 378.

Cal.App.1980. Cit. in sup. and com. (k) cit. in sup. Plaintiff tenant brought this action against his former landlord and rental agents for damages allegedly resulting from the dilapidated and unsafe condition of the premises. Plaintiff alleged six causes of action based on the following theories: breach of warranty of habitability, nuisance, intentional infliction of mental distress, negligent violation of statutory duty, constructive eviction, and injunctive relief from unlawful business practices. The trial court struck all causes of action from the complaint other than the cause of action for breach of warranty of habitability. This court affirmed in part and reversed in part, holding that the tenant's remedies were not limited to an action against the landlord for breach of the warranty of habitability, but included the right to sue the landlord and his agents in tort for damages for intentional infliction of mental distress and injury to personal property suffered as a result of the failure to maintain the premises. Regarding the cause of action for intentional infliction of mental distress, the court stated that the right to recover without physical injury is clearly established in California in situations involving extreme and outrageous conduct; whether this was the case under the present allegations was deemed to present a factual question. Stoiber v. Honeychuck, 101 Cal.App.3d 903, 162 Cal.Rptr. 194, 202.

Cal.App.1979. Cit. in diss. op. and com. (b) cit. in diss. op. The plaintiff claimed a loss of consortium and negligent infliction of emotional distress because the defendant doctor had negligently misdiagnosed the plaintiff's wife's condition as syphilis. The lower court sustained the defendant's demurrer and the plaintiff appealed. This court held that a cause of action for loss of consortium did not exist because the loss did not result from physical injuries to the spouse but rather from a misdiagnosis. This court also held that the plaintiff had not stated a cause of action for the negligent infliction of emotional distress because the requirements of a corresponding physical injury and foreseeability were not met. The dissent argued that because the doctor had discussed

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the plaintiff with the spouse the foreseeability requirement had been met. The dissent also argued that physical injury should not be a requirement in cases involving the negligent infliction of mental distress. In any case the dissent noted that outrageous conduct was necessary only in cases based upon the intentional infliction of mental distress and not in cases based upon the negligent infliction of emotional distress. Molien v. Kaiser Foundation Hospitals, 96 Cal.App.3d 469, 158 Cal.Rptr. 107, 118, opinion vacated 27 Cal.3d 916, 167 Cal.Rptr. 831, 616 P.2d 813 (1980).

Cal.App.1978. Com. (d) quot. in part in disc.; coms. (e) and (f) cit. in disc. A former employee brought an action against his former employer and certain supervisory employees to recover compensatory and punitive damages for defamation and intentional infliction of emotional distress. The lower court rendered judgment for the plaintiff against certain defendants, and such defendants appealed. The major contentions on appeal concerned the sufficiency of evidence of malice and intentional infliction of emotional distress, and the correctness of the jury instructions on an employer's liability for intentional torts of his employees and the proper measure of damages for intentional infliction of emotional distress. The court found that the evidence supported the jury's verdict in favor of the employee for defamation and intentional infliction of emotional distress. However, the court held, inter alia, that the giving of an instruction which left the jury with the impression that the employer was liable for all types of damages and which did not clearly qualify the criteria required for assessment of punitive damages against an employer for acts of an employee was reversible error in view of conflicting evidence pertaining to the liability of the employer and the supervisory personnel and where the instructions also authorized the jury to award damages for economic loss resulting from intentional infliction of emotional distress. Accordingly, the judgment of the lower court was reversed. Agarwal v. Johnson, 81 Cal.App.3d 513, 146 Cal.Rptr. 521, 527, 528.

Cal.App.1977. Quot. in sup. and coms. (j) and (h) quot. in sup. Homeowners brought an action against a contractor to recover damages which allegedly occurred when the contractor, engaged in construction which necessitated removal of a portion of the homeowners' roof, failed to take steps to protect their home and belongings from an ensuing rainstorm. The lower court awarded actual damages and damages for emotional distress upon a jury verdict, and the contractor appealed. The court noted the Restatement position that “some degree of transient and trivial emotional distress is a part of the price of living among people.” It recognized that the Restatement's equating of reckless with intentional extreme and outrageous conduct is embodied in the law of California. The court considered the evidence upon which plaintiffs based their allegation of emotional distress and concluded that “it may not reasonably be deemed to disclose ‘extreme and outrageous intentional (or reckless) invasions of (their) mental and emotional tranquility’. It follows that insofar as the judgment awards damages for emotional distress, it was erroneously entered.” Judgment modified by striking awards for emotional distress, and, as so modified, affirmed. Fuentes v. Perez, 66 Cal.App.3d 163, 136 Cal.Rptr. 275, 277, 278, 279.

Cal.App.1977. Cit. in sup. The plaintiff prevailed in a legal malpractice suit, but was denied recovery for emotional suffering by the lower court. The court affirmed, stating that damages for emotional distress, without physical injuries, are recoverable only in instances of intentional and

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unreasonable infliction of distress by means of extreme and outrageous invasions of tranquility, and not in a case where an attorney has been merely careless and inattentive. Quezada v. Hart, 67 Cal.App.3d 754, 136 Cal.Rptr. 815, 820.

Cal.App.1976. Coms. (d), (e), (f), and (k) quot. in sup. Com. (j) cit. in sup. A tenant brought suit against the owner of an apartment building seeking declaratory and injunctive relief as well as damages for mental distress in connection with alleged threats to evict her. The lower court granted judgment for the defendants on all causes of action. On appeal, the court affirmed judgment that the plaintiff was not entitled to injunctive or declaratory relief, but reversed the judgment as to the cause of action for intentional infliction of mental distress. In reversing, the court stated that the defendant's conduct in using insulting language and humiliating and harassing the tenant constituted outrageous conduct, and, therefore, the question as to whether the tenant should be allowed to recover should have been submitted to the jury. Newby v. Alto Rivieria Apartments, 60 Cal.App.3d 288, 131 Cal.Rptr. 547, 553, 554.

Cal.App.1974. Com. (g) cit. in disc. This action was brought by a former employee of the defendant for defamation, intentional infliction of emotional distress, and wrongful discharge from employment, subsequent to the employee's forced retirement for falsifying sick leave and the discussion of the matter with the employee's subordinates. Affirming a judgment adverse to the employee, this court held, inter alia, that it was not error for the judge to refuse to give certain of the employee's proposed instructions based on the Restatement where they were in substance covered in other instructions. Deaile v. General Tel. Co., 40 Cal.App.3d 841, 115 Cal.Rptr. 582, 587.

Cal.App.1972. Cit. but dist. Insured's restaurant burned, and he was charged with arson. He alleged that his insurers (1) through an adjuster made statements to the official arson investigator and at his preliminary hearing concerning excessive coverage; (2) demanded through their attorneys that insured submit to an oral examination under oath and demanded his records; (3) refused to delay the examination until the criminal matter had been heard or to pay on the policies due to insured's failure to appear for the examination. Although the criminal charges were dropped for lack of probable cause, the court held that the insurer's conduct was not sufficiently extreme or "atrocious" and "utterly intolerable in a civilized community" to be actionable. Gruenberg v. Aetna Insurance Company, 103 Cal.Rptr. 887, 891, superseded 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032. See above case.

Cal.App.1971. Com. (e) cit. in sup. This was an action brought by tenants against their landlord to recover for damages for intentional infliction of mental distress, among other things. The court held that where the tenants vacated the premises after the landlord raised the rents by an unfair and unreasonable amount allegedly in response to demands for repairs to be made, the complaint stated a cause of action for intentional infliction of mental distress, since California provided that remedy despite lack of physical injury to the plaintiffs. Aweeka v. Bonds, 20 Cal.App.3d 278, 97 Cal.Rptr. 650, 652.

Cal.App.1971. Cit. and quot., com. (h) cit. and quot., com. (d) quot. inpart, coms. (i) and (j) cit. and quot. in part, com. (c) and caveat cit., andcoms. (e) and (f) cit. and quot. in ftn. in sup., also cit. and quot. s 46, Tentative Draft 1. The plaintiff's husband and wife, alleged that the defendants knowingly, maliciously and with intent to inflict extreme mental suffering and duress upon the plaintiffs and their family caused an agent of the defendants to go to the home of the plaintiff at midnight to serve a process and pounded in aloud and boisterous manner upon the front door thereby awakening the plaintiffs and the neighborhood although the house was unlit and service of the summons had never been attempted at a reasonable time and manner. The plaintiffs alleged that as a result they became "frightened, upset, nervous and humiliated" and suffered extreme and severe mental distress. The court held that each plaintiff stated a cause of action for intentional infliction of emotional distress. Golden v. Dungan, 20 Cal.App.3d 295, 97 Cal.Rptr. 577, 581-4, 585, 586, 588.

Cal.App.1971. Com. (g) cit. in sup. The plaintiffs, owners of real property, sought to recover damages from the defendants, their real estate agents, on theories of fraud, malicious prosecution, and intentional infliction of emotional distress for alleged manufacturing of a document and perjuring testimony in a prior suit. The court held that although the plaintiff's cause of action for intentional infliction of emotional distress did not constitute a collateral attack upon the judgment in the prior action, the plaintiffs were not entitled to any relief on that cause of action because the testimony of the defendants was absolutely privileged as publication made in the course of a judicial proceeding. Kachig v. Boothe, 22 Cal.App.3d 626, 99 Cal.Rptr. 393, 403.

Cal.App.1970. Com. (g) and illus. cit. in sup., com. (j) cit. and quot. insup., com. (e) cit. in sup. Plaintiff, permanently disabled, was collecting monthly accident benefit payments, due to run for 30 years. To avoid paying over $50,000 under the policy, the defendant insurer's co-defendant claims manager, by concededly outrageous conduct, schemed to make plaintiff surrender his policy or settle for sickness benefits, which ran for a maximum of two years. Plaintiff brought an action in three counts: 1) seeking a declaration that he was entitled to monthly benefits under the accident provision, 2) seeking compensatory and punitive damages for alleged fraud in inducing the plaintiff to buy the policy, and 3) seeking compensatory and punitive damages for intentional infliction of emotional distress upon the plaintiff. The defendants conceded count one. The court granted defendants' motion for a nonsuit on count two. Judgment on count three in plaintiff's favor (with punitive damages reduced because of passion and prejudice) was affirmed by the court, holding that: 1) defendants' bad faith and conduct in refusing to release payments and making false threatening communications to the plaintiff to surrender his policy or settle disadvantageously a nonexistent dispute was tortious and could be the basis of an action for damages for intentional infliction of emotional distress and 2) such conduct, independently of the first holding, constitutes a tortious interference with a protected property interest for which compensatory damages may be recovered for economic loss as well as emotional distress from the conduct or for the economic loss caused by the conduct, and, in a proper case, punitive damages. The court affirmed the trial court's handling of damages and refused to reverse because of technically deficient jury charges which in its judgment did not alter the verdict. Fletcher v. Western National Life Insurance Co., 10 Cal.App.3d 376, 89 Cal.Rptr. 78, 88, 89, 90, 91, 95.

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Cal.App.1970. Com. (g) cit. in sup. Plaintiff petitioned for a writ of mandate to command the respondent court to vacate its order expunging plaintiff's lis pendens. For the expungement of the lis pendens, statute required defendant to prove that plaintiff's action was "not in good faith" and for an "improper purpose." The court found that defendant's evidence on both of these points was insufficient, and stated that plaintiff's yelling over the phone that he would "take defendant for all he was worth" and that he would "tie up the property" and force its sale, was merely an assertion of plaintiff's legal rights. United Professional Plan. v. Superior Court of Orange County, 9 Cal.App.3d 377, 88 Cal.Rptr. 551, 562.

Cal.App.1968. Com. (g) cit. in sup. The plaintiff landowner, an85-year-old man, sought to recover damages from the defendant, his adjoining landowner, for intentional infliction of emotional distress when his heart condition was aggravated from a verbal argument with the defendant's agents as they were removing a fence on the parties' disputed boundary line. Although the court recognized the tort asserted by the plaintiff, it found that a requisite for that tort was the defendant's intent to cause emotional distress, that the defendant's agents were privileged to enter on the land and to exercise reasonable force to protect their principal's land from the plaintiff's intrusion, if the land were in fact that of the defendant, and that a judgment for the plaintiff must be reversed and remanded to permit the defendant to present his proffered evidence to establish that the fence was on his land. Daluiso v. Boone, 73 Cal.Rptr. 105, 110, 111, superseded, 71 Cal.2d 484, 78 Cal.Rptr. 707, 455 P.2d 811 (1969).

Cal.App.1966. Com. (i) cit. in sup. The plaintiffs, two minors, brought actions through their guardians against the defendant to recover for emotional sexual disorders allegedly resulting from the defendant's allegedly willfully inflicting mental distress upon the plaintiffs. Then a 15-year-old girl and13-year-old boy, the plaintiffs had resided in the defendant's home a short time after the dissolution of their parents' marriage. The defendant had written a book advocating, and verbally advocated, that right and wrong in sexual matters was relative, had administered a written sex test to a group including the plaintiffs, and had, in his study, drinking glasses with pictures of nude women on them, which the plaintiffs had observed. Although intentional infliction of mental distress was recognized as a tort, as it was not found that the defendant intended or was reckless in that he should have recognized that any of his conduct would cause the resultant harm, the denial of the defendant's motion for judgment n.o.v. was reversed. Spackman v. Good, 245 Cal.App.2d 518, 54 Cal.Rptr.78, 84, 85.

Colo.

Colo.1999. Subsec. (1) and com. (d) quot. generally in case quot. in disc. Former employee who had conducted illegal undercover narcotics investigations of other employees on instructions of his supervisors sued employer for, inter alia, intentional infliction of emotional distress, alleging that the supervisors fired him to cover up their involvement in the investigations. The trial court granted defendant's motion to dismiss, and the court of appeals affirmed in part and reversed in

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part. Reversing and remanding, this court held that plaintiff failed to state a claim for intentional infliction of emotional distress because defendant's alleged behavior did not rise to the high level of outrageous conduct required by Colorado law. Coors Brewing Co. v. Floyd, 978 P.2d 663, 666.

Colo.1994. Subsec. (1) quot. in sup., com. (h) cit. in sup. Parents sued crematorium, county, and others responsible for mistakenly cremating their son's body, asserting claims for conversion and outrageous conduct. The trial court granted summary judgment for the defendants and the court of appeals affirmed. Again affirming, this court held, inter alia, that, as a matter of law, those involved in the mistaken cremation did not act so recklessly or intentionally as to support a claim of outrageous conduct. Culpepper v. Pearl Street Bldg., Inc., 877 P.2d 877, 882, 883.

Colo.1988. Quot. in case quot. in sup., com. (d) quot. in sup. and quot. in case quot. in sup., com. (h) cit. in disc. An employee sued her employer for wrongful discharge, defamation, and outrageous conduct after she was discharged for alleged dishonesty. The trial court granted the employer summary judgment. The intermediate appellate court affirmed. This court affirmed summary judgment on the outrageous conduct claim, holding that the employer's failure to comport with its own progressive discipline policy described in its personnel manual did not constitute outrageous conduct. The court also reversed in part and remanded, holding that material issues of fact existed regarding the wrongful discharge claim and the defamation claim. Churchey v. Adolph Coors Co., 759 P.2d 1336, 1350, 1351.

Colo.1988. Com. (d) quot. in disc. An ex-husband and his ex-wife sued a priest and a diocese for negligence, outrageous conduct, and breach of a fiduciary duty after the priest engaged in sexual relations with the wife while the husband and wife were seeking marriage counseling from the priest. The trial court dismissed the plaintiffs' claims. The intermediate appellate court affirmed. This court affirmed in part and reversed in part, holding, inter alia, that the complaint's allegations of outrageous conduct were sufficient to withstand a motion to dismiss. Destefano v. Grabrian, 763 P.2d 275, 286.

Colo.1970. Quot. in part in sup. and com. (d) cit. in case, cit. in sup.The court reversed the dismissal of a suit by a plaintiff-debtor complaining of invasion of privacy and intentional or reckless infliction of emotional distress, without impact, by the defendant creditor. The court recognized the existence of the tort of invasion of privacy and concluded that the complaint stated a claim upon which relief can be predicated. The court remanded for a jury determination of whether defendant's conduct was extreme and outrageous. Rugg v. McCarty, 476 P.2d 753, 756.

Colo.App.

Colo.App.2011. Cit. in sup., quot. in case quot. in sup., com. (d) cit. in sup., com. (e) cit. and quot. in sup., com. (f) quot. in sup. Wife and sons of a nursing-home patient who died of a heart attack sued owner of nursing facility, among others, asserting, inter alia, a claim for outrageous conduct. The trial court entered a judgment on a jury verdict for wife. Reversing, this court held

that nursing facility was entitled to a directed verdict on the outrageous-conduct claim, because evidence that the facility's employees were abrupt, irresponsible, and lacking in sensitivity in responding to wife's requests for help, and that they did not attend closely to patient while his condition was deteriorating was not sufficient to create a jury question on outrageousness. Reigel v. SavaSeniorCare L.L.C., 292 P.3d 977, 990-992.

Colo.App.2009. Subsec. (1) quot. in sup., coms. (e) and (f) quot. in conc. and diss. op. Widow of murdered store owner brought a claim for extreme and outrageous conduct, inter alia, against newspaper, alleging that she suffered emotional stress and humiliation in the Korean community and that her reputation was injured after newspaper published and later retracted a column in a popular community newspaper falsely stating that she had not testified at or attended the murder trial of her husband's alleged killer. The trial court granted partial summary judgment on the claim. This court reversed, holding that a reasonable juror could find newspaper's conduct outrageous because its column recklessly impugned widow's integrity by stating that widow, a crime victim, was disloyal to her late husband, whose murder she had witnessed. A concurring and dissenting opinion disagreed, arguing that defendants' actions did not fall within typical categories of extreme and outrageous conduct, since there was no pre-existing legal relationship between defendants and widow, and no particular evidence why defendants should have known that widow was peculiarly susceptible to emotional stress. Han Ye Lee v. Colorado Times, Inc., 222 P.3d 957, 963, 969, 970.

Colo.App.2004. Com. (d) quot. in case quot. in sup. Police officer sued radio talk show host for defamation and outrageous conduct, alleging that defendant stated on his talk show that plaintiff was the person who had stabbed another police officer and that he had a history of domestic violence and had engaged in an extramarital affair. Trial court granted defendant summary judgment on the claim for outrageous conduct. This court affirmed in part, holding, inter alia, that defendants' conduct was not sufficiently extreme and outrageous to go beyond all bounds of decency in a civilized community. Gordon v. Boyles, 99 P.3d 75, 82.

Colo.App.2001. Com. (d) cit. in sup. Construction company sued modular-home purchasers for breach of contract and enforcement of lien. Purchasers counterclaimed for intentional infliction of emotional distress, among other claims, alleging that during the dispute over nonpayment, the company's officer threatened to “rip the house down.” Trial court entered summary judgment for construction company. This court affirmed in part, holding, inter alia, that the company's conduct was not outrageous, because the officer's threat was in contemplation of litigation, was momentary in nature, and was soon retracted. Bob Blake Builders, Inc. v. Gramling, 18 P.3d 859, 866.

Colo.App.2000. Com. (e) cit. in disc. After car lessor sued lessees, alleging that they were in default for failure to make lease payments, lessees counterclaimed and brought a third-party suit against the original lessor who subsequently assigned the lease, alleging outrageous conduct, among other claims. Trial court entered judgment on jury verdict for lessees. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that trial court did not err in denying lessor's motion for directed verdict on the outrageous-conduct claim, because reasonable persons could differ as to whether lessor's conduct was sufficiently extreme to result in liability. Lessor's

refusal to give lessee the keys to his car when he requested them and lessor's employees' use of strong-arming during negotiations, committing fraudulent acts, and falsifying documents related to the lease transaction could be considered extreme and outrageous conduct. Roget v. Grand Pontiac, Inc., 5 P.3d 341, 345.

Colo.App.1996. Com. (g) cit. in headnote and disc. After a truck driver was fired because of his having suffered a heart attack, the driver sued the employer, its president, and the employer's supply company, alleging violations of the Americans with Disabilities Act, the state antidiscrimination act, outrageous conduct, and negligent infliction of emotional distress. Trial court entered judgment on jury verdict for plaintiff. This court reversed and remanded, holding, inter alia, that plaintiff failed to state a cognizable claim for outrageous conduct. The court stated that, although legislative enactments had made unlawful the actions of employers who discharge employees because of a disability, not every violation of such laws is outrageous. It stated that to hold that every discrimination claim automatically constituted outrageous conduct would stretch the tort far beyond its intended boundaries. Bigby v. Big 3 Supply Co., 937 P.2d 794, 796, 800.

Colo.App.1989. Com. (h) cit. in sup. A railroad filed suit to enjoin landowners' water use, and sued the landowners in trespass, private nuisance, and negligence, because the landowners allegedly were irrigating illegally and water was undermining the structural integrity of one of the railroad's tunnels; the defendants counterclaimed for outrageous conduct. At trial, injunctive relief was denied, and the jury found for the landowners on the trespass, nuisance, and negligence claims and also awarded $50,000 for outrageous conduct to one of the landowners. This court affirmed in part as to the claims of trespass, negligence, and nuisance, but reversed in part as to the jury award for outrageous conduct, holding that threatening to suspend water rights and to bring the dispute to court, and attempting to negotiate a cessation of the landowners' use of water rights were insufficient actions to have the issue of outrageous conduct presented to the jury. It noted that the defendant did not accompany its harsh words with equally repugnant actions, nor did it imply that it had some special influence with the court. Denver and Rio Grande v. Forster, 773 P.2d 612, 614.

Colo.App.1988. Quot. in disc., subsecs. (1), (2) and (2)(a) cit. in sup. A decedent's parents sued a hospital and a physician for breach of contract and outrageous conduct after their son died from a ruptured aorta caused by a diving accident. The trial court found in favor of the defendants. Affirming, this court held that the defendants' failure to diagnose a ruptured aorta upon three separate trips to the hospital, instead diagnosing a muscle cramp to explain the son's chest pain, was not outrageous conduct where it was directed at the decedent, not the plaintiffs, and where the plaintiffs did not witness the conduct in question. Bradshaw v. Nicolay, 765 P.2d 630, 632.

Colo.App.1987. Quot. in disc. An agent contracted with a principal to operate a catalog sales agency. After the agent refused to pay his remittances to the principal, the principal removed all the goods from the agent's place of business and changed the locks on all the doors. The agent sued the principal for outrageous conduct, inter alia. This court affirmed the trial court's judgment for the agent, holding that, although the jury determines the ultimate question of whether conduct is outrageous, the trial court decides whether the issue should be submitted to the jury in the

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first instance, based on whether reasonable persons could differ on the conduct being outrageous. The court concluded that, since reasonable persons could differ on the question of whether the principal's conduct was outrageous, submission of the issue to the jury was not error. Montgomery Ward & Co., Inc. v. Andrews, 736 P.2d 40, 46.

Colo.App.1986. Com. (g) cit. in sup. A newspaper company decided to phase out its use of independent distributors and administer distribution through its own district managers. During the course of this phase-out, one of the paper's independent distributors experienced delivery and billing problems and decided to terminate his contract with the company and to withhold payment to the company to give him leverage in his final accounting with the paper. When they were unable to settle on a final accounting, the newspaper sued the distributor to recover on the open account, and the distributor counterclaimed for outrageous conduct and breach of contract. The trial court directed a verdict for the distributor on the plaintiff's claim, directed a verdict for the newspaper on the counterclaim for outrageous conduct, and a jury found for the distributor on the breach of contract claim and awarded him damages. Both parties appealed. This court affirmed, holding that the newspaper's conduct was not outrageous because it was merely implementing its business judgment to convert independent distributorships to salaried district managers in a permissible manner, and also held that the damages that could be awarded to the distributor were limited because the parties' contract was terminable at will. Denver Pub. Co. v. Kirk, 729 P.2d 1004, 1007, appeal after remand 818 P.2d 262 (Colo.1991).

Colo.App.1986. Subsec. (1) cit. in sup. After a dentist administered certain pretreatment drugs to the plaintiff's son, the son suffered cardiac arrest and later was pronounced dead. The plaintiff sued the dentist on theories of wrongful death, outrageous conduct, negligent infliction of emotional distress, lack of informed consent, and breach of implied contract. The trial court awarded the defendant summary judgment on all claims except wrongful death. Affirming, this court held that the mother was unable as a matter of law to recover for negligent infliction of emotional distress and outrageous conduct because she was not subjected to any threat of direct harm herself and she was not present when her son suffered the harm. Hale v Morris, 725 P.2d 26, 29.

Colo.App.1983. Coms. (d) and (h) cit. in disc. An employee and his wife brought suit against his employer seeking damages for the employer's alleged libel and slander, outrageous conduct, and conversion of the plaintiff's property, arising from a truck accident in which the plaintiff was injured during the course of his employment. The trial court dismissed the libel and slander and outrageous conduct claims, and the plaintiffs appealed. This court stated that liability for outrageous conduct had been found only when the conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. The court found that, under the general facts pleaded, the defendant's conduct, which included converting the employee's property left in the truck, not returning his phone calls, and telling people that the employee had been drunk at the time of the accident, could not reasonably be regarded as so extreme and outrageous as to permit recovery in this action. Thus, the court held that the complaint did not state a claim of outrageous conduct for which recovery could be had. The judgment was affirmed in part, but

the judgment dismissing the employee's slander claims was reversed and remanded. Dorr v. C. B. Johnson, Inc., 660 P.2d 517, 521.

Colo.App.1982. Cit. in sup., quot. in part in sup., com. (j) cit. and quot. in part in sup. The plaintiff purchased a new tire from the defendant tire company. Balancing and mounting services were included in the price. When the tire went flat overnight, the defendant agreed to replace it. Shortly before closing time, the plaintiff returned to the defendant's store and the mechanic refused to mount the new tire on the plaintiff's truck. The mechanic told the plaintiff to mount the tire himself and referred the plaintiff to some tools. The plaintiff elected to use his own old truck jack, which he had used only once before and the safety of which he questioned, to mount the tire. While the plaintiff was mounting the tire, the jack broke and the truck fell on his wrist. The plaintiff sued the tire company, the mechanic, and the manager for, inter alia, outrageous conduct. The trial court ruled that although the mechanic's conduct was outrageous, the tort of outrageous conduct required proof of emotional distress, and no such proof was presented by the plaintiff. The plaintiff's sole contention on appeal was that this tort permitted recovery of damages for physical injury without any claim for or evidence of emotional harm. This court affirmed, relying on the Restatement, to hold that the plaintiff must prove the existence of severe emotional distress or harm to recover for this tort. Espinosa v. Sheridan United Tire, 655 P.2d 424, 425.

Colo.App.1982. Com. (d) quot. in disc., coms. (e) and (h) cit. in disc. The plaintiff, a California corporation, was the attorney-in-fact management company for various subsidiary insurance companies. In 1977, one of those subsidiaries issued a homeowner's liability insurance policy to the defendant and his wife, and a second subsidiary issued an automobile liability insurance policy to the defendant. While the defendant and his son were insureds under these policies, the son drove the defendant's car on to the front yard of a residence, seriously injuring its owner. The defendant promptly reported the incident to an agent of the second subsidiary, and that company immediately commenced an investigation. The injured party offered to settle the case for the policy limit of the automobile policy. The insurer rejected the offer, stating that the company was not in a position to settle because it had questions about the coverage under its policy. The insurers brought suit for a declaration that the policies provided no coverage with respect to the injured person's claim against the parent for negligent entrustment of the car. The injured person brought counterclaims against the driver and a third-party claim for compensatory and exemplary damages allegedly caused by the insurer's conduct in handling the claim. The trial court entered summary judgment dismissing the counterclaims, and the insured appealed. The court of appeals held that the counterclaims were sufficient to state causes of action for the alleged negligence of the insurers in failing to exercise reasonable care in representing the insured in the course of litigation and, inter alia, for alleged intentional infliction of emotional distress by outrageous conduct. Summary judgment was improper, however, because reasonable persons could differ on the question whether there was outrageous conduct. Affirmed in part, reversed in part, and remanded with instructions. Farmer's Group, Inc. v. Trimble, 658 P.2d 1370, 1376, 1377, affirmed 691 P.2d 1138 (1984).

Colo.App.1978. Cit. and quot. in sup.; com. (h) cit. in disc. The purchaser of a home brought an action against the seller for intentional infliction of emotional distress by outrageous conduct after

the seller refused to vacate the premises on the date agreed upon in the agreement of sale. The lower court entered judgment on a jury verdict in favor of the purchaser, and the seller appealed, arguing that the trial court erred in refusing to grant the seller's motions for a directed verdict and judgment notwithstanding the verdict. The court held that the question of whether the seller's conduct in refusing to vacate the premises on the agreed upon date, in compounding the situation not only by becoming generally belligerent, but also by referring to the plaintiff's serious and unfortunate physical condition, and by inflaming the disagreement by suggesting that, as an attorney, he would have some special influence in any judicial proceeding, was actionably "outrageous" was properly left for the jury. Accordingly, since reasonable men could differ on the question of whether this series of acts was "outrageous," the court held, inter alia, that the trial court was correct in denying the seller's motion for a directed verdict and for judgment notwithstanding the verdict. Meiter v. Cavanaugh, 40 Colo.App. 454, 580 P.2d 399, 400, 401.

Colo.App.1977. Com. (h) quot. in part in sup. The husband of decedent brought this action, alleging wrongful death and outrage against the operator of an ambulance service and a hospital administrator. Defendants had refused ambulance service to plaintiff's critically ill wife because her physician, who had recently resigned from the hospital staff, would not agree to allow defendant's physicians to examine the plaintiff's wife to determine if the requested transportation were necessary. The wrongful death claim was dismissed and was entered on a jury verdict awarding plaintiff damages for outrage. Plaintiff appealed the granting of defendant's motion to reduce the verdict to the amount requested in the complaint, and defendants cross appealed. The court held that the trial court had erred in amending the verdict to reduce plaintiff's recovery. It was also held that the dismissal of the claim for wrongful death did not preclude recovery on the claim of outrage, since the actions serve different purposes and the success of one is not dependent upon the success of the other, and the question of whether defendant's actions constituted outrageous conduct was held to be for the jury's determination. DeCicco v. Trinidad Area Health Ass'n, 40 Colo.App. 63, 573 P.2d 559, 562.

Colo.App.1975. Com. (d) quot., com. (h) quot. and fol. In this action by a residential tenant against her landlord, plaintiff sought to recover all rents paid alleging that the landlord had breached an implied warranty that the rental premises were habitable; plaintiff also sought damages for emotional distress caused by defendant's allegedly outrageous conduct in not repairing defects. At the conclusion of plaintiff's evidentiary presentation, the court dismissed the complaint, and plaintiff appealed. The court affirmed the dismissal, finding that the law of Colorado clearly rejects the concept of an implied warranty of habitability and refusing to adopt the contrary rule. Though the court recognized that an action in tort will lie to recover for severe emotional distress, unaccompanied by physical injury, such recovery was expressly made subject to the limitations of the Restatement, which requires that the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in acivilized community." Since it failed to meet this standard, plaintiff's emotional distress claim failed. Blackwell v. Del Bosco, 35 Colo.App. 399, 536 P.2d 838, 841.

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Colo.App.1973. Quot. com. (d) and fol. Action by underwriter employed by the state compensation insurance fund against the fund and plaintiff's supervisor for intentional infliction of mental distress. Plaintiff's supervisor delivered to the plaintiff a letter of reprimand which noted certain deficiencies in plaintiff's performance of his duties, a copy of which was sent to the defendant's supervisor. Plaintiff, a paraplegic, contended that the letter, which stated "you must realize the job was created for you because of your handicap" caused him severe emotional distress. The lower court dismissed the complaint against the fund prior to trial, and after trial entered judgment in favor of the supervisor. On appeal, held: Judgment affirmed. The defendant's conduct must go beyond all bounds of decency in order for plaintiff to recover damages for severe emotional distress without any accompanying physical injuries. Since the jury is the finder of fact, it is sufficient that the jury did not find the defendant's conduct to be intentional, extreme, or outrageous. Therefore the jury verdict for the defendant must stand. Paris v. Division of State Compensation Ins. Fund, 517 P.2d 1353, 1355.

Conn.

Conn.2013. Com. (g) quot. in case quot. in sup. Former husband brought claims for fraud and intentional infliction of emotional distress against former wife and wife's former attorneys in connection with allegations that attorneys failed to disclose wife's true financial situation during postdissolution proceedings in which plaintiff sought modification of the alimony award. The trial court granted defendants' motions to strike the claims on grounds of absolute immunity or privilege. The court of appeals affirmed. Affirming, this court held that defendants were protected by the litigation privilege against claims of fraud and intentional infliction of emotional distress for their conduct during judicial proceedings. The court explained that there was no basis for a claim of intentional infliction of emotional distress arising out of a privileged communication consisting of a defamatory statement made in the course of a quasi-judicial proceeding. Simms v. Seaman, 308 Conn. 523, 544, 69 A.3d 880, 892.

Conn.2011. Com. (j) cit. in disc. Former husband brought claim for intentional infliction of emotional distress (IIED) against former wife, who pled guilty to filing numerous false police reports against plaintiff accusing him of sexually abusing the parties' daughters. The trial court found for plaintiff; the court of appeals reversed, finding that the statute of limitations had run. Reversing, this court held that the continuing course of conduct doctrine tolled the statute of limitations for IIED claims, where, as here, outrageous conduct causing severe emotional distress was repetitious and involved some conduct that occurred within the limitations period. Watts v. Chittenden, 301 Conn. 575, 594, 22 A.3d 1214, 1225.

Conn.2003. Com. (d) quot. in case quot. in sup. After fire destroyed a significant portion of a house, and insurer refused to reimburse insured homeowner based on investigators' determination that fire was caused by homeowner's arson, homeowner sued insurer for breach of contract and intentional and negligent infliction of emotional distress. Trial court entered judgment on jury verdict for plaintiff. This court reversed in part, holding, inter alia, that insurer's conduct in its

fire investigation was not extreme and outrageous. While there was evidence that insurer did not conduct a thorough or reasoned investigation, and might have decided too quickly that the fire had been set deliberately, the investigation was not so atrocious as to trigger liability for intentional infliction of emotional distress. Carrol v. Allstate Ins. Co., 262 Conn. 433, 443, 815 A.2d 119, 126.

Conn.2000. Com. (d) quot. but dist. Former schoolteacher sued school board, principal, and assistant principal for, inter alia, intentional infliction of emotional distress. The trial court entered summary judgment for defendants, but the intermediate appellate court reversed and remanded. Reversing and remanding, this court held, in part, that the conduct complained of, which included the making of condescending remarks to plaintiff, the questioning of her abilities, and the insistence on a police escort to accompany plaintiff from the school to her car, was not so extreme and outrageous as to give rise to liability for the intentional infliction of emotional distress. Waters v. United Services Auto. Ass'n, 41 Cal.App.4th 1063, 48 Cal.Rptr.2d 910, 916.

Conn.1991. Cit. in case quot. in disc. The former chairman of a municipal parking authority commission sued the city and its mayor for vexatious suit and intentional infliction of emotional distress, alleging that the mayor first instituted and then abandoned removal proceedings against him after he blocked adoption of revised parking authority bylaws and accused city and authority personnel of wrongful acts. The trial court entered judgment on a jury verdict for the plaintiff. Reversing in part, this court held, inter alia, that, since the only ground for the claim of intentional infliction of emotional distress was the mayor's action in instituting a vexatious suit by including in the removal proceedings two charges that the jury found baseless and since the court had established earlier in its opinion the defendants' liability for bringing those charges, any additional theory supporting the imposition of liability for the same act was entirely superfluous. The court stated that the plaintiff could not recover any greater damages if liability could also be based on extreme emotional distress. DeLaurentis v. City of New Haven, 220 Conn. 225, 597 A.2d 807, 828.

Conn.1986. Cit. in ftn. An employee sued his former employer for wrongful discharge based on a false accusation that he had misappropriated company funds and also for the infliction of severe emotional distress. The trial court granted the defendant's motion to strike. Finding no error, this court held that the plaintiff did not meet his burden of pleading and establishing that the employer should have realized that his conduct involved an unreasonable risk of causing emotional distress and that the distress, if caused, might result in illness or bodily harm to the employee. Morris v. Hartford Courant Co., 200 Conn. 676, 513 A.2d 66, 69.

Conn.1986. Cit. in case quot. in disc., cit. but dist., com. (g) quot. in sup. An employee sued her employer for libel and intentional infliction of emotional distress after the employer discharged her and later made allegedly defamatory statements on a factfinding form regarding the employee's collection of unemployment compensation. The trial court directed a verdict for the employer. Affirming, this court held that the two requirements of intent and outrageousness to sustain a cause of action for the intentional infliction of emotional distress had not been proven, and, since the employer's comment was absolutely privileged, she would not have been liable for intentional

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infliction of emotional distress in any event. Petyan v. Ellis, 200 Conn. 243, 510 A.2d 1337, 1342, 1343.

Conn.App.

Conn.App.2020. Com. (j) quot. in sup. Mother, on behalf of middle-school student, brought, among other things, a claim for intentional infliction of emotional distress (IIED) against middle-school soccer coach, alleging that defendant kicked a soccer ball with great force at a scrimmage during soccer practice such that it struck student's face and gave her a concussion, causing her to repeat a year of school, miss participation in school sports activities and events with friends and family, and suffer humiliation and embarrassment. The trial court granted defendant's motion for summary judgment. This court affirmed, holding that the record could not support a reasonable finding that defendant's action in kicking the ball and injuring student inflicted severe emotional distress on student. The court explained that student's distress, while painful and degrading, was not sufficiently extreme as required to sustain an IIED claim under Restatement Second of Torts § 46, Comment *j*. Maselli v. Regional School District Number 10, 235 A.3d 599, 617.

Conn.App.2019. Cit. in cases cit. in disc.; com. (d), quot. in case quot. in disc. Member of youth organization and his minor son with autism spectrum disorder who was also a member brought a claim for intentional infliction of emotional distress (IIED) against youth organization and organization's chairman, alleging that, after father complained to defendants that other members were bullying son, defendants banned son from attending organization meetings and events. The trial court granted defendants' motion to strike plaintiffs' claims. This court affirmed, holding that the trial court did not err in granting defendants' motion to strike. The court cited Restatement Second of Torts § 46 in defining the elements of an IIED claim, and explained that defendants' failure to relieve son from bullying, son's vulnerability to bullying due to his disorder, and son's expulsion based on reasons aside from his disorder, did not constitute extreme and outrageous conduct necessary to state an IIED claim. Strano v. Azzinaro, 204 A.3d 705, 708, 710.

Conn.App.2011. Com. (d) quot. in sup. Employee sued co-worker for intentional infliction of emotional distress (IIED). The trial court granted defendant's motion to strike the complaint and for judgment. This court affirmed, holding that the four alleged incidents of defendant's inappropriate conduct, occurring over a period of nearly three years—deliberately misinforming plaintiff about a directive from his superior, thereby placing him at risk of violating work rules; falsely reporting to unidentified third parties that plaintiff engaged in outbursts and irrational behavior; becoming "violently angry" at plaintiff such that plaintiff feared for his physical safety; and looking directly at plaintiff and stating, "Bang. Bang."—did not constitute extreme and outrageous conduct for purposes of an IIED claim under Connecticut law. Cassotto v. Aeschliman, 130 Conn.App. 230, 234-235, 22 A.3d 697, 700.

Conn.App.2011. Com. (d) quot. in sup. Social worker sued her supervisors and co-workers, asserting a claim for intentional infliction of emotional distress (IIED). Affirming the trial

court's grant of summary judgment for defendants, this court held that plaintiff's allegations that her supervisors, in retaliation for her filing of an institutional labor grievance against them, conspired with her co-workers to force her to withdraw the institutional grievance, gave her a negative performance evaluation for the first time, terminated her employment, and, when she was reinstated, offered to rehire her at a lower position, causing her to resign and take other employment at a greatly reduced income, did not set forth conduct that was sufficiently extreme and outrageous to sustain her IIED claim. Gillians v. Vivanco-Small, 128 Conn.App. 207, 212, 15 A.3d 1200, 1203.

Conn.App.2009. Com. (d) quot. in sup. Divorced wife sued former husband and his new wife for intentional and negligent infliction of emotional distress, alleging, among other things, that husband made repeated angry and hostile threats that he would have police evict her from the marital residence, and that defendants used her son in a ruse to gain access to the residence when she was not home and change the locks. The trial court granted summary judgment for defendants. Affirming in part, this court held, inter alia, that defendants' behavior, while no doubt hurtful and distressing to plaintiff, was not extreme and outrageous as a matter of law; in general, plaintiffs were necessarily expected and required to be hardened to a certain amount of rough language, and to occasional acts that were definitely inconsiderate and unkind. Davis v. Davis, 112 Conn.App. 56, 67, 962 A.2d 140, 147.

Conn.App.2007. Com. (g) quot. in case quot. in sup. (general cite). State employee sued her former supervisor for, in part, intentional infliction of emotional distress (IIED). The trial court granted summary judgment for supervisor. Affirming, this court held that, because supervisor's allegedly defamatory statements contained in two written documents he prepared in connection with employee's pending federal discrimination claim against employer for failure to promote were absolutely privileged, employee's IIED claim against supervisor likewise failed. McKinney v. Chapman, 103 Conn.App. 446, 455, 929 A.2d 355, 361.

Conn.App.2003. Cit. in sup., com. (d) quot. generally in case quot. in sup. Condominium-unit buyer sued banks that had brought a foreclosure action on his mortgage loan and banks' attorneys, alleging intentional infliction of emotional distress, violation of the Fair Debt Collection Practices Act, and defamation, inter alia. Trial court granted in part defendants' motion to strike plaintiff's complaint. This court affirmed in part as to the emotional-distress claim, holding, inter alia, that trial court properly determined that, even though defendants' conduct in filing a wrongfully motivated lawsuit might have been stressful or hurtful to plaintiff, his allegations failed to meet the threshold pleading requirement of extreme and outrageous conduct. Heim v. California Federal Bank, 78 Conn.App. 351, 365, 828 A.2d 129, 138-139, certification denied 266 Conn. 911, 832 A.2d 70 (2003).

Conn.App.2002. Com. (d) quot. in case quot. in sup. Respiratory therapist formerly employed by hospital sued hospital for intentional infliction of emotional distress. The trial court granted defendant's motion to strike plaintiff's complaint. Affirming, this court held that conduct of defendant's agents, servants, and employees in, among other things, disciplining plaintiff, arguing

with him, and insulting him was not sufficiently outrageous to form the basis for an action for intentional infliction of emotional distress. Bator v. Yale-New Haven Hosp., 73 Conn.App. 576, 577, 808 A.2d 1149, 1150.

Conn.App.2002. Com. (d) quot. in sup., com. (h) quot. in case quot. in disc. Employee who was discharged sued his former employer, asserting, in part, a claim for intentional infliction of emotional distress. The trial court granted defendant's motion to strike the claim. Affirming, this court held, inter alia, that defendant's alleged demands and inquiries into plaintiff's personal beliefs and attitudes, and its harassment of him to change his mind, presumably regarding his refusal to sign false grant documents, did not amount to conduct that was sufficiently extreme and outrageous to state a claim for intentional infliction of emotional distress. Campbell v. Town of Plymouth, 74 Conn.App. 67, 78, 79, 811 A.2d 243, 252, 253.

Conn.App.1999. Cit. in sup., com. (d) quot. in ftn. in sup., coms. (h) and (j) cit. in sup. Elementary school student sued board of education and various school officials for, inter alia, intentional infliction of emotional distress in connection with principal's unconventional teaching methods. The trial court granted defendants' motion to strike. Reversing as to this count of the complaint, the court held, in part, that plaintiff's allegations that principal's system encouraged, created, and tolerated an atmosphere of chaos, disruptiveness, and violence and exposed plaintiff and classmates to physical and verbal abuse were sufficient to withstand defendants' motion to strike. Bell v. Bd. of Educ. of West Haven, 55 Conn.App. 400, 739 A.2d 321, 327.

Conn.App.1994. Cit. in case quot. in sup. In former employee's action for wrongful termination of employment, in which the jury returned a verdict for plaintiff, plaintiff cross-appealed on the ground that the trial court improperly granted defendant employer's motion to set aside the verdict as to plaintiff's claims for negligent misrepresentation and intentional infliction of emotional distress. Affirming in part, this court held, inter alia, that the trial court did not abuse its discretion in granting defendant's motion to set aside the verdict as to intentional infliction of emotional distress, since there was no evidence from which the jury reasonably could have found that defendant had intended to inflict emotional distress or knew or should have known that emotional distress was a likely result of its conduct, or that plaintiff had sustained severe emotional distress. Barry v. Posi-Seal Intern., Inc., 36 Conn.App. 1, 19, 647 A.2d 1031, 1041, certification denied 231 Conn. 942, 653 A.2d 822 (1994).

Conn.Super.

Conn.Super.1995. Com. (h) cit. generally in headnote and quot. in sup. After a film curator at a college library was demoted to assistant and later fired after filing a grievance over her demotion, she sued the college librarian and a co-worker for, in part, intentional infliction of emotional distress. Denying defendants' motion to strike, the court held, inter alia, that defendants' alleged conduct in causing plaintiff to lose her employment in retaliation for filing a grievance

was sufficiently outrageous to state a claim for intentional infliction of emotional distress. Talit v. Peterson, 44 Conn.Sup. 490, 498, 692 A.2d 1322, 1322, 1325.

Conn.Super.1991. Coms. (d)-(f) quot. in sup., com. (h) cit. in sup. and quot. in ftn., com. (j) cit. and quot. in sup. and quot. in ftn. An employee sued his employer for intentional infliction of emotional distress, alleging that his supervisor knew that he was a recovering alcoholic and repeatedly harassed the plaintiff about his recovery and his health and frequently threatened the plaintiff with the loss of his job. Denying the defendant's motion to strike, this court held that, within the context that the defendant was the plaintiff's supervisor and knew of his alcoholism, the defendant's conduct reached the required threshold of outrageousness and was, therefore, an issue for the trier of fact. The court stated that the emotional distress alleged was sufficient, since the plaintiff claimed that he suffered from depression, loss of sleep, anxiety attacks, high blood pressure, rashes, and other skin problems as a result of the defendant's conduct. Mellaly v. Eastman Kodak Co., 42 Conn.Sup. 17, 597 A.2d 846, 847, 848.

Conn.Super.1991. Com. (d) quot. in sup. A husband falsely told his wife that he had tested positive for acquired immune deficiency syndrome (AIDS). In a subsequent divorce action, the wife sued the husband for, inter alia, intentional infliction of emotional distress. The court denied in part the husband's motion to strike the entire complaint, holding that the wife stated a cause of action for intentional infliction of emotional distress. It found that a false statement to one's spouse that one has AIDS was likely to cause shock and fright of enormous proportions and would be regarded as atrocious and utterly intolerable in a civilized community. However, the court held that punitive damages would not be appropriate because the underlying cause of action was based on a claim of outrageous conduct. Whelan v. Whelan, 41 Conn.Sup. 519, 588 A.2d 251, 253.

Conn.Super.1984. Cit. in sup., com. (e) cit. in sup., coms. (f), (g), and (h) quot. in part in sup. An employee sued his supervisor for intentional infliction of emotional distress. This court denied the supervisor's motion for summary judgement, holding that whether the supervisor's demand that the employee perform the work assignment while knowing of the employee's fear of heights was sufficiently extreme and outrageous to impose liability was a jury question, as was whether the supervisor only insisted upon his legal rights in a permissible way so as to make the supervisor's conduct privileged. Brown v. Ellis, 40 Conn.Sup. 165, 484 A.2d 944, 946.

Conn.Super.1984. Cit. in sup. An employee discharged without receiving a job performance evaluation sued the employer for wrongful discharge and intentional infliction of emotional distress. The employer moved to strike these and other counts. This court held that the wrongful discharge count should be stricken because the employee had failed to allege a public policy limitation on the employer's absolute right to terminate. The court denied the motion to strike the emotional distress count, since whether the failure to evaluate constitutes extremely outrageous conduct, an element of emotional distress, is a question of fact that must be decided by the trier of fact. Murray v. Bridgeport Hosp., 40 Conn.Sup. 56, 480 A.2d 610, 614.

Conn.Super.1973. Quot. in part and com. (d) quot. in part in sup.Landowners brought this action against a real estate broker, alleging that, inter alia, the broker had insisted they take a loan he had offered them, insisted they pay him a brokerage fee, and had threatened to attach their home and thus prevent alternate financing if they did not comply with his wishes. This court, after considering several authorities including the Restatement, sustained the broker's demurrer to this court, holding that intentionally inflicting emotional disturbances on another may constitute a common-law tort in Connecticut, but that the complaint failed to allege either the broker's intent to cause mental distress or his foreseeing that his conduct would cause such distress. Hiers v. Cohen, 31 Conn.Sup. 305, 329 A.2d 609, 611.

Del.

Del.2013. Com. (e) quot. in sup., com. (h) quot. in sup. and cit. in ftn., illus. 6 cit. and quot. in sup. and cit. in ftn. Eight-year-old middle-school student and his mother brought various claims against, among others, state police officer in connection with allegations that officer interrogated and threatened student in a room for close to an hour for the purpose of scaring him, in order to shame an older student who was also present into confessing to a bullying incident. The trial court granted summary judgment for officer. This court reversed and remanded as to student's claim for intentional infliction of emotional distress, holding that reasonable minds could differ as to whether officer's conduct was extreme and outrageous, and that it could be inferred that student suffered severe distress, from the fact that he withdrew from the school and was home schooled for the remainder of the year. Hunt ex rel. DeSombre v. State, Dept. of Safety and Homeland Sec., Div. of Delaware State Police, 69 A.3d 360, 367, 368.

Del.1992. Com. (g) cit. in sup. Former patient sued physician and his insurer for defamation, invasion of privacy, and intentional infliction of emotional distress, inter alia, after newspapers published articles concerning a suit brought against physician by other patients and reporting allegedly defamatory remarks physician made about plaintiff in deposition testimony. The trial court granted summary judgment for defendants on the ground that statements made during the course of litigation were absolutely privileged. Affirming in part, reversing in part, and remanding, this court held that absolute privilege for statements made in the course of litigation extended to plaintiff's claims of defamation, invasion of privacy, and intentional infliction of emotional distress insofar as they were based on such statements; moreover, physician's participation in extrajudicial newspaper interviews, in which he made false accusations against plaintiff, might state claim of defamation unprotected by absolute privilege, but was insufficient to trigger liability for invasion of privacy or intentional infliction of emotional distress. Barker v. Huang, 610 A.2d 1341, 1349.

Del.1990. Subsec. (1) cit. in sup. A client sued her attorney for malpractice in his handling of her automobile accident claims. The trial court awarded damages to the client. Affirming, the supreme court held that the record supported the trial court's findings where the attorney failed to advise his client fully concerning her right to pursue a claim against her own insurer, he unilaterally increased his contingency fee, and he intentionally caused a stop payment order on an insurance

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check made out to the client. Moreover, such intentional conduct, arising in a relationship of trust and confidence, was sufficiently outrageous to support an award of damages for emotional distress. Cummings v. Pinder, 574 A.2d 843, 845.

Del.1989. Subsec. (1) cit. in case quot. in disc. The parents of a child born with a genetic disorder sued health care providers for "wrongful birth" and "wrongful life" for failing to timely detect and notify them about the disorder, thus precluding the option of terminating the pregnancy. Upon certification of the issues from the trial court, this court held that a cause of action, rooted in common law, existed for negligence in performing a medical testing procedure and for negligence in failing to timely report the results of the testing; however, it held that the child had no cause of action for wrongful life on a theory that the defendants' negligence deprived the child's parents of the opportunity to reject her birth. The court stated that while extraordinary expenses were ascertainable and recoverable based on the additional financial burden of raising a child with Down syndrome, there could be no recovery for emotional distress, absent a physical injury to the plaintiff or a determination that the defendant's conduct was outrageous. Garrison v. Medical Center of Delaware, 581 A.2d 288, 293.

Del.Super.

Del.Super.2018. Subsec. (h) quot. in case quot. in sup. and cit. in ftn. Individual who was imprisoned on drug charges based on tests indicating that certain powder found in his vehicle was cocaine filed a claim for intentional infliction of emotional distress against, among others, state office of the chief medical examiner and its employees, after re-testing revealed that the powder was actually confectioner's sugar. The trial court granted defendants' motion to dismiss with respect to all but two employees who were specifically tied to the chain of custody in plaintiff's case, holding that, while plaintiff sufficiently alleged that those two employees engaged in outrageous conduct—tampering with the evidence in his case—that caused him emotional distress, he failed to allege facts sufficient to support a claim against the remaining defendants for intentional infliction of emotional distress under Restatement Second of Torts § 46. Dollard v. Callery, 185 A.3d 694, 704.

Del.Super.2016. Cit. and quot. but dist., com. (d) quot. in case cit. in ftn., com. (h) cit. and quot. in case cit. in ftn. Pharmacy customer with HIV infection brought a claim for intentional infliction of emotional distress (IIED), inter alia, against pharmacy and pharmacist as a result of pharmacist disclosing to plaintiff's father the antiviral medications plaintiff was taking; defendants filed a third-party complaint against plaintiff's father, IIED, alleging that father was either solely or partially liable for any damages his son suffered. This court granted father's motion to dismiss the third-party complaint, holding that father's conduct in discussing his son's condition with his wife and later with plaintiff in no way amounted to the extreme and outrageous conduct necessary to state a claim for IIED under the definition set forth in Restatement Second of Torts § 46. Spence v. Cherian, 135 A.3d 1282, 1288, 1289.

Del.Super.2009. Cit. and quot. in sup., cit. in ftn., subsec. (1) cit. in sup., subsec. (2) cit. but dist., com. (*l*) cit. in ftn. Customer sued pharmacy, alleging that pharmacy's employee provided sensitive information detailing her prescription and medical history to third parties, including her daughter and her fiancé's son, without justification. Denying pharmacy's motion to dismiss customer's claim for intentional infliction of emotional distress, this court held, inter alia, that, because customer set forth a direct claim of intentional infliction of emotional distress, rather than an indirect claim, she was not required to be physically present during the alleged conduct; customer did not assert that a third party was the subject of the conduct and that she suffered as a result of her relationship to the third party, but rather that pharmacy intentionally or recklessly inflicted severe emotional damage on her. Fanean v. Rite Aid Corp. of Delaware, Inc., 984 A.2d 812, 818-820.

Del.Super.1987. Subsec. (1) quot. in sup., coms. (d), (h), and (j) cit. in sup. A trailer park resident sued the owner of the park for harassment and intentional infliction of emotional distress, alleging that the owner used scare tactics to convince the resident that he had to buy into the rental park when it became a cooperative community. This court denied the park owner's motion for summary judgment on the ground that material issues of fact existed as to whether the defendant's actions were extreme and outrageous, and whether the plaintiff's distress was both severe and reasonable under the circumstances. Mattern v. Hudson, 532 A.2d 85, 85, 86, 88.

D.C.App.

D.C.App.2023. Com. (d) quot. in case quot. in sup. and cit. in ftn. Former information-technology support-staff employed by the federal government filed a claim for intentional infliction of emotional distress (IIED) against publisher of a book authored by an investigative journalist, alleging that defendant's publication of the book, which contained highly offensive and false assertions about plaintiffs' employment that defendant knew or should have known to be false, amounted to extreme and outrageous conduct that caused plaintiffs severe emotional distress. The trial court denied defendant's special motion to dismiss under the District of Columbia Anti-SLAPP statute. This court reversed as to plaintiff's IIED claim, holding that, even if defendant committed the tort of defamation by publishing the book, actionable defamation on its own was not enough to amount to IIED under Restatement Second of Torts § 46. Salem Media Group, Inc. v. Awan, 301 A.3d 633, 656.

D.C.App.2018. Cit. and quot. in disc., cit. in case cit. in disc., cit. in ftn.; caveat quot. in disc., cit. in ftn.; com. (*l*) cit. and quot. in sup. Relatives of victims of a terrorist bombing in the Republic of Sudan brought a lawsuit against the Ministry of the Interior of the Republic of Sudan, alleging that defendant was liable for intentional infliction of emotional distress (IIED) arising from its support of the terrorist organizations that carried out the bombings. The district court entered default judgment against defendant and certified a question to this court as to whether plaintiffs' claims failed as a matter of law because they were not physically present at the scene of the attack. This court answered the district court's question in the negative, holding that plaintiffs did not need to be present at the bombings to assert an IIED claim against supporters of terrorism. The court

cited Restatement Second of Torts § 46 in explaining that the purpose of the physical-presence requirement was to ensure that only those who were genuinely affected by the traumatic event could recover compensation for an IIED claim, and that the deeply horrifying and publicized nature of terrorist attacks fulfilled that purpose even if the claimants were not present at the site of the attack. Republic of Sudan v. Owens, 194 A.3d 38, 40-43, 45.

D.C.App.2015. Com. (d) quot. in case cit. in sup., com (h) cit. and quot. in case quot. in sup. After mother became romantically involved with counselor at child's school, child's father brought a claim for professional malpractice against counselor and school, and counselor counterclaimed for intentional infliction of emotional distress. The trial court granted the parties' cross-motions for summary judgment. This court reversed as to counselor's emotional-distress counterclaim, holding that questions of fact remained as to whether father's conduct—using a communications firm to publicize his complaint against counselor, which contained particularly sexually explicit language, to media organizations immediately after he filed it—was sufficiently extreme and outrageous to result in liability under Restatement Second of Torts § 46. Newmyer v. Sidwell Friends School, 128 A.3d 1023, 1037, 1041-1043.

D.C.App.2013. Com. (d) quot. in cases quot. in sup. Former special agent with the Treasury Inspector General for Tax Administration brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against former co-workers, alleging that the U.S. Department of Agriculture abruptly rescinded its employment offer to plaintiff after defendants sent it six then-anonymous letters stating, among other things, that it was making a "grave error" in hiring plaintiff, and that plaintiff was under investigation for "gross misconduct and integrity violations." The trial court granted summary judgment for defendants. Affirming as to the IIED claim, this court held, inter alia, that plaintiff's claim failed, because, while there was no doubt that defendants' conduct caused plaintiff distress, no reasonable juror could find that his distress rose to the level of severe emotional distress required to prove this tort, or that defendants' behavior was so outrageous as to go beyond all possible bounds of decency. Armstrong v. Thompson, 80 A.3d 177, 189.

D.C.App.2013. Com. (d) quot. in case quot. in sup., com. (j) quot. in sup. Employee of investment firm sued animal-rights protestors who held demonstrations outside his house, asserting, inter alia, a claim for intentional infliction of emotional distress. The trial court granted plaintiff's motion for a preliminary injunction restricting defendants' protests. Reversing and remanding, this court held that plaintiff did not clearly demonstrate a substantial likelihood of success on the merits of his emotional-distress claim. The court concluded that defendants' conduct was not extreme and outrageous, because their actions took place on public streets on only a few occasions over a period of several weeks, and consisted mostly of chanting slogans and some vague threats. In addition, plaintiff failed to allege that he suffered severe emotional distress, since he did not complain of any symptoms, such as loss of sleep or inability to concentrate, but only labeled the emotions that he was feeling, for instance, humiliation and embarrassment, without indicating the intensity and the duration of the distress. Ortberg v. Goldman Sachs Group, 64 A.3d 158, 163, 165.

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D.C.App.2011. Com. (d) quot. in case quot. in sup. Former residents of a men's homeless shelter closed by the District of Columbia sued the District, asserting, inter alia, a claim for intentional infliction of emotional distress (IIED). Affirming the trial court's grant of summary judgment for defendant, this court held that plaintiffs' IIED claim failed because defendant's closure of the shelter did not constitute extreme and outrageous conduct; defendant attempted to close the shelter in a methodical manner, conducting exit interviews with many residents to provide transitional assistance and transporting them to other shelters, and plaintiffs provided no evidence to support their allegations that defendant caused residents' personal documents to be abandoned outside the shelter. Baltimore v. District of Columbia, 10 A.3d 1141, 1155.

D.C.App.2011. Com. (b) cit. in disc., coms. (f) and (j) cit. in sup. Patient brought claim for negligent infliction of emotional distress against clinic and its doctor, alleging that he suffered serious emotional distress after doctor negligently informed him that he was HIV positive when, as he learned five years later, he was not. The trial court granted summary judgment for defendants. On rehearing, this court reversed and remanded, holding that, while the zone-of-physical-danger requirement continued to be generally applicable to claims of negligent infliction of emotional distress, it would not be applied to bar such a claim where, as here, the defendant had an obligation to care for the plaintiff's emotional well-being or the plaintiff's emotional well-being was necessarily implicated by the nature of the defendant's undertaking or relationship with the plaintiff, and serious emotional distress was especially likely to be caused by the defendant's negligence. Hedgepeth v. Whitman Walker Clinic, 22 A.3d 789, 795, 816.

D.C.App.2007. Cit. in sup., com. (d) quot. in sup. Customer who was arrested for unlawful entry at a restaurant by police officers who were working for the restaurant as private security guards brought, inter alia, a claim for intentional infliction of emotional distress against the police officers and the District of Columbia. The trial court granted summary judgment for defendants. Affirming on this claim, this court held that, because officers had probable cause to arrest plaintiff, the arrest itself could not form the basis for a claim of extreme or outrageous conduct. In addition, the court noted that plaintiff did not seek medical assistance for physical or psychological injury, and thus, without expert testimony, there was no evidence from which a reasonable jury could have found that officers' conduct was so extreme and outrageous that it caused severe emotional distress to plaintiff. Kotsch v. District of Columbia, 924 A.2d 1040, 1045, 1046.

D.C.App.2005. Com. (d) quot. generally in case quot. in disc. Plaintiff who alleged that he was injured when a police officer applied an illegal choke hold to his throat while breaking up a fight between plaintiff and another man sued District of Columbia and police officer for, in part, intentional infliction of emotional distress. The trial court granted defendants' motion for judgment as a matter of law. Affirming in part, this court held, inter alia, that plaintiff's allegations did not assert conduct that was sufficiently outrageous to state a claim for intentional infliction of emotional distress. Smith v. District of Columbia, 882 A.2d 778, 794.

D.C.App.2002. Quot. in case quot. in disc. Former employee of university brought suit for intentional infliction of emotional distress against the university and her supervisor. Reversing

the trial court's dismissal of the claim and remanding, this court held that plaintiff's allegation that defendants subjected her for nine months to loud and piercing noise emitted by sound-screen devices, knowing that she had become seriously ill as a result, stated a claim for intentional infliction of emotional distress. Larijani v. Georgetown University, 791 A.2d 41, 44.

D.C.App.2000. Com. (d) cit. in ftn. Shareholder of co-operative corporation sued property manager of apartment building for negligently performing repairs to his flooded co-op apartment and for intentional infliction of emotional distress. Reversing the trial court's grant of summary judgment for defendant, this court held that plaintiff had sufficiently alleged an injury to his leasehold interest that, if proved, would entitle him to recover from defendant on a negligence theory. The court noted that even though plaintiff's intentional-infliction-of-emotional-distress claim had not been addressed in the trial court, and notwithstanding the obvious difficulty plaintiff faced in proving outrageous conduct on defendant's part, the entire case would be remanded to the trial court for further proceedings. Souci v. William C. Smith & Co., 763 A.2d 96, 103.

D.C.App.1998. Cit. in headnotes, cit. in case cit. in disc., coms. (d) and (j) quot. in disc., com. (h) quot. in case quot. in disc., com. (i) cit. in disc. Individual who was the target of death threats and numerous harassing telephone calls made by man searching for his ex-wife sued ex-wife's former employer, alleging that defendant acted outrageously in providing plaintiff's telephone number and home address to ex-husband. The trial court granted defendant's motion for judgment n.o.v. after the jury returned a verdict awarding plaintiff $40,000 in compensatory damages. Reversing, this court held that the jury's conclusion that defendant's conduct was extreme and outrageous was entirely rational and legitimate, that defendant acted recklessly when he directed ex-husband to plaintiff, and that plaintiff's mental distress was sufficiently severe to support his claim for relief. Homan v. Goyal, 711 A.2d 812, 812, 813, 817, 818, 820, 821, opinion amended 720 A.2d 1152 (D.C.1998).

D.C.App.1997. Quot. in case quot. in sup., quot. in case cit. in disc. Discharged employee sued former supervisor and former employer for, inter alia, defamation and intentional infliction of emotional distress, and his wife asserted a claim for loss of consortium. The trial court dismissed the complaint. Affirming in part, reversing in part, and remanding, this court held, among other things, that employee's termination, and defendants' alleged actions in connection with it, did not constitute sufficiently egregious conduct for purposes of the tort of intentional infliction of emotional distress; that employee had stated a claim for defamation based on supervisor's comment to co-workers that employee had left an empty bullet casing in an office hallway; and that wife could maintain an action for loss of consortium absent proof of physical injury to employee if she showed that she suffered a loss of services or affection because of an actionable tort against her husband. Crowley v. N. American Telecommunications, 691 A.2d 1169, 1171.

D.C.App.1997. Com. (f) quot. in case quot. in disc. A former hospital technologist sued the hospital for wrongful termination based on breach of contract and violation of public policy, and intentional infliction of emotional distress. Plaintiff alleged that defendant intentionally inflicted emotional distress on plaintiff by forcing her to continue either to work in the blood bank, where

her fetus would be exposed to radiation, or to lose her job. The trial court dismissed plaintiff's complaint. This court affirmed, holding, inter alia, that defendant's conduct did not rise to the required level of outrageousness as a matter of law, because defendant did not force plaintiff to remain in a situation where she would be exposed to radiation. Plaintiff had a choice not to work in the blood bank. Duncan v. Children's Nat. Medical Center, 702 A.2d 207, 211, certiorari denied 525 U.S. 912, 119 S.Ct. 257, 142 L.Ed.2d 211 (1998).

D.C.App.1997. Com. (d) quot. in case cit. in disc. Former employee sued former employer for, inter alia, breach of the implied covenant of good faith and fair dealing and intentional infliction of emotional distress in connection with defendant's decision to demote plaintiff following an investigation of sexual harassment charges that had been filed against him. The trial court entered summary judgment for defendant. Affirming, this court held, in part, that, as an at-will employee, plaintiff was not protected by the implied covenant of good faith and fair dealing inherent in every contract, and that defendant's conduct did not rise to the level of outrageousness sufficient to support a cause of action for intentional infliction of emotional distress. Kerrigan v. Britches of Georgetowne, 705 A.2d 624, 628.

D.C.App.1995. Cit. in case cit. in disc. Doctor sued his malpractice insurer, seeking a declaratory judgment that insurer had a duty to defend him in a tort action filed against him. The underlying action asserted claims for libel, slander, and intentional infliction of emotional distress. Trial court granted doctor summary judgment. This court affirmed, holding, inter alia, that insurer had a duty to defend, since the allegations in the underlying tort complaint raised the possibility of coverage within the scope of the insurer's policy. Since recklessness was sufficient to establish liability for intentional infliction of emotional distress, and the policy did not exclude coverage for reckless acts, there existed the potential for liability within the policy coverage under the alleged tort of intentional infliction of emotional distress. American Continental Ins. Co. v. Pooya, 666 A.2d 1193, 1199.

D.C.App.1995. Cit. in disc. A woman injured in a fall in her apartment sued building owner and property manager in state court for negligence, fraud, and intentional infliction of emotional distress. She also sued owner in federal court alleging same claims. Federal court granted owner directed verdict on the intentional-tort claims but entered judgment on jury verdict for plaintiff on negligence claim. State trial court then dismissed all claims against owner and manager, holding that plaintiff's claims were barred by res judicata and collateral estoppel. Reversing, this court held that neither res judicata nor collateral estoppel barred plaintiff's claim. Collateral estoppel was inapplicable because the federal decision's record did not clearly disclose the grounds on which it was based and, thus, the court could not say that the intentional-tort claims were necessarily decided by the federal court. Major v. Inner City Property Mgmt., Inc., 653 A.2d 379, 381.

D.C.App.1994. Quot. in disc., cit. in case. cit. in sup., com. (d) quot. in sup. Tenant sued landlords for intentional infliction of emotional distress, among other claims, arising from conditions in her apartment, including rat infestation and failure to abate plumbing problems. Affirming the trial court's entering of judgment n.o.v. after the jury found for plaintiff, this court held, inter alia, that

evidence of defendants' failure to make effective repairs was not so outrageous as in other landlord-tenant cases supporting emotional-distress claims, in which landlords made no attempt to repair defective premises. Bernstein v. Fernandez, 649 A.2d 1064, 1075.

D.C.App.1994. Cit. generally in diss. op.; com. (d) quot. in ftn. and in diss. op.; com. (e) cit. in case quot. in sup.; com. (f) cit. in headnotes, quot. in sup., cit. in ftn., quot. in diss. op.; com. (j) cit. in ftn. Rape victim brought an action for intentional and negligent infliction of emotional distress against police detective assigned to investigate the rape. Reversing the trial court's grant of summary judgment for defendant and remanding, this court held, inter alia, that genuine issues of material fact existed as to whether defendant's conduct in belittling and insulting plaintiff during interviews following the rape crossed the line from obnoxiousness to outrageousness. The court stated that the correct legal standard to apply was not whether plaintiff was more susceptible to emotional distress than other rape or crime victims but, rather, whether she was more susceptible than a member of the public at large. The dissent argued that defendant's conduct did not meet the Restatement's standard of outrageousness and that rape victims were no more peculiarly susceptible to emotional distress than other crime victims. Drejza v. Vaccaro, 650 A.2d 1308, 1308, 1312-1314, 1316, 1318.

D.C.App.1993. Com. (d) quot. in sup. Employee terminated for neglecting his work duties sued his former employer under several theories, including intentional infliction of emotional distress. The trial court entered summary judgment against employee. This court affirmed, holding that mere discharge of an employee was not extreme and outrageous conduct, and that plaintiff failed to show anything more. Elliott v. Healthcare Corp., 629 A.2d 6, 9.

D.C.App.1993. Cit. in sup., com. (d) quot. in sup. and in diss. op., coms. (e) and (f) quot. in sup., com. (h) cit. in sup. Employee sued supervisors for intentional infliction of emotional distress, inter alia, alleging that, after she filed a sexual-harassment grievance against her immediate superior, defendants colluded with the alleged harasser in responding to plaintiff's grievance and participated in retaliating against plaintiff. The trial court entered judgment on a jury verdict for plaintiff. Affirming in part, reversing in part, and remanding, this court held that one defendant's failure to respond to plaintiff's handwritten grievance was not, as a matter of law, such extreme and outrageous conduct as to permit recovery, whereas the other defendant's conduct in actively aiding alleged harasser to defeat plaintiff's administrative complaint constituted a serious abuse of supervisory authority and supported submission of the liability question to the jury. The dissent argued that no evidence of extreme or outrageous conduct was presented to warrant submission of the case to the jury. King v. Kidd, 640 A.2d 656, 665, 668, 675, 687.

D.C.App.1992. Com. (d) quot. in case quot. in disc. A tenant sought to recover damages against her landlord for intentional infliction of emotional distress, inter alia. After a lease dispute, the landlord gave the tenant notice to quit and subsequently filed a complaint for possession to recover the premises. Affirming the trial court's grant of summary judgment for the landlord, this court held that the landlord's actions were not so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. It noted that the landlord took no overt acts of self-

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help, but resorted to legal processes, and that this was an unremarkable lease disagreement that could not support liability in tort. Bown v. Hamilton, 601 A.2d 1074, 1079.

D.C.App.1991. Com. (d) quot. in case quot. in ftn. A woman underwent an x-ray and surgery during her pregnancy because her physician and hospital negligently failed to ascertain that she was pregnant. Although her twins were born healthy, the woman sued her physician and hospital for negligent infliction of emotional distress. The trial court granted summary judgment in favor of the defendants because recovery for emotional distress absent an accompanying physical injury was not permitted. Reversing and remanding, this court held that the plaintiff could recover if she could convince the trier of fact that the amount of radiation to which she was exposed or the surgical procedure she underwent presented a threat to her own health or that of her unborn twins, and that as a result she experienced serious and verifiable mental distress. The court noted that the defendant's conduct did not rise to the level of outrageousness required for a claim of intentional infliction of emotional distress, since a physician's failure to inform is usually not an intentional act within the traditional concept of intentional torts. Jones v. Howard University, Inc., 589 A.2d 419, 422.

D.C.App.1991. Com. (d) quot. in disc. Homeowners who were dissatisfied with the quality of a painter's work on their house paid the final payment with a check on which they had placed a stop payment order. The homeowners were also attorneys, and the painter sent them a copy of a letter he had sent to the local bar association accusing them of a felony for passing a bad check. The homeowners sued the painter for intentional infliction of emotional distress; inter alia. The trial court granted summary judgment for the painter. Affirming, this court held that the painter's conduct was not sufficiently outrageous to justify liability for intentional infliction of emotional distress; although his conduct in sending the letter might have been malicious, the conduct was not extreme and outside the bounds of decency. Weaver v. Grafio, 595 A.2d 983, 991.

D.C.App.1990. Quot. in case quot. but dist.; com. (d) quot. in sup. and quot. in case quot. but dist. A library employee who was fired on her supervisor's recommendation sued the library and her supervisor for intentional infliction of emotional distress, defamation, assault, and battery. In support of her emotional distress claim, the plaintiff alleged that her supervisor had written numerous memoranda criticizing the plaintiff's performance, had documented her sick leave as unauthorized absences, and had pushed the plaintiff against the wall, threatening and pointing his finger at her. The trial court found for the plaintiff. Reversing on all counts, this court held regarding the emotional distress count that, even if all of the plaintiff's allegations were true, her supervisor's behavior had not been sufficiently outrageous to support a claim for intentional infliction of emotional distress. District of Columbia v. Thompson, 570 A.2d 277, 290, rehearing granted 580 A.2d 144 (1990).

D.C.App.1990. Cit. and quot. in disc. A patient sued a physician for intentional infliction of emotional distress, alleging that the physician verbally abused her during her three-day hospitalization and in several subsequent telephone calls after she submitted a written complaint to the hospital. The trial court granted the physician's motion for summary judgment, on the ground

that the plaintiff's claim was barred by the statute of limitations. Reversing, this court held that an emotional distress claim stemming from verbal abuse, as in this case, was governed by the general three-year residuary statute of limitations applicable to causes of action for which a limitation was not otherwise specially prescribed, and could not be fairly characterized as sufficiently close to the enumerated tort of assault as to make applicable the one-year statute of limitations for assault. The court emphasized the distinct interests protected by the torts of assault and intentional infliction of emotional distress. Saunders v. Nemati, 580 A.2d 660, 661, 664.

D.C.App.1988. Cit. in case cit. in sup. A property owner returned from a trip to find that his home had been broken into, its lock replaced, and a "No Trespassing" sign affixed to the door. For three weeks, the tax sale purchasers, who had acted on the basis of an erroneously issued tax deed, repeatedly locked out and harassed the record owner. In the owner's suit against the purchasers and the government, the erroneously issued deed was declared void and the case went to trial on the claims against the purchasers for wrongful eviction and intentional infliction of emotional distress. The trial court awarded compensatory damages and, in a second trial, awarded punitive damages. Affirming, this court held, inter alia, that there was ample evidence of intentional infliction of emotional distress to support the jury's award of compensatory damages, despite the plaintiff's relatively low out-of-pocket expenses. Robinson v. Sarisky, 535 A.2d 901, 906.

D.C.App.1984. Com. (d) quot. in part in case quot. in sup. A terminated university faculty member sued the university and other university employees on a number of theories. This court affirmed the trial court's judgment for the faculty member on the breach of contract claim, affirmed the directed verdict against the faculty member on the defamation claim, and reversed the directed verdict against the faculty member on the claims of sex discrimination and intentional infliction of emotional distress. This court stated that the employer-employee conflicts did not, as a matter of law, rise to the level of outrageous conduct necessary to be actionable as intentional infliction of emotional distress, since such conduct was not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. Howard University v. Best, 484 A.2d 958, 986, appeal after remand 547 A.2d 144 (1988).

D.C.App.1982. Com. (f) cit. in sup. A patient brought an action against her doctor for intentional infliction of emotional distress. The trial court found for the patient, and the doctor appealed. This court noted that a prima facie case of intentional infliction of emotional distress required an intentional act and a resulting injury, and that the requisite intent could be inferred from the outrageousness of the actor's conduct. Conduct not generally considered extreme or outrageous could be characterized as such if the actor knew that the other person was peculiarly susceptible to emotional distress. Where the doctor knew of his patient's fragile nervousness but cursed her and screamed at her to leave his office, and this conduct led to her hospitalization, the evidence was sufficient to support the judgment. Affirmed. Anderson v. Prease, 445 A.2d 612, 613.

D.C.App.1982. Cit. but dist. coms. (d) and (h) cit. in sup. The plaintiffs sought to recover for an alleged breach of contract because the insurers wrongfully refused their claims. The lower court granted the defendants' motion for a directed verdict on the tort and punitive damages counts; it

entered judgment on the verdict for the plaintiffs on the breach of contract claim. Both parties appealed. This court affirmed the directed verdict on the tort and punitive damages counts, but it reversed and remanded on the breach of contract claim because the lower court had never considered on the merits the defendants' statute of limitations defense. The court noted the elements required for the tort of intentional infliction of emotional distress, holding that the defendants' conduct never approached the required level of outrageousness necessary to impose tort liability. Sere v. Group Hospitalization, Inc., 443 A.2d 33, 37, 38, certiorari denied 459 U.S. 912, 103 S.Ct. 221, 74 L.Ed.2d 176 (1982).

D.C.App.1980. Quot. in sup. Plaintiff, a 16-year-old youth, was mistakenly arrested while in bed at night in his home by a team including armed District of Columbia police and federal agents. The arrest followed a "Sting" operation in which District of Columbia police and federal law enforcement agents had collaborated. Plaintiff was released from custody after four hours. Plaintiff and his family filed two suits for damages based upon the mistaken arrest. The first suit was filed in the Superior Court against the District of Columbia, its mayor, its chief of police, and the employees of Sting 11 claiming damages for slander and defamation, violation of the constitutional right of privacy, procuring arrest and imprisonment, false pretenses, negligence, breaking and entering, infliction of emotional distress, and assault and battery. Plaintiffs filed a second suit in the United States District Court for the District of Columbia against the two federal agents involved in the arrest alleging a violation of the constitutional right of privacy. This second suit was decided first. The federal district court granted summary judgment for the defendants, which judgment was affirmed by per curiam order of the United States Court of Appeals for the District of Columbia Circuit. The Superior Court then granted summary judgment for defendants in the suit pending in that court on all claims by plaintiff, and plaintiff appealed. On appeal, the judgment of the Superior Court was affirmed by the United States Court of Appeals for the District of Columbia Circuit. On appeal, the court found that the issue of plaintiff's claim for damages based upon the infliction of emotional distress had not been disposed of by the district court's opinion. The appeals court found, however, that even if plaintiff's version of the events that occurred during the arrest was accepted fully, no "outrageous" police conduct was alleged that would indicate an intentional or reckless disregard of the plaintiff's emotional well-being. That fact that an officer held a gun, even at close range, during an arrest on probable cause for a felony charge is not in itself so far out of bounds that it can give rise to an emotional distress claim. Jackson v. District of Columbia, 412 A.2d 948, 956, 957.

D.C.App.1980. Quot. in part in sup., com. (d) quot. in part in sup., com. (e) cit. in ftn. and com. (k) cit. in disc. The plaintiff had been a professor at a University for six years. When a new department head was appointed, she sought to dismiss the plaintiff from his position. The college president informed the plaintiff of the decision in June 1975. The plaintiff sought a review, and in August 1975, the Board of Higher Education agreed in writing to restore the plaintiff to his professor status and to award him a two-year contract. The department head and the clinical coordinator of the department balked at compliance with the contract, arguing that the students under the plaintiff would have a more difficult time securing a job upon graduation because of a lack of learned skills. The plaintiff requested a temporary restraining order which was issued the same day. Before

hearings began, the plaintiff suffered a cardiac arrest and died. His widow substituted herself as the party plaintiff, and filed an amended complaint seeking four million dollars in compensatory and punitive damages for, inter alia, wrongful death and infliction of emotional distress. The only overt acts alleged by the plaintiff were the defendants' interference with the plaintiff's contract rights and physical interference with the plaintiff's rights to use school facilities. Medical reports established that the cardiac arrest resulted from hypertension, possibly brought on by job pressures. The trial court granted the defendants' motion to dismiss for failure to state a claim upon which relief could be granted. On appeal, this court found that the trial court had correctly dismissed all counts but that it was analytically incorrect. The court stated that the wrongful death and emotional distress claims could have been established without evidence of physical impact or injury. Nevertheless, the acts perpetrated by the defendants were neither extreme nor outrageous enough to merit recovery by the plaintiff. The acts were not motivated by malice, but by a desire to provide for the students. Embarrassment and difficulty do not approach the requisite outrageousness necessary to establish the tort. The court affirmed the trial court's dismissal. Waldon v. Covington, 415 A.2d 1070, 1076, 1077.

Fla.

Fla.2013. Cit. in case quot. in sup., com. (g) quot. in sup. This court amended the standard jury instructions, as proposed by the Supreme Court Committee on Standard Jury Instructions in Civil Cases, with certain exceptions, and authorized the amended jury instructions for publication and use. The commentary to the instruction on "Burden of Proof on Claim" noted that the Restatement Second of Torts § 46, Comment *g*, and case law discussed the defense of "privilege"; pending further development of Florida law, the committee did not submit a standard instruction concerning any defense. In re Standard Jury Instructions in Civil Cases—Report No. 12-01, 130 So.3d 596, 611, 612.

Fla.2010. Cit. in disc., com. (g) cit. in disc. The Florida Supreme Court substantially authorized revisions of Florida's standard civil jury instructions proposed by the Supreme Court Committee on Standard Jury Instructions in Civil Cases. In its commentary on the jury instruction covering outrageous conduct causing severe emotional distress, the committee noted that, while the tort of "intentional infliction of emotional distress" was recognized in Florida, the boundaries of this tort, particularly when the claimant was a third party affected by conduct occurring between the defendant and another person, were not clearly defined. The committee further noted that, while § 46, Comment *g,* and case law discussed the defense of "privilege" with respect to this tort, pending further development of Florida law, no standard instruction had been submitted concerning any defense. In re Standard Jury Instructions in Civil Cases-Report No. 09-01 (Reorganization of the Civil Jury Instructions), 35 So.3d 666, 757, 760.

Fla.1995. Coms. (d) and (i) quot. in ftn. A man who was erroneously told that he had tested positive for the human immunodeficiency virus (HIV) sued the hospital, a laboratory, and his treating doctor, alleging negligence. Trial court dismissed and intermediate appellate court affirmed.

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Answering the trial court's certified question, this court held that the impact rule applied to a damages claim from a negligent HIV diagnosis. However, it allowed plaintiff to amend his complaint to try to establish that misdiagnosis led to invasive medical treatment or prescriptions of caustic medicine. It noted that it had carved exceptions to the impact rule such as recognizing the tort of intentional infliction of emotional distress. R.J. v. Humana of Florida, Inc., 652 So.2d 360, 363.

Fla.1990. Quot. and cit. in disc.; coms. cit. generally in disc.; coms. (d) and (i) quot. in disc., cit. in spec. conc. op.; com. (k) quot. in spec. conc. op. After an airplane's engines failed en route to the Bahamas, an airline passenger sued the airline for intentional infliction of emotional distress under state law and for emotional distress damages under the Warsaw Convention. The trial court entered summary judgment in favor of the defendant. The intermediate appellate court affirmed in part and reversed in part, reinstating the state law claim for intentional infliction of emotional distress. Reversing and remanding, this court held that the plaintiff did not state a claim for relief for state law reckless or intentional infliction of emotional distress, but did have a cause of action for emotional distress under the Warsaw Convention. The court stated that allegations that the defendant failed to properly inspect, maintain, and operate its airplane rose no higher than negligence and that it was unlikely that the defendant would intentionally put its crews, passengers, and airplanes in such a perilous situation as that which occurred. A specially concurring opinion noted that the majority's approval of certain language from another opinion's dissent should not be taken to mean that impact is required in intentional infliction of emotional distress cases. Eastern Airlines, Inc. v. King, 557 So.2d 574, 575-576, 576, 579.

Fla.1985. Coms. (d) and (g) quot. in disc. A husband sued his group health insurer, alleging that its actions contributed to his wife's wrongful death and constituted intentional infliction of emotional distress. The trial court entered judgment for the plaintiff on the wrongful death claim but against him on the intentional infliction claim, and the intermediate appellate court affirmed. This court ruled that the actions of the insurer did not constitute the extreme and outrageous conduct necessary to support an action for intentional infliction of emotional distress and that the wrongful death action could not be maintained since the woman was an incidental beneficiary of the group policy, and would have been unable to maintain such an action herself. A dissent argued that the wife was a direct beneficiary, since the policy contemplated payments to her as a dependent spouse. Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277, 279.

Fla.1979. Coms. (d), (g), (i) and (j) cit. in conc. op. A pilot brought an action against an airline, his former employer, to recover for the intentional infliction of mental distress caused by the defendant's actions allegedly taken in retaliation for the pilot's comments or criticisms concerning the lack of safety in the airline's equipment and its pilot training procedures. The lower court granted the defendant's motion for a directed verdict. The appellate court affirmed and held that the actions shown by the plaintiff did not constitute independent torts so that they could not form the basis for an action for the intentional infliction of mental distress and could only support an action for breach of contract or unfair labor practices. The concurring opinion stated that neither the defendant's actions nor the effect of those actions upon the plaintiff were of the thoroughly

horrendous character required to make such a claim. Gellert v. Eastern Air Lines, Inc., 370 So.2d 802, 808, certiorari denied 381 So.2d 766 (1980).

Fla.App.

Fla.App.2023. Quot. in case quot. in sup. Estate of patient sued hospital, alleging that healthcare providers in hospital's emergency room performed an intubation of patient that caused patient fatal brain injuries. The trial court granted plaintiff's motion for leave to amend the complaint to add a claim for punitive damages. This court reversed and remanded, holding that plaintiff failed to show that the providers' conduct was grossly negligent such that punitive damages were warranted. The court explained that punitive damages under Florida law were reserved for truly culpable conduct like the extreme and outrageous conduct required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46, and the providers' alleged misfeasance or malfeasance—in placing patient on a floor with fewer observation checks, failing to attend to patient during emergency calls, and beginning intubation without proper supervision—was not grossly negligent. Cleveland Clinic Florida Health System Nonprofit Corporation v. Oriolo, 357 So.3d 703, 706.

Fla.App.2018. Cit. and quot. in sup.; com. (j) cit. and quot. in sup., quot. in case quot. in sup. Brother-in-law sued sister-in-law, alleging that she falsely stated that he was indebted to her for a loan; sister-in-law counterclaimed for, among other things, intentional infliction of emotional distress, alleging that he said that he would never pay her back and pushed her down the stairs. The trial court entered judgment on a jury verdict for sister-in-law on her emotional-distress claim. This court reversed that portion of the decision and remanded, holding that sister-in-law failed to present sufficient evidence that she suffered severe emotional distress within the meaning of Restatement Second of Torts § 46. While the outrageous nature of brother-in-law's conduct warranted a reasonable inference that it was of a type that could cause severe emotional distress to some people, it could not reasonably be said that sister-in-law in particular suffered such distress without any evidence bearing on the actual effect of his conduct on her emotional state. Kim v. Jung Hyun Chang, 249 So.3d 1300, 1305, 1306, 1308.

Fla.App.2012. Quot. in case cit. and quot. in sup. After cemetery disinterred deceased's body without deceased's widow's knowledge or permission and sent the body for reburial in another state at the request of deceased's mother, widow sued cemetery for damages for reckless infliction of emotional distress, inter alia. The trial court entered summary judgment for defendant. Reversing and remanding, this court held that it could not conclude as a matter of law that defendant's conduct did not reach the level of outrageousness required to support this claim, especially in light of the special deference paid by courts to family feelings where rights involving dead bodies were concerned. Mellette v. Trinity Memorial Cemetery, Inc., 95 So.3d 1043, 1049.

Fla.App.2010. Com. (f) quot. in case quot. in sup. Estate of patient who died at a hospital after having hip surgery and going into cardiac arrest brought, inter alia, a claim for intentional infliction

of emotional distress (IIED) against hospital, physician, and nurses, alleging that physician and nurses covered up their injection of patient with a lethal overdose of blood-pressure medication, and provided false information to her family. Reversing the trial court's dismissal of the claim and remanding, this court held that plaintiff sufficiently pleaded the elements of her IIED claim. The court explained that defendants' conduct in making false statements—which led to the interruption of patient's funeral and the return of her body for a second autopsy—rose to the level of atrocious and utterly intolerable behavior; in a situation where a person's loved one had died, it would be apparent to anyone that the person would be susceptible to emotional distress and, therefore, that the action of providing false information concerning the loved one's cause of death met the standard for a claim of IIED. Thomas v. Hospital Bd. of Directors of Lee County, 41 So.3d 246, 256.

Fla.App.2007. Quot. in case quot. in sup. Fast-food restaurant employee brought human immunodeficiency virus (HIV) discrimination suit against employer and supervisor, including an additional claim for intentional infliction of emotional distress. The trial court granted summary judgment for defendants. Affirming in part, this court held, inter alia, that the alleged teasing of plaintiff over her condition by other employees did not rise to the level of outrageous conduct required to sustain the tort of intentional infliction of emotional distress. Byrd v. BT Foods, Inc., 948 So.2d 921, 928.

Fla.App.2007. Coms. (d) and (e) quot. in sup., illus. 5 cit. and quot. in sup. Owner of bottle club sued police officers for intentional infliction of emotional distress (IIED), alleging that defendants conducted a continuing campaign of harassment by running a drug and prostitution ring out of his club and refusing to investigate illegal activities inside or associated with the club while harassing plaintiff and his employees to ensure their silence. The trial court dismissed the complaint. Reversing, this court held that, given the existence of a relationship of authority in this case that would have led plaintiff to believe that he was subject to arrest for not giving in to defendants' demands, defendants' conduct allegedly encompassing a campaign of extortion leading to the demise of plaintiff's business, if proven, went beyond the bounds of decency and was sufficiently outrageous to support plaintiff's IIED claim. Gallogly v. Rodriguez, 970 So.2d 470, 471-473.

Fla.App.2007. Cit. in sup., com. (d) quot. in case quot. in sup., com. (e) cit. in sup., com. (f) cit. and quot. in sup. Claimant brought suit for intentional infliction of emotional distress (IIED) against workers' compensation carrier and its agent for delaying authorization of her double lung transplant. The trial court denied defendants' motion to dismiss. On remand, this court affirmed, holding that, when paired with plaintiff's allegation that defendants knew that plaintiff had a very limited life expectancy and that the additional emotional distress caused by the delay could well hasten her demise, defendants' alleged conduct was sufficiently outrageous to support a claim for IIED and negate the immunity afforded defendants by the state's workers' compensation act; the court further held that the parties' unequal positions could also supply the heightened degree of outrageousness. Liberty Mut. Ins. Co. v. Steadman, 968 So.2d 592, 594-596.

Fla.App.2006. Quot. in case quot. in sup. Jewish stepmother of an employee of a religious organization that allegedly attempted to convince Jews to accept Christian beliefs sued organization for, in part, intentional infliction of emotional distress, arguing that defendant falsely, and without her permission, portrayed her as a convert to the organization in a newsletter that it published and distributed. The trial court dismissed the complaint. Affirming in part, this court held, inter alia, that the newsletter publication fell short of the extreme and outrageous conduct required to support the tort of intentional infliction of emotional distress. The court reasoned that the language in question occurred in a praise report primarily intended for the eyes of like-minded individuals who would have viewed the subject matter in a positive light. Rapp v. Jews for Jesus, Inc., 944 So.2d 460, 466.

Fla.App.2005. Com. (d) quot. in case quot. in sup. Nurse sued employer hospital for, in part, intentional infliction of emotional distress, alleging that, in compliance with employer's directions to report to work immediately despite her seizure-like symptoms, she drove to work, suffered a seizure, and was injured in a car accident. Trial court dismissed the suit. This court affirmed, holding, inter alia, that defendant's direction to its employee that she report to work right away, despite its awareness that she might be suffering symptoms of a serious condition, did not exceed all bounds of decency within the contemplation of intentional infliction of emotional distress. Hernandez v. Tallahassee Medical Center, Inc., 896 So.2d 839, 841.

Fla.App.2004. Com. (d) quot. in sup. Minister and his wife brought suit against parishioners for slander, negligent and intentional infliction of emotional distress, and loss of consortium, after parishioners publicly accused minister of stealing church funds to buy a new car. Trial court granted defendants' motion to dismiss complaint. Affirming in part, this court held, inter alia, that the alleged acts, while embarrassing and unsettling, did not rise to the level of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Legrande v. Emmanuel, 889 So.2d 991, 995.

Fla.App.2003. Adopted in case cit. in disc. Gas-station/convenience-store employee who claimed that she received psychological injuries as a result of a robbery at the store brought suit against employer, alleging that defendant was negligent in failing to provide adequate security. Affirming the trial court's grant of summary judgment for defendant, this court held that, under Florida law, plaintiff could not maintain an action for negligent infliction of emotional distress against defendant in the absence of a physical impact or injury. The court noted that the impact doctrine had no application to the tort of intentional infliction of emotional distress, which was not alleged here, because the duties created by such an intentional tort had never been restricted to the protection of physical person and property. Rivers v. Grimsley Oil Co., 842 So.2d 975, 976.

Fla.App.2003. Com. (d) quot. generally in case quot. in sup. In a dispute between siblings over an inheritance, plaintiff sued executrix of decedent's estate for intentional infliction of emotional distress and slander. Affirming in part the trial court's dismissal of the claims, this court held, inter alia, that plaintiff could not recover for intentional infliction of emotional distress, since the facts

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as pled failed to show that defendant's conduct was extreme and outrageous. Shedeke v. Gomez, 837 So.2d 1122, 1123.

Fla.App.2002. Quot. in sup. Mother and grandparents, individually and on behalf of child, sued father, father's private investigator, and elementary school principal after father and investigator allegedly kidnapped child from school. The trial court granted defendants' motions to dismiss. Affirming in part, this court held, inter alia, that principal's action of releasing child to father when presented with out-of-state custody order did not rise to level of extreme and outrageous conduct sufficient to support claim of intentional infliction of emotional distress. Allen v. Walker, 810 S.2d 1090, 1091.

Fla.App.2002. Com. (d) adopted in case quot. in disc. Employee sued her employer and supervisors for discrimination on the basis of sexual orientation and for intentional infliction of emotional distress. The trial court granted defendants' motion to dismiss. Affirming, this court held, inter alia, that plaintiff's allegations of verbal abuse and disparate treatment, if true, constituted objectionable and offensive conduct, but did not rise to the level of outrageousness that was required by law in a claim for intentional infliction of emotional distress in the employment context. De La Campa v. Grifols America, Inc., 819 So.2d 940, 943.

Fla.App.2001. Quot. in case quot. in ftn. Trial court entered an order in a guardianship adversary proceeding, authorizing guardian husband to discontinue life-prolonging procedures for his wife. This court reversed in part and remanded, holding, inter alia, that record was insufficient to support a temporary injunction sought by wife's parents, and that any action challenging final order of guardianship court must be filed as an adversary proceeding within the guardianship. The court stated that it did not need to decide whether parents stated cause of action for intentional infliction of emotional distress against husband. Emotional-distress damages were questionable, since parents generally had no common-law or statutory right to recover such damages if their married, adult daughter was a wrongful-death victim. In re Guardianship of Schiavo, 792 So.2d 551, 562, appeal after remand 800 So.2d 640 (Fla.App.2001).

Fla.App.2001. Cit. in case quot. in sup. Former law-firm employee sued firm's attorney, asserting a claim for intentional infliction of emotional distress arising out of instances of sexual harassment in the workplace. The trial court denied defendant's motion for a directed verdict, and entered judgment on a jury verdict for plaintiff. Affirming, this court held that plaintiff's evidence of defendant's persistent verbal abuse coupled with his repeated offensive, unwelcomed physical contact established a prima facie case that defendant's workplace harassment of plaintiff was outrageous. Johnson v. Thigpen, 788 So.2d 410, 412.

Fla.App.2001. Quot. in case quot. in disc. Former employee sued former employer for employment discrimination and intentional infliction of emotional distress, among other things, based on alleged handicap discrimination and racial discrimination in violation of state law. Trial court dismissed plaintiff's claim. Affirming in part, reversing in part, and remanding, this court held that plaintiff failed to prove that defendant's conduct was sufficiently outrageous to sustain

claim for intentional infliction of emotional distress. Williams v. Southeast Florida Cable, Inc., 782 So.2d 988, 991.

Fla.App.2000. Subsec. (1) quot. in sup. Teacher sued pupils for intentional infliction of emotional distress in connection with defendants' publication and distribution of a student bulletin. The trial court dismissed the complaint. Reversing and remanding, this court held that defendants' conduct in creating a newsletter in which they threatened plaintiff and her family with death and serious bodily harm could be considered extreme and outrageous and outside the bounds of all decent behavior. Nims v. Harrison, 768 So.2d 1198, 1200.

Fla.App.1998. Cit. in disc., com. (d) quot. and cit. in disc., com. (k) cit. in disc., illus. 1-3 cit. in disc. Tenants who were constructively evicted from their leased premises sued landlord for intentional infliction of emotional distress. The trial court dismissed the complaint. Affirming, this court held that the conduct complained of, which included defendant's failure to act despite its alleged knowledge that the property at issue was below the flood elevation level required by FEMA, that the property was continuously in standing water, and that there was water in the electrical fixtures and lights was not so extreme and outrageous as to give rise to an action for intentional infliction of emotional distress. Clemente v. Horne, 707 So.2d 865, 866, 867.

Fla.App.1997. Com. (d) quot. in case quot. in disc. After a police officer and an investigator for the department of health and human services seized a child from the mother at a church where the mother had been attending services, the mother sued the department, the city, the officer, and the investigator for, among other claims, civil-rights violations and intentional infliction of emotional distress. Trial court dismissed the mother's complaint. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that plaintiff stated a cause of action for intentional infliction of emotional distress, in light of her allegation that the officers' unjustified and unexplained taking of her children while she and her children attended church services was outrageous. She alleged that this conduct was accomplished by ripping the infant from her arms, choking her until she lost consciousness, throwing her to the ground, arresting her for challenging the officers' legal authority to take the children without a court order or any justification, and then initiating dependency proceedings to terminate the parent-child relationship. Johnson v. State HRS, 695 So.2d 927, 929, appeal after remand 793 So.2d 20 (Fla.App.2001).

Fla.App.1997. Cit. and quot. in conc. and diss. op. A woman, her family, and a friend sued a department store for false imprisonment and intentional infliction of emotional distress, among other claims, after they were detained and evicted from the store and their photos were taken against their will and placed in public view on a bulletin board labeled “Wall of Shame.” Trial court granted defendant summary judgment, holding that defendant's actions did not rise to the level of outrageousness required for intentional infliction of emotional distress. This court reversed and remanded, holding, inter alia, that trial court properly granted summary judgment on the emotional-distress claim, but that a fact issue existed regarding the false-imprisonment claim, particularly as to whether the detention was reasonable and warranted. The opinion concurring in part and dissenting in part argued that fact issues existed as to the emotional-distress claim, because it could

not be concluded that there was no conceivable interpretation of the facts on which a fact finder could determine that defendant's actions were outrageous. Rivers v. Dillards Dept. Store, Inc., 698 So.2d 1328, 1333.

Fla.App.1996. Adopted in case cit. in disc., cit. in diss. op., cit. in case quot. in diss. op., com. (d) quot. in case quot. in sup., cit. in diss. op., subsec. (1) quot. in diss. op., com. (h) cit. and quot. in diss. op. Woman and her husband sued health-care plan and participating physician from whom woman was required to seek treatment for medical malpractice and intentional infliction of emotional distress, alleging that defendants, in an effort to maximize profits, purposefully failed to provide woman with adequate care. The trial court granted defendants' motion to dismiss. Affirming in part, reversing in part, and remanding, this court held that plaintiffs had stated a cause of action for medical negligence, but that defendants' conduct was not so outrageous as to allow recovery for mental distress. Dissent believed that the lower court's determination of whether plaintiffs had stated a cause of action for intentional infliction of emotional distress should have been made based on all of the evidence, rather than on their complaint. Paul v. Humana Medical Plan, Inc., 682 So.2d 1119, 1121-1123.

Fla.App.1993. Com. (d) quot. in case quot. in sup. Former grocery store employee who was terminated for theft sued store and its owner for intentional infliction of emotional distress. Reversing the trial court's entry of judgment on a jury verdict for employee and remanding, this court held that, even if the store's conduct in its theft investigation exceeded the bounds of propriety, it did not rise to the level of outrageousness, consisting as it did of reporting the theft to the police after failing to use successfully Florida's civil theft statute. Food Lion, Inc. v. Clifford, 629 So.2d 201, 203.

Fla.App.1993. Cit. in case quot. in ftn., com. (d) cit. in disc. and cit. and quot. in case quot. in ftn. A police officer made a videotape of an autopsy performed on a minor who died from a drug overdose. Officer then hosted a viewing of the tape at his home with other officers in an alleged “party atmosphere” where the audience joked and laughed. The minor's mother and sister sued police department and city for intentional infliction of emotional distress, among other claims. Trial court initially granted defendants summary judgment but appellate court reversed. On remand, trial court granted defendants summary judgment on basis of sovereign immunity from liability for an employee's willful and wanton conduct. This court affirmed, holding that if jury found that officers' conduct supported a claim for outrageous infliction of emotional distress by reckless conduct, this conduct would at least constitute willful and wanton conduct under the state sovereign immunity statute; therefore, sovereign immunity doctrine would bar this claim. Williams v. City of Minneola, 619 So.2d 983, 987.

Fla.App.1992. Com. (g) cit. generally in sup. Two children sued a department store and one of its employees for false imprisonment, intentional infliction of emotional distress, and defamation, alleging that the defendants falsely accused them of shoplifting, detained them for two hours, interrogated them in an intimidating manner, and refused their requests to call their parents. The trial court entered a directed verdict for the defendants on three counts and the jury found for

the defendants on the other two. Affirming, this court held, inter alia, that the defendants were privileged to engage in reckless or outrageous conduct to assert their legal right to detain persons whom they had probable cause to suspect of shoplifting. The court stated that the defendants' conduct did not even approach the limits of the privilege, since there was probable cause to suspect the plaintiffs of shoplifting, the employee who detained the children had called her supervisor, and the employee then followed the supervisor's instructions to call the sheriff's office. Canto v. J.B. Ivey and Co., 595 So.2d 1025, 1028.

Fla.App.1992. Cit. in case cit. in disc., quot. in sup., coms. (d) and (i) cit. in sup. While a patient was waiting in a hospital for x-rays to diagnose a medical problem, a hospital physician verbally assaulted her in a loud and abusive way concerning a debt that she owed to the physician's friend. The patient sued the physician for intentional infliction of emotional distress. Reversing in part the trial court's dismissal of the action and remanding, this court held that, given the doctor-patient relationship between defendant and plaintiff and defendant's knowledge of plaintiff's medical problems, defendant acted in deliberate disregard of the high degree of probability that plaintiff would suffer severe emotional distress and the complaint sufficiently alleged outrageous conduct to survive a motion to dismiss. McAlpin v. Sokolay, 596 So.2d 1266, 1269, 1270.

Fla.App.1991. Cit. in sup., cit. in ftn. to conc. and diss. op., cit. in conc. and diss. op., com. (d) quot. in sup. After a television station broadcast a videotape showing the remains of a child who had been abducted in 1985, the child's parents sued the television station for invasion of privacy and outrage. The trial court dismissed the complaint with prejudice. Affirming in part and reversing and remanding in part, this court affirmed the dismissal of the invasion of privacy claim but reversed the dismissal of the count for the tort of outrage, concluding that reasonable persons in the community could find that the defendant's alleged conduct was outrageous in character and exceeded the bounds of decency so as to be intolerable in a civilized community. A concurring and dissenting opinion argued that the plaintiffs stated a cause of action for invasion of privacy, as well as for intentional infliction of emotional distress, although the two counts might prove to be identical and require an election by the plaintiffs at a subsequent point as to which tort to pursue. Armstrong v. H & C Communications, Inc., 575 So.2d 280, 281-283.

Fla.App.1991. Cit. and quot. in sup., cit. in case quot. in disc., com. (d) cit. in sup. and quot. in case quot. in sup., com. (f) quot. in disc., com. (i) cit. in disc. After police officers displayed photographs and showed a videotape to several other individuals of the autopsy of a 14-year-old boy who had died of a drug overdose, the decedent's mother and sister sued the city, among others, for intentional infliction of emotional distress, inter alia. The trial court granted the defendant's motion for summary judgment. Reversing and remanding, this court held that a cause of action in tort for reckless infliction of emotional distress lay for outrageous conduct involving pictures of the dead body of a plaintiff's spouse, child, sibling, or parent, even though the plaintiff was not present at the display of the pictures and the allegedly tortious conduct did not physically impact the plaintiff, whether or not the emotional distress in turn caused physical harm to the plaintiff. Williams v. City of Minneola, 575 So.2d 683, 690-693, review denied 589 So.2d 289 (Fla.1991), appeal after remand 619 So.2d 983 (1993). See case below.

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Fla.App.1990. Cit. in disc., coms. (d) and (g) quot. in disc. The settlor-beneficiary of a trust sued the trustee bank for intentional infliction of emotional distress, inter alia, alleging that the defendant invested all of the plaintiff's liquid assets in a fund that was declining in value, contrary to the plaintiff's instructions and investment plan and the bank's proposal and that this mismanagement caused the beneficiary to develop heart disease. The trial court granted the defendant's motion for summary judgment on the claim for intentional infliction of emotional distress. Affirming, this court held that the trustee's actions did not support the plaintiff's claim for intentional infliction of emotional distress because those actions did not rise to the level of outrageous conduct required by Florida law and that they were privileged as the assertion of legal rights the defendant had within the trust agreement. Baker v. Florida Nat. Bank, 559 So.2d 284, 288, review denied 570 So.2d 1303 (Fla.1990).

Fla.App.1990. Cit. and quot. in disc., cit. generally in case quot. in disc., com. (d) quot. in disc. The personal representative of his deceased father's estate sued several family members for intentional infliction of emotional distress, inter alia, alleging that, to remove him as personal representative and deprive him of his share of the assets, the defendants conspired to have the plaintiff falsely arrested, convicted, and sentenced for the first-degree murder of the decedent, who was in fact accidentally shot and killed by the plaintiff as he was cleaning his shotgun. The trial court dismissed the complaint with prejudice. Reversing in part and remanding, this court held that the allegations were sufficient to state a cause of action. The court said that outrageousness was more likely to be found where some relationship existed that gave the defendant the power to affect the plaintiff's interests; here, the defendants' relationship to the plaintiff with regard to the estate of their father gave the defendants the power to affect directly the plaintiff's interests. Fridovich v. Fridovich, 573 So.2d 65, 71, 72, reversed 598 So.2d 65 (Fla.1992).

Fla.App.1990. Subsec. (1) quot. in sup., com. (d) quot. and cit. in sup., com. (e) and illus. 5 cit. in sup. A woman sued a restaurant owner for slander, malicious prosecution, and intentional infliction of emotional distress after the owner had her arrested for refusing to pay for a lobster she claimed was uncooked and inedible. The trial court granted summary judgment for the owner. Reversing in part, the court of appeal held that there was sufficient evidence in the record to support plaintiff's claims for malicious prosecution and emotional distress. The court said that a question of fact existed as to whether the food was inedible and whether the innkeeper had probable cause to believe he was being defrauded, and that a jury could find the owner's calculated use of the threat of arrest to extort from a patron money she did not owe sufficiently outrageous to warrant recovery for intentional infliction of emotional distress. Lashley v. Bowman, 561 So.2d 406, 408-410.

Fla.App.1990. Subsec. (1) and coms. (d) and (i) quot. in case quot. in sup., com. (g) cit. in sup. A husband and wife sued a cemetery alleging intentional infliction of emotional distress and breach of their statutory right of access after cemetery employees ejected them while they were trying to hold a memorial service at their son's grave. Plaintiffs had previously conducted such services without incident at the site. The trial court dismissed the statutory claim and entered summary judgment for the cemetery on the emotional distress claim. Reversing and remanding, the court of

appeal held that plaintiffs had stated a cause of action for violation of their statutory right of access to the cemetery, and that the claim of emotional distress should have gone to the jury, as a trier of fact could find that the cemetery acted recklessly, in deliberate disregard of a high probability that ejecting plaintiffs from the cemetery would cause them emotional distress. Mallock v. Southern Memorial Park, Inc., 561 So.2d 330, 331-332.

Fla.App.1989. Coms. (d) and (g) quot. in disc. An insured party sued a group health insurer and its servicing agent for fraud, negligence, and intentional infliction of emotional distress stemming from the insurer's denial of insurance coverage of the insured's two ailing sons and the agent's action of relaying the insurer's decision to the insured that the sons were no longer covered. The jury found in favor of the servicing agent on the negligence claim and for the insured on all other counts. This court affirmed the judgment entered against the insurer but reversed the judgment against the servicing agent. It determined, inter alia, that the proof failed to reach the heavy burden required for recovery for intentional infliction of emotional distress allegedly caused by the servicing agent. The court explained that in relaying false information as to coverage, the servicing agent had no authority to make independent coverage decisions with respect to the insurance policy and it had initially double checked the coverage question with the primary insurer. In addition the servicing agent had referred the plaintiff's counsel to the primary insurer on all questions of coverage. Blue Cross/Blue Shield of Fla. v. Weiner, 543 So.2d 794, 796-797, certiorari denied 494 U.S. 1028, 110 S.Ct. 1475, 108 L.Ed.2d 612 (1990).

Fla.App.1989. Subsec. (1) cit. in case cit. in disc., subsec. (2)(a) quot. in sup., illus. 1 cit. in case cit. but dist. A man informed parents that he had sexually abused their daughter, and that his wife had been supplying the daughter with illegal drugs from the time she was 8 years old, throughout her childhood, until she was 23 years old. The parents sued the man and his wife for intentional infliction of emotional distress. The trial court granted the defendants summary judgment. Affirming, this court held that, on public policy grounds, damages for emotional distress were recoverable only by the victim of abusive behavior and not by members of her family who were not present when the behavior occurred. The court, however, noted that the situation would have been different if the information given by the defendant to the plaintiffs had been intentionally false. M.M. v. M.P.S., 556 So.2d 1140, 1141, review denied 569 So.2d 1279 (1990).

Fla.App.1988. Subsec. (d) cit. in sup. The mother of a kindergarten student sued a convenience store for false imprisonment, malicious prosecution, and intentional infliction of emotional distress, after it had the child arrested for stealing a package of gum. The trial court entered judgment for the plaintiff on the false imprisonment claim. Reversing, this court held that the store's actions were privileged because it had probable cause to institute proceedings and it asserted its legal rights in a permissible manner. Southland Corp. v. Bartsch, 522 So.2d 1053, 1056, review dismissed 531 So.2d 167 (1988).

Fla.App.1988. Quot. in disc., com. (d) quot. in disc. A defendant appealed a jury finding that he intentionally inflicted emotional distress upon plaintiffs. The trial court entered judgment on the jury verdict, but this court reversed, holding that the charged conduct was not so outrageous in

character and extreme in degree as to go beyond all possible bounds of decency, and be regarded as atrocious and utterly intolerable in a civilized community. Swinarski v. Keller, 529 So.2d 1208, 1209, review denied 541 So.2d 1172 (1989).

Fla.App.1987. Com. (d) quot. in case cit. in sup. An insured sued her insurer for intentional infliction of mental distress. The trial court granted the insurer's motion for summary judgment. Affirming, this court held that the insurer's arbitrary refusal to pay on a valid insurance claim was not so outrageous in character as to be actionable. Davis v. Gulf Life Insurance Company, 502 So.2d 1012, 1013.

Fla.App.1987. Quot. and cit. in sup., com. (g) quot. in case quot. in disc., com. (e) quot. in ftn. in sup., com. (f) quot. in sup. The insured held a credit disability policy requiring the insurer to make car loan payments to the bank if he became totally disabled. After the insured became totally disabled, the insurer honored its policy for more than a year and then stopped payments on the basis that the total disability stemmed from a preexisting disability. After the insured's explanations were rebuffed, he was subjected to verbal assaults and his car was repossessed. He sued the insurer for payment under the policy, and sought compensatory and punitive damages. The jury found for the insured. This court affirmed in part and reversed in part, holding, inter alia, that damages were properly awarded for intentional infliction of emotional distress because the insurer's behavior was extreme and outrageous, and represented an abuse of an unequal relationship and an attempt to exploit the plaintiff's known vulnerabilities. Dependable Life Ins. Co. v. Harris, 510 So.2d 985, 986-989.

Fla.App.1987. Cit. in ftn., cit. in disc., quot. in sup., com. (d) quot. in case quot. in disc. and in diss. op., com. (h) quot. in disc. and in ftn. and cit. and quot. in diss. op., com. (i) and illus. 15 and 16 quot. in diss. op. An airplane passenger sued the airline for intentional infliction of emotional distress because an engine failed during the flight. The passenger argued that the airline's maintenance of the airplane was reckless conduct because 12 similar engine failures had previously occurred on the airline's aircraft. The trial court dismissed the complaint on the ground that the passenger had failed to state a claim. Affirming in part, reversing in part, and remanding, this court held that the passenger had stated a cause of action because the airline's inadequate maintenance of its aircraft rose to the level of reckless conduct. The dissent argued that there was no cause of action because the airline's behavior was not willful misconduct. King v. Eastern Airlines, Inc., 536 So.2d 1023, 1024, 1025, 1027, 1032-1036, decision disapproved and remanded 557 So.2d 574 (1990). See above case.

Fla.App.1987. Cit. in disc., coms. cit. in disc., com. (d) quot. in sup., com. (h) cit. in sup. A doctor sued a hospital for intentional infliction of mental distress following his termination as director of the hospital laboratory. The trial court granted the hospital's motion for summary judgment, holding that the hospital's conduct was not so extreme and outrageous as to permit recovery where the conduct consisted of denying the plaintiff basic support services, excluding the plaintiff from social affairs, falsely accusing the plaintiff of theft, prohibiting laboratory personnel from conversing with the plaintiff, and publishing false information about the plaintiff's income. Scheller

v. American Medical Intern., Inc., 502 So.2d 1268, 1270, 1271, review denied 513 So.2d 1060 (Fla.1987).

Fla.App.1986. Quot. in sup. The estate of a nursing home patient sued the nursing home for the wrongful death of the patient from infected bed sores. The trial court entered judgment on a jury verdict for the plaintiff awarding both compensatory and punitive damages. Affirming, this court held that there was sufficient evidence of willful or wanton conduct to justify the award of punitive damages because the defendant's conduct was outrageous and beyond the bounds of decency. Payton Health Care Facilities, Inc. v. Estate of Campbell, 497 So.2d 1233, 1240.

Fla.App.1985. Com. (j) cit. in conc. and diss. op. An employee brought a tort action against her employer and her supervisor, alleging damages arising out of an incident in which the supervisor had offensively touched the employee while they were both on duty. The trial court granted summary judgment in favor of the employer, holding that the claims were barred by the exclusivity provision of the workers' compensation act, but did not grant summary judgment for the supervisor. On rehearing, this court affirmed, rejecting the employee's argument that, even if the tort of battery was barred under the statute, the claim for intentional infliction of emotional distress was not. A concurring and dissenting opinion criticized the majority for not allowing the claim for intentional infliction of emotional distress, stating that the majority's reasoning did not take into account the unique quality of the tort in that physical injury need not be shown. Brown v. Winn-Dixie Montgomery, Inc., 469 So.2d 155, 161.

Fla.App.1985. Com. (d) quot. in sup. A widow sought compensatory and punitive damages from a cremation society, alleging breach of contract, negligence, and intentional infliction of emotional distress because the cremation society scattered the decedent's ashes at sea, contrary to his specific instructions. The trial court entered judgment for the widow and awarded her compensatory and punitive damages. This court reversed on the damage award issue, but affirmed the trial court's denial of the cremation society's motion for directed verdict on the widow's claim of intentional infliction of emotional distress. The court reasoned that denial was proper because the evidence presented regarding the cremation society's handling of the decedent's ashes contrary to his specific instructions was such “extreme and outrageous” conduct as to go beyond all bounds of decency in a civilized community. Smith v. Telophase Nat. Cremation Soc., Inc., 471 So.2d 163, 166.

Fla.App.1984. Subsec. (1) and com. (d) quot. in spec. conc. op. A customer sued the owner of a retail store for intentional infliction of emotional distress after four of the store's employees chased her and wrongfully accused her of stealing in front of a crowd of people. The trial court found for the plaintiff, and this court affirmed without written opinion. The specially concurring opinion noted that this tort was reserved for extreme and outrageous conduct that would be regarded as atrocious in a civilized society. Jefferson Ward Stores, Inc. v. Khorozian, 519 So.2d 627, 628.

Fla.App.1983. Com. (d) quot. in case quot. in disc. The defendant attorney appealed from the trial court dismissal of her third-party complaint against the plaintiff's law firm for indemnity and intentional infliction of emotional distress. This court affirmed, stating that there was no basis for

the indemnity claim and that the claim for intentional infliction of emotional distress failed because the conduct alleged was not beyond the bounds of decency. Anderson v. Rossman & Baumberger, P.A., 440 So.2d 591, 593.

Fla.App.1983. Cit. in disc., cit. in case cit. in ftn. in disc., and coms. (e) and (f) quot. in disc. After the plaintiff was rendered totally disabled by a car accident, his insurer paid the plaintiff disability income for several years. Later, the insurer stopped payments and falsely represented that the plaintiff was not disabled. The plaintiff was forced to sign a paper agreeing that no further payments were due. The plaintiff then brought this action for outrageous conduct causing severe emotional distress. The trial court dismissed the action for failure to state a claim. This court reversed and adopted the view that a cause of action for emotional distress brought about by outrageous conduct was actionable notwithstanding the absence of another tort. Dominguez v. Equitable Life Assur. Soc., 438 So.2d 58, 59, 60, 62.

Fla.App.1983. Cit. in disc. A former employee of a community college brought this suit against the college and its president for intentional infliction of emotional distress. The plaintiff alleged that the president made sexually suggestive invitations to her. The trial court dismissed the complaint. On appeal the district court of appeal affirmed, holding that the tort upon which the plaintiff's complaint was based was not recognized in Florida. None of the allegations against the principal tortfeasor involved a touching or any form of battery. They were limited to the use of offensively opprobrious words directed to the plaintiff by her superior on the job. The plaintiff's declination of the propositions was alleged to have resulted in the loss of her job. The court stated that the obnoxious and socially odious words allegedly coming from the defendant, if true, were nevertheless without physical contact or threat of bodily harm. The declination to extend her employment contract had no legal significance as none of the defendants were legally obligated to do so. That event and the other consequences complained of were found to be insufficient as a matter of law to state grounds for relief under existing law. The plaintiff's only alternative for remedy was to bring a claim in federal court for sexual discrimination. On motion for rehearing, the court certified to the state supreme court the question whether one could recover damages for intentional infliction of mental distress not incidental to any other actionable wrong. Gmuer v. Garner, 426 So.2d 972, 973-975.

Fla.App.1983. Quot. in disc. The husband of a deceased insured sought damages against a group health insurer for breach of contract, intentional infliction of emotional distress to the insured while she was alive, and wrongful death. The trial court entered judgment on the verdict in favor of the husband, but set aside the jury award for damages suffered by the insured while living. The court of appeals affirmed. There was sufficient evidence to support a finding that the insurer's actions constituted the intentional infliction of emotional distress. The insurer, although fully aware of the serious condition of the insured and of its obligations to her, discontinued the nursing services to spite the insured, notwithstanding the potentially devastating consequences to her. The trial court did not err in setting aside the jury award sustained by the insured while she lived since the Florida wrongful death statute allowed the estate to recover damages only for prospective loss of earnings

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of the decedent and for the decedent's medical and funeral expenses which were not recovered by the survivor. Metropolitan Life Ins. Co. v. McCarson, 429 So.2d 1287, 1290.

Fla.App.1980. Subsec. (1) cit. in sup. and quot. in sup. in ftn. Com. (d) quot. in sup. and com. (j) cit. in ftn. in sup. Plaintiffs were cashier for defendant supermarket and her husband. Cashier had worked for supermarket for six years. The supermarket had been experiencing a cash shortage, and defendant security manager for defendant supermarket asked plaintiff cashier to submit to a polygraph test. She was told that company policy required all employees to take the test or be fired. Plaintiff consented in writing to take the test. At this point she was told by the security manager that it was company policy to have her admit to prior thefts because any one who had worked for the company as long as she had must have taken something. He told her that if she denied such past thefts she would be terminated as untrustworthy. Plaintiff claimed that she protested her ignorance, but that the security officer told her the alternative to confession was termination. He also told her that any confession would not go against her record, and that other employees had signed such statements and been retained by the supermarket in return for repayment of the amount taken. Plaintiff then signed a statement drawn up by the security officer admitting the theft of $150. The polygraph test was then administered and plaintiff was told by the security officer that “it didn't clear.” The next day, the security officer insisted that plaintiff sign a new statement admitting the theft of $500 and gave her another polygraph test. Later, plaintiff was told that she was suspended until the investigation was completed, but that she would then be notified to return to work. Instead, she was terminated because of her admission of misappropriating company cash, although she claimed to have returned all the money taken. About a month later, plaintiff and her husband met with officials of the supermarket to discuss her termination. This meeting was tape recorded and while unintelligible in spots included a statement by plaintiff's husband that plaintiff's truthfulness concerning her version of the threats made by the security manager had been established by an independent polygraph examination by a certified polygraph expert retained by plaintiffs. Plaintiffs brought suit against the supermarket and the security manager to recover damages for intentional infliction of emotional distress and for fraud. The lower court admitted into evidence the tape recording of the meeting between plaintiffs and supermarket officials. The jury found for plaintiffs, awarding compensatory and punitive damages. Defendants appealed. The appeals court found: (1) the conduct of the security manager was not sufficiently outrageous as to give rise to a cause of action for the intentional infliction of emotional distress; (2) plaintiffs did have a cause of action for fraud and (3) the trial court committed reversible error when it admitted the tape recording into evidence. The appeals court reversed the judgment of the trial court and remanded for a new trial on the issues of liability and damages, compensatory and punitive in regard to the claims based upon fraud and deceit. Food Fair, Inc. v. Anderson, 382 So.2d 150, 153.

Fla.App.1979. Cit. in disc., subsec. (1) quot. in disc., coms. (d) and (j) quot. in part in disc. and com. (i) cit. and quot. in part in disc. The defendant credit company had telephoned the plaintiff and, in order to obtain the address for the plaintiff's son for credit purposes, falsely stated that the plaintiff's grandchild had been involved in a car accident and the defendant needed to know the son's address. The plaintiff sued for intentional infliction of mental distress and claimed that she suffered severe mental distress until she ascertained that the story was false. A jury entered a verdict

in favor of the plaintiff and awarded both compensatory and punitive damages. The defendant appealed. This court affirmed the lower court's decision and held that the defendant's conduct was reckless, extreme and outrageous, beyond all bounds of human decency and was properly found to be liable for injuries resulting from such conduct. The court stated that the plaintiff does not have to incur bodily harm if the defendant's conduct is sufficiently extreme and outrageous. The court stated that evidence of fright, worry and/or grief could be sufficient to prove that the defendant had intentionally inflicted mental distress. Ford Motor Credit Co. v. Sheehan, 373 So.2d 956, 958-959.

Fla.App.1975. Cit. in ftn. in sup. A mother brought this action against a newspaper for trespass, invasion of privacy, and intentional infliction of mental distress. While plaintiff was away from home a severe fire occurred which killed her seventeen year old daughter. Defendant's photographer, assigned to the fire, entered the house, without express invitation, and took certain photographs of the interior at the request of officials at the scene of the fire. Defendant published a picture of a silhouette on the floor of the house where the plaintiff's daughter's body had lain. It was from this publication that plaintiff first learned of her daughter's death. The trial court dismissed counts of invasion of privacy and entered summary judgment for the defendant on the counts of trespass and intentional infliction of mental distress. On appeal, reversed as to compensatory damages for trespass and invasion of privacy, but otherwise affirmed. The court held that a genuine issue of material fact existed as to whether custom and usage implied consent for the photographer to enter plaintiff's home in her absence while covering a news event. Although not a trespass per se, if entry by the photographer into plaintiff's home constituted an intrusion, it follows that such intrusion constituted a sufficient basis for the tort of invasion of privacy. Fletcher v. Florida Publishing Co., 319 So.2d 100, 112.

Fla.App.1973. Com. (e) cit. in diss. op. but not fol. The plaintiff insureds, injured in a collision with an uninsured motorist, brought an action against defendant, insurer of plaintiffs, for recovery in excess of the policy limits for uninsured motorist coverage and for punitive damages resulting from defendant's malicious bad faith in requiring plaintiffs to resort to arbitration, rather than pay plaintiffs for their valid claim. On plaintiffs' appeal from a judgment dismissing the complaint, the court affirmed, and held that under Florida law, defendant's failure to settle plaintiffs' claim, even if in bad faith, did not render defendant liable for punitive damages or damages in excess of the uninsured motorist coverage. Baxter v. Royal Indemnity Company, 285 So.2d 652, 662, cert. dismissed 317 So.2d 725 (1975).

Ga.

Ga.1991. Subsec. (1) quot. in sup., com. (d) quot. in sup. and cit. in diss. op., com. (j) cit. in sup. A former managerial employee sued her employer for intentional infliction of emotional distress, inter alia, alleging that the defendant transferred her to another division and demoted her to a meaningless position after she testified against the defendant in an employment discrimination suit. The trial court granted summary judgment for the defendant, and the intermediate appellate court affirmed. Reversing in part, this court held that the plaintiff's allegations, if proved, that the

defendant deliberately set out to retaliate against her for testifying against it, which retaliation included subjecting her to abuse by her supervisor and causing her severe emotional pain, met the threshold requirement of extreme and outrageous conduct and thus presented a question of fact for the jury. The dissent argued that, even if the defendant had an improper motive, its act of transferring the plaintiff to an equal-paying job in a less hospitable office did not go beyond all possible bounds of decency. Yarbray v. Southern Bell Tel. & Tel. Co., 261 Ga. 703, 409 S.E.2d 835, 837, 838.

Ga.App.

Ga.App.2022. Com. (f) quot. in case quot. in sup. Father of 15-year-old daughter who committed suicide filed claims for intentional infliction of emotional distress and negligence against funeral home and business hired by funeral home to produce daughter's death certificate, alleging that funeral home and business acted in concert to cause him emotional distress by making fun of his sexual orientation and his daughter's suicide in a manner that suggested that his same-sex marriage contributed to her depression and suicide. The trial court granted business's motion to dismiss. This court reversed in part and remanded, holding that father sufficiently alleged outrageous conduct in support of his claim for intentional infliction of emotional distress under Restatement Second of Torts § 46 by asserting that business knew or should have known that he was especially susceptible to emotional distress following his daughter's suicide. Mayorga v. Benton, 875 S.E.2d 908, 913.

Ga.App.2013. Com. (d) cit. in case quot. in sup. Former employee who had used a false identity to acquire her job and receive workers' compensation benefits brought a claim for intentional infliction of emotional distress (IIED) against former employer, after defendant filed an administrative-fraud complaint against her with the state workers' compensation board. The trial court granted summary judgment for defendant. Affirming, this court held that plaintiff's claim failed, because defendant's filing of a complaint with the workers' compensation board, which led a government agency to investigate and eventually arrest plaintiff, did not amount to extreme and outrageous conduct for purposes of plaintiff's IIED claim, even if defendant's complaint was motivated by a desire to limit its future workers' compensation exposure. The court noted that it was undisputed that defendant provided fully accurate information in the complaint, and there was no suggestion that probable cause for plaintiff's arrest was lacking. Garcia v. Shaw Industries, Inc., 741 S.E.2d 285, 289.

Ga.App.2008. Cit. in sup. After a court ruled against former husband in connection with a custody and visitation dispute, husband filed an action pro se against ex-wife, her attorney, and a psychologist, asserting various claims arising from alleged misrepresentations made about him by defendants. The trial court granted defendants' motions to dismiss. Reversing in part and remanding, this court held, inter alia, that plaintiff properly pled the essential elements of a claim for intentional infliction of emotional distress, namely, that defendants' intentional conduct was extreme and outrageous and that it caused him severe emotional distress. Walker v. Walker, 293 Ga.App. 872, 668 S.E.2d 330, 334.

Ga.App.2005. Com. (d) quot. in case quot. in sup. Customer sued drugstore for, in part, intentional infliction of emotional distress, alleging that she suffered injuries resulting from drugstore's pharmacy having twice misfilled her prescription with the wrong medication. On remand, the trial court denied defendant summary judgment. This court reversed in part, holding, inter alia, that pharmacy's error, while unfortunate, did not constitute the extreme and outrageous conduct required to sustain a claim of intentional infliction of emotional distress as a matter of law, since there was no evidence that drugstore's actions or omissions were egregious or made with conscious indifference to the consequences. Mableton Parkway CVS, Inc. v. Salter, 273 Ga.App. 477, 482, 615 S.E.2d 558, 564.

Ga.App.2002. Subsec. (1), com. (f) quot. in sup., com. (d) quot. in case quot. in sup. Employee, individually and on son's behalf, sued employer and employer's manager for intentional infliction of emotional distress and false imprisonment for refusing to let employee leave her job or use the phone to care for son who suffered broken arm at school. The trial court granted defendants summary judgment. Affirming, this court held, inter alia, that manager's actions, while harsh and insensitive, were not so extreme and outrageous as to sustain claim for intentional infliction of emotional distress. Miraliakbari v. Pennicooke, 254 Ga.App. 156, 157, 159, 561 S.E.2d 483, 486, 488.

Ga.App.2000.Com. (d) cit. in case cit. in ftn. Man who was arrested for theft by conversion after failing to return a broken-down rental truck to rental company sued company, alleging, among other things, intentional infliction of emotional distress. Trial court granted defendant summary judgment. Reversing in part, this court held, inter alia, that fact issues existed as to whether defendant's conduct in reporting the truck stolen, even though it knew that truck had broken down, was sufficiently extreme and outrageous as to support plaintiff's claim for intentional infliction of emotional distress. Fleming v. U-Haul Co., 246 Ga.App. 681, 686, 541 S.E.2d 75, 80.

Ga.App.2000. Cit. in case quot. in disc. Employee sued his employer for intentional infliction of emotional distress, after suffering a mental breakdown caused by a harsh and ill-timed job evaluation. Trial court granted defendant summary judgment. This court affirmed, holding that giving a harsh performance evaluation on the day an employee returned from extended psychiatric care and continuing that interview despite the employee's tearful entreaties for a postponement did not rise to the requisite level of outrageousness and egregiousness to sustain a claim for intentional infliction of emotional distress. The court stated that there was nothing inherently outrageous with subjecting an employee to a straightforward if harsh evaluation of his job performance, regardless of its timing. Jarrard v. United Parcel Service, Inc., 242 Ga.App. 58, 529 S.E.2d 144, 148.

Ga.App.1996. Subsec. (1), com. (j) quot. in case quot. in diss. op. Putative wife brought action for intentional infliction of emotional distress against nursing home at which putative husband was a patient after home discharged husband into the custody of his son from an earlier marriage but did not inform plaintiff of the release. The trial court entered summary judgment for defendant. Affirming in part, reversing in part, and remanding, this court held, inter alia, that defendant's

actions lacked the element of outrageousness or egregiousness necessary to give rise to liability under a theory of intentional infliction of emotional distress. Dissent believed that a jury could conclude that defendant's conduct was sufficiently insulting as to humiliate and embarrass plaintiff, and that such distress, if extreme, would warrant the imposition of liability. Fisher v. Toombs County Nursing Home, 223 Ga.App. 842, 479 S.E.2d 180, 186.

Ga.App.1994. Cit. in sup. Mother sued county medical examiner and county coroner for intentional infliction of emotional distress resulting from the autopsy performed on her stillborn fetus. This court affirmed the trial court's granting of summary judgment for defendants, holding that defendants' actions did not rise to the necessary level of outrageousness and egregiousness as a matter of law. The court noted that defendants were authorized by state law to perform the autopsy, since medical examiner testified in his deposition that he considered the stillbirth to be suspicious and unexplained. Clark v. Arras, 212 Ga.App. 695, 443 S.E.2d 277, 278.

Ga.App.1993. Quot. in part in case cit. in sup. A former employee of a school system sued her supervisor and a co-worker for intentional infliction of emotional distress. This court affirmed judgment for defendants, holding that the co-worker's actions in showing plaintiff a hole in the crotch of his pants and asking her if she would like to staple it closed and making a lewd gesture referring to sexual activity he imagined she engaged in with her husband on a vacation trip were simply isolated incidents of "tasteless and rude social conduct" that did not rise to the level necessary to support a claim for emotional distress damages. Hendrix v. Phillips, 207 Ga.App. 394, 395, 428 S.E.2d 91, 92.

Ga.App.1993. Cit. in disc., com. (d) quot. in disc. A railway worker sued his employer under the Federal Employers' Liability Act (FELA) and the Hours of Service Act, alleging negligent and intentional infliction of emotional distress claims from stressful work assignments and an extended work schedule, which included lengthy periods with no days off and workdays of 12 hours or longer without adequate breaks for meals and other personal needs. This court reversed a denial of the railroad's motion for summary judgment, holding, inter alia, that, even if the emotional distress claims could have been asserted under FELA, the employer actions complained of did not rise to the level of egregious or outrageous behavior required to support such claims. Norfolk Southern Ry. Co. v. Spence, 210 Ga.App. 284, 285, 435 S.E.2d 680, 681, cert. denied ___ U.S. ___, 114 S.Ct. 2743, 129 L.Ed.2d 862 (1994).

Ga.App.1992. Cit. in sup., subsec. (1) quot. generally in sup., com. (d) quot. in sup. Railroad employee sued employer for intentional infliction of emotional distress, inter alia, caused by employer's allegedly humiliating treatment of employee upon discovering that employee was severely claustrophobic and depressed. The trial court granted defendant summary judgment. This court vacated and remanded with directions to enter judgment on the pleadings for defendant, since defendant failed to file any depositions, affidavits, or testimony on the motion for summary judgment. It held that plaintiff did not prove outrageous conduct by defendant and that defendant was acting within his authority when he inquired into plaintiff's medical condition and adjusted

his work schedule and duties to accommodate his illness. Bowers v. Estep, 204 Ga.App. 615, 420 S.E.2d 336, 339.

Ga.App.1992. Subsec. (1), com. (d) quot. in case quot. in sup. Terminated employee sued company owner's relative for intentional infliction of emotional distress allegedly caused by relative's use of foul and abusive language directed at plaintiff. The trial court granted defendant summary judgment, and this court affirmed, holding, inter alia, that defendant's name-calling did not rise to the level of outrageousness necessary for an intentional tort and that plaintiff's own testimony revealed that she was not severely offended, since she did not ask defendant to refrain from his offensive conduct. Cooler v. Baker, 204 Ga.App. 787, 420 S.E.2d 649, 650, 651.

Ga.App.1992. Com. (f) quot. in sup. Chronic diabetes patient sued her physician for intentional infliction of emotional distress. The trial court granted defendant's motion for a directed verdict. Reversing, this court held that plaintiff's allegations that defendant relentlessly vented anger against her while she was in the hospital after having been admitted to the emergency room complaining of chest pain, that he was aware of her potentially fragile physical condition, and that her physical condition deteriorated following defendant's alleged conduct were sufficient to state a cause of action for intentional infliction of emotional distress. Williams v. Voljavec, 202 Ga.App. 580, 415 S.E.2d 31, 33.

Ga.App.1992. Com. (d) quot. in sup. Employee was indicted by grand jury for forgery of a letter that transferred the employer's license for computer hardware to employee and for theft of computer hardware. After plaintiff pleaded no contest, defendant allowed the transfer of hardware ownership to plaintiff. Employee then sued employer for intentional infliction of emotional distress, inter alia, caused by the humiliation of being booked and jailed, and having to spend large sums of money in attorneys' fees. The trial court granted defendant summary judgment; this court affirmed, holding that plaintiff had not presented sufficient evidence that defendant's conduct went beyond all possible bounds of decency. Yarbrough v. SAS Systems, Inc., 204 Ga.App. 428, 419 S.E.2d 507, 509.

Ga.App.1991. Subsec. (1) cit. in disc., com. (d) quot. in sup. An employee sued her supervisor for slander and intentional infliction of emotional distress as a result of the supervisor accusing the employee of cheating on an exam in front of other workers. The trial court entered judgment on a jury verdict awarding the plaintiff compensatory damages, but granted the defendant a judgment n.o.v. as to the award for punitive damages for slander and the damage award for intentional infliction of emotional distress. Affirming, this court held that a false accusation of dishonesty or lack of integrity in connection with one's employment, although distressful, is a common part of ordinary life and does not constitute intentional infliction of emotional distress for which the law allows a recovery. It stated that the supervisor's accusation did not cause more distress than a reasonable person could be expected to endure. Peoples v. Guthrie, 199 Ga.App. 119, 404 S.E.2d 442, 444.

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Ga.App.1990. Subsec. (1) cit. in disc., com. (d) quot. in disc. and quot. generally in case quot. in conc. op. After the death of her grandson, a grandmother, who had previously been told by an insurance agent that up to $10,000 would be available for funeral expenses, was informed that she was entitled to only a portion of the actual expenditures of $9,469. After an altercation with the insurance adjuster, in which the adjuster allegedly threw funeral bills across his desk towards the grandmother, pounded on the desk, and pointed his finger at her, the grandmother sued the insurer for breach of contract and intentional infliction of emotional distress. The trial court granted the insurer summary judgment on the breach of contract claim and denied the insurer's motion for judgment notwithstanding the mistrial on the emotional distress claim. Affirming, this court held that the denial of the post-trial motion was consistent with the prior rulings, and that a material issue of fact existed as to whether the conduct of the insurance adjuster was extreme and outrageous. The concurring opinion asserted that a special relationship existed and that the defendant's conduct went far beyond the norms of acceptable business behavior. Georgia Farm Bureau Mut. Ins. v. Mathis, 197 Ga.App. 324, 398 S.E.2d 387, 389, 390.

Ga.App.1989. Com. (f) cit. in case quot. in sup. An employee fired by her employer sued him for her bonus and vacation pay and also for intentional infliction of emotional distress. The trial court entered judgment on a jury verdict for the plaintiff on all counts. Affirming the lower court's ruling on the emotional distress count, this court said that the plaintiff's testimony that the defendant had used threatening and abusive language in warning her not to sue him gave sufficient support to the jury's verdict. The court noted that the existence of a long-term employee-employer relationship between the parties added to the defendant's threats a character of outrageousness that they might not have had in another context. Anderson v. Chatham, 190 Ga.App. 559, 379 S.E.2d 793, 800.

Ga.App.1989. Com. (f) quot. in case quot. in sup., com. (h) cit. in case cit. in sup. A woman called her pharmacist, complained of a migraine headache, and asked to refill her prescription for medicine. The pharmacist called the woman's physician, was told that the prescription had not been renewed recently, then called the police and had the woman arrested for an attempt to fraudulently obtain a controlled substance. The woman sued the pharmacist and pharmacy, inter alia, for intentional infliction of emotional distress. Following a jury verdict for the plaintiff, the trial court granted the defendant's motion for judgment n.o.v. Reversing, this court said the question had been properly submitted to the jury because a reasonable person could find the defendant's behavior outrageous. Moreover, since the defendant was in a position of control over the plaintiff's health and welfare and had known the plaintiff for a long time, had perceived that the plaintiff had emotional problems, and had called the police without making a serious attempt to find out whether the plaintiff's physician would renew the prescription, the jury determination that the defendant's actions were wanton and with malicious purpose was not unfounded. Gordon v. Frost, 193 Ga.App. 517, 388 S.E.2d 362, 366.

Ga.App.1989. Com. (b) quot. in part in sup. A restaurant owner sued a broadcasting company and a radio talk-show host for defamation, intentional infliction of emotional distress, negligence, invasion of privacy, and tortious interference with business relations after the host made disparaging remarks about plaintiff and his restaurant. The trial court granted summary judgment

for the defendants, holding that each comment was a constitutionally protected expression of opinion, hyperbole, or a statement of fact. Reversing, the court of appeals held that the trial court erred in granting summary judgment on plaintiff's claim for emotional distress, since a factfinder could consider the host's exhortations to his listeners to go to plaintiff's place of business and confront him in a hostile and assaultive manner sufficiently extreme and outrageous conduct as to result in liability. S & W Seafoods v. Jacor Broadcasting, 194 Ga.App. 233, 390 S.E.2d 228, 231.

Ga.App.1988. Com. (c) quot. in disc., com. (d) quot. in sup., com. (j) quot. in case quot. in sup. An insurance agent who was verbally threatened over the telephone by his former employer for contacting the employer's clients sued the employer for intentional infliction of emotional distress. The trial court granted the defendant's motion for summary judgment. Affirming, this court held that the threat did not constitute an actionable wrong; it was not enough that the threat was intentional because it would not have produced such severe distress in a reasonable person as to rise to the level of outrageous conduct needed for the tort. Moses v. Prudential Ins. Co. of America, 187 Ga.App. 222, 369 S.E.2d 541, 543, 544.

Ga.App.1985. Subsec. (1) quot. in sup., coms. (f) and (j) quot. in sup., com. (e) cit. in sup. A part-time grocery store cashier with multiple sclerosis sued her employer for intentional infliction of emotional distress after she was discharged for not cooperating with a polygraph examination regarding inventory shortages. The plaintiff contended that she suffered trembling and partial paralysis after becoming upset during her polygraph examination. The trial court rendered summary judgment in favor of the defendant, finding that the defendant's conduct was not sufficiently outrageous to sustain an allegation of intentional infliction of emotional distress. This court affirmed, holding that although a polygraph examination in connection with a theft investigation would be upsetting to a normal person, and perhaps more so to a person whose emotional threshold was lowered by multiple sclerosis, the elements of the tort were not present. Bridges v. Winn-Dixie Atlanta, Inc., 176 Ga.App. 227, 335 S.E.2d 445, 447, 448.

Ga.App.1980. Cit. in sup. The plaintiffs were awarded damages, based on a jury verdict, in an action for trespass, assault, invasion of privacy and intentional infliction of emotional distress. This court held that the trial court had erred by failing to charge the jury on proximate causation because the element of proximate cause is essential to an action for the intentional infliction of emotional distress. This court therefore reversed the trial court's judgment. Whitmire v. Woodbury, 154 Ga.App. 159, 267 S.E.2d 783, 785, judgment reversed 246 Ga. 349, 271 S.E.2d 491 (1980).

Hawaii

Hawaii, 2008. Cit. in sup., coms. (d), (e), and (g) quot. in sup. Automobile-accident victim brought a claim for the tort of malicious defense, inter alia, against tortfeasor's liability insurer and insurer's attorney, alleging that defendants used the courts imprudently, and acted primarily for a purpose other than that of adjudicating the claims and defenses, such harassment, annoyance, or infliction of injury. Affirming the trial court's dismissal of this claim, this court declined to recognize the

tort of malicious defense. The court expressed the view that Hawaii's existing rules, statutes, and tort law offered appropriate remedies for plaintiff's injuries, noting that, in certain cases, a plaintiff aggrieved by a defendant's assertion of malicious defenses was entitled to recover compensatory and punitive damages through an intentional-infliction-of-emotional-distress (IIED) claim; in this case, plaintiff stated a claim for IIED based upon, among other things, defendants' alleged conduct during the underlying litigation. Young v. Allstate Ins. Co., 119 Hawai'i 403, 198 P.3d 666, 688, 689.

Hawaii, 2007. Adopted in case quot. in sup. (general cite). Mortgagors brought various claims against mortgage-payment servicer and its maintenance contractor after contractor entered and secured mortgagors' property before foreclosure of the property was complete. The trial court granted servicer's petition for a determination that its proposed settlement with plaintiff was in good faith. This court vacated and remanded, but held, inter alia, that the amount of the proposed settlement was reasonable. The court noted that while plaintiff's case against servicer for both conversion and intentional infliction of emotional distress was reasonably strong, particularly as to intent to injure, because there was evidence that servicer was aware of mortgagee's instructions not to enter and secure the property until foreclosure was complete, damages were nonetheless subject to considerable uncertainty. Brooks v. Dana Nance & Co., 113 Hawai'i 406, 153 P.3d 1091, 1100.

Hawaii, 2004. Cit. in ftn. Patient sued cardiologist for malpractice. Federal district court entered judgment on jury verdict for plaintiffs, but court of appeals reversed and remanded. Answering certified questions from district court, this court held that amount of medical special damages awardable to plaintiff in negligence suit was not limited to discounted amount paid to healthcare provider by Medicare, and that plaintiff could recover reasonable value of medical services. In applying Restatement Second of Torts § 920A and the collateral-source rule, the court noted that the Hawaii Supreme Court had many times relied on the Restatement as persuasive authority, citing, for instance, a case involving intentional infliction of emotional distress. Bynum v. Magno, 106 Hawai'i 81, 101 P.3d 1149, 1154.

Hawaii, 2003. Cit. and quot. in sup. and adopted, cit. generally in ftn., cit. generally in conc. op., coms. (b), (j), and (k) quot. in sup. State-university professor whose application for a promotion had been denied three times before she was promoted brought suit for, in part, intentional infliction of emotional distress against university and personnel-committee members. The trial court directed a verdict against plaintiff on the claim. Affirming, this court held that the trial court's grant of a directed verdict was harmless error; since the jury did not find that plaintiff was subjected to a hostile work environment, it could not have found in her favor on her intentional-infliction-of-emotional-distress claim had it been submitted. The court adopted Restatement Second of Torts § 46, according to which proof of bodily injury was not necessary to establish severe emotional distress. A concurring opinion argued that the conduct complained of was not outrageous. Hac v. University of Hawaii, 102 Hawai'i 92, 73 P.3d 46, 58, 60, 61.

Hawaii, 2000. Cit. in disc., com. (h) quot. in case cit. in disc. Store's former manager brought claims for age discrimination and intentional or negligent infliction of emotional distress, among

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other things, against store and district manager. Plaintiff appealed summary judgment in favor of defendants. Affirming, this court held that the district manager's verbal criticism of plaintiff was not "outrageous" and did not amount to intentional infliction of emotional distress. Shoppe v. Gucci America, Inc., 94 Hawai'i 368, 387, 14 P.3d 1049, 1068.

Hawaii, 1998. Cit. in headnote, cit. in case quot. in disc., com. (d) quot. in disc. State human rights commission filed complaint charging landlords with discriminatory conduct in failing to rent a small cottage to a family of four. Defendants counterclaimed for negligence and negligent and intentional infliction of emotional distress. The trial court granted plaintiff's motion to dismiss the counterclaim. Affirming in part, reversing in part, and remanding, this court held, inter alia, that plaintiff negligently investigated prospective tenants' claim of discrimination by failing to consult administrative rules setting forth the occupancy limits for a dwelling the size of the cottage in question; however, plaintiff's demand that defendants publish the results of plaintiff's investigation in at least one state newspaper did not constitute conduct giving rise to a claim for negligent or intentional infliction of emotional distress. Tseu ex rel. Hobbs v. Jeyte, 88 Hawai'i 85, 962 P.2d 344, 345, 352.

Hawaii, 1996. Cit. in headnotes, cit. in case quot. in sup., com. (d) quot. in case quot. in sup., com. (h) cit. in case quot. in sup. A woman brought an action against her father for childhood sexual abuse and also asserted claims for defamation and intentional infliction of emotional distress, inter alia, based on defendant's statement that he was still angry at plaintiff for reporting the assaults to police in 1964 and would never forgive her. Affirming the trial court's grant of summary judgment for defendant with respect to the claim for intentional infliction of emotional distress, this court held, in part, that defendant's statement, made to his other daughter in the privacy of his home, was not so unreasonable or outrageous as to give rise to a cause of action for intentional infliction of emotional distress; moreover, the statement was not made actionable by the fact that defendant repeated it to plaintiff, in direct response to plaintiff's inquiry. Dunlea v. Dappen, 83 Hawai'i 28, 924 P.2d 196, 197, 198, 206.

Hawaii, 1994. Cit. in sup., com. (d) quot. in ftn., com. (h) cit. in case quot. in sup. Hotel employee sued the hotel and others after he was discharged from his position pursuant to the hotel's policy of prohibiting married persons from working in the same department, seeking damages for intentional infliction of emotional distress and asserting other claims. On remand, the trial court entered final judgment for hotel. Affirming in part, this court held, inter alia, that, since there was no evidence that hotel had acted unreasonably in the course of discharging plaintiff, it could not be held liable for emotional distress damages. Ross v. Stouffer Hotel Co., 76 Hawai'i 454, 465, 879 P.2d 1037, 1048.

Hawaii, 1982. Cit. in disc. The plaintiffs brought suit against the defendant homeowner's association, claiming negligent and intentional infliction of emotional distress and libel in connection with a neighborhood dispute over an assessment charged to the plaintiffs. The lower court permitted only the negligent infliction of emotional distress count to go to the jury; it then entered judgment on the jury verdict for the plaintiff. Both parties appealed. This court reversed

and remanded for a new trial. The court held that the plaintiffs could recover only for intentional, not negligent, infliction of emotional distress when the dispute involved debt collection. The court also held that there was sufficient evidence to permit the jury to decide whether the defendants libeled the plaintiffs and also intentionally inflicted emotional distress. Chedester v. Stecker, 64 Hawaii 464, 643 P.2d 532, 535.

Hawaii, 1970. Com. (j) cit. in sup. This was an action against the stateby homeowners seeking damages for the flooding of their house, resulting from failure of a culvert to drain water from a state highway, the culvert having been blocked by beach sand. Plaintiffs alleged that the state had failed to keep the culvert free of such sand. Plaintiffs testified that the flooding of their husehad left them “heartbroken” and “shocked”. Judgment was for plaintiffs and included an amount for “mental anguish and suffering, inconvenience, disruption of home and family life, past and future, etc.” Upon appeal, the court affirmed the judgment, except … as to the award for “mental anguish and suffering.” In its opinion the court discussed in detail the authorities and cases involving such damages and held that the interest in freedom from negligent infliction of serious mental distress is entitled to independent legal protection; that there is a duty to refrain from the negligent infliction of serious mental distress; that whether or not the defendant is liable to the plaintiff in any particular case will be solved most justly by the application of general tort principles. The court remanded the case to the trial court to decide whether under the facts of the case, serious mental distress to plaintiffs was a reasonably foreseeable consequence of defendant's acts. The concurring and dissenting opinions rejected the position of the majority in this respect. Rodrigues v. State, 472 P.2d 509, 519, 520.

Hawaii App.

Hawaii App.2013. Adopted and quot. in case cit. in sup., com. (d) quot. in sup. Former employee of beach resort sued manager of the resort, alleging claims of age discrimination and intentional infliction of emotional distress (IIED) in connection with defendants' decision to terminate her employment. The trial court granted summary judgment for defendant. Affirming as to plaintiff's claim for IIED, this court held that defendant's alleged conduct failed to rise to the required level of "outrageous" or "extreme" conduct. The court pointed out that plaintiff failed to allege any facts in support of her IIED claim beyond those supporting her discrimination claim, and that Hawaii case law was clear that termination alone, even if based on discrimination, was not sufficient to support an IIED claim without a showing of something outrageous about the manner or process of termination. Simmons v. Aqua Hotels and Resorts, Inc., 310 P.3d 1026, 1033.

Hawaii App.2011. Com. (j) quot. in law dictionary quot. in sup. and cit. in case quot. in sup. State charged father with abuse of family or household member in connection with an incident in which he punched his 10-year-old son twice on the left leg, with enough force to cause bruising, as punishment for lying. After a bench trial, the trial court found father guilty. Reversing, this court held, among other things, that the trial court's finding that father's actions caused son mental distress (rather than extreme mental distress) was not sufficient to negate father's assertion of a

statutory parental discipline defense. The court reasoned that, by requiring the mental distress to be extreme, the plain language of the statute clearly prohibited force that was designed to cause or known to create the risk of causing something more than the ordinary definition of emotional or mental distress. State v. Dowling, 125 Hawai'i 406, 263 P.3d 116, 122.

Hawaii App.1998. Cit. in case quot. in ftn. Former employee sued former employer for, inter alia, intentional infliction of emotional distress, alleging that his termination constituted extreme and outrageous behavior exceeding all bounds usually tolerated by decent society. The trial court granted defendant's motion for summary judgment. Affirming in part, vacating in part, and remanding, this court held, among other things, that, to the extent plaintiff's termination was the result of racial discrimination, material factual issues existed as to whether defendant had engaged in outrageous conduct. Takaki v. Allied Machinery Corp., 87 Hawai'i 57, 951 P.2d 507, 516.

Hawaii App.1989. Com. (d) quot. in sup., com. (h) cit. in sup. A man sued his neighbors for intentional infliction of emotional distress, and the neighbors counterclaimed for libel, defamation, and intentional infliction of emotional distress. All claims were dismissed without prejudice. Subsequently, the original plaintiff sued his neighbors and their attorney for malicious prosecution, abuse of process, and intentional infliction of emotional distress, claiming that the counterclaims in the previous suit had been filed with the sole purpose of harassing him. The trial court granted the defendants summary judgment on all counts. Affirming the lower court holding on the count of emotional distress, this court said that, in the context of the parties' prior litigation, the defendants' sending of interrogatories with questions considered abusive by the plaintiff was not unreasonable, and thus, as a matter of law, could not be characterized as outrageous behavior beyond the bounds of decency. Wong v. Panis, 7 Hawaii App. 414, 772 P.2d 695, 700.

Idaho,

Idaho, 2013. Com. (d) quot. in case quot. in sup. Former assistant principal of high school brought claims for, among other things, negligent infliction of emotional distress against school district, principal, and district's superintendent in connection with allegations that he was sexually harassed by principal and others. The trial court granted summary judgment for defendants. Reversing as to plaintiff's emotional-distress claim, this court held that there was a sufficient question of fact as to whether defendants' conduct exceeded that degree of inconsiderate verbal remarks to which an ordinary person was expected to be hardened. The court pointed to plaintiff's evidence that he complained to principal of the alleged harassment and asked that it stop, that the various sexual remarks continued even after defendants were made aware that plaintiff found them offensive, and that defendants retaliated against plaintiff for his complaints. Frogley v. Meridian Joint School Dist. No. 2, 314 P.3d 613, 624.

Idaho

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Idaho, 2010. Com. (g) quot. in sup. Landowner brought action for breach of contract and intentional infliction of emotional distress (IIED) against title insurer, seeking relief for insurer's failure to defend the appeal in his suit to secure an easement running over an access road to his property. The trial court granted summary judgment for defendant. Affirming, this court held, as to the IIED claim, that, because defendant had the legal right to pay plaintiff the limit of his insurance policy instead of pursuing further litigation, which it did, defendant's conduct was not extreme and outrageous as a matter of law; merely exercising a legal right, without more, was not a tort. Mortensen v. Stewart Title Guar. Co., 149 Idaho 437, 235 P.3d 387, 397.

Idaho, 2010. Com. (j) cit. and quot. in disc. and sup. and quot. in case quot. in sup. Insureds sued automobile insurer, alleging, among other things, breach of contract and bad faith in connection with its handling of their claims arising from an accident caused by an uninsured motorist. The trial court entered judgment on a jury verdict awarding plaintiffs damages for, among other things, emotional distress suffered by plaintiff mother. Affirming that portion of the judgment, this court held that there was sufficient evidence of severe emotional distress caused by defendant's misconduct in denying and delaying payment, for example, evidence that plaintiffs suffered from embarrassment, harassment by medical-bill collectors, and internal family strife, and that mother experienced depression and crying; proof that emotional distress was severe did not require evidence of a psychological disorder, and, in many cases, the extreme and outrageous character of the defendant's conduct was in itself important evidence of such distress. Weinstein v. Prudential Property and Cas. Ins. Co., 149 Idaho 299, 233 P.3d 1221, 1234, 1246, 1247.

Idaho, 2007. Com. (h) quot. in case quot. in sup. Insured who was involved in a multi-vehicle accident sued insurer for bad faith, breach of contract, and intentional infliction of emotional distress in connection with its handling of a personal-injury claim filed against him by another party who was severely injured in the accident. The trial court granted summary judgment for defendant. Affirming in part, this court held that summary judgment on plaintiff's claim for intentional infliction of emotional distress was appropriate because defendant's conduct in failing to settle the claim within the policy limits was not beyond the bounds of decency. The court concluded that, while defendant could have acted more expeditiously under the particular facts of this case, the record did not show that it acted intentionally or recklessly in carrying out its investigation. McKinley v. Guaranty Nat. Ins. Co., 144 Idaho 247, 159 P.3d 884, 891.

Idaho, 2003. Coms. (e) and (f) cit. in ftn., com. (g) cit. in sup., com. (h) quot. in sup. Former employee, who had an excellent work record for 22 years, sued employer for wrongful termination, breach of implied contract, and intentional infliction of emotional distress, after he was fired and escorted off the premises. Trial court dismissed plaintiff's claims. This court affirmed, holding, inter alia, that defendant was not liable for intentional infliction of emotional distress, because the manner of discharge and attendant circumstances were not outrageous. Defendant merely insisted upon its rights in a permissible way, even if it knew of plaintiff's susceptibility to emotional distress from being fired. Edmondson v. Shearer Lumber Products, 139 Idaho 172, 75 P.3d 733, 741, cert. denied 540 U.S. 1184, 124 S.Ct. 1426, 158 L.Ed.2d 88 (2004).

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Idaho, 1985. Cit. in case quot. in disc., com. (d) quot. in disc., com. (j) cit. in disc. A purchaser of land sued the previous landowner for misrepresentations of title and of the condition of the property and for negligent infliction of emotional distress. The trial court quieted title in the purchaser and awarded her damages for the misrepresentation of the condition of the property before the sale and for negligent infliction of emotional distress. This court reversed the award of damages for negligent infliction of emotional distress. The court held that, although the purchaser had suffered severe emotional distress that had manifested itself in physical symptoms, she could not recover for negligent infliction of emotional distress merely because there was a breach of contract. The court reasoned that the law was unable to redress every emotional wrong that a plaintiff suffered. Brown v. Fritz, 108 Idaho 357, 699 P.2d 1371, 1375, 1376.

Idaho, 1983. Cit. in ftn. An employee who, upon informing her supervisor that she was injured in a fall, was directed to continue working, brought an action against her employer for intentional infliction of emotional distress. The trial court granted summary judgment in favor of the employer. On appeal, this court affirmed, holding that the plaintiff's claim for emotional distress did not constitute the separate tort of outrage, and was, moreover, barred by the exclusive remedy provisions of the workers' compensation act. Yeend v. United Parcel Service, Inc., 104 Idaho 333, 659 P.2d 87, 88.

Idaho, 1980. Cit. in sup. and quot. in sup. and com. (d) cit. in sup. Defendant auctioneer breached his contract with plaintiff seller by selling logging equipment at less than the minimum specified price. The auctioneer's attorney issued the proceeds of the sale in multiple payee checks with release endorsements, which forced the seller to choose between compromising his own claim and delaying his father's receipt of funds due him. The trial court, in addition to awarding money damages for breach of contract and emotional distress caused by the breach, awarded punitive damages based on the attorney's alleged intentional infliction of severe emotional harm. The court reversed on this issue, holding that plaintiff was not entitled to recover punitive damages, because he had failed to demonstrate the required impact resulting from extreme and outrageous conduct, his hurt feelings being insufficient. Hartfield v. Max Rouse & Sons Northwest, 100 Idaho 840, 606 P.2d 944, 953, 954.

Idaho App.

Idaho App.2009. Quot. in case quot. in disc. Real estate agent brought pro se suit against real estate developer, alleging nonpayment of a commission and negligent infliction of emotional distress, inter alia. The trial court granted summary judgment for defendant. This court reversed and remanded as to the emotional-distress claim, holding that, while in ordinary circumstances of social interaction it would not be foreseeable that insulting and demeaning remarks like those attributed to defendant could inflict serious emotional harm, here there was evidence of plaintiff's unusual emotional fragility and susceptibility to harm from the insults due to his emotional instability or mental illness, and that plaintiff's odd behavior and reactions had been observed by defendant; thus, fact questions remained as to whether defendant was aware of plaintiff's unique emotional

delicacy such that he should have foreseen that his alleged crude sexual insults and advances would inflict serious emotional harm. Johnson v. McPhee, 147 Idaho 455, 210 P.3d 563, 576.

Idaho App.2006. Com. (j) quot. in sup. Sisters brought various claims against individual who was caught prowling outside older sister's home with a video camera containing surreptitiously taped images of younger sister and sisters' mother in various stages of undress. The trial court entered judgment on a jury verdict for plaintiffs. This court affirmed in part but reversed the trial court's order denying defendant's motion for judgment n.o.v. on plaintiffs' claim for intentional infliction of emotional distress, holding that plaintiffs' evidence, including younger sister's testimony that she would only change in a windowless room, experienced difficulty trusting males, and was fearful of walking at night, failed to demonstrate the type of severe or disabling emotional reaction essential to such a claim. Alderson v. Bonner, 142 Idaho 733, 132 P.3d 1261, 1269.

Idaho App.1991. Com. (j) cit. in disc. The owners of a dominant tract of land sued the owners of a servient tract to enjoin the defendants from interfering with the plaintiffs' use of an easement that the plaintiffs alleged was conveyed to them by a warranty deed, as well as to recover damages for the emotional distress they allegedly suffered when the defendants blocked off the easement. The trial court ruled for the plaintiffs, awarding them damages for emotional distress. Reversing in part, this court held, inter alia, that the defendants' conduct in locking the gates and barring the plaintiffs from using the right-of-way was not extreme and outrageous and there was no proof that the plaintiffs suffered any severe emotional distress as a result of that conduct. Bethel v. Van Stone, 120 Idaho 522, 817 P.2d 188, 195.

Idaho App.1986. Com. (j) quot. in sup. The plaintiff was arrested for allegedly interfering with the investigation of his brother who was being questioned for drunken driving. The plaintiff alleged that he was beaten while he was in jail and that he was falsely arrested and abused, and he sued police officers, the city, county, and state for violations of his civil rights. His wife also sued the defendants for intentional infliction of emotional distress arising out of her husband's arrest, but the trial court dismissed her claim. This court reversed on the dismissal of the wife's claim, holding that the question of whether the wife's distress was severe enough for her to recover was a question of fact for a jury. The court noted that liability for this tort is incurred only when the distress was so severe that no reasonable person could be expected to endure it. Herrera v. Conner, 111 Idaho 1012, 729 P.2d 1075, 1086.

Idaho App.1985. Quot. in sup. The plaintiffs sued to recover for property loss and mental anguish sustained when the defendant shot and killed their donkey. Concluding that damages for mental anguish were not recoverable, the trial court struck that claim from the complaint. Reversing, this court concluded that a claim for mental anguish may be asserted in connection with the independent torts of negligent or intentional infliction of emotional distress. The court concluded that the plaintiffs, by alleging that the defendant had been reckless and that they had suffered extreme mental anguish and trauma, alleged facts that, if proven, would permit recovery under a theory of intentional infliction of emotional distress. Gill v. Brown, 107 Idaho 1137, 695 P.2d 1276, 1277.

Idaho App.1984. Com. (j) cit. and quot. in sup. Purchasers of a tavern sued the vendors, alleging breach of a covenant not to compete and intentional infliction of emotional distress. The trial court awarded plaintiffs damages on both counts. This court affirmed the award of nominal and punitive damages for the breach of contract, but remanded for reconsideration of the amount of punitive damages. It reversed the award of damages for intentional infliction of emotional distress, holding that plaintiffs' upset, embarrassment, anger and depression were not so severe that no reasonable person could be expected to endure them, as required to warrant recovery. Davis v. Gage, 106 Idaho 735, 682 P.2d 1282, 1288, appeal after remand 109 Idaho 1029, 712 P.2d 730 (1985).

Ill.

Ill.2016. Cit. in case cit. in disc.; coms. (d) and (j) quot. in disc. Mortgagor sued bank, preservation company, and its subcontractors who, following the entry of a judgment of foreclosure, had entered mortgagor's home believing it was vacant and had found her at home, alleging, inter alia, intentional infliction of emotional distress (IIED). The trial court granted summary judgment for defendants on the IIED claim and the court of appeals affirmed. Affirming, this court held that defendants' entry onto the property to check on its condition after attempting to determine the occupancy of the house and their immediate removal upon determining plaintiff was at home could not be deemed extreme and outrageous. The court relied on the standard articulated in Restatement Second of Torts § 46 in outlining the requirements for an IIED claim. Schweihs v. Chase Home Finance, LLC, 77 N.E.3d 50, 63.

Ill.2003. Cit. in sup., com. (d) cit. and quot. in cases quot. in sup., com. (j) cit. in sup. and cit. and quot. in cases quot. in sup. Former wife sued former husband for intentional infliction of emotional distress. The trial court denied defendant's motion to dismiss, and the appellate court affirmed. Affirming, this court held that plaintiff stated a claim for intentional infliction of emotional distress, since her allegations of dozens of episodes of abusive behavior, including specific details and time frames for physical and emotional attacks by defendant, sufficiently set forth the element of extreme and outrageous conduct, and her assertion that she suffered from loss of self-esteem, difficulty in forming relationships, and post-traumatic stress disorder for which she incurred medical and psychological expenses stated the element of severe emotional distress. Feltmeier v. Feltmeier, 207 Ill.2d 263, 268, 274, 276, 278 Ill.Dec. 228, 798 N.E.2d 75, 80, 83, 84.

Ill.1999. Cit. in disc. A trainman sued his employer railroad under the Federal Employers' Liability Act (FELA) for intentional infliction of emotional distress, alleging that he suffered injury to his nervous system due to the demeaning comments of a trainmaster, one of defendant's managerial agents. Answering a certified question from the trial court, the appellate court held that a plaintiff need not prove physical contact to recover for intentional infliction of emotional distress. This court reversed and remanded, concluding that a plaintiff must plead and offer proof of physical contact or the threat of physical contact before a plaintiff can recover for the intentional infliction of emotional distress under FELA. Wilson v. Norfolk & Western Ry. Co., 187 Ill.2d 369, 240 Ill.Dec. 691, 693, 718 N.E.2d 172, 174.

Ill.1994. Com. (d) quot. in sup., coms. (e) and (f) cit. in sup., com. (j) quot. in sup. A woman and her two children sued a city, a village, and several police officers for, among other claims, intentional infliction of emotional distress. Plaintiffs alleged that the woman was assaulted by a male intruder in her apartment, that police were summoned, and that while the officers questioned the woman in a rude and accusatory manner and refused to break down the apartment door, the intruder raped her daughter. The trial court granted defendants' motion to dismiss and the intermediate appellate court affirmed. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that plaintiffs stated an emotional-distress cause of action against the city and its police officer, since an average member of the community would resent a police officer who treated a sexual-assault victim in a rude and demeaning manner, and would consider it outrageous for an officer to refuse to break down a door in such a situation because of the fear of liability for property damage. Doe v. Calumet City, 161 Ill.2d 374, 204 Ill.Dec. 274, 280, 641 N.E.2d 498, 507, 508.

Ill.1992. Com. (d) cit. in sup. and quot. in case quot. in sup., com. (e) cit. in spec. conc. op. Promoter of a classic cartoon festival organized as a benefit to increase public awareness of neurofibromatosis brought an action, with his wife and son, against a radio station and two radio personalities for reckless infliction of emotional distress, inter alia, alleging that defendants' statements on the air that the promoter's wife and son, who were afflicted with the disease, had abnormally large heads and that the promoter and his wife were married at a shotgun wedding caused them to suffer emotional distress. The trial court dismissed the complaint, and the intermediate appellate court affirmed in part. Reversing in part and remanding, this court held, inter alia, that plaintiffs adequately alleged that defendants' conduct was extreme and outrageous, on the bases of the context in which the statements were made, their publication to the community at large, and defendants' improper use of the media. The specially concurring opinion argued that the public nature of the objectionable remarks should not overshadow a critical analysis of their content. Kolegas v. Heftel Broadcasting Corp., 154 Ill.2d 1, 180 Ill.Dec. 307, 315, 320, 607 N.E.2d 201, 210, 214.

Ill.1988. Cit. in disc., coms. (d) and (j) quot. in disc., coms. (e) and (g) cit. in disc. An investor who entered into a real estate sale and financing agreement involving a bank was told by the bank that he could not transfer his certificates of deposit until he assigned the bank second mortgages in connection with the real estate deal. The investor sued the bank for intentional infliction of emotional distress. The trial court dismissed the complaint for failure to state a claim, and the intermediate appellate court reversed. This court affirmed, holding that the bank's refusal to release funds that were unrelated to the real estate sale was outrageous conduct, which could give rise to tort liability. McGrath v. Fahey, 126 Ill.2d 78, 126 Ill.Dec. 724, 727, 728, 533 N.E.2d 806, 809, 810.

Ill.1983. Com. (d) cit. in sup. Having witnessed injuries to his brother caused by an allegedly defective escalator, a minor brought an action for emotional distress against the manufacturer in strict liability, and against the owner and service contractor in negligence. The trial court dismissed the action. The appellate court affirmed the dismissal as to the manufacturer, but reversed as to the owner and the service contractor. This court affirmed the appellate court's decision and noted that,

in the absence of physical injury or impact, recovery had been permitted for intentionally inflicted emotional distress but had not been afforded for mental distress caused by another's negligence. Rickey v. Chicago Transit Authority, 98 Ill.2d 546, 75 Ill.Dec. 211, 457 N.E.2d 1, 2.

Ill.1976. Cit. in disc.; coms. (d), (j), and (f) cit. and quot. in part in sup.; coms. (i) and (e) cit. in sup.; com. (g) quot. in part in sup. Defendant, in her amended counterclaim, sought to recover from plaintiff and counterdefendant finance company for alleged intentional infliction of severe mental distress. Defendant alleged that the finance company caused such anguish by virtue of techniques it used in attempting to collect the amount due from defendant under a promissory note secured by a security interest in her household goods. The Supreme Court, in affirming the lower courts, held that defendant's counterclaim failed to state a cause of action. The court noted that conduct which gives rise to a mental distress action must be extreme and outrageous, that the emotional stress must be severe, that the actor must be aware of a high degree of probability of emotional distress resulting. The court determined that the finance company had a right to insist on its legal rights, and that its conduct was not sufficiently outrageous so as to sustain a cause of action. The dissent upon denial of rehearing felt that the dismissal of the counterclaim should be reversed. The dissent noted that on a motion to dismiss, the charges must be assumed to be true. The dissent further noted that the conduct must be considered in the context of the time, place, the person making the appraisal, and the knowledge of the actor that the conduct will cause emotional distress. Public Finance Corp. v. Davis, 66 Ill. 85, 4 Ill.Dec. 652, 360 N.E.2d 765, 767, 768, 769.

Ill.App.

Ill.App.2020. Coms. (d) and (j) cit. in sup. Parents and guardians of minor children who played baseball on a team that won a youth league championship sued, among others, operator of the league, alleging that defendants actively concealed that some of the children did not reside within the team's identified boundaries in order to benefit from the team's notoriety and success, and later unceremoniously stripped the children of their championship title after the residency-rule violations came to light. The trial court granted defendants' motion to dismiss plaintiffs' claim for intentional infliction of emotional distress. Affirming, this court held that defendants' alleged behavior was not so extreme and outrageous that it surpassed all bounds of decency, as required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. Benton v. Little League Baseball, Incorporated, 181 N.E.3d 902, 927.

Ill.App.2020. Com. (d) quot. in cases quot. in sup. Former employee brought, among other things, a claim for intentional infliction of emotional distress (IIED) against former employer and supervisor, alleging that supervisor's retaliatory conduct culminating in plaintiff's termination was extreme and outrageous, because she made false statements that plaintiff's work performance was subpar and that she and plaintiff had multiple counseling sessions regarding the quality of her work. The trial court granted defendants' motion for summary judgment. This court affirmed, holding that supervisor's conduct did not rise to the level of outrageous and extreme behavior necessary for an IIED claim. Citing Restatement Second of Torts § 46, Comment *d*, the court

explained that supervisor's conduct amounted to no more than common ill will between employers and employees, and the fact that supervisor held power over plaintiff did not make her conduct extreme and outrageous. DiPietro v. GATX Corporation, 167 N.E.3d 247, 259, 260.

Ill.App.2020. Coms. (d) and (j) quot. in case quot. in sup. University professor brought, among other things, a claim for intentional infliction of emotional distress (IIED) against colleague, alleging that, for seven years, defendant made false statements to co-workers and federal agencies that plaintiff was performing illegal and violent acts, resulting in damage to plaintiff's mental health, career, and research projects. The trial court granted defendant's motion to dismiss. This court reversed and remanded, holding that plaintiff alleged sufficient facts stating a claim for IIED. Citing Restatement Second of Torts § 46, the court explained that plaintiff's allegations of defendant's continued harassment campaign over the course of seven years created a genuine issue of material fact as to whether defendant's conduct was sufficiently outrageous to sustain an IIED claim. Prakash v. Parulekar, 177 N.E.3d 1, 15.

Ill.App.2017. Com. (j) cit. in case cit. in sup. Parents of two-year-old patient who died during recovery from surgery to replace her pacemaker sued medical center that performed the surgery, seeking, among other things, damages for reckless infliction of emotional distress based on allegations that defendant's nurses left medical tubing in place in patient's body when it was released for burial despite plaintiffs' request that the tubes be removed. The trial court entered judgment on a jury verdict in favor of defendant. Affirming, this court held that the trial court did not err by giving the jury an instruction defining the tort of reckless infliction of emotional distress based on language from a state supreme court opinion that relied on Restatement Second of Torts § 46. The court reasoned that the instruction was an accurate statement of Illinois law, had no improper effect on the jury, and was neither misleading nor confusing. Eid v. Loyola University Medical Center, 72 N.E.3d 851, 867.

Ill.App.2017. Com. (j) quot. in case quot. in sup. Patient who received treatment for injuries sustained in a motor-vehicle accident filed a claim for intentional infliction of emotional distress (IIED) against health-care provider in connection with allegations that it asserted a fraudulent health-care services lien against the settlement proceeds in her personal-injury case, that it refused to provide her attorney with a copy of its participating-provider agreement, and that it sent a threatening letter to her attorney. The trial court granted summary judgment for defendant. This court affirmed in part, holding that plaintiff could not recover on her IIED claim, because the record lacked evidence that defendant engaged in extreme and outrageous conduct or that plaintiff experienced distress so severe that no reasonable person could have been expected to endure it, as required to state such a claim under Restatement Second of Torts § 46, Comment *j*. Turner v. Orthopedic and Shoulder Center, S.C., 82 N.E.3d 801, 803, 806.

Ill.App.2016. Com. (j) cit. in sup. and quot. in case quot. in sup. State's attorney and his employees brought claims for malicious prosecution, intentional infliction of emotional distress (IIED), and defamation against assistant special prosecutor and his investigators, after plaintiffs were acquitted of various charges brought by defendants. The trial court granted defendant's motion to dismiss

with prejudice for lack of subject-matter jurisdiction. Reversing in part and remanding, this court held that plaintiffs pleaded sufficient facts to establish a cause of action for IIED under Restatement Second of Torts § 46 by alleging that defendants fabricated and manufactured evidence and concealed exculpatory evidence for the purpose of falsely and maliciously detaining, arresting, and charging plaintiffs, with the knowledge that such charges lacked probable cause. Bianchi v. McQueen, 58 N.E.3d 680, 701.

Ill.App.2015. Com. (d) quot. in case quot. in sup. Church deacon brought a claim for intentional infliction of emotional distress (IIED), inter alia, against church members stemming from church members signing and publishing a petition alleging that plaintiff verbally threatened to report the details of church members' offerings to the IRS. The trial court granted defendants' motion to dismiss. Affirming, this court cited Restatement Second of Torts § 46, Comment *d*, in holding that plaintiff failed to provide any factual allegations that defendants' conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. Chang Hyun Moon v. Kang Jun Liu, 44 N.E.3d 1134, 1143.

Ill.App.2015. Com. (d) quot. in case quot. in sup. Mortgage borrower who had been permitted to live in her home during the foreclosure-redemption period filed claims for, among other things, intentional infliction of emotional distress (IIED) against mortgage lender, property-preservation service, its contractor, and contractor's employees, after employees removed the door lock and entered her home while she was inside. The trial court granted summary judgment for defendants on plaintiff's IIED claim. Affirming, this court held that a reasonable juror could not find that defendants' conduct was sufficiently extreme and outrageous to state a claim for IIED under Restatement Second of Torts § 46; contractor's employees conducted an investigation to determine whether the home was occupied before entering, plaintiff saw the employees in her driveway but refused to answer their repeated knocking, and the only other evidence plaintiff relied on to show that defendants' conduct was extreme and outrageous was that one of the employees was "forceful" when he asked that she come to the front door to speak with him. Schweihs v. Chase Home Finance, LLC, 41 N.E.3d 1011, 1021.

Ill.App.2014. Cit. and quot. in sup. Family and estate of tenant of an apartment complex brought wrongful-death and survival claims against owner of the complex in connection with tenant's suicide, which was allegedly the result of defendant's intentional infliction of emotional distress (IIED) in attempting to wrongfully evict tenant. The trial court dismissed those claims with prejudice, finding that, under Illinois law, such claims could not be brought in connection with a suicide. Vacating that portion of the decision and remanding, this court held that, in the case of IIED, the fact that a victim committed suicide in no way limited a defendant's liability for its actions where the emotional distress was a substantial factor in causing the suicide. The court relied on Restatement Second of Torts § 46 in concluding that there was no special substantial-factor test pertaining to suicide cases; rather, regarding intentional torts, liability followed under ordinary principles of tort law, unless it was limited by some other rule, such as the intervening-cause rule. Turcios v. DeBruler Co., 2014 IL App (2d) 130331, 12 N.E.3d 167, 173, 174.

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Ill.App.2012. Com. (d) cit. in case cit. in sup., com. (j) cit. and quot. in cases quot. in sup. Owner of a condominium unit damaged by subsidence brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against condominium association, alleging that defendant failed to make timely repairs and subsequently refused to repair the actual problem causing the damage, thereby causing her continued displacement from her home. The trial court dismissed plaintiff's complaint. Affirming in part, this court held that plaintiff failed to state a claim for IIED; although defendants' actions were inconvenient, aggravating, and annoying, they did not rise to the level of extreme and outrageous conduct necessary to state an IIED claim, and plaintiff's conclusory assertions that she suffered from emotional distress in the form of aggravation of her dementia and that she suffered monetary losses, medical expenses, emotional distress, and pain and suffering were insufficient to allege that she endured the requisite severe and extreme emotional distress. Duffy v. Orlan Brook Condominium Owners' Ass'n, 2012 IL App (1st) 113577, 981 N.E.2d 1069, 1079, 1081, 1082.

Ill.App.2007. Com. (d) quot. in case quot. in disc. Mother, on behalf of son, sued vaccine manufacturers and thimerosal manufacturers, alleging that her son's exposure to the mercury-based preservative, thimerosal, in routine vaccines given to him in a two-year period following his birth in 1995 caused his autism; mother and husband also sued individually for intentional infliction of emotional distress (IIED) due to their son's injuries. The trial court, inter alia, dismissed the IIED claim. This court affirmed that portion of the decision, holding that plaintiffs' allegation that defendants knew by 1982 that thimerosal was a toxic substance could not alone support the tort's requirement of extreme and outrageous conduct where defendants' affirmative matter established that the FDA's determination at the time son received the vaccines was that the amount of thimerosal used was sufficiently nontoxic. Reilly ex rel. Reilly v. Wyeth, 377 Ill.App.3d 20, 315 Ill.Dec. 428, 876 N.E.2d 740, 755.

Ill.App.2005. Com. (d) cit. and quot. in case quot. in disc. Homeowners whose neighbors aimed a video surveillance camera at their garage, driveway, and yard brought an action against neighbors for, in part, intentional infliction of emotional distress. The trial court granted neighbors' motion to dismiss. This court affirmed, holding, inter alia, that homeowners failed to state a cause of action for intentional infliction of emotional distress, as neighbors' actions, which also included continually harassing homeowners by calling the police, were not sufficiently extreme and outrageous to cause a reasonable person severe emotional distress. Schiller v. Mitchell, 357 Ill.App.3d 435, 293 Ill.Dec. 353, 828 N.E.2d 323, 333, 338.

Ill.App.2004. Com. (d) quot. in case quot. in disc. After member of orthodox Jewish community was excommunicated by rabbinic court, he sued members of the rabbinic court and others for, in part, intentional infliction of emotional distress. Affirming the trial court's dismissal of the complaint, this court held, inter alia, that, because of plaintiff's actions and knowledge of the community's rules and practices, the rabbinic court's act of excommunicating plaintiff after determining that he had refused three consecutive summonses to appear before it was not so outrageous as to support a claim of intentional infliction of emotional distress. Thomas v. Fuerst, 345 Ill.App.3d 929, 281 Ill.Dec. 215, 803 N.E.2d 619, 625.

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Ill.App.2003. Com. (j) cit. in case quot. in disc. Former employee of community college sued, among others, department vice president for intentional infliction of emotional distress, inter alia. The trial court entered judgment on a jury verdict for plaintiff. Reversing in part and remanding, this court held, inter alia, that instruction requiring jury to determine whether "one or more" of 11 enumerated actions by defendant constituted extreme and outrageous conduct improperly allowed jury to impose liability on defendant for intentional infliction of emotional distress even if it found that only one of the incidents, even a push, had occurred. The court noted that the emotional distress suffered must be of such intensity and duration that no reasonable person could be expected to endure it. Valentino v. Hilquist, 337 Ill.App.3d 461, 475, 271 Ill.Dec. 697, 709, 785 N.E.2d 891, 904.

Ill.App.2002. Cit. in sup., com. (j) cit. in sup. and quot. in case cit. in disc., illus. 13 cit. in case quot. in disc. Former husband appealed trial court's denial of his motion to dismiss former wife's claim for intentional infliction of emotional distress. Affirming, appellate court held that wife stated valid emotional-distress claim where husband's 11-year pattern of physical and verbal abuse, including beatings, physical restraint, isolation, and stalking, caused her severe emotional distress manifested by posttramatic stress disorder, depression, and fear of relationships with men, and that pattern of marital abuse constituted a continuing tort for limitations purposes. Feltmeier v. Feltmeier, 333 Ill.App.3d 1167, 1171, 1174, 1176, 268 Ill.Dec. 109, 112, 114, 116, 777 N.E.2d 1032, 1036, 1038, 1040, affirmed 207 Ill.2d 263, 278 Ill.Dec. 228, 798 N.E.2d 75 (2003). See above case.

Ill.App.2001. Com. (d) quot. in case quot. in disc., com. (j) cit. in case quot. in sup. Therapist's employee, who was obligated to enter into therapeutic relationship as condition of employment, sued therapist in November 1996 for intentional infliction of emotional distress, inter alia. Plaintiff alleged that defendant initiated campaign of offensive sexual overtures and used his position as therapist and employer in an attempt to get her to submit to his desires. Trial court dismissed, holding that plaintiff's tort claims were barred by two-year statute of limitations. This court reversed in part, holding, inter alia, that plaintiff's allegations of frequent, unwelcome, and offensive sexual advances sufficiently stated claim for emotional distress, and patient's cause of action for intentional infliction of emotional distress did not accrue until last act of continuing tortious behavior occurred. Pavlik v. Kornhaber, 326 Ill.App.3d 731, 743, 260 Ill.Dec. 331, 341, 761 N.E.2d 175, 186, 187.

Ill.App.2000. Com. (d) quot. in case quot. in disc. Employee who was demoted after complaining about safety issues and statutory violations at employer's nuclear power station sued employer for, in part, intentional infliction of emotional distress. Trial court dismissed. This court reversed and remanded the intentional-infliction-of-emotional-distress claim. The court held, inter alia, that defendant's alleged conduct of performing a sham investigation for the sole purpose of retaliating against plaintiff because he reported that defendant was violating nuclear safety regulations was sufficient to constitute extreme and outrageous conduct. Graham v. Commonwealth Edison Co., 318 Ill.App.3d 736, 744, 252 Ill.Dec. 320, 328, 742 N.E.2d 858, 866.

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Ill.App.2000. Com. (j) quot. in case quot. in disc. After decedent was cremated, decedent's sons sued cemetery, funeral home, and decedent's former wife for intentional infliction of emotional distress, among other claims, alleging that defendants interfered with their right to possess and preserve decedent's body. Trial court dismissed. This court reversed in part and remanded, holding, inter alia, that plaintiffs sufficiently pleaded a viable emotional-distress claim against the funeral home and the former wife, because defendants, through a forged signature on a cremation authorization form, allegedly deprived plaintiffs of the opportunity to grieve their father's death by participating in making arrangements and choosing his final resting place. Rekosh v. Parks, 316 Ill.App.3d 58, 67, 249 Ill.Dec. 161, 170, 735 N.E.2d 765, 774.

Ill.App.2000. Com. (g) quot. in disc. A mother who was involved in a child-custody dispute with the father of her children sued father and father's attorney for, in part, intentional infliction of emotional distress, after attorney sent a letter to plaintiff's spouse relating that plaintiff had engaged in a sexual relationship with father in the hope of persuading him to compromise his legal position in the custody dispute. Reversing the trial court's dismissal of the complaint and remanding, this court rejected defendants' argument that they were absolutely privileged to publish the allegedly defamatory letter because they were merely insisting on their legal rights in a permissible way. The court said that, by sending the letter, defendants were not insisting on any legal right but simply hoping to gain advantage in pending litigation. Thompson v. Frank, 313 Ill.App.3d 661, 664, 246 Ill.Dec. 463, 466, 730 N.E.2d 143, 146.

Ill.App.1999. Com. (d) cit. in case quot. in disc., quot. in spec. conc. op., cit. in case cit. in conc. op. Former employees sued their employer for retaliatory discharge and intentional infliction of emotional distress, among other claims, alleging that they were demoted and reassigned to perform demeaning and humiliating tasks. Trial court granted employer summary judgment. This court affirmed, holding, inter alia, that although the retaliation and indignities to which the plaintiffs alleged they were subjected were wholly lacking in social utility, the court could not conclude that defendant's conduct was of such an outrageous character that no reasonable person could be expected to endure it. Welsh v. Commonwealth Edison Company, 306 Ill.App.3d 148, 154, 156, 239 Ill.Dec. 148, 152, 154, 713 N.E.2d 679, 683, 685.

Ill.App.1998. Cit. in headnote, cit. and quot. in disc., cit. in case quot. in disc., com. (d) cit. and quot. in disc., com. (k) cit. in disc. Pursuant to the Federal Employer's Liability Act (FELA), railroad employee sued railroad for intentional infliction of emotional distress. Defendant moved for summary judgment on the ground that plaintiff had endured no physical contact or threat of physical contact as a result of defendant's actions. The trial court denied the motion but certified to this court the question whether plaintiff was required to plead and offer proof of physical contact or threat of physical contact before he could recover under a theory of intentional infliction of emotional distress. Answering the question in the negative, this court held that intentional infliction of emotional distress was cognizable under FELA, and that, as long as the distress was genuine and severe, plaintiff was not required to prove physical contact or threat of same. Wilson v. Norfolk and Western Ry. Co., 296 Ill.App.3d 1044, 1045, 1050, 1052, 231 Ill.Dec. 516, 517, 521, 522,

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696 N.E.2d 812, 813, 817, 818, reversed 187 Ill.2d 369, 240 Ill.Dec. 691, 718 N.E.2d 172 (1999). See above case.

Ill.App.1997. Cit. in headnote, com. (d) quot. in case quot. in disc., coms. (j) and (k) cit. in disc. Individual was charged by car lessor with, among other things, criminal trespass to a vehicle. When his case against lessor for intentional infliction of emotional distress, malicious prosecution, and defamation was dismissed, he brought malpractice action against law firm that represented him in the underlying litigation. The jury returned a verdict for plaintiff, but the trial court entered judgment n.o.v. on the claim for intentional infliction of emotional distress and granted defendant's motion for a new trial on the malicious-prosecution and defamation claims. Affirming in part and reversing in part, this court held, inter alia, that lessor's conduct was not so extreme and outrageous that no reasonable person could be expected to endure it; that, even though the dismissal of the underlying case constituted termination in favor of plaintiff, lessor had probable cause to commence proceedings against him; and that lessor's remarks concerning plaintiff's possible connection to car theft did not amount to defamation per se. Adams v. Sussman & Hertzberg, Ltd., 292 Ill.App.3d 30, 30, 37, 38, 225 Ill.Dec. 944, 945, 950, 951, 684 N.E.2d 935, 936, 941, 942.

Ill.App.1997. Com. (j) quot. in case quot. in disc. Terminated clinic employee sued clinic and individual board members for, inter alia, intentional infliction of emotional distress. The trial court dismissed the complaint. Affirming, this court held, in part, that, while defendants' method of termination subjected plaintiff to hurt feelings and a certain amount of indignity, their conduct was neither outrageous nor beyond all bounds of decency. Brackett v. Galesburg Clinic Ass'n, 293 Ill.App.3d 867, 870, 228 Ill.Dec. 534, 536, 689 N.E.2d 406, 409.

Ill.App.1997. Com. (j) quot. in case quot. in disc. Surgical patient who was operated on by HIV-positive physician sued physician, second physician, hospital, and corporation of which physician was allegedly an employee for, inter alia, battery, conspiracy, and intentional and negligent infliction of emotional distress. Except for the count of negligent infliction of emotional distress, the trial court dismissed the complaint. Affirming, this court held, in part, that an HIV-positive physician intending to perform invasive surgery was under a duty to disclose his HIV status to his patient, and that a failure to do so gave rise to an action for negligent infliction of emotional distress, even in the absence of proof of transmission of the virus from physician to patient. To the extent that plaintiff accused second physician, hospital, and corporation of intentional infliction of emotional distress, the court found that those defendants had no duty to know of operating physician's HIV status. Doe v. Noe No. 1, 293 Ill.App.3d 1099, 1113, 228 Ill.Dec. 937, 947, 690 N.E.2d 1012, 1022, vacated 303 Ill.App.3d 139, 236 Ill.Dec. 461, 707 N.E.2d 588 (1998).

Ill.App.1996. Subsec. (2) cit. in headnote and quot. in disc., subsecs. (2)(a) and (2)(b) cit. in disc., com. (d) quot. in case quot. in diss. op., com. (j) quot. in case quot. in diss. op. After her son was fatally shot, a mother sued a newspaper publisher for invasion of privacy, intentional infliction of emotional distress, and battery. The newspaper's staffers had eavesdropped and taken unauthorized photographs of the son while he was undergoing emergency treatment at the hospital for a bullet wound and published the mother's statements to her son. The trial court dismissed

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plaintiff's complaint. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that plaintiff stated a cause of action for intentional infliction of emotional distress caused by the newspaper when it barred her from seeing her dead son on December 31 while it photographed him, and when it published the January 1 article featuring her son and the photograph of him lying dead. However, the newspaper's publication of the January 3 article four days after plaintiff's son's death, which did not include any mention of plaintiff, did not fall under Restatement (Second) of Torts § 46(2)(a) or (b). Dissent argued that plaintiff failed to state an emotional-distress cause of action, because the newspaper never invaded plaintiff's home and never used her words or the deceased's photograph to publicize its coverage of the story, and the distress plaintiff suffered was not such that no reasonable person could be expected to endure it. Green v. Chicago Tribune Co., 286 Ill.App.3d 1, 221 Ill.Dec. 342, 343, 350-351, 355, 675 N.E.2d 249, 250, 257-258, 262.

Ill.App.1996. Cit. in headnotes, coms. (d) and (j) quot. in case quot. in sup. Physician whose hospital staff privileges were revoked after the hospital's medical director determined that he was incompetent and had been falsifying patient records sued hospital and medical director for, inter alia, intentional infliction of emotional distress, alleging that, in the five years before his privileges were revoked, medical director engaged in a constant course of harassment, defamation, and intimidation against him. The trial court dismissed the complaint. Affirming, this court held that the alleged misconduct, which included, but was not limited to, charges of incompetence and suggestions that physician seek retraining, was not so outrageous or extreme as to be considered intolerable by a reasonable person. Tabora v. Gottlieb Memorial Hosp., 279 Ill.App.3d 108, 215 Ill.Dec. 870, 871, 878, 664 N.E.2d 267, 268, 275.

Ill.App.1993. Cit. in case quot. in disc., com. (j) quot. in case quot. in disc. Employees of an independent contractor hired to do work at a municipality's electricity-generating station sued the city, as operator of the station, the manufacturer of the generating equipment used at the station, and their employees after plaintiffs were exposed to asbestos, alleging that they suffered severe emotional distress and mental anguish. The trial court dismissed plaintiffs' complaint. Affirming, this court held, inter alia, that plaintiffs' intentional infliction of emotional distress counts were properly dismissed because it was not alleged that defendants knew of the allegedly injurious condition. The court noted that, although the manufacturer admitted during oral argument that work was halted when the presence of asbestos was discovered, since this fact was not alleged in the complaint, plaintiffs did not establish that defendants intentionally or recklessly inflicted severe emotional distress. Campbell v. A.C. Equipment Services, 242 Ill.App.3d 707, 182 Ill.Dec. 876, 879, 610 N.E.2d 745, 749.

Ill.App.1993. Com. (d) quot. in case quot. in sup. Guardian and next friend of decedent's estate beneficiaries sued decedent's widow for intentional infliction of emotional distress, among other claims, arising from widow's failure to exercise her implicit duty under a family settlement agreement to sign a spousal waiver needed to release decedent's pension and profit-sharing funds to estate beneficiaries. Affirming in part, this court agreed that the trial court correctly dismissed the emotional distress claim, holding that, assuming that plaintiff's allegations were true, all that could be said was that defendant asserted her legal rights in connection with a family dispute over

decedent's estate, and that she may have breached the family settlement agreement, yet neither action constituted extreme or outrageous conduct. Wilkonson v. Yovetich, 249 Ill.App.3d 439, 188 Ill.Dec. 550, 557, 618 N.E.2d 1120, 1128.

Ill.App.1992. Com. (j) cit. in case cit. in disc. Woman who was involuntarily removed from her home by village paramedics, police officers, and social worker and transported to a hospital for psychological evaluation brought an action for intentional infliction of emotional distress, inter alia, against the village and the individual defendants who removed her. Affirming in part the trial court's dismissal of plaintiff's claims, this court held that plaintiff's emotional distress claim was properly dismissed for failure to allege extreme and outrageous conduct. Anderson v. Village of Forest Park, 238 Ill.App.3d 83, 179 Ill.Dec. 373, 381, 606 N.E.2d 205, 214.

Ill.App.1992. Com. (d) quot. in case quot. in sup. The executor of the estate of a plow operator, who was electrocuted when his plow became entangled in a guy wire that contacted a power line, and the son and grandson of the operator sued the power company for intentional infliction of emotional distress, among other claims. The trial court dismissed this count of the complaint, holding that the facts alleged did not show the extreme and outrageous conduct needed to support the cause of action. Affirming, this court held that the defendant's conduct in insulating, marking, and maintaining the wire and transmission poles was neither extreme nor outrageous and, at most, constituted negligence. Hayes v. Illinois Power Co., 225 Ill.App.3d 819, 167 Ill.Dec. 290, 587 N.E.2d 559, 563.

Ill.App.1992. Com. (i) quot. in sup. An ex-wife sued her former husband and their daughter for intentional infliction of emotional distress, inter alia, after she discovered that defendants were conspiring to have her murdered. Reversing the trial court's dismissal of plaintiff's complaint and remanding, this court rejected defendants' argument that they had not recklessly disregarded the risk of causing plaintiff's emotional distress and held that, with each additional person informed of and brought into the conspiracy, defendants ran the risk that someone would either expose the plan or, as it turned out, inform the police, resulting in plaintiff's discovery of the plot and her subsequent emotional distress because of it. Vance v. Chandler, 231 Ill.App.3d 747, 173 Ill.Dec. 525, 528, 597 N.E.2d 233, 237.

Ill.App.1991. Com. (d) cit. in case quot. in disc. A promoter of a classic cartoon festival organized as a benefit to increase public awareness of neurofibromatosis brought an action, with his wife and son, against a radio station and two radio personalities for reckless infliction of emotional distress, inter alia, alleging that the defendants' statements that the promoter and his wife were married at a shotgun wedding and that the wife and son, who were afflicted with the disease, had abnormally large heads caused them to suffer emotional distress. The trial court dismissed the complaint. Affirming in part, this court held that, although the defendants' remarks were tasteless, they did not constitute the truly extreme and outrageous conduct required for the tort. Kolengas v. Heftel Broadcasting Corp., 217 Ill.App.3d 803, 161 Ill.Dec. 172, 578 N.E.2d 299, 305, judgment affirmed in part, reversed in part, and remanded 154 Ill.2d 1, 180 Ill.Dec. 307, 607 N.E.2d 201 (1992). See above case.

Ill.App.1991. Com. (d) quot. in case quot. in disc. An employer, who related to the local police department that one of its employees had threatened, harassed, and assaulted a co-worker, terminated the employee. The discharged employee sued her employer alleging, among other things, defamation, false-light invasion of privacy, and intentional infliction of emotional distress. The trial court dismissed all the claims. Affirming, this court held, inter alia, that the statements concerning the employee's alleged criminal conduct were absolutely privileged and that the conduct of the employer did not satisfy the criteria for an intentional infliction of emotional distress claim. The court noted that statements made prior to the commencement of trial, including statements to police alleging criminal activities, were absolutely privileged. The court also found that the conduct of the employer did not result in distress so severe that no reasonable man could be expected to endure it. Layne v. Builders Plumbing Supply Co., 210 Ill.App.3d 966, 155 Ill.Dec. 493, 569 N.E.2d 1104, 1109.

Ill.App.1991. Com. (d) cit. in disc., com. (j) quot. in disc. Two police officers were told that their psychological test results were indeterminate and likely invalid, indicating either deliberate manipulation of the test or mental illness, and were stripped of their badges and reassigned to positions in the records section. They were retested a week later and allowed to resume their regular duties. The police officers sued the chief of police and the city for intentional infliction of emotional distress. The trial court dismissed for failure to state a claim. Affirming, this court held that the defendants' conduct was not extreme and outrageous. The court said that the incident was an isolated occurrence, the defendants' response was timely, and the event was brought to an expeditious conclusion. Lundy v. City of Calumet City, 209 Ill.App.3d 790, 153 Ill.Dec. 874, 567 N.E.2d 1101, 1103.

Ill.App.1990. Com. (d) cit. and quot. in sup. An employer sued a former employee to recover money he claimed she owed him from her employment with him. The former employee counterclaimed, alleging intentional infliction of emotional distress, conversion, and defamation. The trial court entered judgment on a jury verdict for the employee on all claims. Reversing and remanding, this court held that although the evidence was sufficient to support the verdict, the trial judge's conduct was sufficient to create prejudice in the minds of a jury. It determined, inter alia, that a jury reasonably could have found that the employer's conduct toward the employee, commencing while she was still his employee and continuing long after he fired her, constituted extreme and outrageous conduct and that the employer knew that the employee was undergoing psychotherapy and was susceptible to emotional distress. The court cited evidence that the employer pressured the employee for dates, persisted to offer her money for sexual favors, and attempted to disrupt her subsequent employment relationship by harassing her new employer. Pavilon v. Kaferly, 204 Ill.App.3d 235, 149 Ill.Dec. 549, 561 N.E.2d 1245, 1251-1252.

Ill.App.1990. Cit. in case cit. in sup., com. (j) cit. and quot. in sup., illus. 1 cit. and quot. in sup. A patient sued a physician for intentional infliction of emotional distress, alleging that the physician negligently made an improper diagnosis, causing her to suffer severe emotional distress, and intentionally inflicted severe emotional distress upon her by ordering the surgical removal of

significant portions of her internal structures and the abortion of her baby. The trial court granted the physician's motion to dismiss the patient's complaint and denied the patient's motion for leave to file a second amended complaint. Reversing and remanding, this court held, inter alia, that the patient stated a cause of action for intentional infliction of emotional distress because she allegedly suffered severe emotional distress as a result of the physician's outrageous conduct, and because the physician could be charged with the knowledge that, by reason of the patient's pregnancy, she was peculiarly susceptible to emotional distress and that there was a high probability that his conduct would cause the patient to experience severe emotional distress. Wall v. Pecaro, 204 Ill.App.3d 362, 149 Ill.Dec. 388, 561 N.E.2d 1084, 1088, appeal denied 136 Ill.2d 555, 153 Ill.Dec. 385, 567 N.E.2d 343 (1991).

Ill.App.1989. Coms. (d) and (j) quot. in cases cit. in sup. A former insurance company employee sued her former employer for intentional infliction of emotional distress, alleging that she was insulted, ridiculed, and sexually harassed by supervisors and co-workers, causing her mental anguish that required psychiatric treatment. The trial court dismissed the complaint. Affirming, this court held that plaintiff's complaints of inconsiderate, rude, vulgar, uncooperative, unprofessional, and unfair behavior by supervisors and co-workers did not allege sufficiently outrageous conduct or sufficiently severe emotional distress to support a claim for intentional infliction of emotional distress. Miller v. Equitable Life Assur. Soc., 181 Ill.App.3d 954, 130 Ill.Dec. 558, 559, 560, 537 N.E.2d 887, 888, 889.

Ill.App.1989. Cit. but dist., com. (d) cit. in case cit. but dist., com. (e) cit. but dist. A school teacher attending a college for her master's degree was accused of cheating and expelled from the program. She was reinstated, but the college officials continued to allege that she had achieved her high grades by cheating. The teacher sued the college for intentional infliction of emotional distress. The trial court dismissed the complaint. Affirming, this court stated that the college officials' conduct, although rude and unjustified, did not rise to the level of outrageousness required to support the charge. Nor did the officials use their authority over the plaintiff to coerce her to commit any act she would not do otherwise. Finally, although the plaintiff argued that the officials knew about her particular susceptibility to emotional distress, she had presented no evidence that she indeed had such a susceptibility. Rudis v. National College of Educ. 191 Ill.App.3d 1009, 139 Ill.Dec. 89, 91, 548 N.E.2d 474, 476, 478.

Ill.App.1988. Coms. (d), (i), and (j) quot. in disc. The purchasers of an automobile sued a car dealer for fraud, alleging that the defendant had orally misrepresented or misstated the purchase price and the interest rate contained in contracts relating to the purchase of an automobile. The trial court entered a judgment for the plaintiffs. This court reversed in part and remanded, holding that the record did not support the award of damages for pain and suffering; the defendant's conduct was not of an extreme and outrageous nature that would justify a recovery for severe emotional distress. Kleidon v. Rizza Chevrolet, Inc., 527 N.E.2d 374, 377, appeal denied 123 Ill.2d 559, 128 Ill.Dec. 891, 535 N.E.2d 402 (1988).

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Ill.App.1988. Com. (j) cit. in case quot. in disc. A former student sued his former professor and law school based on breach of contract and tort. The student alleged that the professor had wrongfully intercepted his unfavorable student teacher evaluation and had retaliated by lowering the student's grade, and that the professor had wrongly gained access to the student's record book. The trial court entered judgment on the pleadings for the defendants and granted the defendants' motion for sanctions against the student. This court affirmed in part, holding, inter alia, as a matter of law, that the conduct alleged was not of such an extreme and outrageous nature as to have constituted a basis for recovery for intentional infliction of emotional distress; however, it reversed in part as to the trial court's entry of sanctions. It determined that the alleged severe emotional distress manifested by anxieties, depression, loss of time and ability to concentrate, and interference with peace of mind, was not severe enough to allow recovery. Mucklow v. John Marshall Law School, 176 Ill.App.3d 886, 126 Ill.Dec. 314, 320, 531 N.E.2d 941, 947.

Ill.App.1988. Coms. (d), (e), (i), and (j) quot. in disc. The executive director of an abortion clinic sued a pro-life activist for intentional infliction of emotional distress, libel, and invasion of privacy. The trial court granted the defendant's motion to dismiss. Reversing in part and remanding, this court held that the plaintiff was a private individual who was involved in a matter of public concern; therefore he did not have to meet the actual malice standard that was required of public figures and officials to maintain an action for intentional infliction of emotional distress. The court further held that the allegations were sufficient for a jury to find that the defendant's conduct was beyond both the bounds of decency and what a reasonable person could have endured, and that the plaintiff suffered severe emotional distress as a result. Van Duyn v. Smith, 173 Ill.App.3d 523, 123 Ill.Dec. 367, 369, 374, 527 N.E.2d 1005, 1008, 1012, appeal denied 124 Ill.2d 562, 129 Ill.Dec. 157, 535 N.E.2d 922 (1989).

Ill.App.1987. Com. (d) quot. in case quot. in sup., com. (e) cit. in case quot. in sup. A company in the retail revolving credit business suspected an employee of stealing company credit cards. Following a criminal investigation the company terminated her employment. The employee sued her former employer for intentional infliction of emotional distress as a result of her being accused and threatened during the investigation. The trial court granted summary judgment for the employer. Affirming, this court held that the tort of intentional infliction of emotional distress required conduct so outrageous and extreme as to go beyond the bounds of decency, which was not present in the instant case despite the existence of the employer-employee authority relationship. Gibson v. Chemical Card Services, Corp., 157 Ill.App.3d 211, 109 Ill.Dec. 416, 418, 421, 510 N.E.2d 37, 39, 43.

Ill.App.1987. Coms. (d), (i), and (j) cit. in sup. A man who was stabbed to death was taken to an emergency room and then transported to the medical examiner's office where an autopsy was performed. The widow was not notified and did not learn of her husband's death until four months later, after which she sued the city and others for intentional infliction of emotional distress. The trial court granted in part and denied in part the plaintiff's motion for leave to file an amended complaint. Holding that the plaintiff failed to state a cause of action, this court affirmed the trial court's denial of leave and reversed that part of its order granting leave to file an amended

complaint. The court concluded that the alleged facts failed to establish that the defendants' conduct was so extreme as to be beyond all possible bounds of decency, that it was in conscious disregard of the high probability it would inflict severe emotional distress, or that the distress resulting from this conduct was so severe that no reasonable person could be expected to endure it. Hearon v. City of Chicago, 157 Ill.App.3d 633, 110 Ill.Dec. 161, 164, 510 N.E.2d 1192, 1195.

Ill.App.1987. Com. (d) quot. in case cit. in disc. A bank customer sued the bank for intentional infliction of emotional distress after the bank refused to release certain funds deposited in various accounts, even after he suffered a heart attack. The trial court dismissed the complaint, holding that the defendant's conduct did not meet the criteria for intentional infliction of emotional distress. Reversing, this court held that, in light of the bank's knowledge of the plaintiff's heart attack, its conduct could be deemed within the scope of the tort; therefore, dismissal was error. McGrath v. Fahey, 163 Ill.App.3d 584, 117 Ill.Dec. 304, 307, 520 N.E.2d 655, 658.

Ill.App.1987. Com. (d) quot. in case cit. in sup. A pastor who was discharged against his will sued his former church and its officers for, inter alia, intentional infliction of emotional distress, asserting that the defendants' extreme and outrageous conduct consisted of their plans to "systematically and disrespectfully oust their pastor of forty years." The trial court entered judgment on a jury verdict in favor of the pastor. Reversing and remanding, this court held that, because the defendants' conduct did not rise to the level of outrageous conduct beyond all possible bounds of decency, the plaintiff failed to prove intentional infliction of emotional distress. Owens v. Second Baptist Ch. of La Grange, 163 Ill.App.3d 442, 114 Ill.Dec. 557, 561, 516 N.E.2d 712, 716, appeal denied 119 Ill.2d 559, 119 Ill.Dec. 388, 522 N.E.2d 1247 (1988).

Ill.App.1987. Cit. in case quot. in sup., com. (a) quot. in case quot. in sup. Adoptive parents entered into an agreement with a private agency to adopt a child. Although the adoption was ultimately successful, the process was interrupted when the child's birth mother changed her original story regarding the child's biological father and the mother's former husband recanted his denial of paternity. The adoptive parents sued the adoption agency alleging negligence and breach of the adoption agreement. The trial court granted the agency's motion to dismiss. Affirming in part and reversing and remanding in part, this court held, inter alia, that the plaintiffs did not state a cause of action for reckless infliction of severe emotional distress because, in allegedly failing to implement certain procedural safeguards—conducting adequate investigations, collecting sworn affidavits, and keeping adequate records—the agency did not follow a course of conduct so outrageous as to go beyond the bounds of decency. Petrowsky v. Family Service of Decatur, 165 Ill.App.3d 32, 116 Ill.Dec. 42, 46, 518 N.E.2d 664, 668, appeal denied 119 Ill.2d 574, 119 Ill.Dec. 397, 522 N.E.2d 1256 (1988).

Ill.App.1985. Coms. (c), (d), and (f) quot. in cases quot. in disc. A former newspaper delivery driver sued his former employer for intentional infliction of emotional distress and retaliatory discharge when the driver objected to remaining on a particular delivery route. The trial court dismissed the complaint. Affirming, this court held that the employer's actions were not so outrageous in character or so extreme in degree, and the distress inflicted on the driver was not

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so severe, to support the driver's cause of action. Burgess v. Chicago Sun-Times, 132 Ill.App.3d 181, 87 Ill.Dec. 292, 296, 476 N.E.2d 1284, 1288.

Ill.App.1984. Coms. (d), (i), and (j) cit. in case quot. in disc. The plaintiff's noncustodial former wife took their son to bimonthly psychotherapy sessions for one year without the plaintiff's knowledge or consent. The plaintiff alleged that the defendant psychiatrist intentionally inflicted emotional distress. The trial court granted the defendant's motion to dismiss. This court affirmed in part, reversed in part, and remanded. The court explained that the intentional infliction of emotional distress requires that the defendant's conduct go beyond all possible bounds of decency, that the plaintiff's distress be so severe that no reasonable man could endure it, and that the defendant be aware that severe emotional distress will result from his action. As the defendant performed at the noncustodial parent's request, the court held, the defendant's conduct was not extreme and outrageous. Dymek v. Nyquist, 128 Ill.App.3d 859, 83 Ill.Dec. 52, 55, 469 N.E.2d 659, 662.

Ill.App.1984. Com. (d) quot. in sup. A woman sued her former employer for intentional infliction of emotional distress. As branch manager of a bank, the plaintiff had suspected that one of the employees under her supervision was involved in theft and embezzlement of the bank's funds. She conducted an investigation and notified her supervisors. The employee was eventually returned to his job. The plaintiff alleged that as a result she was transferred, demoted, and subjected to relentless criticism, mistreatment, and humiliation by the bank management. The trial court dismissed her action for failure to state a claim. Affirming, this court held that the bank's conduct had not been so reprehensible that it rose to the level of outrageous conduct sufficient to state a claim for the intentional infliction of emotional distress. Harris v. First Federal Sav. and Loan Ass'n, 129 Ill.App.3d 978, 85 Ill.Dec. 89, 91, 473 N.E.2d 457, 459.

Ill.App.1984. Com. (j) quot. in case, cit. in sup. The conservator of the estate of an incompetent filed a complaint against an insurance company for willfully refusing to pay benefits owing her. The trial court dismissed the count alleging that the insurer was liable for treble damages, and this court reversed and remanded. On remand, the trial court entered judgment for the insurer. This court reversed and remanded on the issue of attorney fees and affirmed on the remaining issues. It held that the instruction, on the elements of the tort of intentional infliction of mental distress, that the emotional distress suffered must be severe and of such intensity and duration that no reasonable person could be expected to endure it, was neither misleading nor confusing. Sale v. Allstate Ins. Co., 126 Ill.App.3d 905, 81 Ill.Dec. 901, 913, 467 N.E.2d 1023, 1035.

Ill.App.1983. Com. (d) quot. in case quot. in disc., com. (e) cit. in sup. and cit. in case quot. in disc., corn. (i) cit. in case quot. in disc., com. (j) cit. in sup. and quot. in case quot. in disc. A former employee brought an action against a co-worker and his supervisor, claiming that the co-worker continually harassed him with an intent to cause him severe anxiety and mental distress. The supervisor, according to the complaint, failed to act to prevent further harassment after being informed of the situation. The trial court dismissed the complaint for failure to state a cause of action. On appeal, the plaintiff challenged the lower court's finding that the acts complained of fell short of being “outrageous.” This court determined that the most serious conduct alleged,

involving the placing of human waste in a file the plaintiff was using, could not form the basis for the cause of action asserted by the plaintiff because, as a single act, it lacked the requisite intensity and duration. The court added that the plaintiff's claim against his former supervisor was properly dismissed, as he failed to allege an extreme and outrageous abuse of authority. Affirmed. Morrison v. Sandell, 112 Ill.App.3d 1057, 68 Ill.Dec. 556, 446 N.E.2d 290, 291, 292.

Ill.App.1982. Cit. in disc. The plaintiff brought an action against the defendant insurance company and the insurance company's agent, seeking to recover for damages for failing to notify the plaintiff that her ex-husband had defaulted in making payments on his life insurance policy. The plaintiff had been the owner of the policy, and upon the plaintiff's divorce from her husband, the husband was ordered to maintain the policy with their child named as beneficiary. The trial court granted the agent's motion to dismiss the claim as to the agent, and the plaintiff appealed. This court determined that the agent had no duty to notify the plaintiff, who was a customer of the defendant insurance company. The plaintiff also had argued that the agent's failure to notify the plaintiff caused her severe emotional distress. The court rejected this argument, stating that because the agent's failure to notify was not improper, it would be inconsistent to deem that conduct outrageous. The order dismissing the claim against the agent was affirmed. Bellmer v. Charter Sec. Life Ins. Co., 105 Ill.App.3d 234, 61 Ill.Dec. 34, 39, 433 N.E.2d 1362, 1367.

Ill.App.1981. Coms. (d), (e), and (g) cit. in disc. The plaintiff, an installer for the telephone company, brought an action against his employer alleging that the employer intentionally caused him to suffer severe emotional distress. The plaintiff asserted that it was the defendant's policy to permit, allow, and encourage installers to falsify their work reports which were used for billing customers and compiling reports of corporate expenses. The plaintiff also alleged that when he refused to comply with his superiors' demands, his foreman and superiors harassed him and used retaliatory practices in order to coerce the plaintiff's compliance. The trial court granted summary judgment in favor of the defendant, and the plaintiff appealed. On appeal, the higher court concluded that a jury could reasonably find that the coercion and retaliation allegedly suffered by the plaintiff were so outrageous, extreme, and atrocious as to be considered intolerable in a civilized community. Accordingly, the judgment was reversed and remanded. Milton v. Ill. Bell Tel. Co., 101 Ill.App.3d 75, 56 Ill.Dec. 497, 500, 427 N.E.2d 829, 832.

Ill.App.1981. Coms. (d), (j), and (i) quot. in disc. A franchisee brought an action against her corporate franchiser and the franchiser's district manager, alleging, inter alia, intentional infliction of emotional distress. The plaintiff claimed that the district manager had “insulted, disturbed, disquieted, and threatened” the plaintiff. She further averred that the manager had ordered her out of her store and threatened to send false reports to the corporate headquarters concerning the plaintiff. The trial court dismissed the plaintiff's complaint with prejudice for failure to state a claim. This court affirmed. The alleged conduct of the district manager amounted to nothing more than mere “insults and indignities,” which cannot be deemed outrageous. Plocar v. Dunkin' Donuts of America, Inc., 103 Ill.App.2d 740, 59 Ill.Dec. 418, 422, 423, 431 N.E.2d 1175, 1179, 1180.

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Ill.App.1981. Cit. in diss. op. and com. (g) cit. in diss. op. The plaintiff brought an action against his employer's workmen's compensation insurer, alleging that the defendant intentionally caused him severe emotional distress during the handling of his workmen's compensation claim. The lower court entered judgment in favor of the plaintiff, awarding him both compensatory and punitive damages. The defendant appealed, arguing inter alia, that the plaintiff did not prove that he was entitled to compensatory damages. The court found that the plaintiff sufficiently stated a cause of action for intentional infliction of mental distress, making the insurance company liable to the employee for compensatory damages, although not punitive damages. The dissent argued that the insurance company should not be liable because, in denying the plaintiff's claim on account of a questionable cause of the plaintiff's injury, the defendant did no more than insist upon a legal right in a permissible way. Robertson v. Travelers Ins. Co., 100 Ill.App.3d 845, 56 Ill.Dec. 222, 231, 427 N.E.2d 302, 311, judgment reversed 95 Ill.2d 441, 69 Ill.Dec. 954, 448 N.E.2d 866.

Ill.App.1980. Com. (d) quot. in part in case cit. in sup. The plaintiffs instituted suit against the defendants alleging that their newspaper article, which discussed the death of the plaintiffs' son by drug overdose, was libelous and was an intentional infliction of emotional distress. The trial court dismissed the complaint for failure to state a cause of action. On the issue of intentional infliction of emotional distress, this court stated that liability would exist only where the conduct had been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. The court found that the defendants' article merely stated the writer's opinions regarding the problems that teenagers had with alcohol and drugs, and listed some methods she felt would help to solve those problems. This court therefore affirmed the lower court's decision. Galvin v. Gallagher, 81 Ill.App.3d 927, 37 Ill.Dec. 150, 401 N.E.2d 1243, 1246.

Ill.App.1980. Com. (d) cit. in disc. An employee brought an action against his employer for, inter alia, intentional infliction of emotional distress based upon his discharge. The lower court dismissed the complaint with prejudice. This court stated that this tort requires extreme and outrageous conduct by the defendant which is intended to cause emotional distress or which is done in reckless disregard for the probability of causing emotional distress, and the plaintiff's severe emotional distress proximately caused by the defendant's outrageous conduct. The conduct of the tortfeasor must be so outrageous and extreme that it goes beyond all bounds of human decency. Here, an employee at will was discharged, an act well within the employer's rights. Without further allegation, this was not the outrageous conduct required to state a cause of action. The order of the trial court was affirmed. Palmateer v. International Harvester Co., 85 Ill.App.3d 50, 40 Ill.Dec. 589, 406 N.E.2d 595, 598, judgment affirmed in part, judgment reversed in part 85 Ill.2d 124, 52 Ill.Dec. 13, 421 N.E.2d 876 (1981).

Ill.App.1979. Cit. and quot. in disc. and cit. in diss. op., subsec. (2) cit. and quot. in part in disc. and com. (i) quot. in disc. and cit. and quot. in part in diss. op. The plaintiff had a seizure at work and little was done by his superiors or the medical attendant to help him. The plaintiff and his family sued his employer, his co-worker and the medical attendant alleging that the co-worker's and the attendant's outrageous conduct had caused the plaintiff's emotional distress. The lower court dismissed the complaint and the plaintiff appealed. This court affirmed and held that the Workmen's

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Compensation Act precluded the plaintiff worker from recovery for the tort of emotional distress when the alleged outrageous acts of the defendants were not intentional. The court concluded that because the defendants' conduct was not intentionally calculated to cause the plaintiff worker's emotional distress, the complaint was properly dismissed. The court held that the plaintiff's family could not recover because neither of them had been present at the time of the incident. The dissent argued that the majority had not applied the standards of the tort correctly. The dissent stated that the defendants' conduct was so wanton as to create the intent required under the Workmen's Compensation Act and therefore the Act should not have precluded the plaintiff's recovery. Collier v. Wagner Castings Co., 70 Ill.App.3d 233, 26 Ill.Dec. 641, 388 N.E.2d 265, 268, 269, 272-273, judgment affirmed 81 Ill.2d 229, 41 Ill.Dec. 776, 408 N.E.2d 198 (1980).

Ill.App.1979. Com. (d) cit. and quot. in sup. and coms. (e) and (j) cit. in sup. The plaintiff was a new tenant in a hotel and when she was attempting to move in her landlord refused to allow her to use the freight elevator unless she paid him three months rent in advance. The plaintiff was detained, frightened, upset and worried although she did not seek medical attention. The plaintiff sued her landlord for intentional infliction of emotional distress. The defendant's motion for summary judgment was denied and a jury found for the plaintiff. This court reversed and held that no recovery would be allowed where the actions of the defendant were not so extreme as to go beyond all bounds of human decency and where the emotional distress suffered by the plaintiff was merely fright and worry. The court stated that the plaintiff's distress must be of such a nature that no one would be expected to endure it. The court stated that even though a landlord-tenant relationship existed between the plaintiff and the defendant, the plaintiff must still prove that the defendant's behavior was extreme and outrageous. Farnor v. Irmco Corp., 73 Ill.App.3d 851, 29 Ill.Dec. 894, 392 N.E.2d 591, 595, 596.

Ill.App.1979. Coms. (d) and (j) quot. in part in sup. The plaintiff sued the defendant for intentional infliction of emotional distress because the defendant had made phone calls and frequent threats to the plaintiff's family. The lower court dismissed the complaint for failure to state a cause of action. This court affirmed and held, inter alia, that the defendant's conduct was not so outrageous as to go beyond all bounds of human decency. The court stated that only conduct which was extremely outrageous in nature could support a cause of action in this tort. Kelly v. Franco, 72 Ill.App.3d 642, 28 Ill.Dec. 855, 391 N.E.2d 54, 59.

Ill.App.1979. Cit. in sup. The plaintiffs had been harassed by a collection agency in its attempts to collect a debt allegedly owed to a health clinic. The plaintiffs sued the collection agency and the clinic alleging the intentional infliction of emotional distress, for which they sought compensatory damages and for the defendants violation of a statute for which they sought compensatory and punitive damages. The plaintiffs argued that the clinic was vicariously liable for the actions of the agency. The lower court dismissed the complaint against the clinic but found that the complaint stated a cause of action against the agency and that the prayer for punitive damages was proper. This court found that the complaint sufficiently alleged that the clinic could be vicariously liable for the actions of the agency. The court discussed the elements of a cause of action for the intentional infliction of emotional distress and noted that the defendant agency claimed that its actions were

not extreme and outrageous. The court found that the complaint alleged facts to support a cause of action for this tort. The court found that the complaint stated a cause of action for the violation of the statute and that the clinic could be held vicariously liable as a principal for its agent's violations of the statute. The court determined that punitive damages were recoverable for a violation of the statute. However, the court found that the plaintiffs had not alleged sufficient facts to show that the clinic should be held vicariously liable for punitive damages, if awarded, and the prayer for punitive damages against the clinic should have been stricken with leave to amend. Sherman v. Field Clinic, 74 Ill.App.3d 21, 29 Ill.Dec. 597, 392 N.E.2d 154, 159.

Ill.App.1979. Cit. in disc. and coms. (d), (e), (i) and (j) cit. and quot. in part in sup. The plaintiffs had been issued a homeowner's policy by the defendant insurance company. Their home and personal belongings were so severely damaged by a fire that they had to move into a motel. The plaintiffs felt that the defendant was not making payments according to the policy and numerous discussions took place before the plaintiffs sued. The plaintiffs alleged that they were forced to resort to charity and were subject to distress, embarrassment and great financial difficulties. The lower court dismissed the complaint and the plaintiffs appealed. This court affirmed the dismissal of the count which alleged the intentional infliction of emotional distress. The court stated that the plaintiffs must have alleged conduct which was so extreme and outrageous that it went beyond that which humans could be expected to endure. The court stated that malicious conduct would not necessarily be sufficient to create a cause of action for the intentional infliction of emotional distress if the conduct was not so outrageous that it went beyond all bounds of human decency. This court also affirmed the dismissal of the count which alleged that the defendant had not acted in good faith in its dealings with the plaintiffs. The court stated that the plaintiffs had alleged that the defendant's conduct was willful, wanton and malicious but the allegations were insufficient because no facts existed to support the allegations. Tobolt v. Allstate Ins. Co., 75 Ill.App.3d 57, 30 Ill.Dec. 824, 393 N.E.2d 1171, 1175.

Ill.App.1978. Subsec. (1) quot. but dist. Plaintiff insured brought this suit to recover punitive damages against an insurer for alleged breach of its duty of good faith and fair dealing and for compensatory damages for intentional infliction of emotional distress. Plaintiff asserted that the defendant had instilled in him a fear for his life, and that defendant had attempted to coerce him into surrendering his disability income policy. In affirming the dismissal of certain counts in the complaint, the court held that plaintiff had failed to allege specific facts which could be interpreted as outrageous conduct on defendant's part or which could substantiate plaintiff's allegation that he suffered severe emotional distress. It was also held that plaintiff's complaint failed to state a cause of action for defendant's breach of its duty of good faith upon which relief could be granted. DeBolt v. Mutual of Omaha, 56 Ill.App.3d 111, 13 Ill.Dec. 656, 371 N.E.2d 373, 375.

Ill.App.1978. Coms. (d), (e), (i) cit. in sup.; com. (j) quot. in sup. The parents of two sons, who were treated for inflamed tonsils with radiation treatments in 1947 before tonsil radiation was linked with thyroid cancer, one of whom developed thyroid cancer in 1962 and the other a nodule on his thyroid gland in 1974 that was thought be be cancerous, brought an action against the hospital, the physician who advocated the use of such treatments in young patients, and others to recover for

alleged intentional infliction of severe emotional distress. The lower court dismissed the complaint, and the parents appealed. The court found that the plaintiffs' complaint failed to allege extreme or outrageous conduct by the defendants which was "beyond all possible bounds of decency," that the acts of any of the defendants were done intentionally, or that the defendants knew that severe emotional distress was "certain or substantially certain" to result from the defendants' alleged acts in 1947. Accordingly, the court held that the complaint filed by the parents, alleging that they suffered, and for the remainder of their lives would suffer, great emotional trauma as well as pain and worry over the health and well-being of their sons as a result of the defendants' wrongful, negligent, willful, wanton and reckless conduct, failed to state a cause of action for intentional infliction of severe emotional distress. The judgment of the lower court was affirmed. Neuberg v. Michael Reese Hospital & Medical Ctr., 60 Ill.App.3d 679, 18 Ill.Dec. 62, 377 N.E.2d 215, 218.

Ill.App.1977. Coms. (d) and (j) quot. in part in case quot. in sup. Plaintiff's complaint alleged that the actions of defendant's agent, the driver of defendant's truck, constituted intentional and negligent infliction of emotional distress and intentional assault. The driver-agent allegedly made feints at plaintiff's vehicle as if he were going to strike it while both were traveling at high speed on a highway. The complaint was dismissed, and plaintiff appealed. Affirmed in part, reversed in part, and remanded. Held: The count alleging negligent infliction of emotional distress was properly dismissed since plaintiff failed to assert a physical impact between the two vehicles. Plaintiff did state a cause of action for defendant's intentional or willful entrustment of its truck to an incompetent driver, for which plaintiff's recovery would depend upon proof of defendant's knowledge of the driver's incompetence. The court also held that proof of defendant's negligence in permitting its truck to operate in violation of Interstate Commerce Commission rules and regulations might entitle a jury to find defendant liable for the intentional tort of its driver. Rosenberg v. Packerland Packing Co., Inc., 55 Ill.App.3d 959, 13 Ill.Dec. 208, 370 N.E.2d 1235, 1238.

Ill.App.1976. Cit. and fol., subsec. (1) quot., com. (d) quot., com. (f) quot. in part, (erron. cit. as § 56), com. (f) quot., com. (g) quot., com. (h) quot., Appendix Vol. (through December 1963) cit., Restatement In The Courts, 1965, 1967, 1968-69, 1970-71, 1972-73, 1974 Supps. cit. Plaintiff brought this suit to recover an amount due and owing under a promissory note executed by defendant and secured by consumer goods of all kinds, including household goods, owned by defendant. Defendant filed a counterclaim, which was dismissed on plaintiff's motion, and, when the court dismissed her motion for leave to file an amended counterclaim in which she claimed damages for severe emotional distress intentionally inflicted upon her by plaintiff's manner of seeking to collect two delinquent accounts, she appealed. While the appellate court did find that defendant's pleadings were sufficient to allege the defendant's particular susceptibility and the plaintiff's notice thereof, it affirmed the trial court's dismissal because it was unable to find within the pleadings any allegations of fact which might reasonably have been regarded as a "major outrage," i.e., "so extreme or outrageous as to permit recovery" under the principles set forth in Section 46 of the Restatement of Torts. Public Finance Corporation v. Davis, 36 Ill.App.3d 99, 343 N.E.2d 226, 230, 231. Aff'd, 66 Ill.2d 85, 4 Ill.Dec. 652, 360 N.E.2d 765. See above case.

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Ind.

Ind.2009. Quot. in case quot. in ftn. Restaurant patrons brought claim for intentional infliction of emotional distress (IIED), inter alia, against restaurant operator and its employee after employee stated to a passerby and a police officer that one of the plaintiffs had "pulled a gun" inside the store, leading to plaintiff being publicly handcuffed and detained by police who found no gun. The trial court granted summary judgment for defendants. Affirming, this court held that the qualified privilege applicable to citizen reports of suspected criminal activity prevented plaintiffs, as a matter of sound judicial and public policy, from succeeding on any of their claims, including their IIED claim. Williams v. Tharp, 914 N.E.2d 756, 769.

Ind.2008. Cit. in case quot. in conc. op. Hospital-operating-room perfusionist sued heart surgeon for assault and intentional infliction of emotional distress (IIED), following a verbal altercation between the parties. The trial court entered judgment on a jury verdict for defendant on plaintiff's IIED claim, but found for plaintiff on his assault claim. Affirming, this court held, inter alia, that the trial court did not err in refusing to instruct the jury that the phrase "workplace bullying," which was raised in connection with the testimony of plaintiff's expert witness, was irrelevant to plaintiff's claims, because workplace bullying could be considered an element of IIED. The concurring opinion observed that, even if the testimony was erroneously admitted, it was harmless error, since it was offered to prove the elements of the IIED claim, and did not go to the elements of the assault claim—the only claim being reviewed in this appeal. Raess v. Doescher, 883 N.E.2d 790, 799.

Ind.2006. Com. (j) quot. in sup. After an unruly passenger became a potential security risk onboard a flight five months after the September 11th terrorist attack, ultimately causing the small plane to be diverted to an airport where he was arrested, couple who were also passengers on the flight brought, in part, claim for negligent infliction of emotional distress against airline that operated the flight. The trial court denied defendant's motion for summary judgment on this claim, and the court of appeals affirmed that portion of the decision. This court reversed, holding that, while the couples' fear and anxiety during the flight were not trivial, the physical impact in this case was slight to nonexistent, and thus allowing an emotional-distress claim to proceed based on the couple's lingering mental anguish, viewed by the court as speculative, would essentially abrogate the requirements of Indiana's modified-impact rule. Atlantic Coast Airlines v. Cook, 857 N.E.2d 989, 1000.

Ind.1997. Cit. in headnote, cit. in disc. Postal worker sued co-worker for invasion of privacy after learning that defendant had disclosed plaintiff's HIV-positive status to another employee. The trial court entered summary judgment for defendant. After reviewing the history of the tort of invasion of privacy and exploring the differences between actionable defamation and the tort of disclosure of private facts, this court affirmed. It held that Indiana did not recognize the subtort of public disclosure of private facts and that, even if it did, plaintiff could not recover under these circumstances because he had failed to establish the element of "publicity." The court also noted

that, to the extent plaintiff alleged mental distress, such harm was addressed by the tort of outrage. Doe v. Methodist Hosp., 690 N.E.2d 681, 682, 691.

Ind.1991. Quot. in disc. Family members surrounded and threatened another man while one of them repeatedly touched a revolver he had in a holster. The man being threatened sued the family members alleging several claims, including assault and intentional infliction of emotional distress, and sought to recover for his emotional and psychological injury. The trial court entered summary judgment in favor of the defendants, and the intermediate appellate court affirmed. This court vacated and reversed in part, but affirmed the entry of summary judgment as to the emotional distress count of the complaint. The court held, inter alia, that under proper circumstances, liability would attach to a defendant for an intentional infliction of emotional distress, but that the facts in the case did not support a finding that the defendants intended to cause emotional injury to the plaintiff. The court reasoned that the jury could not infer that the defendants' possession of a gun was intended to inflict emotional injury on the plaintiff merely from the plaintiff's assertion that the defendants knew the plaintiff disliked guns. Cullison v. Medley, 570 N.E.2d 27, 31, appeal after remand 619 N.E.2d 937 (Ind.App.1993).

Ind.1981. Subsec. (2) cit. in diss. op. The plaintiff below brought an action against the defendant loan company. The plaintiff claimed that employees of the loan company intentionally threatened, assaulted, and beat the plaintiff in the plaintiff's home in front of his family. The trial court granted the defendant partial summary judgment on the plaintiff's claim for damages sought for the mental distress suffered by the children and wife as a result of watching the defendant's conduct. The plaintiff's petition for transfer was denied by the higher court. In a dissent to denial of transfer, it was argued that the court should not have required that the plaintiff's family suffer contemporaneous physical impact before they could recover for infliction of emotional distress where the defendant's act was intentional. It was also noted that the Restatement limits recovery to immediate family members in order to prevent a flood of litigation. The wife and children were immediate family members who witnessed the conduct; therefore they should not be denied recovery. Elza v. Liberty Loan Corp., _ Ind. ___, 426 N.E.2d 1302, 1307, 1309.

Ind.App.

Ind.App.2023. Cit. in disc. Patients sued hospital, alleging, among other things, that defendant was vicariously liable for intentional infliction of emotional distress, after defendant's employee improperly accessed plaintiffs' medical records and shared their private health information with the employee's then-husband. The trial court granted defendant's motion for summary judgment. On appeal, this court affirmed, holding that defendant was not liable to plaintiffs for intentional infliction of emotional distress, because its employee did not act with the requisite intent or recklessness to cause emotional distress under Restatement Second of Torts § 46. The court pointed out that the designated evidence showed that defendant's employee attempted to keep her improper actions a secret from both defendant and plaintiffs. Fox v. Franciscan Alliance, Inc., 204 N.E.3d 320, 329.

Ind.App.2020. Com. (d) quot. in case quot. in sup. Citizens who resided in a large-scale public housing complex sued city, state, and others, alleging that defendants knew that the soil and air in and around the complex were contaminated with dangerous levels of lead, arsenic, and other hazardous substances, but took no action to inform plaintiffs or to otherwise safeguard them from the danger. The trial court denied defendants' motion for judgment on the pleadings. Affirming, this court held that plaintiffs recited sufficient facts to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46, because a reasonable person could conclude that defendants' alleged conduct in knowingly exposing vulnerable citizens to toxic substances when reasonable alternatives existed was extreme and outrageous. State v. Alvarez by next friend Alvarez, 150 N.E.3d 206, 219.

Ind.App.2016. Com. (d) quot. in sup. Former in-home health worker who was acquitted on charges of stealing jewelry from two patients brought claims for, among other things, intentional infliction of emotional distress (IIED) against former employer and investigators hired by employer, alleging that defendants wrongfully accused her of the thefts. The trial court granted summary judgment for defendants. Affirming, this court held that plaintiff failed to show that defendants' conduct was outrageous, or that defendants intended to cause her emotional harm, as required to state an IIED claim under Restatement Second of Torts § 46. Ali v. Alliance Home Health Care, LLC, 53 N.E.3d 420, 443.

Ind.App.2016. Com. (d) quot. in sup. High-school basketball coach who was not offered the coaching position for the school year following an incident in which he threw a basketball toward a student player filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against school district and high-school principal, alleging that principal failed to conduct a thorough investigation and led administrators and others to believe that he had conducted one, and released a statement by coach removing, without his knowledge or consent, the word "allegedly," so that it read as an admission to hitting the player with the ball. The trial court granted in part defendant's motion for summary judgment. This court affirmed, holding that the trial court did not err in granting summary judgment on plaintiff's IIED claim. Citing Restatement Second of Torts § 46, Comment *d*, the court explained that defendant's alleged conduct was not so outrageous in character or extreme in degree that it was to be regarded as atrocious or utterly intolerable in a civilized community. McCollough v. Noblesville Schools, 63 N.E.3d 334, 342.

Ind.App.2015. Com. (d) quot. in case quot. in sup. Terminated store manager filed, inter alia, an intentional-infliction-of-emotional-distress claim against former supervisor and former employer, alleging that supervisor contacted the police to falsely accuse her of stealing from the store, which resulted in her being charged with theft. The trial court granted defendants' motion for summary judgment. This court reversed in part, holding that there were genuine issues of material fact as to whether defendants' conduct caused plaintiff severe emotional distress. Citing Restatement Second of Torts § 46, Comment *d*, the court determined that a reasonable factfinder could find that defendants' conduct was sufficiently outrageous, given plaintiff's allegations that defendants

reported her without evidence or belief that she did had committed theft. Bah v. Mac's Convenience Stores, LLC, 37 N.E.3d 539, 550.

Ind.App.2015. Com. (d) quot. in case quot. in sup. After mortgagor fell behind on her mortgage payments, mortgagee filed a foreclosure action; mortgagor filed a counterclaim for, inter alia, intentional infliction of emotional distress (IIED), alleging that plaintiff intentionally mishandled her application for the federal Home Affordable Modification Program, which caused defendant emotional distress. The trial court dismissed defendant's counterclaims. Affirming, this court held that defendant failed to allege a sufficient IIED claim. Quoting Restatement Second of Torts § 46, Comment *d*, the court reasoned that, even if defendant's allegations were true and plaintiff mishandled her application under the federal program, a successful IIED claim required conduct that was outrageous and extreme, which was not present in this case. Jaffri v. JPMorgan Chase Bank, N.A., 26 N.E.3d 635, 640.

Ind.App.2014. Com. (d) quot. in case quot. in sup., com. (f) quot. in sup., com. (*i*) cit. in sup. Patient sued mental-health center for intentional infliction of emotional distress, alleging that it disclosed his confidential medical information to his grandmother, whom he had named as his emergency contact upon admission to the center, without his authorization. After a hearing, the trial court granted summary judgment for defendant. Reversing in part, this court held that there was a genuine issue of material fact as to whether defendant's conduct—in contacting plaintiff's grandmother to inform her that he had been admitted and was safe—was so outrageous that it satisfied the reckless element of a claim for intentional infliction of emotional distress, given that defendant had specialized knowledge as a mental-healthcare provider, as well as actual knowledge that plaintiff was experiencing a mental-health crisis and that he did not want his family to know about his condition. The court noted that, under Restatement Second of Torts § 46, intentional infliction of emotional distress could be found where the actor knew that severe emotional distress was certain, or substantially certain, to result from his or her conduct, and where he or she acted recklessly, or in deliberate disregard of a high degree of probability that the emotional distress would follow. J.H. v. St. Vincent Hosp. and Health Care Center, Inc., 19 N.E.3d 811, 819, 820.

Ind.App.2014. Com. (d) quot. in case quot. in disc. Former chief executive officer of a charitable organization sued president of a foundation that provided grants to the organization, alleging, among other things, intentional infliction of emotional distress arising from statements that defendant allegedly made to the mayor's chief of staff, who was engaged in negotiations with plaintiff about a potential employment opportunity in the mayor's office. The trial court granted summary judgment for defendant. This court affirmed, holding that the evidence did not support a determination that defendant's conduct was extreme and outrageous. While the evidence showed that defendant stated that plaintiff's organization was being audited due to concerns over financial irregularities, that statement was true at the time it was made, and the evidence did not support plaintiff's claim that defendant continued an alleged "defamation campaign" against plaintiff even after learning from the audit that there was no missing money. Miller v. Central Indiana Community Foundation, Inc., 11 N.E.3d 944, 960.

Ind.App.2013. Com. (d) quot. in case quot. in sup. Parents whose infant son died of "undetermined" causes while under the care of a babysitter recommended by a pastor at their church brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against church, after church issued a press release about the death that included the family and child's names. The trial court granted defendant's motion for summary judgment on the IIED claim. Affirming as to this claim, this court held that defendant's press release and press conference disclosing the circumstances of the infant's death, as well as pastor's failure to follow up with plaintiffs after he went to the hospital on the day of the baby's death, might have been insensitive, but it did not rise to the level of outrageous conduct required to succeed on an IIED claim. The court concluded that there was no evidence that defendant had any intent to emotionally harm plaintiffs. Westminster Presbyterian Church of Muncie v. Yonghong Cheng, 992 N.E.2d 859, 870.

Ind.App.2012. Com. (d) quot. in case quot. in sup. Former employee of city housing agency brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against agency, after criminal charges against him for ghost employment, official misconduct, and deception were voluntarily dismissed by the prosecutor. The trial court granted summary judgment for defendant. Affirming, this court held that defendant's conduct in reporting to law-enforcement authorities plaintiff's suspected criminal activity, allegedly consisting of conducting personal business during work hours, using a public vehicle for personal reasons, and making false statements on his time cards, did not rise to the level of extreme and outrageous conduct necessary to maintain plaintiff's IIED claim. Brown v. Indianapolis Housing Agency, 971 N.E.2d 181, 188.

Ind.App.2012. Com. (d) quot. in sup. Thirteen-year-old child, by the Indiana Department of Child Services as his next friend, sued county coroner's office and city, asserting, inter alia, a claim for intentional infliction of emotional distress (IIED) arising from their removal of his morbidly obese mother's remains from the apartment he had shared with her. The trial court granted summary judgment for defendants. Reversing with respect to plaintiff's IIED claim and remanding, this court held that a genuine issue of material fact existed as to whether defendants' conduct in dragging decedent's body, covered only with a sheet, outside on a mattress while plaintiff watched, winching the mattress onto a tow truck's flatbed, and tossing a dirty carpet on her body before it was transported to the coroner's office was so outrageous that it satisfied the reckless element of the tort. Johnson ex rel. Indiana Dept. of Child Services v. Marion County Coroner's Office, 971 N.E.2d 151, 162.

Ind.App.2011. Com. (d) cit. in sup. and quot. in case quot. in sup. Homeowners brought a claim for intentional infliction of emotional distress (IIED), inter alia, against neighbors. The trial court granted summary judgment for defendants. Affirming, this court held that plaintiffs' allegations that defendants installed surveillance cameras aimed at their property and used video footage from the cameras to pursue criminal-mischief charges against one plaintiff for vandalizing their property asserted conduct that was not sufficiently outrageous to maintain plaintiffs' IIED claim against defendants. Curry v. Whitaker, 943 N.E.2d 354, 361.

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Ind.App.2011. Com. (d) quot. in case quot. in sup. After university professor was terminated for sexually harassing his supervisor, he sued supervisor, asserting a claim for, inter alia, intentional infliction of emotional distress (IIED). The trial court granted summary judgment for defendant. Affirming, this court held that there was no evidence to establish that defendant intended to cause plaintiff emotional distress, as required for plaintiff's IIED claim, when defendant initiated her harassment complaint against him with the university; defendant acted according to the scope of her responsibilities at the university, and filed her complaint when she believed that the university's zero-tolerance policy had been violated. Haegert v. McMullan, 953 N.E.2d 1223, 1235.

Ind.App.2011. Com. (d) quot. in sup. Family members of deceased brought, inter alia, claim for intentional infliction of emotional distress (IIED) against funeral home, funeral director, and others involved in deceased's interment, after deceased's too-large casket caused bulging in the vault, which was not completely sealed, and deceased's casket had to be exhumed, replaced, and reinterred. The trial court granted summary judgment for defendants. This court affirmed, holding, as a matter of law, that defendants' actions did not constitute "outrageous" behavior as contemplated by the narrow definition adopted by Indiana for the tort of IIED from Restatement Second of Torts § 46. York v. Fredrick, 947 N.E.2d 969, 976-977.

Ind.App.2009. Com. (d) quot. in case quot. in sup. Property owners brought nuisance, intentional infliction of emotional distress (IIED), and other claims against neighboring dairy farm, alleging that farm's operation, including its associated noises and smells, interfered with the comfortable enjoyment of their property. The trial court granted summary judgment for defendant. Affirming, this court held, inter alia, that defendant's actions did not constitute "outrageous" behavior sufficient to state a claim for IIED as a matter of law. The court reasoned that defendant was largely, if not entirely, compliant with state regulations, and that, however negligent defendant may have been in operating its dairy farm, none of the designated facts suggested that any alleged negligence was so extreme in degree that it went beyond all possible bounds of decency. Additionally, there was nothing in the record that would support a reasonable inference that defendant intended to cause emotional distress to plaintiffs by its behavior. Lindsey v. DeGroot, 898 N.E.2d 1251, 1264.

Ind.App.2008. Quot. in cases quot. in sup. Two African-American restaurant patrons sued restaurant and its employee for, among other things, intentional infliction of emotional distress, alleging that, because of employee's false report that one patron had pulled out a gun at the restaurant, police detained them on their knees at gunpoint for more than an hour and a half while family members and neighbors watched. The trial court granted summary judgment for defendants. Reversing and remanding for trial, this court held, inter alia, that genuine issues of fact remained as to whether employee's conduct was extreme and outrageous and whether he acted intentionally or recklessly. The court declined to hold that the filing of a false report could never amount to extreme or outrageous conduct as a matter of law. Williams v. Tharp, 889 N.E.2d 870, 879.

Ind.App.2005. Quot. in case quot. in disc. Dog owner whose dog died after being attacked by neighbors' German shepherd dog sued neighbors for, in part, intentional infliction of emotional distress. The trial court granted defendants' motion for partial summary judgment. This court

affirmed in part, holding, inter alia, that defendants' habit of letting their German shepherd run unleashed in violation of community dog-control guidelines did not constitute sufficiently outrageous behavior necessary to sustain a claim for intentional infliction of emotional distress, since this behavior, while negligent to some extent, was not so extreme as to go beyond all possible bounds of decency. Moreover, the record did not support a reasonable inference that defendants intended to cause plaintiff emotional distress by their conduct. Lachenman v. Stice, 838 N.E.2d 451, 456, 457.

Ind.App.2002. Com. (d) quot. in case quot. in sup. After pastor's wife was injured in a car accident, insurer hired detective agency to conduct surveillance to confirm her disability determination. When insurer denied disability benefits based on agency investigator's videotape of wife as she played piano in front of the congregation, pastor and wife sued detective agency for invasion of privacy and intentional infliction of emotional distress. Trial court granted agency summary judgment. This court affirmed, holding, inter alia, that agency's act of videotaping plaintiffs during church worship services was not extreme and outrageous conduct. Agency videotaped wife pursuant to a routine investigation to uncover possible insurance fraud; given the nature of investigation, it was necessary to use covert surveillance procedures. Creel v. I.C.E. & Associates, Inc., 771 N.E.2d 1276, 1282.

Ind.App.2002. Quot. in case quot. in sup., com. (d) quot. in sup. Estranged husband sued late wife's guardian for wrongful interment and intentional infliction of emotional distress, alleging that guardian precluded him from attending the funeral and wrongfully authorized the interment. Trial court entered judgment on jury verdict for plaintiff. This court reversed, holding, inter alia, that plaintiff's emotional-distress claim failed because defendant did not engage in extreme and outrageous conduct. Although plaintiff anticipated to be ejected or arrested had he elected to attend the funeral, he did not in fact attempt to do so. Plaintiff's testimony as to expectable conduct by defendant upon his appearance at the funeral was merely speculative. Inlow v. Wilkerson, 774 N.E.2d 51, 55, 57.

Ind.App.2002. Cit. but dist. Patient who underwent therapy for voyeurism sued counselors for malpractice, fraud, and outrage based on conversations counselors had with patient's employer. Trial court denied patient's motion for attorney's fees and granted counselors' motion for summary judgment. Affirming in part, court of appeals held, inter alia, that patient could not recover for outrage where counselors' conversations with employer were made at patient's request and were motivated by concern for his well-being rather than intent to harm patient. Munsell v. Hambright, 776 N.E.2d 1272, 1280.

Ind.App.2002. Quot. in case quot. but dist. Disabled employee sued former employer for disability discrimination, retaliatory discharge, and emotional distress. Trial court denied employer's motion for summary judgment. Reversing and remanding, court of appeals held that employee failed to show that employer's termination of employee for fighting was a pretext, and employee could not recover for intentional infliction of emotional distress because employer's firing him pursuant

to disciplinary policy was not extreme and outrageous conduct. Powdertech, Inc. v. Joganic, 776 N.E.2d 1251, 1264.

Ind.App.2001. Com. (d) quot. in case quot. in sup. Mechanic and his wife sued employer, a coemployee, and a supervisor for libel, intentional infliction of emotional distress, and invasion of privacy, after supervisor took a photo of coemployee posing in a sexually suggestive position next to plaintiff, who was sleeping in the employee break room. Trial court denied defendants' motion for summary judgment on the emotional-distress claim. This court reversed in part, holding, inter alia, that plaintiffs' emotional-distress claim failed, because there was no dispute that defendants did not intend to harm plaintiff. Defendants testified that the picture was a practical joke and that they did not intend to hurt or humiliate plaintiff. Branham v. Celadon Trucking Services, Inc., 744 N.E.2d 514, 523.

Ind.App.1999. Cit. in case quot. in sup., com. (d) quot. in case quot. in sup., com. (i) quot. in ftn. Former employee sued supervisor for tortious interference with her business relationship with employer and intentional infliction of emotional distress. The trial court entered summary judgment for defendant. Reversing and remanding, this court held that plaintiff could maintain an action for tortious interference even though she was an at-will employee, that plaintiff was not required to show that defendant acted illegally, that material factual issues existed as to whether defendant's actions were justified as actions taken in the scope of her employment, and that questions remained as to whether defendant's inquiries into plaintiff's personal life and alleged misrepresentations about plaintiff's job security amounted to extreme and outrageous conduct. Bradley v. Hall, 720 N.E.2d 747, 752.

Ind.App.1998. Quot. in case quot. in disc. Seven-year-old boy was injured when he became entangled in fence at city playground; his family brought tort action against city, seeking damages for the harm they sustained in witnessing the accident. The trial court granted city's motion for judgment on the pleadings. Affirming, this court held that, to the extent family members alleged that boy was the victim of an assault resulting in emotional distress to them, the complaint failed to state a claim on which relief could be granted. Rivera ex rel. Rivera v. City of Nappanee, 704 N.E.2d 131, 133.

Ind.App.1997. Cit. in headnote, quot. in case quot. in disc. After a deceased man's daughter sued the deceased's second wife for exerting undue influence over the deceased, the second wife disinterred the deceased's remains and removed the headstone from his grave. The daughter and other family members then sued the second wife for intentional infliction of emotional distress, among other claims. Trial court awarded plaintiffs damages. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that there was sufficient evidence to support trial court's judgment that defendant intentionally committed extreme and outrageous conduct and that such conduct caused plaintiffs severe emotional distress. Defendant disinterred the deceased's remains and removed the headstone, even though she knew that the deceased's family members customarily decorated the deceased's grave on Memorial Day. When the family members arrived at the grave site, they suffered extreme emotional trauma when they discovered the grave had been desecrated.

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The daughter also suffered emotional distress when she was informed that the grave had been desecrated. Mitchell v. Stevenson, 677 N.E.2d 551, 554, 563.

Ind.App.1996. Cit. in headnotes, quot. in case quot. in disc., com. (d) quot. in disc. Deputy sheriff who was suspected, but later acquitted, of switching price tags on store merchandise sued sheriff, among others, for, inter alia, intentional infliction of emotional distress. The trial court granted sheriff's motion for summary judgment. Affirming, this court held that sheriff did not engage in extreme and outrageous conduct when he issued arrest and search warrants for deputy, detailed the misconduct during a press conference, and attempted to deny deputy his pension. Conwell v. Beatty, 667 N.E.2d 768, 770, 775-776, 777.

Ind.App.1996. Cit. in headnotes, quot. and adopted in case quot. in disc., com. (d) quot. in disc., appendix cit. in disc. Couple that agreed to pay contractor $80,000 to build their new home sued contractor for fraud after they discovered that the final cost of the house was going to exceed $120,000. Couple also asserted a claim for intentional infliction of emotional distress against contractor's wife in connection with threatening phone calls she made to couple. The trial court granted defendants' motions for summary judgment. Affirming in part and reversing in part, this court held that the corporate veil of contractor's construction company did not insulate him from liability for fraud where he personally participated in the alleged misconduct, but that summary judgment was properly entered for wife, as the phone calls, while unreasonable, did not constitute outrageous conduct. Gable v. Curtis, 673 N.E.2d 805, 809-810.

Ind.App.1996. Cit. in headnote, quot. in case quot. in disc. Former employee who alleged that, after he was terminated, his former employer prevented him from pursuing his rights under his union's collective-bargaining agreement sued employer for, inter alia, intentional infliction of emotional distress. The trial court granted employer's motion for summary judgment. Affirming, this court held that employee's claim was preempted by § 301 of the Labor Management Relations Act because resolution required interpretation of the collective-bargaining agreement. Short v. Haywood Printing Co., Inc., 667 N.E.2d 209, 210, 214.

Ind.App.1994. Subsec. (1) quot. generally in case quot. in sup. Husband and wife sued wife's former husband and hospital for intentional infliction of emotional distress, among other claims, after hospital released to former husband plaintiff husband's mental-health records. This court affirmed the trial court's granting of summary judgment to hospital, since hospital complied with what it reasonably believed was a valid subpoena duces tecum. The court, however, reversed and remanded the trial court's granting of summary judgment to former husband, stating that a genuine issue of material fact remained concerning former husband's intent to harm plaintiff husband emotionally, noting both the level of animosity between former and current husband and the undisputed evidence that former husband referred to plaintiff husband's mental-health condition in court proceedings where plaintiff's mental health was irrelevant. Watters v. Dinn, 633 N.E.2d 280, 292.

Iowa,

Iowa, 2019. Com. (d) quot. in case quot. in sup. Former employee of state department of public safety sued state and others for, among other things, intentional infliction of emotional distress in connection with his termination. The trial court granted summary judgment for defendants. Affirming in part, this court held that defendants' alleged behavior did not rise to the level of outrageous conduct necessary to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court pointed out that plaintiff's allegations—that defendants deliberately endangered lives by sending representatives to his house to place him on administrative leave, and that his supervisors repeated known falsehoods regarding his threat to public safety to the governor with the knowledge that the governor would broadcast those falsehoods—was not substantial evidence of conduct so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Hedlund v. State, 930 N.W.2d 707, 724.

Iowa, 2014. Coms. (e), (h), and (j) quot. in sup. Former state-university employee sued university and state for intentional infliction of emotional distress and other claims, alleging that his supervisor engaged in outrageous, retaliatory conduct against him over a substantial period of time in an attempt to cover up her own theft from university. The trial court entered judgment on a jury verdict for employee. The court of appeals affirmed as to employee's emotional-distress claim. Affirming that portion of the decision, this court, citing Restatement Second of Torts § 46, held that there was sufficient evidence that defendants engaged in outrageous conduct and that plaintiff suffered from severe or extreme distress to submit employee's claim to the jury. The court reasoned that the conduct here constituted unremitting psychological warfare that exceeded a deliberate campaign to badger and harass employee and crossed the line into outrageous conduct; moreover, employee experienced mental trauma over an extended period of time, substantiated by a psychologist, which manifested itself physically in symptoms such as insomnia, light-headedness, nausea, and weight loss. Smith v. Iowa State University of Science and Technology, 851 N.W.2d 1, 26, 29, 30.

Iowa, 2013. Com. (b) cit. in case quot. in diss. op. Ecuadorian clients sued attorney for legal malpractice after their I-601 applications for permission to enter the United States were denied and they were barred from readmission to the country for 10 years. The trial court granted attorney's motion for a directed verdict on clients' claims for emotional-distress damages. The court of appeals reversed that portion of the decision and remanded. Affirming, this court held that clients' claim for emotional-distress damages was viable, because an attorney-client relationship in the immigration context was the type of relationship in which negligent conduct was especially likely to cause severe emotional distress. The dissent argued that there were sound policy reasons against opening the door wider to claims for negligently caused pure emotional harm, even when it was foreseeable, including avoiding fictitious or trivial claims, the difficulty of establishing or disproving the nature and extent of the alleged mental injury, and limiting liability. Miranda v. Said, 836 N.W.2d 8, 40.

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Iowa

Iowa, 1996. Com. (d) cit. in case cit. in sup. University faculty member who was denied tenure sued the dean of the university for intentional infliction of emotional distress. Affirming the trial court's grant of summary judgment for defendant, this court held, inter alia, that defendant's conduct in a meeting with plaintiff in his office, during which defendant allegedly lost his temper, began yelling at plaintiff in a sexist and condescending manner, referred to her as a "young woman," and accused her of causing trouble and "making my life difficult," did not rise to the level of outrageous behavior necessary to state a claim for intentional infliction of emotional distress under Iowa law. Taggart v. Drake University, 549 N.W.2d 796, 802.

Iowa, 1996. Com. (d) quot. in case quot. in disc. and cit. generally in headnote. A discharged police officer sued the city and others alleging, among other claims, intentional infliction of emotional distress. Plaintiff alleged that the police chief had assured him that, if he pled guilty to obstruction-of-justice charges against him, he would retain his job, subject to a 30-day suspension. He further alleged that he relied on the chief's assurance to his detriment by submitting guilty and nolo contendere pleas instead of going to trial as he initially planned. Trial court granted defendants' motion to dismiss. This court affirmed, holding, inter alia, that defendants were not liable for intentional infliction of emotional distress because the police chief's actions were not outrageous. Van Baale v. City of Des Moines, 550 N.W.2d 153, 154, 156-157.

Iowa, 1991. Cit. in disc., com. (f) cit. in disc. A lawyer committed suicide shortly after receiving a letter from his law firm informing him of a delay in its decision as to when he could return to work following his hospitalization for severe depression. The decedent's wife sued the firm for intentional infliction of emotional distress, inter alia. The trial court granted the firm's motion for summary judgment. Affirming, this court held that the law firm's conduct was not so outrageous as to justify a finding of intentional infliction of emotional distress. The court noted that, although the decedent's fragile mental condition was considered in determining whether the conduct was outrageous, the conduct was not extreme, since the letter did not dismiss the decedent but indicated only that there would be a delay in deciding when he could resume working. Cutler v. Klass, Whicher & Mishne, 473 N.W.2d 178, 183.

Iowa, 1991. Com. (j) quot. in case quot. in sup. The husband of a patient who suffered a paralyzing stroke while undergoing cardiac bypass surgery sued a cardiologist for intentional infliction of emotional distress, inter alia, alleging that the cardiologist's approach in explaining the patient's severe brain damage and the prospect that she would never regain consciousness caused him severe emotional distress. The trial court directed a verdict for the defendant, finding insufficient evidence to submit the claim to the jury. Affirming, this court held that the plaintiff's testimony of feeling upset and confused by the cardiologist's advice to "unplug" the patient and his advice that the plaintiff would be broke after three months of trying to keep the patient alive fell far short of proof

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necessary to sustain a prima facie case for intentional infliction of emotional distress. Tappe v. Iowa Methodist Medical Center, 477 N.W.2d 396, 404.

Iowa, 1990. Com. (d) cit. in sup. Plaintiffs recovered a judgment against an electric cooperative association for damages that resulted when an electrical fire, caused by an imbalance in electrical voltage delivered to plaintiffs' property, destroyed their hog farrowing facility and livestock. They appealed, contending that the trial court erred in excluding evidence of lost profits and in failing to allow a claim for emotional distress. Affirming in part, this court held that the trial court correctly determined that plaintiffs' complaint did not allege conduct so extreme and outrageous as to permit a claim for intentional infliction of emotional distress. The court reversed in part and remanded for retrial on the damage issue, holding that plaintiffs should have been permitted to submit evidence of lost profits. Mills v. Guthrie County Rural Elec., 454 N.W.2d 846, 850.

Iowa, 1990. Com. (d) quot. in case quot. in disc., com. (e) cit. in disc. An employee who left his job after receiving constant verbal abuse from his supervisor sued his employer for religious discrimination and intentional infliction of emotional distress. Following a bench trial, the trial court entered judgment for the employee on both counts. Reversing in part and remanding, this court held, inter alia, that the employer took prompt remedial action to rectify the abuse and was not liable for religious harassment, and that there was insufficient evidence to raise a jury question of intentional infliction of emotional distress. The court did not decide whether the supervisor's conduct of making anti-Catholic statements was sufficiently outrageous to be actionable, stating that the plaintiff's complaints of being upset, grouchy, and nervous were insufficient to warrant a finding of severe emotional distress. Further, the causal relation between the defendant's conduct and the plaintiff's physical symptoms of weight loss and colitis was not within the common experience of a jury and required expert testimony. Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 636.

Iowa, 1989. Cit. in disc., cit. but dist., com. (d) cit. in case cit. in disc., com. (j) cit. in disc. A discharged employee sued her former employer, alleging damages for retaliatory discharge and emotional distress after she was diagnosed as suffering from a work-related skin rash and was terminated. The trial court awarded judgment on a jury verdict for the employee on the ground that she was discharged because of her threat to institute a workers' compensation claim. Affirming, this court held that the evidence supported the verdict on the wrongful discharge claim and that emotional distress damages were recoverable. The court stated that it knew of no logical reason why a wrongfully discharged employee's damages should be limited to out-of-pocket loss of income when the employee also suffered causally connected emotional harm. It also determined that the plaintiff was not required to prove that the emotional distress was severe. Niblo v. Parr Mfg., Inc., 445 N.W.2d 351, 353, 356, 357.

Iowa, 1987. Com. (d) quot. in case quot. in disc. A farmer sued the seller of a tractor he purchased and the holder of the security interest in the tractor for abuse of process and intentional infliction of emotional distress, after a criminal case was brought against him in connection with an outstanding balance on the tractor. The trial court directed verdicts for the defendants, and the intermediate

appellate court reversed and remanded for a new trial. Vacating the judgment of the intermediate appellate court and affirming the judgment of the trial court, this court held that there was no evidence that the defendants misused legal process to collect the debt. The court further held that outrageous conduct on the part of the defendants was not shown to support a claim of intentional infliction of emotional distress. Tomash v. John Deere Indus. Equipment Co., 399 N.W.2d 387, 393.

Iowa, 1986. Cit. in disc. A union sought judicial review of a decision by the state civil rights commission that found the union guilty of racial discrimination against a complainant. The trial court affirmed and ruled that the commission's finding was supported by substantial evidence. Affirming in part and reversing in part, this court upheld the commission's award of emotional distress damages concluding that the union's discriminatory acts were the basis for the victim's emotional distress that necessitated his seeking treatment for headaches. Although the court did not rule on the question of whether a civil rights complainant must show outrageous conduct as required in tort cases to prevail on a claim for emotional distress damages, it noted that some jurisdictions require such a showing and others require a showing that the distress was proximately caused by racial discrimination. Chauffeurs, Local Union No. 238 v. Iowa Civil Rights Com'n, 394 N.W.2d 375, 383.

Iowa, 1986. Subsec. (2)(a) quot. in sup., com. (1) quot. in disc. Minor children and their parents sued a neighbor who had sexually abused the children. The neighbor settled with the children, and the parents sought recovery for expenses of medical treatment of the children arising from the neighbor's conduct and for intentional infliction of mental distress. The trial court granted summary judgment to the neighbor. The state supreme court reversed in part, holding that the parents could recover for their children's medical expenses. The court affirmed in part, holding that the parents could not recover for mental distress because they were not present at the neighbor's assault. The parents became aware of the abuse two months after it occurred and therefore the court relieved the neighbor from liability. H.L.O. by L.E.O. v. Hossle, 381 N.W.2d 641, 644.

Iowa, 1986. Com. (d) cit. in case quot. in disc. This suit was brought on behalf of three children who were sexually abused by their mother and her boyfriend. The first claim against the state agency was for negligently delaying the removal of the children from the home of an inadequate and abusive parent. The second claim was for the intentional infliction of emotional distress. The trial court dismissed the negligence counts against the state but overruled a motion to dismiss the claim for intentional infliction of emotional distress. Affirming, this court held that a question of fact existed as to whether the state agency's failure to remove the children from their mother's home constituted an outrageous act for the purpose of proving intentional infliction of emotional distress. The court noted that outrageous conduct could be proved without showing that such conduct was willful and wanton. M.H. By and Through Callahan v. State, 385 N.W.2d 533, 539.

Iowa, 1986. Subsec. (2)(a) quot. in case cit. in disc. The mother of a hit-and-run victim sued the driver for intentional infliction of emotional distress, based on the driver's failure to stop and report the accident and the subsequent cover-up. The trial court awarded the driver summary judgment.

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Affirming, this court held that the elements of geographical nearness and contemporaneous perception were not present to sustain the cause of action. Roberts v. Bruns, 387 N.W.2d 140, 143.

Iowa, 1985. Quot. in sup., com. (d) quot. in case quot. in sup. A bank refused to honor a cashier's check that it had made out to the plaintiff. The plaintiff had obtained the cashier's check by cashing a personal check from a third party who the plaintiff had known lacked sufficient funds to cover the personal check. The plaintiff brought this action for the amount of the check and for compensatory and punitive damages. The jury found for the plaintiff against the bank, and this appeal followed. Finding insufficient evidence of either outrageous conduct or severe emotional distress, this court overturned the plaintiff's claim for damages for mental anguish. Bossuyt v. Osage Farmers Nat. Bank, 360 N.W.2d 769, 776.

Iowa, 1985. Com. (d) quot. in sup. A gas station cashier sued an employer and its area manager for libel and slander, breach of an employment contract, wrongful discharge, and tortious infliction of emotional distress after she was fired due to a company policy that mandated that all workers on a given shift be fired when the cash register was short. The cashier received a form from her employer to give to the unemployment office stating that the employee had been terminated because of "unexplained shortages." The trial court entered judgment on a jury verdict for the libel, slander, and emotional distress claims and dismissed the claims for wrongful discharge and breach of employment contract. All of the parties appealed. This court reversed on the libel, slander, and emotional distress claims, and affirmed the dismissal of the wrongful discharge and breach of employment contract claims, holding that the form supplied to the employment office was absolutely privileged under an Iowa statute, and that the defendant's conduct was not sufficiently outrageous to sustain the emotional distress claim. Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98, 104-105.

Iowa, 1985. Cit. in disc., subsec. (1) cit. in disc., com. (d) quot. in sup., com. (d) quot. in case quot. in sup. An employee brought an action against his employer, alleging wrongful discharge and tortious infliction of emotional distress resulting from his termination. The employee claimed that his termination was due to his treatment for alcoholism and that his supervisor yelled at him and accused him of misconduct. His employer contended that the termination was based on poor job performance. The trial court entered summary judgment for the employer. This court affirmed, holding that the supervisor's conduct was not so extreme as to satisfy the element of outrageous conduct necessary to an action for tortious infliction of emotional distress. Northrup v. Farmland Industries, Inc., 372 N.W.2d 193, 197, 198, 199.

Iowa, 1985. Com. (d) quot. in sup. An employee sued a bank, a bank director, and others for intentional infliction of emotional distress, slander, intentional interference with his employment contract, wrongful discharge, and breach of an option contract. The trial court dismissed all claims due to insufficient evidence, and the state supreme court affirmed. The bank's relocation of the employee, at the director's instigation, from a branch office close to his home where he had worked for six weeks, back to the main office out of which he had previously worked for 17 years, did not constitute such outrageous conduct as to support a cause of action for intentional infliction

of emotional distress. The court also held that the director's conduct in forcing plaintiff's office relocation did not constitute intentional interference with plaintiff's employment contract. Because plaintiff had no contractual right to remain in the branch office, his transfer was not a breach of his contract with the bank, and without a breach between the two parties there was no tort of intentional interference with contract. Reihmann v. Foerstner, 375 N.W.2d 677, 681.

Iowa, 1984. Com. (j) quot. in part in sup., coms. (h) and (j) cit. in sup. Farmers gave their neighbor permission to use their field as a path as long as the ground was frozen. Although the neighbor informed his buyer of that condition, the buyer's employee drove across the field when it was no longer frozen, thereby damaging the land. This court remanded the case for a substituted judgment setting aside the verdicts for compensatory and punitive damages for emotional distress and the award of attorney fees, and reinstated the verdict for damages for trespass. This court held that the record lacked substantial evidence that the farmers suffered distress so severe that a reasonable man could not be expected to endure it. The issue of intentional infliction of emotional distress, therefore, should not have been submitted to the jury. Bethards v. Shivvers, Inc., 355 N.W.2d 39, 44.

Iowa, 1984. Subsec. (1) cit. in disc., com. (d) cit. in disc. The plaintiff brought an action for breach of contract and intentional infliction of emotional distress after the defendant bank refused to lend him money. The jury found for the plaintiff. On appeal, the defendant claimed that an agreement to lend the plaintiff $25,000 lacked consideration, as more consideration than a promise to pay was required to support a promise to lend money. This court affirmed in part, reversed in part, and remanded. First, the court found that an offer and acceptance existed when the bank promised to lend and plaintiff executed the note. The court held that performance on the part of the plaintiff was sufficient consideration. As to the emotional distress claim, the court held that the bank's breach of contract did not approach the requisite standard of outrageousness necessary to find liability. Harsha v. State Sav. Bank, 346 N.W.2d 791, 801.

Iowa, 1984. Com. (d) cit. in case quot. in sup., com. (e) quot. in sup. The defendant employed the plaintiff as a school bus driver. The plaintiff recorded her actual time and questioned breakdown pay and the granting of extra runs by seniority. The defendant reduced the plaintiff's route time, suspended her, and then fired her for falsifying time cards. The trial court found for the plaintiff in her suit for defamation and intentional infliction of emotional distress. This court affirmed in part but reversed the judgment based on intentional infliction of emotional distress. It held that, despite the defendant's position of authority over the plaintiff, the defendant's conduct was not so extreme and outrageous as to be considered atrocious. Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108, 118.

Iowa, 1983. Subsec. (1) cit. in disc. The plaintiff brought this action against a United States corporation and a Saudi Arabian partnership alleging breach of an employment contract, intentional infliction of emotional distress, and use of malicious threats. The trial court directed verdicts on the mental distress and malicious threats claims; the jury found for the plaintiff against the partnership alone on the contract claim. The plaintiff appealed; this court reversed in part and

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ordered a new trial on the malicious threats claim. Citing the Restatement, this court enumerated the elements of the tort of intentional infliction of mental distress and found that the trial record was so incomplete that the plaintiff's appeal must fail because it was insufficiently documented regarding several elements. Powell v. Khodari-Intergreen Co., 334 N.W.2d 127, 129.

Iowa, 1983. Subsec. (1) cit. in sup., coms. (d) and (h) quot. in sup. A husband brought an action for alleged intentional interference with marital conciliation and intentional infliction of emotional distress against an individual who proposed to his wife while she was still married to the husband but was planning a divorce. The trial court entered summary judgment for the defendant, and the husband appealed. This court affirmed, holding that there was no independent tort action for damages for interference with conciliation, and the defendant's conduct was not so outrageous as to constitute intentional infliction of emotional distress. Roalson v. Chaney, 334 N.W.2d 754, 756.

Iowa, 1983. Cit. in sup. In this case the court affirmed the trial court's order overruling defendant's motion to dismiss a claim alleging intentional infliction of physical and emotional distress caused by the defendant's seduction of plaintiff's former husband, the basis for defendant's motion being that the court had abolished the claim of alienation of affections. The court noted that the elements of the tort of intentional infliction of emotional distress and some of its policy considerations are different from those in an alienation claim. "We cannot conclude as a matter of law that no facts are conceivable under which a claim for intentional infliction of emotional distress could be maintained merely because it, like alienation claims, arises out of a failed marital relationship. Whether such facts are present is more appropriately resolved upon presentation of evidence through summary judgment, * * * or by trial." Van Meter v. Van Meter, 328 N.W.2d 497, 498.

Iowa, 1981. Cit. in sup., coms. (h), (j) and (k) cit. in sup. and com. (j) quot. in part in sup. The plaintiffs needed a large sum of money in order to buy two businesses but were unable to procure a bank loan. The defendant signed a bank note in order to allow the plaintiffs to obtain the money. The parties continued their relationship, the defendant was comaker on another note, they became co-owners and purchased additional land together. Eventually, the business relationship deteriorated so the plaintiffs sold their interest in the business to the defendant. The plaintiffs then sued, inter alia, for intentional infliction of emotional distress. The defendant appealed from a jury verdict in favor of the plaintiffs. The defendant argued on appeal that the evidence was insufficient for the claim to go to the jury because the plaintiffs had not shown that the defendant's conduct was outrageous or that the plaintiffs' distress was severe and extreme. This court stated that the plaintiff needed to show that the defendant had intentionally caused or recklessly disregarded the probability of causing emotional distress and that the defendant's outrageous conduct was the actual and proximate cause of the plaintiffs' emotional distress. This court stated that although emotional distress includes all highly unpleasant mental reactions, it is only when the reaction is extreme, whether physical or emotional, that the plaintiff is entitled to compensation. In some cases, the outrageousness of the defendant's conduct may be enough evidence that the distress was severe. In this case, the court found that the plaintiff had not carried his burden of showing severe and extreme emotional distress. The court stated that more evidence is necessary than that the plaintiff felt badly for a month and evidence was needed to show distress during the relationship.

This court held therefore that the lower court erred by submitting the plaintiffs' claim of intentional infliction of emotional distress to the jury. Paulsen v. Russell, 300 N.W.2d 289, 297.

Iowa, 1977. Cit. coms. (d) and (f). This was an action for damages resulting from injury to plaintiff's business as a result of defendant's alleged tortious debt collection practices. Plaintiff appealed after the lower court had announced its intention to dismiss the case against one defendant and after a jury verdict was returned for the other defendant. There was no recorded judgment upon the jury verdict. In dismissing the appeal, the court held that, as there was absent a final judgment on the direct verdict and as there was no record of the jury verdict, it had no jurisdiction to entertain the appeal even though defendant had not moved for a dismissal. DeKruyff v. Johnston, 252 N.W.2d 389, 390.

Iowa, 1977. Cit. in disc. and com. (f) cit. in disc. Plaintiff, a borderline mental retardate, worked as a maintenance man in defendant's store. Plaintiff "borrowed" defendant's floor scrubber to moonlight by cleaning tavern floors. He also took cleaning materials for the scrubber. A security officer of defendant interrogated plaintiff, threatened plaintiff with jail, and had plaintiff sign several statements concerning the use of the scrubber and the cleaning materials, sign a confession to the theft of store merchandise worth $5000, and sign a promissory note to defendant store for $5000. A clinical psychologist testified that some of the words were beyond plaintiff's comprehension, and plaintiff testified that he signed documents under threat of jail. Plaintiff also testified as to mental anguish from the incident, and that he had recurring dreams which affected his relationship with his family. The trial court overruled a motion for a directed verdict by defendant, and the jury found for plaintiff. Defendant moved for a judgment n.o.v. and also for a new trial. The motion for a new trial was sustained, and plaintiff appealed. The issue before the court was that plaintiff did not predicate his claim on a common law tort, but rather on a criminal statute on malicious threats. The court held that this statute does give rise to a civil cause of action, that plaintiff's execution of the statements under compulsion and duress is a recognized common law defense to an action on a note between the original parties. Therefore, the trial court should have overruled defendant's motion for a new trial, and this court returned the case for reinstatement of the verdict and the judgment thereon. Hall v. Montgomery Ward & Co., 252 N.W.2d 421, 425.

Iowa, 1976. Com. (d) quot. in part and cit. in disc., com. (i) cit. in disc. Action against a mortician for mental distress suffered by plaintiff as a result of defendant's manner of dealing with plaintiff's deceased father's burial. For plaintiff to recover, he must show outrageous conduct by defendant evidencing intent to cause, or reckless disregard of the probability of causing, emotional distress. On appeal from summary judgment for defendant, the court held that it was for a jury to determine if defendant's conduct were "outrageous." Meyer v. Nottger, 241 N.W.2d 911, 918.

Iowa, 1972. Subsec. (1) cit. but dist. The court held that an insured did not state a cause of action for intentional infliction of severe emotional distress in an action brought against his insurer for failure to pay a fire loss claim, because there was no hint of "conduct exceeding all bounds usually tolerated by society" where the insurer waited a reasonable period for an arson investigation and

where the amount of loss was unknown both to the insurer and the insured. Amdsen v. Grinnell Mutual Reinsurance Co., 203 N.W.2d 252, 255.

Iowa, 1970. Quot. but dist. illus. 7, 15, 16 cit. in sup. Lender sued Borrowers on a note; defendants answered and filed a counterclaim for damages for mental anguish, malicious harassment, and invasion of privacy. Defendants appealed from a judgment for plaintiff and a dismissal of their counterclaim seeking $15,000 for credit harassment. The court affirmed. It held that it was not an abuse of discretion to deny a jury trial to defendants when the request did not comply with the pertinent procedural rule; nor to overrule their objections to plaintiff's Certificate of Readiness (to try all issues). Since no discovery procedures were attempted and prohibited there was no justiciable issue. On the merits, the court held that plaintiff's failure to furnish a copy of defendants' reaffirmation of their obligation (after discharge in bankruptcy) did not render the note unenforceable because the debt was merely revived and the suit was based on the original obligation. The court also decided the public interest would be best served by denying the defendants a remedy for the plaintiff's failure to furnish receipts. The court ruled that, as in written agreement, the defendants were obligated on the unpaid balance, plus interest, calculated at original terms. It thereby dismissed the defendants' counterclaim for overpayment, based on principal only. The discharge in bankruptcy of the husband did not discharge the wife, who remained liable as a comaker of the loan. Finally the court dismissed the counterclaim for mental anguish and invasion of privacy because the evidence did not require a finding that plaintiff's conduct in requesting payment willfully or intentionally sought to cause mental anguish, and telephoning the wife at her place of employment was not an invasion of privacy as a matter of law. Beneficial Finance Co. of Waterloo v. Lamos, 179 N.W.2d 573, 582.

Iowa App.

Iowa App.1996. Cit. in headnote, cit. in disc., subsec. (1) cit. in disc. Daughter of nursing-home resident who committed suicide sued nursing home for loss of parental consortium and for tortious infliction of emotional distress. The trial court directed a verdict for defendant on the issue of emotional distress but submitted the claim for loss of consortium to the jury, which found in plaintiff's favor and awarded her $400,000 in damages. After ordering a remittitur to $100,000, the trial court entered judgment accordingly. Affirming and remanding, this court held that statements made by defendant's employees concerning decedent's suicide, although careless, were not outrageous, and that the trial court did not abuse its discretion by ordering the remittitur. Lamb v. Newton-Livingston Inc., 551 N.W.2d 333, 334, 338.

Iowa App.1995. Cit. in headnotes, com. (d) quot. in case quot. in sup. Demolition experts who alleged they were exposed to asbestos while demolishing a building sued their employer and the owner of the building for negligence and intentional infliction of emotional distress. The trial court granted defendants' motions for summary judgment. Affirming, this court held that plaintiffs, who were unable to show they presently suffered any effects of asbestos exposure, were limited to bringing their claims under the state workers' compensation law. Furthermore, plaintiffs failed to

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prove that defendants acted outrageously, atrociously, or in a manner intolerable to a civilized society, causing plaintiffs severe emotional distress. Slaymaker v. Archer-Daniels-Midland Co., 540 N.W.2d 459, 459-461.

Iowa App.1993. Com. (d) quot. in case quot. in sup. A nurse sued her hospital and supervisor for sexual harassment and intentional infliction of emotional distress. Affirming trial court's dismissal of the action, this court held that, as substantial evidence supported the finding that the nurse had not been subjected to sexual harassment, the nurse had not satisfied her burden of proof with regard to her emotional distress claim. The court stated that the supervisor never made any sexual overtures to the nurse and did not discuss sexual matters with her. Edmunds v. Mercy Hosp., Cedar Rapids, 503 N.W.2d 877, 880.

Iowa App.1989. Com. (d) cit. in disc. and quot. in sup. A hospital employee was transferred within departments, suspended, and finally dismissed after his supervisor continually received complaints from his co-workers that his performance was substandard. The employee sued the hospital, claiming he suffered emotional distress as a result of the defendant's harassment. The trial court entered judgment for the plaintiff based on a jury verdict awarding him actual and punitive damages for intentional infliction of emotional distress. Reversing, this court held, inter alia, that the plaintiff presented insufficient evidence of outrageous conduct to create a jury question on the emotional distress claim. The court found no extensive scheme of harassment and noted testimony that the transfer and eventual dismissal of the plaintiff was necessary to protect the patients as the plaintiff was making numerous errors in conducting laboratory tests. McClinton v. Iowa Methodist Med. Center, 444 N.W.2d 511, 512, 514.

Iowa App.1987. Com. (h) quot. in diss. op. A husband sued his wife's dentist for intentional infliction of emotional distress after the dentist had an affair with plaintiff's wife. When the suit was dismissed, the plaintiff's attorney failed to file a timely appeal. The plaintiff sued the attorney for malpractice, but the trial court granted the defendant's motion for summary judgment. Affirming, the majority of this court held that the plaintiff's underlying cause of action would not have been successful because the dentist's conduct was not outrageous as a matter of law; therefore, the attorney was not liable even if his conduct was negligent. The dissent argued that reasonable members of a jury could find that the dentist's conduct as a professional had been sufficiently extreme and outrageous to result in liability. Kunau v. Pillers, Pillers & Pillers, P.C., 404 N.W.2d 573, 580.

Iowa App.1984. Cit. in cases cit. in disc., com. (d) quot. in disc., coms. (d) and (g) cit. in diss. op. Employee sued former supervisors for intentional infliction of emotional distress, alleging that defendants' unmerciful harassment after arbitration of a grievance caused his psychiatric illness. This court reversed the trial court's grant of judgment n.o.v. The court held that while the individual acts alleged might be merely insulting, the jury could properly conclude that all the incidents together amounted to a course of conduct exceeding all bounds usually tolerated by decent society. The dissent argued that defendants' conduct did not meet the legal test for outrageousness, and that

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the conduct was privileged because defendants believed they were furthering the interests of their employer in a legal way. Blong v. Snyder, 361 N.W.2d 312, 316, 318.

Iowa App.1982. Coms. (j) and (k) cit. in case quot. in disc. A homeowner brought suit against a manufacturer of prebuilt homes to recover damages due to the defendant's alleged use of defective materials in the construction of the plaintiff's home. The plaintiff also sought damages for mental anguish and emotional distress as a result of the defendant's alleged negligence. The defendant then filed a cross-petition against a third-party defendant, seeking indemnification. The trial court entered judgment for the plaintiff and also for the defendant on its indemnity claim. On appeal, the defendant argued that the plaintiff failed to prove by substantial evidence the elements of intentional infliction of emotional distress. After a review of the plaintiff's evidence, this court concluded that there was substantial evidence the the plaintiff suffered extreme emotional distress proximately caused by the defendant's conduct. Therefore, the court affirmed in part, holding that the trial court did not err in submitting this issue to the jury. The judgment against the third-party defendant was reversed another grounds. Randa v. U.S. Homes, Inc., 325 N.W.2d 905, 908.

Kan.

Kan.2010. Com. (g) quot. in sup., com. (j) cit. in sup. After television station incorrectly reported that arrestee was being held as a suspect in a serial-murder investigation, arrestee brought a claim for the tort of outrage, inter alia, against television station's owner and news director. The trial court entered judgment on a jury verdict for plaintiff on the claim. Reversing as to this portion of the judgment, this court held that plaintiff failed to present sufficient evidence to prove that the injury he suffered was extreme within the context of this action for outrage; elevated fright, continuing concern, embarrassment, worry, and nervousness did not by themselves constitute sufficient harm to warrant an award of damages for outrage. The court noted that plaintiff's testimony also did not attempt to separate the anxiety suffered as a result of legitimate, constitutionally protected news reporting from any distress caused by defendants' alleged unprivileged conduct. Valadez v. Emmis Communications, 290 Kan. 472, 229 P.3d 389, 394, 395.

Kan.2004. Cit. in case cit. in disc., com. (b) quot. in disc. After hospital employee obtained consent from deceased patient's purported common-law wife to harvest his organs and tissues, patient's daughters brought suit in federal district court against hospital for intentional infliction of emotional distress and outrage, inter alia. Plaintiffs filed their suit 21 months after patient's death. Answering a certified question, this court determined that the statute of limitations on a claim of outrage and intentional infliction of emotional distress was two years. The court rejected defendant's argument that, since the tort of outrage had roots in the common-law tort of assault, it should have the same one-year statute of limitations as the tort of assault. Hallam v. Mercy Health Center of Manhattan, Inc., 278 Kan. 339, 97 P.3d 492, 496.

Kan.1991. Cit. generally in case quot. in sup., subsec. (1) cit. in sup. and cit. in case quot. in sup., com. (h) cit. and quot. in case quot. in sup., com. (j) cit. and quot. in sup., com. (k) quot.

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in sup. A former employee and her husband sued her former employer for assault, battery, false imprisonment, and intentional infliction of emotional distress, alleging that the former employer refused to pay the former employee, shoved her, locked her in a building, and filed intentionally false police reports against her and her husband, and induced an employee to lie to the police about the plaintiffs' alleged involvement in vandalism. The trial court entered judgment on a jury verdict for the plaintiffs, but the intermediate appellate court reversed. Reversing the appellate court's decision and affirming the trial court, this court held, inter alia, that reasonable people could regard the defendant's abuse of the criminal justice process as atrocious and utterly intolerable behavior, and that the enormity of the outrage created by the former employer's conduct was sufficient to satisfy the requirement of severe and extreme emotional distress for the tort of outrage. Taiwo v. Vu, 249 Kan. 585, 822 P.2d 1024, 1028-1031.

Kan.1986. Subsec. (1) quot. in case cit. in disc. Following her son's death, the plaintiff expressed her desire that an autopsy not be performed, even though it was required by law, or at most, the plaintiff consented to a limited autopsy, excluding an examination of the brain. Several weeks after the son's burial, the plaintiff learned that a complete autopsy had been performed, including the brain. The plaintiff sued her son's treating physician for negligent infliction of emotional distress based on interference with a dead body, and sued the state for the outrageous conduct of its employee, the physician who had informed the plaintiff that a state hospital "had her son's brain in a jar." The trial court granted summary judgment for both defendants. This court affirmed, holding that the treating physician was not liable for emotional distress because his interference with the dead body had not been intentional or malicious, but that this defendant was liable for the costs of exhuming the son's body and its reburial because he had assumed a duty of care toward the plaintiff when he took on the responsibility of relaying the mother's request for a partial autopsy to the coroner, and then he breached that duty by failing to convey the request. The court further held that the state was not liable because its employee's conduct in informing the mother that the brain had been autopsied was not sufficiently outrageous or extreme in degree to support a claim for intentional infliction of emotional distress. Burgess v. Perdue, 239 Kan. 473, 721 P.2d 239, 242.

Kan.1985. Subsec. (1) cit. in case quot. in sup., coms. (f), (h) and (i) cit. in case quot. in sup. Subcontractor and his wife sued prime contractor for intentional infliction of emotional distress, alleging that defendant's superintendent had attempted to force plaintiffs to pay a debt by falsely informing them that the sheriff was coming to make an arrest. This court reversed the jury verdict for plaintiffs, finding that the defendant's call to plaintiffs' business concerning an insufficient fund check in which defendant had a legitimate interest was not the extreme and outrageous conduct necessary to support the tort of outrage. The court also found that although defendant knew that the wife had recently suffered a miscarriage, his delivery of the message to her in a nonabusive manner was not the equivalent of maliciously giving a disturbing message to a critically ill or mentally unbalanced person. Neufeldt v. L.R. Foy Const. Co., Inc., 236 Kan. 664, 693 P.2d 1194, 1197.

Kan.1983. Quot. in case quot. in sup. A realtor mistakenly informed a class of prospective realtors that the father of a murdered boy was being held as a suspect in the crime, and the father and his wife subsequently sued the realtor and his employer on claims of slander, outrage, defamation

of character, and invasion of privacy. After the trial court granted summary judgment to the defendants on all claims, the plaintiffs appealed. This court affirmed in part, reversed in part, and remanded. The court ruled that the realtor was not privileged in making the offending statements, thereby rejecting a trial court finding that the father was a public figure and also rejecting the realtor's contention that the common interest or duty doctrine of qualified privilege was applicable to the facts at hand. The court accordingly reversed the trial court's ruling on the father's claim of slander and remanded for a trial on that issue. The court affirmed the trial court ruling that the plaintiffs had established no claim based on outrageous conduct by the realtor, noting that the statements of the realtor, while improper, were neither beyond all possible bounds of decency nor utterly intolerable in a civilized community. Hanrahan v. Horn, 232 Kan. 531, 657 P.2d 561, 566.

Kan.1983. Com. (d) cit. in sup. The plaintiffs were the parents of a girl who was injured in a car accident. The plaintiffs' daughter and another girl suffered massive head injuries in the accident, and the girls were taken to separate hospitals. A police officer followed the ambulance carrying the other girl to the hospital, and because the wrong purse was sent along, the officer mistakenly deduced that the girl was the plaintiffs' daughter. The plaintiffs were notified, and after their arrival at the hospital they were told by hospital officials that their daughter had died. Shortly thereafter they learned that their daughter, although injured severely, was alive at another hospital. The plaintiffs had both been in poor health and after the incident their conditions deteriorated further. The brought an action against the hospital alleging emotional distress caused by the extreme and outrageous conduct of the hospital in misinforming them as to their daughter's condition. The trial court directed a verdict in favor of the hospital and the plaintiffs appealed. This court affirmed on the grounds that the hospital's conduct had not been so severe and outrageous as to subject it to liability, as it had justifiably relied on the police officer's mistaken identification. Hoard v. Shawnee Mission Medical Ctr., 233 Kan. 267, 662 P.2d 1214, 1223, 1225.

Kan.1981. Subsec. (1) cit. in sup., coms. (f), (h), and (j) cit. in sup. The plaintiff, a hospital patient, brought this action against the defendant doctor in order to recover for the intentional infliction of emotional harm. This suit resulted from an encounter between the plaintiff and the defendant doctor, whom the plaintiff had previously sued and settled with, in a hospital. The plaintiff was being prepared for surgery when the defendant doctor walked over to her and, with a hostile look, shouted, “I don't like you, I don't like you, and I wanted to let you know that before you went in there!” The trial court sustained a motion for summary judgment in favor of the defendant doctor. The intermediate court reversed and remanded this case for trial. This court reversed the intermediate court's decision and entered summary judgment for the defendant. This court found that the doctor's conduct was neither extreme nor outrageous enough to trigger tort liability, because the defendant doctor's dislike for the plaintiff was no surprise, there was no doctor-patient relationship at the time, and the incident was apparently just a chance encounter. This court also held that the emotional distress suffered by the plaintiff was insufficient to recover upon because the total extent of the plaintiff's distress was only continuing concern and nervousness, and the plaintiff did not suffer an impairment of normal functioning, nor did she require treatment for emotional distress. Roberts v. Saylor, 230 Kan. 289, 637 P.2d 1175, 1179, 1180.

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Kan.1980. Cit. in disc. This case, filed in federal court, presented a question to be answered by Kansas law which controlled the substantive legal issues of the case. The question was whether the tort of bad faith was recognized in Kansas. The court stated that bad faith, as an independent tort, was a recent development in law designed to afford an insured a remedy against an insurer. The bad faith tort was designed to rectify the unequal bargaining position of the insured and to recognize the importance of the public interest nature of the insurance industry. Courts which had rejected the bad faith tort argue that contract remedies are sufficient to protect an insured and that the public interest nature of insurance is not a sufficient basis on which to adopt a new tort. Also, many states have enacted statutory penalties against insurers who act in bad faith. Kansas already had the tort of outrage which provided the same protection that the tort of bad faith was designed to provide. A claim by a third party may be a better ground for the new tort, but the question here involved a first party claim. The insurer and the third party are involved in a fiduciary relationship, while the insurer and the first party are involved in an adverse relationship. According to Kansas statutes, insureds are protected from the bad faith of an insurer by legislative remedies. The court found it inappropriate to expand the legislative remedies by judicial decree. The court held that the tort of bad faith was not recognized in Kansas. Spencer v. Aetna Life & Cas. Ins. Co., 227 Kan. 914, 611 P.2d 149, 153.

Kan.1979. Cit. in sup., subsec. (1) quot. in sup., subsec. (2) quot. in sup., com. (d) quot. in part in sup. Neighbor appealed from a judgment awarding adjoining landowner's wife damages for emotional distress sustained by the wife upon witnessing a fence line dispute in which the neighbor assaulted her husband. The court held that the conduct of the neighbor consisting of spontaneous verbal outbursts, profane and disparaging, coupled with the assault upon her husband, upon the neighbor's discovery that the husband and another adjoining landowner were fencing part of the neighbor's land in with their own was not extreme and outrageous as a matter of law, and that such conduct was not of the type and nature as would ordinarily cause emotional injury to bystanders, whether or not they were members of family of the person assaulted. Accordingly, the husband and wife failed to show that the neighbor intentionally or recklessly caused the wife severe emotional distress, and the evidence was insufficient, as a matter of law, to establish the wife's claim for intentionally inflicted emotional distress. Wiehe v. Kukal, 225 Kan. 478, 592 P.2d 860, 862, 863.

Kan.1976. Subsec. (1) quot. in disc. Action for damages for invasion of privacy resulting in summary judgment for defendant after discovery was completed. Plaintiff appealed. Defendant bank foreclosed on plaintiff's property for a delinquent loan and bought the house in the foreclosure sale, giving plaintiff a six-month option to redeem. While she was arranging financing, a representative of defendant visited her. When she answered the door, he gave her his business card, entered her front room and sat down. She had not invited him in, but she also did not ask him to leave, and, ultimately, even gave him a tour of the house. He informed her of the difficulty she would have in procuring financing and made her an offer for the house. Subsequent to this visit, plaintiff did secure the necessary money and redeemed the house. Judging the evidence in a light most favorable to plaintiff, the facts failed to disclose actionable invasion of privacy, or conduct sufficiently extreme or outrageous to justify liability for mental distress, and summary judgment

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was properly granted. Vespa v. Safety Federal Savings and Loan Association, 219 Kan. 578, 549 P.2d 878, 881.

Kan.1975. Subsec. (1) quot. but dist.; com. (d) quot. but dist.; coms. (f)and (h) cit. but dist. Subsec. (1) also quot. in syllabus by the Court. A creditor bank took over the management function of a debtor restaurant operator. A suit arose concerning various claims and counterclaims. The jury found the creditor guilty of debtor harassment and of invading the debtor's privacy. The trial court entered judgment on this verdict, and the creditor appealed. In reversing, the court stated that the creditor's assumption of the management of the debtor's restaurant business was insufficient, as a matter of law, to establish invasion of privacy or debtor harassment constituting outrageous conduct causing severe emotional distress. Dotson v. McLaughlin, 216 Kan. 201, 531 P.2d 1, 2, 7, 8.

Kan.1974. Subsec. (1) quot., and coms. (e), (h), and (f) cit., and fol.The plaintiff debtor sued her creditor for harassment, and a health insurer,which was a subsidiary of the creditor's parent, for refusing to make payments under her policy. The plaintiff alleged that after she became unable to keep up with her loan payments as a result of illness, the insurer failed to pay and the creditor made harassing phone calls to her and her parents. The trial court directed a verdict in favor of the creditor and against the insurer. The appellate court reversed with respect to the creditor and remanded for a new trial, holding that a cause of action for debtor harassment exists if the creditor engages in extreme and outrageous conduct, and that the trial court improperly excluded evidence of the telephone calls made to the plaintiff's parents. Dawson v. Associates Financial Services Co., 215 Kan. 814, 529 P.2d 104, 109, 113.

Kan.App.

Kan.App.2020. Com. (d) quot. in sup. Family members of a party guest who suffered from chronic mental illnesses brought, among other things, a claim for intentional infliction of emotional distress (IIED) against police officer, alleging that, after defendant had been called to help take guest to a hospital, defendant unjustifiably killed guest when guest approached him in an erratic manner. The trial court granted defendant's motion for summary judgment. This court reversed in part and remanded, holding that the trial court erred in failing to recognize that there were genuine disputes of material fact as to whether defendant had the privilege to use lethal force against guest. The court explained that the unprivileged use of a firearm on a person before his family constituted extreme and outrageous conduct necessary to sustain an IIED claim under Restatement Second of Torts § 46, Comment *d*. Estate of Randolph v. City of Wichita, 459 P.3d 802, 826.

Kan.App.2013. Com. (j) cit. in sup. Father and twin brother of decedent sued cremation company and its staff, alleging the tort of outrage and other claims related to the temporary loss of decedent's cremated remains. The trial court granted summary judgment for defendants. Affirming, this court held, among other things, that none of the disputed facts alleged by plaintiffs were material to whether they suffered extreme and severe emotional distress, a required element of their claim of

outrage. While father testified that he had seen a psychologist twice following decedent's death, and brother alleged that, after the events occurred with decedent's remains, he suffered from chest pain, discomfort, and crying, and had to increase his heart and sleep medications, none of the claimed injuries rose to the level of extreme or severe distress, and the record did not explicitly show that plaintiffs sought medical treatment or psychological counseling specifically related to defendants' loss of decedent's remains. Dana v. Heartland Management Co., Inc., 301 P.3d 772, 781.

Kan.App.2002. Subsec. (1) adopted in case cit. in disc. Plaintiffs appealed trial court's dismissal of their claim for negligent infliction of emotional distress based on plaintiffs' failure to allege any physical injury. Affirming, the court of appeals held that, since the only exception to the physical-injury requirement in emotional-distress claims required an allegation of willful or wanton conduct, plaintiffs' claim was nothing more than the tort of outrage, an intentional tort barred by the applicable one-year statute of limitations. Curts v. Dillard's, Inc., 30 Kan.App.2d 814, 48 P.3d 681, 682.

Kan.App.1993. Subsec. (1) cit. in disc. Employee who was terminated for allegedly stealing company tools sued former employer for the tort of outrage, inter alia, contending that defendant, acting through its agents and employees, created a climate within the plant that made it impossible for plaintiff to return to work after an arbitrator sustained his grievance and ordered that he be reinstated. Affirming in part the trial court's granting of summary judgment for defendant, this court held, inter alia, that defendant's conduct did not rise to the "extreme" and "outrageous" level necessary to support a cause of action for the tort of outrage. Lindemuth v. Goodyear Tire and Rubber Co., 19 Kan.App.2d 95, 864 P.2d 744, 749.

Kan.App.1982. Subsec. (1) quot. in disc., com. (d) quot. in case quot. in disc., com. (e) cit. in case quot. in sup., com. (f) cit. in case quot. in conc. op. A county employee brought an action against the county and the county commissioner for assault, defamation, intentional infliction of emotional distress, and violation of civil rights arising out of an incident during which the commissioner shouted invectives at the employee for five to fifteen minutes. The district court entered summary judgment for the county and the commissioner. On the question whether summary judgment was appropriate for the assault count, this court held that issues of material fact existed on the issue of whether the commissioner's fist-shaking, pounding on a table, and shouting of invectives at the employee could have put the employee in immediate apprehension of bodily harm. On the question whether summary judgment should have been granted for intentional infliction of emotional distress, the court held that an issue of material fact existed on whether the commissioner's calling the employee a "fucking spic" constituted outrageous conduct. The court affirmed the judgment for the county, but reversed and remanded as to the counts of assault and intentional infliction of emotional distress against the commissioner. The concurrence agreed that the discovery record presented submissible claims for assault and emotional distress. Gomez v. Hug, 7 Kan.App.2d 603, 645 P.2d 916, 920-922, 928.

Kan.App.1979. Cit. in disc. A husband sued the attorney representing his wife in a separate maintenance action and sought to recover damages based on fraud, breach of contract, negligence,

outrageous conduct, oppression, intentional infliction of emotional distress and violation of disciplinary rules. The trial court entered summary judgment for the defendant and the plaintiff appealed. The appellate court affirmed and held that no contract had ever existed between the plaintiff and the defendant, nor was promissory estoppel appropriate. Professional negligence by an attorney could not apply to anyone other than his client. The court also ruled that nothing in the record indicated that defendant was aware of any facts which would indicate prior knowledge of the likelihood of harm to the plaintiff, an element necessary for the cause of action of infliction of emotional distress. The court stated that an allegation of oppression could support an award of punitive damages, but only if actual damages were first recoverable. The court added that the plaintiff had failed to prove the necessary elements of fraud. Therefore, the plaintiff was not entitled to recover. Young v. Hecht, 3 Kan.App.2d 510, 597 P.2d 682, 687.

Kan.App.1977. Quot. in sup. This was an action for slander and outrage brought against an attorney. Plaintiff's complaint, which alleged that during the course of a heated argument he had been called "nigger" and "bastard," was absent of any allegations of special damages. In affirming summary judgment for defendant, the court held that words of general abuse, regardless of how rule or vexatious, are not slanderous per se and cannot support recovery in a slander action, in the absence of the showing of special damages. Bradshaw v. Swagerty, 1 Kan.App.2d 213, 563 P.2d 511, 514.

Ky.

Ky.2016. Subsec. (1) quot. in sup., adopted in case cit. in sup. Estate of student who committed suicide, allegedly because of persistent bullying at school, brought a wrongful-death action against, among others, school teachers, alleging that they knew or should have known that student was being mistreated and they failed to stop or report the bullying. The trial court granted summary judgment for defendants. The court of appeals affirmed on grounds that student's suicide was a superseding intervening cause. This court affirmed on other grounds, holding that suicide was not a superseding intervening event barring liability for wrongful death when bullying was shown to be a substantial factor in causing the suicide, but that, here, plaintiff failed to demonstrate that defendants' failure to identify and stop the bullying was the cause-in-fact or proximate cause of student's suicide. The court explained that its recognition of the right of an estate of a suicide victim to seek recompense for bullying was consistent with its adoption of Restatement Second of Torts § 46 for liability for conduct causing severe emotional distress to another. Patton v. Bickford, 529 S.W.3d 717, 734.

Ky.2012. Cit. in disc., subsec. (1) adopted in case quot. in sup. Patient brought a claim for intentional infliction of emotional distress (IIED) against, among others, emergency-room physician who treated her for bleeding during her pregnancy, alleging that, the day after defendant told her that she had miscarried her fetus, and prescribed a contraction-inducing drug, plaintiff learned that she was still pregnant and, five days later, delivered the fetus, which did not survive. The trial court granted summary judgment for defendant; the court of appeals affirmed. Affirming,

this court held that plaintiff could not maintain her claim for IIED, because the facts of this case presented a classic situation of medical negligence instead. The court noted that there could be only one recovery for emotional distress on the same acts, since such emotional distress would have been caused either as a result of an injury done to the plaintiff physically or by outrageous conduct the purpose of which was to inflict emotional distress, but not by both. Childers v. Geile, 367 S.W.3d 576, 579, 580, 582.

Ky.2012. Cit. in ftn. Client brought a legal-malpractice action against attorney, alleging that attorney failed to file, before the applicable statute of limitations expired, a negligence suit on her behalf against pilot who crashed his airplane into her home. The trial court entered judgment on a jury verdict for plaintiff. The court of appeals affirmed in part, but vacated plaintiff's damages for pain and suffering because there was no physical impact. Reversing and remanding, this court held, inter alia, that the physical-impact rule was no longer the threshold standard in Kentucky law for claims involving emotional distress; instead, emotional-distress plaintiffs were required satisfy the elements of a general negligence claim and show, by expert or scientific proof, that the claimed emotional injury was severe or serious. The court noted that, because emotional tranquility was rarely attained and that some degree of emotional harm was an unfortunate reality of living in a modern society, recovery was only permitted when the harm experienced reached a level where a reasonable person would no longer be expected to adequately manage it. Osborne v. Keeney, 399 S.W.3d 1, 17.

Ky.2004. Cit. in disc. and cit. in ftn., subsec. (1) and com. (h) quot. in disc. and cit. in ftn., coms. (d) and (f) cit. in ftn. Store employees who were fired for allegedly violating company policy by eating candy from torn bags removed from store's shelves brought suit against store and supervisor, raising, in part, claim of intentional infliction of emotional distress arising out of the termination proceedings. Trial court entered judgment on a jury verdict in favor of plaintiffs. The court of appeals reversed. Affirming in part, this court held, inter alia, that the "indignities" plaintiffs allegedly suffered as a result of defendant's surveillance and accusations fell short of the extreme and outrageous conduct necessary to support an intentional-infliction-of-emotional-distress claim. Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 788-792.

Ky.1996. Cit. and cit. generally in disc., adopted in case cit. in sup., cit. generally in treatise quot. in sup., com. (f) quot. in sup. Former employee sued former employer for, inter alia, intentional infliction of emotional distress. After 32 years of service, employee was forced to resign and, in exchange for a severance package, was required to interview in another state for a job employer knew to be nonexistent. When employee suffered an emotional breakdown and severe depression as a result of employer's acts, employer placed him under surveillance and provided his disability-insurance carrier with inaccurate information in an effort to persuade insurer to deny coverage. The trial court entered judgment on a jury verdict for employee. Affirming, this court held that employer's conduct, which included deliberate attempts to exploit employee's frail mental condition, was sufficiently outrageous to be considered socially unacceptable. Kroger Co. v. Willgruber, 920 S.W.2d 61, 65, 67.

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Ky.1994. Cit. in cases cit. and quot. in disc., cit. in sup., coms. (d) and (i) quot. in case quot. in disc. Worker who was exposed to asbestos while removing pipes and ducts from a building's basement sued the building's owner for, inter alia, outrageous conduct causing severe emotional distress. The trial court entered summary judgment for defendant, and the court of appeals affirmed in part. Reversing and remanding, this court held, inter alia, that issues of fact as to whether defendant's failure to warn plaintiff of the presence of asbestos in the building was knowing and reckless precluded summary judgment. Capital Holding Corp. v. Bailey, 873 S.W.2d 187, 191, 195, 196.

Ky.1990. Cit. and quot. in sup., cit. in case cit. in sup., com. (d) quot. in sup., com. (e) cit. in diss. op., com. (f) cit. and quot. in sup. and cit. in diss. op., com. (h) quot. in diss. op. A hospital patient who gave birth to a stillborn fetus sued the hospital for negligence, breach of contract, and intentional infliction of emotional distress. The trial court granted summary judgment for the defendant, on the ground that the acts of the hospital staff were not sufficiently outrageous. The intermediate appellate court reversed and remanded. Reversing and remanding for entry of judgment for the hospital, this court held that although the hospital staff's conduct showed a lack of compassion in failing to respond immediately to the patient's complaints of pain, telling the patient to "shut up," and telling the patient that the baby would be disposed of in the hospital, it was not sufficient to support a claim for the tort of outrageous conduct because there was no evidence that their conduct was intentional, outrageous, or reckless, and there was no evidence that their conduct intentionally or recklessly caused the plaintiff's emotional distress. The dissent argued that a jury should have been given the opportunity to decide whether the hospital staff's conduct before, during, and after the birth of the plaintiff's child was outrageous and whether the hospital staff had knowledge of the plaintiff's susceptibility to emotional distress. Humana of Kentucky, Inc. v. Seitz, 796 S.W.2d 1, 3-5.

Ky.1986. Cit. in sup., cit. in conc. op. A worker sued his employer and its insurer for outrageous conduct leading to emotional distress for having delayed his worker's compensation payments. The trial court awarded the defendants' motion for summary judgment, and the intermediate appellate court reversed. Reversing, this court held that the Workers' Compensation Act provided an exclusive remedy and consequently barred the employee's tort action for separate damages due to the untimely payment of benefits. The concurring opinion argued that there was no cause of action for outrageous conduct because the defendants did not engage in the contemptible conduct necessary to serve as a basis for the cause of action. Zurich Ins. Co. v. Mitchell, 712 S.W.2d 340, 343, 344.

Ky.1984. Cit. in disc., quot. in sup., cit. in diss. op., com. (d) cit. and quot. in diss. op. After husband was indicted for forging weight tickets, husband and wife were allegedly harassed by a fellow coal company employee. Plaintiffs' complaint alleged that defendant had harassed them by CB radio, forced the wife's vehicle into oncoming traffic, and kept her house under surveillance, causing mental anguish that resulted in physical illness. The trial court characterized the suit as a personal injury action and granted defendant a directed verdict based on a one-year statute of limitations. The appellate court affirmed. The supreme court reversed and recognized the tort of intentional infliction of emotional distress, after comparing it to invasion of privacy. The court

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also held that the five-year statute of limitations applied regardless of whether plaintiff suffered resulting physical harm, because the essence of the tort was invasion of the right to be free from emotional distress arising from another's conduct. The dissent opposed the decision to recognize the tort and argued that plaintiffs had not met the required standard of proof. Craft v. Rice, 671 S.W.2d 247, 250-252.

Ky.1983. Cit. in disc. An employer appealed from a trial judgment and intermediate appellate affirmance for an employee in a wrongful discharge action. This court affirmed. The employee was injured, and when he returned to work, was assigned duties beyond his capabilities. He sought workers' compensation benefits and was then fired. This court held that, as an exception to the termination-at-will doctrine, an employee fired for seeking workers' compensation benefits had a cause of action for wrongful discharge, dictated by public policy. This court noted that the action should be maintained in tort as another facet of compensation for outrageous conduct and invasion of privacy. Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730, 733.

Ky.App.

Ky.App.2017. Quot. in disc.; com. (d) quot. in disc. Father and his children, tenants of a rental home, filed, inter alia, claims for intentional infliction of emotional distress and outrage (IIED) against former landlord and rental agent for damages, alleging rental charges in excess of the lease amount and failure to remediate mold exposure, which, among other things, led to the children's treatment for mold exposure that led to and exacerbated respiratory problems. The trial court granted partial summary judgment for defendants on plaintiffs' IIED and outrage claims. This court affirmed, holding that plaintiffs failed to establish an IIED or outrage claim, and noted that plaintiffs did not appeal the trial court's order regarding their IIED and outrage claim. The court pointed to the trial court's reliance on the standard set forth in Restatement Second of Torts § 46, Comment *d*, in which it noted that plaintiffs failed to describe facts evidencing "outrageous and intolerable" conduct. Joiner v. Tran & P Properties, LLC, 526 S.W.3d 94, 99.

Ky.App.2011. Quot. in sup., adopted in case cit. in sup. Former police cadet who resigned after two days of training filed a complaint against the state police and others, claiming, inter alia, intentional infliction of emotional distress arising from sleep deprivation for 24 hours, the use of a word of profanity in her presence, having to drink from a hose, being asked if she wore a sports bra, and having to share a table with a man who had cut himself while shaving. The trial court dismissed. Affirming, this court held, among other things, that while defendants' alleged actions might have been impolite or discourteous, they did not rise to the level of outrageous conduct. Burton v. Kentucky State Police, 341 S.W.3d 589, 594.

Ky.App.2010. Com. (d) quot. in case quot. in sup. As part of her action for interference with the exercise of her rights under the federal Family and Medical Leave Act, former employee brought a claim for intentional infliction of emotional distress (IIED) against employer. This court affirmed the trial court's grant of summary judgment for defendant on plaintiff's IIED claim,

holding that there was no evidence that defendant intended to cause emotional distress when it terminated plaintiff's employment or that it acted recklessly; plaintiff's wrongful termination alone was insufficient to constitute outrageous conduct sufficient to support a claim for IIED. Highlands Hosp. Corp. v. Preece, 323 S.W.3d 357, 368.

Ky.App.2009. Com. (d) quot. in case quot. in sup. Employee sued fast-food restaurant chain, her supervisor, and supervisor's fiancé, after an unknown telephone caller who pretended to be a police officer convinced supervisor and fiancé to subject plaintiff to a strip search and sexual assault, as well as other degrading acts, over a three-hour period; supervisor filed a cross-claim for intentional infliction of emotional distress (IIED) against restaurant chain. The trial court, inter alia, entered judgment on a jury verdict awarding supervisor compensatory and punitive damages on her cross-claim. Affirming in part, this court held that the trial court's denial of a directed verdict on supervisor's IIED claim was proper, since the jury's verdict was not so flagrantly against the weight of the evidence as to indicate passion or prejudice; because there was evidence that restaurant chain was aware that the hoax caller had previously targeted many other of its stores, but intentionally failed to inform its managers to protect its image, the court could not rule, as a matter of law, that chain's conduct did not qualify as outrageous. McDonald's Corp. v. Ogborn, 309 S.W.3d 274, 294.

Ky.App.2006. Com. (h) cit. in case cit. in sup. Social Security disability examinee sued examining physician, examining facility, and nonmedical assistant/facility owner for, in part, assault, battery, and outrageous conduct in connection with rough and painful treatment she allegedly received during a physical examination. The trial court granted summary judgment for defendants. This court affirmed, holding, as to the claim of outrageous conduct, that defendants' alleged actions, including yanking plaintiff's limbs beyond their range of motion, puncturing her skin during a sensory examination, and providing her with an inadequate gown that left her private areas exposed to male assistant's view, could not be reasonably regarded as so extreme and outrageous as to permit recovery. Andrew v. Begley, 203 S.W.3d 165, 173.

Ky.App.2005. Cit. in sup. Employee who was discharged sued former employer for, in part, intentional infliction of emotional distress. Affirming the trial court's grant of summary judgment for employer, this court held, inter alia, that employee's emotional-distress claim failed because employer's act of terminating employee did not rise to the level of extreme and outrageous conduct necessary to sustain the claim, and the embarrassment that employee allegedly suffered as a result of losing his job did not meet the standard of being "substantially more than mere sorrow" required by state law to satisfy the element of severe emotional distress for the claim. Benningfield v. Pettit Environmental, Inc., 183 S.W.3d 567, 572.

Ky.App.2003. Cit. in case cit. and quot. in sup. After county dog warden shot and killed a family dog, dog owners sued warden and county fiscal court members for wrongful destruction of the dog and outrageous conduct causing severe emotional distress. Trial court dismissed plaintiffs' suit. This court affirmed, holding that plaintiffs failed to state an emotional-distress claim, because there was no evidence that warden intended to inflict emotional harm on plaintiffs. Warden did

not shoot the dog in plaintiffs' presence, and he had not made positive identification of the dog's owner. Ammon v. Welty, 113 S.W.3d 185, 188.

Ky.App.2001. Subsec. (1) adopted in case quot. in disc. and cit. in ftn. High school student sued teacher for false imprisonment, assault and battery, and outrageous conduct after teacher chained student to a tree as a joke. Trial court directed a verdict for teacher. This court affirmed in part, holding, inter alia, that plaintiff's outrageous-conduct claim failed, because plaintiff could not show that teacher's actions were intended only to cause him extreme emotional distress, rather than to merely touch or to deprive him of his liberty. Tort of outrage was intended as a "gap-filler," providing redress for extreme emotional distress where traditional common-law actions did not. Banks v. Fritsch, 39 S.W.3d 474, 480.

Ky.App.2001. Adopted in case cit. in disc., quot. in sup., com. (d) quot. in sup., com. (f) quot. and cit. in sup. Owner of pet horses brought action for intentional infliction of emotional distress against farm owners who had agreed to board horses but sold them for slaughter, then lied to owner about horses' whereabouts. Trial court entered judgment on jury verdict for plaintiff. Affirming, this court held, inter alia, that plaintiff established each of the required elements necessary for liability under tort of intentional infliction of emotional distress: reckless conduct, outrageousness, causation, and severe emotional distress. Burgess v. Taylor, 44 S.W.3d 806, 811-812.

Ky.App.2001. Quot. in sup., cit. in case cit. in sup., com. (d) quot. in sup., com. (h) cit. and quot. in sup. African-American store employee sued store and coemployees for intentional infliction of emotional distress, inter alia, alleging that he was subjected to extreme racial remarks, verbal abuse, intimidation, and harassment. Trial court granted defendants summary judgment. This court reversed in part and remanded, holding, inter alia, that a jury could find that defendants' conduct was sufficiently extreme and outrageous so as to constitute intentional infliction of emotional distress. If plaintiff was subjected to racial remarks on nearly a daily basis by his coworkers and supervisors for seven years, a jury could find such conduct to be intentional, outrageous, and intolerable. Wilson v. Lowe's Home Center, 75 S.W.3d 229, 237, 238.

Ky.App.1999. Subsec. (1) and com. (d) quot. in sup. In same-sex "hostile work environment" sexual-harassment action, employee sued supervisor for intentional infliction of emotional distress. The trial court entered judgment on a jury verdict for plaintiff. Affirming, this court held, in part, that the conduct complained of, which included calling plaintiff sexually explicit names, making lewd comments, and requesting oral sex, was sufficiently extreme and outrageous as to give rise to a claim for intentional infliction of emotional distress. Brewer v. Hillard, 15 S.W.3d 1, 6, 7.

Ky.App.1993. Cit. in case quot. in disc. Workers' compensation claimant brought tort action against carrier for malicious, fraudulent, and oppressive conduct, bad-faith denial of claim, and engaging in unfair, false, misleading or deceptive acts in violation of state statutory law after carrier refused to pay for questionable back surgery and stopped claimant's temporary total disability payments. The trial court entered judgment on a jury verdict awarding claimant damages.

Reversing, this court held, inter alia, that the exclusivity provisions of the Workers' Compensation Act precluded claimant's tort action, since carrier's conduct did not rise to the level of extreme or outrageous conduct. General Acc. Ins. Co. v. Blank, 873 S.W.2d 580, 582.

Ky.App.1993. Adopted in case cit. in sup., subsec. (1) quot. in part in disc. Former parochial school student sued school employee, school, and others seeking damages for sexual abuse. The trial court dismissed the suit on limitations grounds and also entered summary judgment for all defendants except employee. Affirming, this court held that student's claims were time-barred except his claim for the tort of outrage, but there was no evidence to raise an inference that school, its owners, or its operators engaged in extreme or outrageous conduct toward student sufficient to support a claim based on this tort. While employee's admitted sexual abuse could clearly be found to be extreme and outrageous conduct, an action for the tort of outrage did not lie against him because any emotional distress inflicted on student was incident to and subsumed by employee's intentional torts of assault and battery. Rigazio v. Archdiocese of Louisville, 853 S.W.2d 295, 298.

Ky.App.1989. Cit. in case cit. in disc., com. (d) quot. in disc. An employee sued her former employer, inter alia, alleging wrongful discharge and intentional infliction of emotional distress when it fired the employee in retaliation for filing for workers' compensation benefits. The trial court entered summary judgment for the employer, concluding that jurisdiction was preempted by the federal Labor Management Relations Act, and this court affirmed in part, reversed in part and remanded. The court held that the claim of retaliation for filing a workers' compensation claim did not turn on interpretation of the collective bargaining agreement, and thus the claim was not preempted by the federal statute. Also, the court held that the conduct of the employer and the union did not reach the standard of outrageous or indecent conduct and found no error of the trial court's dismissal of the claims of intentional infliction of emotional distress. Bednarek v. Local Union 227, 780 S.W.2d 630, 632.

Ky.App.1989. Cit. in sup., coms. and illus. cit. in sup., com. (h) cit. in sup. During divorce proceedings, a wife sued her husband for outrageous conduct that caused her severe emotional distress after he committed adultery and liquidated and spent most of their marital assets. The trial court dismissed the complaint for failure to state a cause of action. Affirming, this court held that, while the emotional and financial distress caused by defendant's adultery and fraud may have been painful and difficult, defendant's actions did not rise to the level of outrageousness necessary to impose liability. Whittington v. Whittington, 766 S.W.2d 73, 74.

Ky.App.1988. Subsec. (1) and com. (d) cit. but dist., subsec. (2) cit. in disc. A mother who saw her daughter struck by a truck sued the driver for mental suffering, based on claims of negligence and outrageous conduct. This court affirmed the trial court's entry of summary judgment for the defendant, finding that his conduct was negligent, not outrageous, and that in negligence cases there could be no recovery for mental anguish without physical contact. Wilhoite v. Cobb, 761 S.W.2d 625, 627.

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Ky.App.1979. Cit. in disc. A husband sued his wife and her lover for alienation of affection and intentional infliction of emotional distress. The trial court dismissed the suit for failure to state a cause of action and the husband appealed. This court affirmed and held that one spouse could not sue the other for the intentional infliction of emotional distress caused by the other spouse openly consorting with another person. The court recognized that conduct which exceeded all bounds of decency in a civilized society was actionable but usually accompanied by physical contact or harm. The court noted that it did not believe public policy would be served by allowing recovery under this specific fact pattern, even in light of the growing trend which had allowed such recovery. Browning v. Browning, 584 S.W.2d 406, 407.

La.

La.2001. Com. (d) quot. in case quot. in sup. Former bank employee sued bank for intentional infliction of emotional distress, inter alia, alleging that supervisors harassed her and belittled her in front of customers, and that she was demoted and had her salary cut. Trial court entered judgment on jury verdict for plaintiff; appellate court affirmed. This court reversed, holding that jury erred in finding defendant liable for age discrimination and intentional infliction of emotional distress. Plaintiff was demoted for just cause, as bank needed to make reconstructive changes and there was evidence that plaintiff was not a productive employee. She had poor performance evaluations, handled personal matters on bank time, and disregarded bank policies as to transfer of customer funds. LaBove v. Raftery, 2000-1394 (La. 11/28/01), 802 So.2d 566, 578.

La.2000. Cit. in disc., com. (d) quot. in disc. Employee sued former employer for, inter alia, intentional infliction of emotional distress, alleging that he was terminated after a supervisor falsified his annual review. The trial court entered judgment on a jury verdict for plaintiff, and the intermediate appellate court affirmed. Reversing, this court held, in part, that a jury instruction that failed to explain that plaintiff was required to establish defendant's extreme and outrageous conduct was so misleading as to affect the verdict, and that, in this case, neither defendant's behavior nor plaintiff's alleged resulting mental suffering rose to the level needed to support recovery under a theory of intentional infliction of emotional distress. Nicholas v. Allstate Ins. Co., 765 So.2d 1017, 1021-1022.

La.1992. Cit. in case cit. in disc., com. (j) cit. in sup. An employee sued a co-worker, her employer, her supervisor, and a union representative for intentional infliction of emotional distress caused by the co-worker's sexual harassment of plaintiff. The trial court dismissed, since only one act complained of occurred within the statute of limitations, and that act was not outrageous; the intermediate appellate court affirmed. This court affirmed in part but reversed and remanded for further proceedings the claims against defendants other than the union representative, holding that those claims were not time-barred. The court said that the last act of harassment, occurring less than one year before suit was filed, might not have been outrageous standing alone but could have been outrageous as part of an ongoing harassment that had not abated within one year of suit being

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filed and ultimately caused plaintiff serious emotional injury. Bustamento v. Tucker, 607 So.2d 532, 538.

La.1991. Cit. in disc., cit. generally in sup. and in ftn., subsec. (1) quot. in ftn., com. (d) quot. in sup., coms. (e)-(g), (i), and (j) cit. in sup. After an employee and two other workers were subjected to a one-minute outburst of profanity by a supervisor who berated them for failing to work with adequate diligence, the employee sued the employer and the supervisor for intentional infliction of emotional distress, alleging that as a result of the incident she suffered pains in her chest and respiratory problems requiring hospitalization. The trial court entered judgment on a jury verdict for the plaintiff, and the intermediate appellate court affirmed. Reversing and rendering, this court held that the defendants were not liable because their conduct was not extreme or outrageous to a degree calculated to cause severe emotional distress to a person of ordinary sensibilities and the supervisor did not intend to inflict emotional distress of a severe nature, nor did he believe such a result was substantially certain to follow from his conduct. White v. Monsanto Co., 585 So.2d 1205, 1208-1210.

La.1990. Subsec. (1) quot. in disc. Game agents for the state stopped and searched a mudboat, and questioned and detained two duck hunters for failing to comply with duck tagging regulations. The duck hunters brought a civil rights action against the state and its game agents for damages resulting from the alleged unconstitutional arrests, searches and seizures, and infliction of emotional distress. The trial court entered judgment in favor of the hunters for actual and punitive damages. The intermediate appellate court affirmed but vacated the punitive damages award. Reversing, this court held, inter alia, that no constitutional or statutory rights were violated. The court also determined that the plaintiffs did not suffer genuine and serious mental distress to support a finding of infliction of emotional distress resulting from a message accidentally left by other state agents on the plaintiffs' camphouse door stating, “We missed you this time but look out next time.” The court found that the agents' acts were not intentional, outrageous, or related to another tort and the plaintiffs' mental disturbance was not severe or related to personal injury or property damage. Moresi v. Dept. of Wildlife & Fisheries, 567 So.2d 1081, 1095.

La.App.

La.App.2022. Com. (g) cit. in case quot. in sup. Police officer brought, among other things, a claim for intentional infliction of emotional distress (IIED) against city and police department, alleging that defendants acted in an extreme and outrageous manner that caused him severe emotional injuries when they terminated him after his arrest following a domestic dispute; city civil service commission reinstated plaintiff upon appeal, and plaintiff added current and former city employees as additional defendants. The trial court granted defendants' exception of no cause of action. This court affirmed, holding that plaintiff failed to allege facts supporting his IIED claim. Citing Restatement Second of Torts § 46, Comment *g*, the court explained that plaintiff's complaint lacked allegations that he was subjected to a pattern of repeated, deliberate harassment over time at the workplace, and defendants' actions in arresting and conducting disciplinary proceedings against

plaintiff were within their legal rights to discipline plaintiff. Cunningham v. City of New Orleans, 336 So.3d 977, 992.

La.App.2017. Com. (d) quot. in case quot. in sup. Terminated employee brought a claim for intentional infliction of emotional distress (IIED) against former supervisor and others, alleging, among other things, that supervisor created a stressful working environment by entering plaintiff's computer without permission to change plaintiff's financial reports. The trial court granted summary judgment for defendants. Affirming, this court held that there was no indication that the work stress experienced by plaintiff was anything more than stress attendant to his position; moreover, plaintiff failed to show that supervisor intentionally inflicted such distress on plaintiff or that supervisor should have known that it was certain or substantially certain to result, as required to state an IIED claim under Restatement Second of Torts § 46. Hanna v. Shell Exploration and Production, Inc., 234 So.3d 179, 200.

La.App.2014. Com. (f) quot. in sup. and cit. in case quot. in sup., illus. 9 cit. in ftn. Former resident of an assisted-living facility, who had filed an underlying action against facility, brought a separate action for intentional infliction of emotional distress (IIED) against facility's counsel, alleging that counsel engaged in outrageous conduct during a deposition by asking her, in questions posed as affirmative statements, whether she knew that her two attorneys—one of whom was her husband and the other of whom was his associate—were having an affair. The trial court granted attorney's peremptory exception of no cause of action. Reversing and remanding for further proceedings, this court held that plaintiff stated a cause of action for IIED, given the irrelevant nature of the questions, coupled with the fact that plaintiff was a 70-year-old, medically impaired resident of an assisted living facility who was alleged to be terminally ill. The court reasoned that, under Restatement Second of Torts § 46, it was appropriate to take into consideration plaintiff's position as a vulnerable victim in determining whether the questions posed by defendant constituted extreme and outrageous conduct. Sullivan v. Malta Park, 156 So.3d 751, 759.

La.App.2007. Subsec. (1) quot. in case quot. in diss. op. Insured whose home suffered wind and rain damage as a result of Hurricane Katrina sued his homeowners insurer for breach of contract and bad-faith failure to pay his claim. This court affirmed the trial court's judgment awarding plaintiff $87,500 in property damages and $125,000 in general damages for plaintiff's mental anguish, stress, and inconvenience sustained as a result of defendant's bad faith. The dissent contended that defendant should not have been held liable for plaintiff's mental distress under the facts, arguing that, although defendant's actions were arbitrary and capricious, they were not intentional or outrageous, and plaintiff did not present any evidence that he suffered measurable and severe psychic trauma and/or injury to justify such an award under the circumstances. Orellana v. Louisiana Citizens Property Ins. Corp., 972 So.2d 1252, 1260.

La.App.2002. Com. (d) quot. in case quot. in sup. Former employee sued former employer, employer's president, and its owner for intentional infliction of emotional distress in connection with termination of his employment. The trial court entered judgment against employer and owner and dismissed claim against president. Reversing, this court held that defendants' conduct was not

sufficiently extreme and outrageous to support claim of intentional infliction of emotional distress. Goldberg v. Moses, 811 So.2d 1165, 1166, writ denied 824 So.2d 1166 (2002).

La.App.2001. Com. (d) quot. in case quot. in sup. Former employee sued former employer, alleging intentional infliction of emotional distress related to denials of employee's requests for shift changes due to job pressures. The trial court granted defendant summary judgment. Affirming, this court held, inter alia, that defendant's conduct did not give rise to tort claim, but was within range of acts covered by workers' compensation. Labbe v. Chemical Waste Management, Inc., 786 So.2d 868, 874, writ denied 796 So.2d 685 (La.2001).

La.App.2001. Subsec. (1) quot. in conc. op. Former employee sued employer for negligent and intentional infliction of emotional distress, alleging that she sustained emotional-distress injuries from job-related stress resulting from understaffing of the department in which she worked. Affirming in part the trial court's dismissal of plaintiff's claims, this court held, inter alia, that plaintiff did not state a cause of action for intentional infliction of emotional distress, since she failed to allege any facts showing that defendant's conduct was outrageous or intended to cause her severe emotional distress. The concurring opinion agreed with the majority that plaintiff failed to satisfy the elements of intentional infliction of emotional distress. Richardson v. Home Depot USA, 808 So.2d 544, 553.

La.App.1996. Cit. generally in case cit. in Appendix containing trial court op. Church members filed a mandamus action against a church, seeking the production of church financial records. A trial court directed church to produce records. The church members later sued the church, its pastor, and their insurers for defamation and intentional infliction of emotional distress, alleging that the pastor disfellowshipped and removed some of the church members from the church's membership rolls because of their participation in the mandamus action. It was an essential tenet of the Pentecostal faith that Holy Scripture prohibited taking another Pentecostal member to court. Trial court dismissed plaintiffs' suit, holding, inter alia, that, although plaintiffs claimed humiliation and embarrassment, the element of severe emotional distress was absent. Furthermore, defendants' actions were not outrageous, since the First Amendment free-exercise clause provided a complete defense to claims of outrageous conduct. This court affirmed, holding that, based on the state and federal Constitutions, this suit would constitute an impermissible interference in the church's ecclesiastical matters. Glass v. First United Pentecostal Church, 676 So.2d 724, 737.

La.App.1996. Quot. in case quot. in disc., coms. (b) and (d) quot. in case quot. in disc. Patient sued physician for, inter alia, breach of the physician-patient privilege and intentional infliction of emotional distress when physician released patient's medical records to government agents in connection with an unrelated medical-malpractice suit brought by patient under the Federal Tort Claims Act (FTCA). The trial court granted physician's motion for summary judgment. Affirming, this court held that patient waived the physician-patient privilege with respect to medical records that were relevant to his FTCA claim; to the extent that physician breached the privilege by disclosing information that was not pertinent to the FTCA claim, patient was not damaged; and

physician's conduct was not so outrageous as to be considered intolerable in a civilized society. Sanders v. Spector, 673 So.2d 1176, 1180.

La.App.1994. Quot. in case quot. in sup., com. (d) quot. in case quot. in sup. Heirs sued their deceased father's companion, asserting various tort claims, including intentional infliction of emotional distress by inappropriate disposal of decedent's ashes and refusal to return their father's personal effects. Reversing the trial court's maintenance of an exception of no cause of action to the tort claims and remanding for trial, this court held that the heirs had stated a viable cause of action for intentional infliction of emotional distress. Mavromatis v. Lou-Mar, Inc., 632 So.2d 828, 834, 835.

La.App.1993. Cit. in case quot. in sup., com. (j) cit. in case quot. in sup. After former employees sued employers for damages, alleging that employers' sexual harassment constituted negligent and intentional infliction of emotional distress, employers brought third-party claim against insurers for costs of their defense, inter alia. Granting summary judgment for insurers, this court held that the policies in question, which required that bodily injury or property damage be caused by an occurrence and excluded coverage for intentional acts, did not require insurers to defend employers against charges of on-the-job sexual harassment, which allegedly occurred over a two-to-three-year period, since the conduct could be characterized as intentional in view of the length of time over which it occurred. Pylant v. Lofton, 626 So.2d 83, 87.

La.App.1993. Cit. in case quot. in sup., com. (i) cit. in case quot. in sup. A wrongfully arrested person sued the state police and the arresting officer, alleging that they, in investigating and arresting her for possible drug-related activity, intentionally inflicted emotional distress and committed other torts. This court amended judgment for plaintiff by reducing the general damage award for anxiety and distress, affirmed, and rendered, holding, inter alia, that the officer's alleged conduct in investigating plaintiff's prescription drug purchases without a reasonable suspicion, in eventually having the plaintiff arrested, and in conducting the investigation for personal reasons —to gain information that would discredit the plaintiff in her suit against the officer for erroneous arrest in a previous incident—was sufficient to support the emotional distress claim. Taylor v. State, 617 So.2d 1198, 1204.

La.App.1992. Cit. but. dist., coms. cit. but dist. Husband, individually and on behalf of minor children, sued priest and other church officials, alleging that priest's illicit affair with his wife resulted in the breakup of his marriage and caused emotional distress to him and his children. Affirming the trial court's dismissal, this court held that Louisiana did not recognize a cause of action for alienation of a spouse's affections or for alienation of a parent's affections, and plaintiffs did not state a cause of action for intentional infliction of emotional distress because there was no evidence that defendants' conduct was directed at plaintiffs or was intended to cause them emotional distress. Greene v. Roy, 604 So.2d 1359, 1363, writ denied 607 So.2d 544 (La.1992).

La.App.1990. Cit. in sup., subsec. (1) quot. in sup., com. (h) quot. in case quot. in sup. While waiting for the arrival of safety goggles and gloves to transfer corrosive material, an employee

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was subjected to her supervisor's ranting, accusing her of failing to do her job and threatening to fire her, using profane and abusive language. Within minutes of the tirade, the employee went to the plant infirmary with tightness and pain in her chest, pounding and pain in her head, and appearing to be in shock. She was admitted to the hospital for two days, underwent many tests, and was diagnosed as suffering an acute anxiety reaction probably brought on by the incident at work. She sued her supervisor and employer for intentional infliction of emotional distress. The jury awarded the plaintiff damages against both defendants, and this court affirmed, holding that because the language used here could be considered vile, abusive, and profane, the plaintiff was likely to be more than usually offended by the language, and the supervisor had authority to recommend or impose firing or other disciplinary action, there was an egregious lack of mutuality and appropriateness that rose to the level of outrageousness. White v. Monsanto Co., 570 So.2d 221, 223, 224, 227, judgment reversed 585 So.2d 1205 (La.1991). See above case.

La.App.1989. Com. (d) quot. in case quot. in disc. A worker sued an insurance company and two of its insurance adjusters alleging that he suffered severe mental distress when the insurance company terminated his workers' compensation benefits after having made weekly payments to him for over a year. The worker asserted that the insurer stopped payments solely because he refused to accept an unreasonably low settlement offer. The trial court dismissed the suit on an exception of no cause of action, but this court affirmed in part and reversed in part and remanded. The court ruled that Louisiana law permitted an employee to maintain a cause of action for intentional infliction of emotional distress against his employer's workers' compensation insurer; however, where the plaintiff employee merely alleged emotional and financial loss caused by the wrongful termination of benefits, his sole remedy lay in the penalties and attorney's fees provisions of state law. While expressing doubts as to whether the worker could successfully allege additional acts to show outrageous conduct, the court concluded that the worker should have an opportunity to amend his petition. Boudoin v. Bradley, 549 So.2d 1265, 1267.

La.App.1989. Cit. and quot. in case quot. in disc., coms. (d) and (g) quot. in case quot. in sup. Two corporations sued a minority shareholder to compel specific performance of a contract to sell the shareholder's stocks in the corporations back to the corporations. The trial court entered judgment on a jury verdict in favor of the shareholder but granted a partial judgment n.o.v. reducing the award for wrongful infliction of mental suffering. The intermediate appellate court affirmed in part in an opinion that was later vacated by the supreme court. On remand, this court reversed and rendered in part and affirmed in part. As to the shareholder's wrongful infliction of mental suffering claim, the court reversed the trial court's judgment, holding that the failure of the corporations to buy back the stock and the failure of the corporations to allow the shareholder to inspect corporate records to ascertain the “true book value” of the stocks was not conduct so atrocious and outrageous as to support a finding of wrongful infliction of mental suffering. It noted that the corporations had a legal right to take most of the actions they did. Directional Wireline Services v. Tillett, 552 So.2d 1201, 1215-1216, writ denied 551 So.2d 1343 (1989).

La.App.1986. Cit. in disc. Three men were involved in a dispute with a group of people at a tube rental shop. A struggle ensued between one of the men and a local deputy sheriff, during which the

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deputy suffered a fatal heart attack. The decedent's children sued the men for the wrongful death of their father due to the defendants' alleged assault and battery. The trial court held for the plaintiffs. This court affirmed, holding, inter alia, that the jury had been properly instructed about liability for harm resulting from intentional or reckless infliction of emotional distress when it was instructed that in addition to the torts of assault and battery, one who by extreme and outrageous conduct intentionally or recklessly causes severe or emotional distress to another is subject to liability for such emotional distress and for the bodily harm or death that results therefrom. Sparacello v. Andrews, 501 So.2d 269, 276.

La.App.1978. Cit. and quot. in sup. and coms. (d) and (g) quot. in sup. An employee and her spouse brought an action against an employer for emotional trauma due to the intentional acts of the employer. The plaintiffs contended that the defendant employer's arbitrary discontinuance of the employee's disability benefits, in addition to visits and telephone calls to her in disregard of her doctor's warnings, were intentional torts subjecting her to physical injury and emotional trauma. The lower court sustained the employer's exception of no cause of action and dismissed the demands of the employee and spouse. On appeal, the court noted that the general rule concerning damages for mental distress due to intentional tort is that the defendant must either have actively desired to bring about the mental anguish or realized to a virtual certainty that it would occur, and that recovery for mental anguish caused by intentional torts has generally been limited to instances of outrageous conduct. The plaintiffs' theory of liability was predicated, partially, on Section 46 of the Restatement. However, the court found that the facts as alleged in the plaintiffs' petition did not, as a matter of law, warrant a finding of an intent to cause emotional distress under the Restatement. The court held that the petition, which failed to allege facts showing that the employer intended to embarrass, humiliate, or emotionally and mentally disturb the employee and that such conduct was done in a manner which was outrageous beyond the privileged bounds of insisting on one's legal rights, did not state a cause of action for emotional trauma due to intentional acts. Accordingly, the judgment of the lower court was affirmed. Steadman v. South Central Bell Tel. Co., 362 So.2d 1144, 1145, 1146.

La.App.1976. Cit. in sup. A tenant sued to recover a security deposit which he had given to his landlord at time of entering into a lease for a residence which had not been made available to the tenant because of remodeling work. The landlord reconvened for attorney's fees and damages for mental pain and suffering, anxiety, and loss of dignity. The lower court entered judgment in favor of the landlord, and the tenant appealed. The tenant contended that the trial court erred in finding that the utterance, “If you were a man, I would beat the hell out of you,” spoken by tenant, was actionable in the context in which it was used. The court held that in the instant context that the aforementioned utterance was not that “extreme and outrageous conduct” as set forth in the Restatement. The landlord was in the rental business, in which landlord-tenant disputes were not uncommon. The court could not say that these statements or “curse words,” absent further amplification, were necessarily so outrageous as to constitute that conduct made actionable under the Restatement. Roshto v. Bajon, 335 So.2d 486, 488.

La.App.1968. Quot. in sup. Defendant was a creditor of plaintiff's and made repeated calls to plaintiff's neighbors' houses since plaintiffs did not have a phone. Plaintiff claimed defendant harrassed and shamed plaintiffs by these calls. Plaintiff sued and a default judgment was entered. Defendant got a restraining order against the execution of the judgment. The judgment for plaintiff was affirmed although the amount was reduced. The court held that conduct on the part of a creditor that is calculated to cause and does cause mental and physical harm is actionable, and the court held further that defendant's conduct had exceeded the bounds tolerated by society. Boudreaux v. Allstate Finance Corp., 217 So.2d 439, 444.

Me.

Me.2014. Com. (j) quot. in sup. After tests revealed numerous lead hazards throughout their rental home, tenants brought claims for, inter alia, intentional infliction of emotional distress (IIED) against landlord, alleging that the lead paint had injured their three children. The trial court granted landlord judgment as a matter of law on tenants' IIED claim. This court vacated as to the IIED claim and remanded, holding, among other things, that it could not say as a matter of law that no reasonable juror could find that landlord's conduct caused the children severe emotional distress. The court pointed to evidence that landlord allowed tenants to live in a home that exposed their young children to toxic levels of lead for several years, that landlord failed to comply with his legal duty to relocate tenants for four months after the home was declared a lead hazard, that the children were scared and confused when the home was posted as not safe for children, and that the children would scream “the poison is going to kill us” if a child attempted to enter an area of the home that had been cordoned off to prevent the spread of lead dust. Bratton v. McDonough, 2014 ME 64, 91 A.3d 1050, 1058.

Me.2010. Com. (k) quot. in sup., cit. in ftn., and cit. in case quot. in sup.; com. (j) cit. in sup.; illus. 19 and 20 quot. in ftn. Ex-girlfriend brought a claim for intentional infliction of emotional distress against ex-boyfriend, alleging that defendant accumulated piles of paper and trash throughout the parties' home, regularly yelled and screamed, kicked the walls, and was emotionally abusive toward her. The trial court entered judgment awarding plaintiff damages. Vacating the trial court's judgment, this court held, inter alia, that plaintiff's emotional distress was not so severe that no reasonable person could be expected to endure it; while plaintiff reported feeling inadequate and withdrawn, socially paralyzed, and intimidated by defendant's controlling and compulsive behavior, and her friends described her as being, at times, guarded, jumpy, and withdrawn, plaintiff endured the distress over the course of her 15-year relationship with defendant, as evidenced by the fact that she successfully managed her business, met the demands of daily living, and did not seek assistance from the police or treatment from mental-health professionals. Lyman v. Huber, 2010 ME 139, 10 A.3d 707, 712, 713.

Me.1998. Cit. generally and adopted in case quot. in disc. Employer's liability insurer brought suit for a declaratory judgment that it had no duty to defend employer against farm worker's intentional-infliction-of-emotional-distress claim stemming from employer's conduct during

previous litigation in which worker had obtained a judgment against employer for personal injuries. Vacating the trial court's entry of judgment for insurer and remanding, this court held, inter alia, that the policy exclusion for intended or expected bodily injury was inapplicable to worker's claim, since employer might be found to have intentionally inflicted emotional distress without subjectively intending or foreseeing the alleged distress suffered by worker. Maine Mut. Fire Ins. Co. v. Gervais, 715 A.2d 938, 941.

Me.1997. Com. (g) cit. in disc. Wife whose leg was broken when she attempted to assist her husband in a fistfight brought personal injury action against husband's opponent. Defendant filed a counterclaim in which he asserted that the initiation of a civil suit against him constituted the tort of intentional infliction of emotional distress. The trial court entered judgment on a jury verdict for defendant and, postjudgment, entered judgment as a matter of law for plaintiff on defendant's counterclaim. Affirming, this court held, in part, that the initiation of a lawsuit could not serve as the basis for a claim of intentional infliction of emotional distress. Davis v. Currier, 1997 ME 199, 704 A.2d 1207, 1209.

Me.1996. Quot. in case quot. in disc., com. (h) quot. in case quot. in disc. A man who was insured under a disability policy fell down a flight of stairs and seriously injured his back. The insured sued the insurer for, among other claims, intentional infliction of emotional distress based on actions the insurer took in the course of its investigation and in denying coverage. Jury awarded plaintiff damages, but the trial court set aside the jury verdict in plaintiff's favor on the emotional distress claim. This court affirmed in part and vacated in part, holding, inter alia, that, although plaintiff presented evidence of a cumulative number of acts and circumstances that adversely affected him in a substantial way, he failed to show that defendant's actions arose independently of its denial of the disability claim, were intentionally or recklessly inflicted, and were extreme and outrageous. The rude and sarcastic behavior of the doctor who examined plaintiff could not be attributable to defendant. Furthermore, defendant's attorney's attendance at the workers' compensation hearing and communication with one of the attorneys for the employer's insurer did not constitute the kind of conduct that supported an emotional-distress claim. Colford v. Chubb Life Ins. Co. of America, 687 A.2d 609, 616, cert. denied 520 U.S. 1264, 117 S.Ct. 2433, 138 L.Ed.2d 194 (1997).

Me.1993. Com. (h) cit. in disc. A woman whose child had been removed from her home by the state sued the state and governmental officials, bringing various civil rights and tort claims, including one for intentional infliction of emotional distress. This court, vacating in part a dismissal of all claims, held that the state could be liable for negligence if it was proved to have handled the investigation preceding the removal carelessly, but all other claims were properly dismissed. The court saw no extreme or outrageous conduct in the state case worker's alleged neglect of the case and misrepresentations that would support an emotional distress claim, particularly in light of the competent evidence on which the state based its decision. Gray v. State, 624 A.2d 479, 484.

Me.1993. Cit. and quot. in sup. Wife sued former husband after her divorce complaint was granted on the ground of irreconcilable differences, alleging, among other claims, intentional infliction of emotional distress resulting from physical and psychological abuse. The trial court entered

judgment in favor of wife. Affirming, this court held that interspousal immunity did not apply to husband's conduct, since there was no longer any marital harmony to be preserved, evidentiary requirements safeguarded against frivolous litigation, and the divorce provided no compensatory relief. Henriksen v. Cameron, 622 A.2d 1135, 1138, 1139.

Me.1990. Quot. in case quot. in sup., com. (g) cit. in sup. A fire insurance policy issued to the owner of a clam depuration plant contained provisions denying coverage if the plant was left vacant for more than 60 consecutive days or if the risk of fire was increased by any means within the control or knowledge of the insured. The insurer cited both provisions in denying the owner's claim for payment after the plant was destroyed by fire and the owner was indicted for soliciting to commit arson, charges that were later dismissed. The owner sued the insurer, inter alia, for intentional infliction of emotional distress, and the trial court dismissed those counts. The jury returned a special verdict against the plant owner on the other counts, finding no breach of contract by the insurer or malicious prosecution of the arson charge. This court held that although the dismissal of the intentional infliction of emotional distress claims prior to trial may have been premature, it was harmless error as the evidence adduced at trial demonstrated that the insurer's conduct in asserting the policy defenses and its refusal to pay the fire loss did not constitute extreme and outrageous conduct. Chiapetta v. Lumbermens Mut. Ins. Co., 583 A.2d 198, 201.

Me.1990. Subsec. (1) and com. (k) cit. in disc., subsec. (2) quot. and cit. but dist., com. (d) quot. in disc. Parents sued their son for a declaratory judgment to establish their right under a lease agreement to live rent-free in an apartment as life tenants and for damages for emotional distress. The trial court entered judgment on a jury verdict for the plaintiffs and awarded them damages for emotional distress. Affirming, this court held that there was ample evidence to uphold the jury's finding that the defendant's conduct was sufficiently extreme and outrageous to support liability. The court said that the defendant demanded that the plaintiffs pay up to $3,000 a month in rent, threatened to evict them if they failed to pay the rent, even though the plaintiffs were aged and in poor health, and telephoned his sister to seek her assistance in having their father declared mentally incompetent. The court stated that s 46(2) of the Restatement (Second) of Torts did not apply to the facts of this case to exclude the sister's testimony about the telephone conversation. Latremore v. Latremore, 584 A.2d 626, 630-633.

Me.1989. Com. (d) quot. in case quot. in disc., com. (h) cit. in disc. A computer specialist who was fired for operating a company car under the influence of alcohol and for erasing computer files sued his employer for intentional infliction of emotional distress, inter alia, alleging that a new departmental manager had humiliated him, demoted him without cause, and told him to remove software from a computer against his better judgment. The trial court granted summary judgment for the defendant. Vacating in part, affirming in part, and remanding, this court held that, even when viewed in the light most favorable to the plaintiff, his evidence created no genuine issue that the manager's conduct was so extreme and outrageous as to exceed all possible bounds of decency. Staples v. Bangor Hydro-Electric Co., 561 A.2d 499, 501, appeal after remand 629 A.2d 601 (Me.1993).

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Me.1988. Cit. in case quot. in disc., com. (h) cit. in disc. A landowner's suit against an adjoining landowner for malicious prosecution was dismissed for want of prosecution. The plaintiff then sued the same defendant on theories of false accusation and intentional infliction of emotional distress. The trial court granted summary judgment to the defendant on the false accusation claim, giving preclusive effect to the prior dismissal, and a jury awarded damages to the plaintiff on the emotional distress claim. Affirming, this court held that the plaintiff was not precluded from litigating issues of fact common to the two different causes of action; because no issue of fact was actually tried in the malicious prosecution action, the judgment of dismissal in that action did not bar the presenting of any factual issue in this case. The court stated further that it would not disturb the jury's finding that all of the elements of the claimed emotional distress were adequately supported by credible evidence. Gurski v. Culpovich, 540 A.2d 764, 767.

Me.1987. Cit. in disc. A husband sued his wife's divorce attorney for intentional interference with parental custody rights and intentional infliction of emotional distress as a result of the interference. Affirming the trial court's grant of summary judgment to the defendant, this court held that to prove claims for both intentional interference with parental custody rights and intentional infliction of emotional distress, either some direct contact between the individual held liable and the child or a violation of a court order by that individual was needed. The court concluded that since there was no contact alleged between the defendant attorney and the plaintiff's children, summary judgment was proper. Finn v. Lipman, 526 A.2d 1380, 1382.

Me.1987. Cit. in disc. After the plaintiff discovered a human leg in a bag that he believed contained his recently deceased father's personal belongings, he sued the hospital and funeral home that had arranged for the delivery of his father's personal belongings for negligent infliction of severe emotional distress. The trial court granted the defendants' motions for a directed verdict, holding that the plaintiff's severe emotional distress was not proximately caused by the intentional or reckless conduct of either defendant. Vacating and remanding, this court held that, since a jury could conclude that the defendants reasonably should have foreseen that members of the deceased's family would be vulnerable to emotional shock at finding a severed leg in what was supposed to be the decedent's personal effects, the lower court erred in granting the defendants' motions for directed verdict. The court said that a plaintiff who alleged negligently inflicted severe emotional distress need not show physical impact, objective manifestation, underlying or accompanying tort, or special circumstances. Gammon v. Osteopathic Hosp. of Me., Inc., 534 A.2d 1282, 1284.

Me.1986. Com. (d) cit. in sup., com. (h) quot. in sup. The buyer of a memorial stone for her mother's grave sued the seller for breach of contract, negligence, and negligent and intentional infliction of emotional distress, after the stone was delivered too late for an unveiling ceremony. The trial court granted summary judgment to the seller. Affirming in part, vacating in part, and remanding, this court applied the general rule that emotional distress was not compensable on a breach of contract theory; in addition, the complaint did not sufficiently state a claim for negligent infliction of emotional distress. The court found, however, that the buyer's allegations of repeated misrepresentations by the seller of a timely delivery sufficiently set forth conduct on which liability

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for intentional infliction of emotional distress could be predicated. Rubin v. Mathews Intern. Corp., 503 A.2d 694, 699, 700.

Me.1979. Coms. (d) and (j) quot. in part and cit. in disc. in sup., com. (k) cit. in disc. in sup. The Worker's Compensation Commission awarded a total of three months compensation to a claimant for her mental anxiety, which required hospitalization, caused by the pressures of day to day employment as the first woman on the state police force. The trial court entered a pro forma decree from which the employer appealed. This court vacated the trial court's judgment and remanded the case for further findings. The court held that gradual mental injuries were recoverable under the Workman's Compensation Act, however, there were certain guidelines which had to be met for recovery. The court held that a plaintiff would have to show either that she was subjected to pressures greater than the average worker which caused the injury, or that it was the usual work related pressures which caused the injury. Townsend v. Maine Bureau of Public Safety, 404 A.2d 1014, 1018.

Me.1979. Quot. and cit. in disc., com. (i) cit. in disc. and coms. (d), (j) and (k) quot. in part and cit. in disc. The plaintiff debtor brought an action against a creditor and a credit life insurer for damages for, among other things, conversion and mental suffering resulting from the intentional acts of the defendants' employees. The trial court, after the jury found for the plaintiff and against the defendants on all counts, granted the defendants' motion for judgment n.o.v. with regard to the jury's finding that the defendants had committed conversion and intentional infliction of emotional distress. All parties appealed. This court held that the trial court had properly found that the transaction was a consumer credit transaction. The court held that the trial court had properly ruled on the defendants' motion for judgment n.o.v. with regard to the conversion claim and the claim for intentional infliction of emotional distress. However the trial court had set aside the award of compensatory damages for the intentional infliction of emotional distress claim but had allowed the punitive damage award to stand and this court held that this was error and set aside the punitive damage award. The court held that one could recover for the tort of intentional infliction of emotional distress for pain and suffering which is accompanied by physical injury and caused by tortious conduct or for distress which is manifested by illness or bodily harm and caused by negligent conduct even if no direct physical injury occurred or for severe emotional distress which is caused by extreme or outrageous conduct which is either intentional or reckless. Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 154.

Md.

Md.2008. Com. (d) quot. in case quot. in sup. Father brought a claim for intentional interference with custody and visitation rights against his former wife and her mother, alleging that defendants fled to Egypt with the couple's two minor children. The trial court entered judgment on a jury verdict for plaintiff. This court affirmed, holding that the tort of interference with parent-child relations was recognized by this court in a prior case, in which, after noting that the plaintiff's allegations in that case were insufficient to sustain a cause of action for assault, battery, or

intentional infliction of emotional distress, the court indicated that abduction and enticement were precursor causes of action for the tort. Khalifa v. Shannon, 404 Md. 107, 945 A.2d 1244, 1254.

Md.2003. Com. (d) quot. generally in ftn. Husband sued wife for malicious prosecution, alleging that, as a result of false criminal charges brought against him by wife, he was arrested on three occasions and charged with stalking, harassment, and violation of a protective order. The trial court granted wife's motion to dismiss, ruling that the action was barred by the doctrine of interspousal immunity. The court of special appeals affirmed in part, holding that malicious prosecution was not so outrageous as to bring it within the exception to interspousal immunity. Reversing and remanding, this court abrogated the interspousal-immunity rule as to all cases alleging an intentional tort. Bozman v. Bozman, 376 Md. 461, 830 A.2d 450, 453.

Md.2000. Com. (j) quot. in case quot. in disc. Female employee sued employer and various individuals for, inter alia, violations of Title VII, alleging that defendants were liable for male co-worker's creation of a sexually hostile work environment. Plaintiff also asserted a claim for intentional infliction of emotional distress. The trial court dismissed the complaint, and the intermediate appellate court affirmed. Affirming in part, reversing in part, and remanding, this court held, among other things, that plaintiff's allegations were sufficient to state a claim under Title VII; however, even assuming that defendants' alleged failure to protect her from co-worker was extreme and outrageous, plaintiff had failed to establish that her resulting emotional distress was severe. Manikhi v. Mass Transit, 360 Md. 333, 758 A.2d 95, 114.

Md.1993. Com. (j) quot. in part in case quot. in sup., com. (e) cit. in case quot. in diss. op. A 16-year-old former employee sued his employer and several co-workers, alleging false imprisonment, malicious prosecution, defamation, wrongful discharge and intentional infliction of emotional distress after he was detained for four hours by security personnel and accused of stealing. After the jury returned a verdict for plaintiff, the trial court granted judgment notwithstanding the verdict on the emotional distress and wrongful discharge claims. Affirming in part, this court held that the embarrassment and distress suffered by the employee were not sufficiently severe to support the emotional distress claim. A dissent argued that when conduct was shown to be sufficiently outrageous, the distress need not be so severe to establish a cause of action. Caldor, Inc. v. Bowden, 330 Md. 632, 643-645, 673, 625 A.2d 959, 964, 965, 979.

Md.1992. Cit. in disc., com. (d) quot. in sup. and quot. in case quot. in disc. A local union president sued a national union and its president for defamation and intentional infliction of emotional distress. After the local union improperly entered into a contract without the national's approval, a heated labor dispute arose in which the defendants circulated leaflets accusing the plaintiff of lying, perjury, and misappropriating union funds. The trial court entered a jury verdict for the plaintiff on both the defamation and intentional infliction of emotional distress claims, and the intermediate appellate court affirmed. Affirming in part, this court upheld the defamation judgment but reversed the intentional infliction of emotional distress judgment and remanded for a new damage determination. It noted that labor struggles were often vicious and that the defendants'

conduct was hardly extreme and outrageous in that context. Batson v. Shiflett, 325 Md. 684, 602 A.2d 1191, 1216, 1217.

Md.1992. Com. (d) quot. in disc., quot. in case quot. in diss. op., cit. in diss. op.; com. (e) quot. in disc., quot. in case cit. in diss. op.; com. (f) quot. and cit. in disc.; com. (h) quot. in disc. and cit. in diss. op. An employee suffering from borderline personality disorder was accused of stealing from her employer, suspended without pay, and demoted from her managerial position. After receiving psychiatric treatment, employee sued her employer for intentional infliction of emotional distress and obtained a jury verdict in her favor. Trial court granted defendant's motion for judgment n.o.v., and intermediate appellate court reversed. Reversing the appellate court and reinstating trial court's judgment, this court held that, since there was no evidence that defendant knew of plaintiff's particular psychological vulnerability, defendant's actions did not reach the required level of outrageousness. Dissent contended that, since reasonable persons may differ as to the outrageousness of defendant's conduct, the jury determination should not have been disturbed. Kentucky Chicken Co. v. Weathersby, 326 Md. 663, 607 A.2d 8, 11, 12, 15-19, 23.

Md.1991. Com. (d) quot. in case quot. in disc., com. (e) cit. in case quot. in disc. A patient sued on a theory of intentional infliction of emotional distress, inter alia, a psychologist whom the plaintiff and his wife had consulted for marriage counseling, alleging that the defendant and the plaintiff's wife had engaged in a sexual relationship that resulted in the dissolution of the plaintiff's marriage. The trial court dismissed the complaint for failure to state a claim. This court reversed and remanded on the ground that a jury might find extreme and outrageous conduct where a psychologist who was retained to improve a marital relationship implemented a course of extreme conduct that was injurious to the patient and designed to facilitate a romantic, sexual relationship with the patient's spouse. Figueiredo-Torres v. Nickel, 321 Md. 642, 584 A.2d 69, 75, 76.

Md.1988. Com. (d) cit. in disc. A physician who knew he suffered from genital herpes entered into a sexual relationship with a nurse without informing her of his condition; the nurse contracted the disease. The nurse sued the physician for fraud, negligence, and intentional infliction of emotional distress. The federal district court certified to this court the question of whether a cause of action existed in this state for each of the plaintiff's claims. This court held, inter alia, that one who knowingly engaged in conduct that was highly likely to infect another with an incurable disease had committed sufficiently extreme and outrageous conduct to give rise to a cause of action for intentional infliction of emotional distress. B.N. v. K.K., 312 Md. 135, 538 A.2d 1175, 1181.

Md.1986. Com. (d) quot. in case quot. in disc. A noncustodial parent sued a noncustodial, nonparental third party for intentional interference with child visitation rights. The trial court dismissed for failure to state a cause of action, and the plaintiff appealed. This court affirmed, finding first that the plaintiff had not pleaded a cause of action for assault or battery. The court then found that, under current state law, no action for damages existed pursuant to the cause of action pleaded by the plaintiff, because the third party's alleged interference with the plaintiff's visitation rights in this case was not substantial enough to require any payment of damages. Hixon v. Buchberger, 306 Md. 72, 507 A.2d 607, 609.

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Md.1985. Com. (d) quot. in sup. A workers' compensation claimant brought an intentional tort claim against his employer's workers' compensation insurer because of the insurer's failure to timely pay disability benefits and medical bills. The trial court entered judgment for the insurer, holding that the claimant's sole and exclusive remedy against the insurer was under the state's workers' compensation law. This court held that the Workers' Compensation Act's exclusive remedy provision did not preclude damages for the tort of intentional infliction of emotional distress caused by the nonpayment of benefits. The court remanded to allow the claimant to amend his complaint to adequately plead the extreme and outrageous conduct requirements of intentional infliction of emotional distress in order to distinguish his claim from ordinary nonperformance of a statutory duty. Gallagher v. Bituminous Fire & Marine Ins., 303 Md. 201, 492 A.2d 1280, 1285.

Md.1985. Com. (d) quot. in case quot. in disc., com. (g) quot. and cit. in disc. Plaintiff was assaulted at work and suffered physical and emotional trauma. The defendant insurer failed to pay for the plaintiff's therapy although it was ordered to do so by the workmen's compensation commission. Despite warnings from the plaintiff's psychiatrist that an examination by another doctor could result in a suicide attempt, defendant insisted on the exam, and plaintiff attempted suicide four days later. Plaintiff's suit for negligent and intentional infliction of emotional distress resulted in a judgment for the defendant, and the Maryland Court of Appeals granted certiorari prior to review by the intermediate court. The court affirmed dismissal of the negligence count, finding the workmen's compensation act to be the exclusive remedy for negligent claims investigation, but it reversed and remanded the claim of intentional infliction of emotional distress, as the plaintiff's allegation that the defendant ordered the examination to harass the plaintiff into abandoning her claim or into committing suicide stated something more than the permissible exercise of the defendant's legal rights. Young v. Hartford Accident & Indemnity, 303 Md. 182, 492 A.2d 1270, 1277, 1278.

Md.1979. Coms. (d) and (i) cit. in sup. Woman instituted a suit against spouse for negligent misrepresentation and intentional infliction of emotional distress upon learning after 20 years that her marriage to the defendant was void. The parties participated in a religious marriage ceremony in 1956. They lived together as husband and wife for 18 years and had two children. In 1974 the defendant left the plaintiff for another woman, prompting the plaintiff to seek and obtain a decree awarding her alimony and child support. The defendant filed a motion to strike the decree on the ground that the marriage was void because he was not divorced from his first wife at the time he purported to marry the plaintiff. In the present action, the plaintiff seeks compensatory damages for the emotional distress she claimed to have suffered as a result of the defendant's negligent misrepresentation of his marital status and damages for the intentional infliction of emotional distress which plaintiff claimed resulted from that concealment. On appeal from a verdict favorable to the plaintiff, the court found that the evidence was sufficient to support a jury finding that the plaintiff had been physically injured as a foreseeable result of defendant's negligent misrepresentation. In addition, the court affirmed the lower court's holding that the defendant was not liable for intentional infliction of emotional distress, since plaintiff did not show that when defendant made the misrepresentation he could have anticipated that 20 years later he would reveal

what he had concealed and cause plaintiff to suffer emotional distress. Thus, the court concluded that the plaintiff failed to establish the requisite element of intentional or reckless conduct by the defendant. Vance v. Vance, 286 Md. 490, 408 A.2d 728, 736.

Md.1977. Quot. in sup. Coms. (d), (f), (i) and (j) quot. and dist., coms. (h), (e) cit. and dist. The plaintiff, a stutterer, brought this action against his employer and his supervisor to recover damages for intentional infliction of emotional distress, allegedly caused by defendant supervisor's repeated ridicule of plaintiff's impediment and defendant employer's ratification of that conduct. Verdicts and judgments for plaintiff were reversed on appeal. Reversal was affirmed upon further review. The court held that plaintiff had failed to establish that his distress was "severe" within the contemplation of the rule requiring establishment of that element of the tort. Harris v. Jones, 281 Md. 560, 380 A.2d 611, 613, 614, 615, 616.

Md.Spec.App.

Md.Spec.App.2021. Quot. in sup.; com. (d) cit. in sup.; com. (e) cit. in case quot. in sup. Father of two minor children sued mother, who had de facto legal and physical custody of children following the parties' separation and eventual divorce, alleging, among other things, intentional infliction of emotional distress based on mother's conduct in badmouthing him to children and distancing children from him emotionally. The trial court granted mother's motion to dismiss. Affirming, this court held that father failed to state a claim against mother for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court reasoned that, while mother's conduct was arguably intentional or reckless in some instances, it was not sufficiently extreme or outrageous to state a claim for intentional infliction of emotional distress; in addition, father did not allege that mother's conduct caused him severe emotional distress. Haines v. Vogel, 249 A.3d 151, 162-164.

Md.Spec.App.2017. Cit. and quot. in sup.; com. (g) quot. in sup. Mechanic on leave from work due to stress filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against his supervisor who had informed management of rumors that plaintiff owned guns with a permit to carry, was returning to work, and might use guns against co-workers. The trial court granted summary judgment for defendant. This court affirmed, holding that defendant's alleged conduct did not rise to the level of "outrageousness" that was necessary to state an IIED claim, and was protected by the qualified privilege of common interests. The court cited Restatement Second of Torts § 46 in setting forth theelements of an IIED claim and noting that, even where a prima facie case was established, situations existed where such conduct was privileged. Lindenmuth v. McCreer, 165 A.3d 544, 559.

Md.Spec.App.2010. Com. (d) quot. in case quot. in sup. Divorced wife sued former husband for conversion, intentional infliction of emotional distress (IIED), breach of fiduciary duty, and fraud premised largely on husband's alleged financial misfeasance during the marriage. The trial court granted summary judgment for husband. Affirming, this court held, as to the IIED claim, that

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husband's alleged behavior in causing wife to believe that she was to blame for their financial difficulties, yelling at her on several occasions, and deceiving her about their finances and his personal life was not so extreme in degree as to go beyond all possible bounds of decency, and thus did not rise to the level of extreme or outrageous conduct necessary to state a claim for intentional infliction of emotional distress. Lasater v. Guttmann, 194 Md.App. 431, 448, 5 A.3d 79, 89.

Md.Spec.App.2002. Quot. in case quot. but dist. Husband sued wife for malicious prosecution after she filed false criminal charges against him on three occasions. Affirming in part trial court's dismissal, appellate court held that doctrine of interspousal immunity barred husband's complaint, as conduct underlying claim of malicious prosecution, while causing humiliation and hardship, did not rise to level of outrageousness contemplated by narrow exception to interspousal immunity. Bozman v. Bozman, 146 Md.App. 183, 806 A.2d 740, 749, reversed 376 Md. 461, 830 A.2d 450 (2003). See above case.

Md.Spec.App.1999. Coms. (d) and (e) cit. generally in headnotes and quot. in cases quot. in disc. Church member sued church and pastor for intentional infliction of emotional distress, inter alia, alleging that pastor exploited his position to initiate a sexual relationship with her when she sought advice from him about marital problems. Affirming the trial court's dismissal of the claim, this court held, in part, that because the case did not involve an officially sanctioned treatment relationship between the relevant parties, the conduct alleged was not extreme enough to merit recovery for intentional infliction of emotional distress. Borchers v. Hrychuk, 126 Md.App. 10, 727 A.2d 388, 389, 392.

Md.Spec.App.1998. Cit. in headnotes, cit. in disc., com. (d) quot. and cit. in disc., com. (e) and illus. 15 and 16 quot. in disc., com. (h) quot. in sup., com. (i) cit. in disc. In divorce proceedings, husband sued wife for, inter alia, intentional infliction of emotional distress after he discovered that two of the three children born during the couple's marriage were fathered by the man with whom wife was having an extramarital affair. Husband also sought recovery under a theory of promissory estoppel, arguing that he chose not to contribute to his employer's 401(k) plan in reliance on wife's assurances that he could depend on her stock holdings once he retired. The trial court dismissed the complaint. Affirming in part and reversing in part, this court held that a jury could conclude that wife acted outrageously in concealing her extramarital affair, lying about the children's paternity, and affirmatively misrepresenting to husband that he was the children's biological father; however, husband's promissory-estoppel claim failed where he did not establish that wife made a clear and definite promise to him regarding the future use of her stock holdings. Doe v. Doe, 122 Md.App. 295, 712 A.2d 132, 133, 134, 152-154, 157, 159, 160.

Md.Spec.App.1997. Com. (d) quot. in case quot. in disc. A woman sued her former boyfriend and his brother for intentional infliction of emotional distress, among other claims, alleging that, while she was ill from undergoing radiation treatment for breast cancer, the boyfriend repeatedly woke her up in the middle of the night admonishing her to leave. She also alleged that the brother telephoned her during the same period, calling her “bitch,” “whore,” and a “one-breasted woman,” and telling her that she was a financial burden and was going to die. Trial court granted

defendants summary judgment. This court affirmed, holding, inter alia, that plaintiff failed to state an emotional-distress claim, because the verbal language, although it included threats, was for the purpose of pressuring plaintiff to leave the boyfriend's house, where, regardless of the morality of his position, she had no legal right to remain. Considering that defendants had the legal right to require plaintiff to leave, the court did not perceive their verbal actions alone to be of such egregiousness so as to satisfy the elements of the tort. Miller v. Ratner, 114 Md.App. 18, 688 A.2d 976, 996.

Md.Spec.App.1993. Cit. in sup., coms. (d) and (f) quot. in sup. Corporation and its officers sued their lender for breach of contract and intentional infliction of emotional distress, among other claims, after defendant demanded immediate repayment of loan under parties' loan agreement. The trial court granted defendant summary judgment. This court affirmed, holding that claim for emotional distress was properly dismissed because defendant's conduct was rude, insensitive, and callous but not beyond bounds of decency when it demanded payment or more collateral in a threatening manner from one corporate officer while officer was ill and hospitalized; instead, defendant had contractual right to insist on repayment of plaintiffs' debts and to seek collateral to protect itself. Waller v. Maryland Nat'l Bank, 95 Md.App. 197, 620 A.2d 381, 400, 401, cert. granted and judgment vacated 332 Md. 375, 631 A.2d 447 (1993).

Md.Spec.App.1993. Com. (g) quot. in case quot. in sup. Decedent's mother and siblings sued decedent's stepmother, a cemetery, and a vault company for intentional infliction of emotional distress, inter alia, after decedent's body was disinterred and moved to a new vault at stepmother's request without mother's notification or consent. Affirming the trial court's dismissal of the complaint, this court held, inter alia, that, as mother's averment was that stepmother wanted gravesites switched so that she could be buried next to her natural son, there was no allegation that the movement of decedent's body was done to inflict emotional distress on mother. Walser v. Resthaven Memorial Gardens, Inc., 98 Md.App. 371, 394, 633 A.2d 466, 477.

Md.Spec.App.1992. Subsec. (2) and com. (l) quot. in sup., subsec. (2)(a) cit. in case quot. in sup. A husband alleged that a psychiatrist used personal and confidential information that he received from the husband regarding the husband's wife to seduce the wife and become sexually intimate with her, apparently as part of his treatment of her. The husband sued the psychiatrist for intentional infliction of emotional distress, inter alia. The trial court dismissed the complaint. This court affirmed, holding that the husband's absence at the time of the seduction precluded him from recovering for intentional infliction of emotional distress. The court said that although there were situations in which conduct directed principally at one person had been regarded as extreme and outrageous as to another, normally the other person must have been present to witness the conduct to recover; the limitation was justified by the practical necessity of drawing the line somewhere. The court reasoned that to relax the presence requirement in cases such as this would greatly expand the scope of the tort. Homer v. Long, 90 Md.App. 1, 599 A.2d 1193, 1199.

Md.Spec.App.1992. Com. (d) quot. in case quot. in sup. Doctor who was discharged from position as director of department of medicine sued hospital and its administrators for, among other claims,

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intentional infliction of emotional distress. Plaintiff was discharged immediately before a no-confidence vote that could have resulted in the dismissal of one of hospital's administrators. The trial court granted defendants' motion to dismiss; this court affirmed, holding that defendants' conduct in discharging an employee with whose service they were no longer satisfied was an everyday occurrence and, moreover, that there was no indication that plaintiff was particularly susceptible to the stress of being terminated or that defendants knew of any such susceptibility. Hrehorovich v. Harbor Hospital, 93 Md.App. 772, 614 A.2d 1021, 1035.

Md.Spec.App.1991. Cit. in case quot. in disc. After a seven-year-old child allegedly was traumatized by a horror movie shown at an after-school program she attended, she and her parents sued workers at the program and the city that operated it for intentional infliction of emotional distress, inter alia. The trial court dismissed the claim. Affirming in part, this court held that no reasonable mind could properly conclude that the defendants desired to inflict emotional distress on the child or that they knew that such distress was substantially certain to occur. The court said that, although the record showed that the child had been frightened once by a scary story told to her a year-and-a-half earlier, it was not enough to demonstrate a high probability that she would be distressed by watching the movie. The court also stated that the plaintiffs failed to show that the defendants' conduct was extreme in degree and outrageous in character. Abrams v. City of Rockville, 88 Md.App. 588, 596 A.2d 116, 120.

Md.Spec.App.1991. Com. (j) quot. in case quot. in sup. The former president of a local union sued a national union and its president for conspiracy, defamation, and intentional infliction of emotional distress after the defendants distributed flyers and made statements at local meetings accusing plaintiff of misconduct. The trial court entered judgment on a jury verdict awarding plaintiff compensatory and punitive damages on the defamation and emotional distress claims. Affirming, the court of special appeals held, inter alia, that the evidence supported plaintiff's claim of severe emotional distress where defendants' accusations of perjury, illegal acts, and misappropriation of funds triggered negative reactions in local union members and caused plaintiff to lose his local's election, after which plaintiff took to drinking and drugs, became incapable of working or performing daily activities, and eventually was hospitalized for depression and substance abuse. Batson v. Shiflett, 86 Md.App. 340, 586 A.2d 792, 801, affirmed in part and reversed in part 325 Md. 684, 602 A.2d 1191 (1992). See above case.

Md.Spec.App.1991. Com. (d) quot. in sup., com. (j) quot. generally in case quot. in sup. An employee sued her former employer for intentional infliction of emotional distress, inter alia. The employer fired the plaintiff for misconduct and then rescinded the discharge pending an investigation. The employee did not return to work. The trial court dismissed the claims and granted the defendant's motion for attorney's fees incurred in its defense. On remand, the court awarded the defendant $12,000 against the plaintiff's attorney. This court vacated the award of attorney's fees and remanded for a trial on that issue and held that evidence supported the finding that the plaintiff's attorney did not have substantial justification for filing and maintaining the claim because the defendant's conduct did not come close to meeting the standard needed for a finding

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of intentional infliction of emotional distress. Beery v. Maryland Med. Lab., 89 Md.App. 81, 597 A.2d 516, 524.

Md.Spec.App.1989. Subsec. (1) quot. in disc., com. (d) quot. in sup. A church member sued a church elder for intentional infliction of emotional distress after she was "disfellowshipped" and subjected to ostracism, surveillance, name-calling, and obscene gestures over a period of years. The trial court granted judgment n.o.v. for the defendant. Affirming, this court held that the plaintiff failed to establish the required element of severity to impose liability for intentional infliction of emotional distress because mere insults, indignities, annoyances, and other trivialities were insufficient to create tortious liability. Vauls v. Lambros, 78 Md.App. 450, 553 A.2d 1285, 1289, 1290.

Md.Spec.App.1987. Cit. in disc., com. (j) quot. in case cit. in sup., com. (k) cit. in case cit. in disc. A young woman was sexually abused by her stepfather throughout her adolescence. She eventually sued him for intentional infliction of emotional distress. The trial court found for the plaintiff and awarded her compensatory and punitive damages. This court affirmed, holding that the emotional distress inflicted on the plaintiff was sufficiently severe to be actionable, and that there was more than adequate evidence from which the jury could find that the defendant's conduct was sufficiently extreme and outrageous to cause the plaintiff's emotional distress. Reagan v. Rider, 70 Md.App. 503, 521 A.2d 1246, 1246, 1249, 1251.

Md.Spec.App.1986. Quot. in case cit. in sup. A labor union business agent sued employers, their agents, an attorney, an investigative bureau and its director for intentional infliction of emotional distress, invasion of privacy, and conspiracy to commit those torts, alleging that the defendants circulated evidence of his prior criminal record to union officials, hired an investigator to put him under surveillance, and sent his wife evidence of his extramarital affair. The defendants moved to dismiss and motioned for summary judgment. The trial court dismissed the case as to one employer and its agents for lack of subject matter jurisdiction, and as to all other defendants granted summary judgment on one count and dismissed all other counts for lack of subject matter jurisdiction. The business agent appealed. This court affirmed in part, and held that the business agent had failed to establish a cause of action for intentional infliction of emotional distress based on the defendants' conduct and the plaintiff's personality. This court reversed and remanded the invasion of privacy issue, as the surveillance could have constituted an actionable intrusion upon seclusion. This court did not find actionable the claim for public disclosure of private facts. Pemberton v. Bethlehem Steel Corp., 66 Md.App. 133, 502 A.2d 1101, 1115, cert. denied 306 Md. 289, 508 A.2d 488 (1986).

Md.Spec.App.1985. Com. (d) quot. in case cit. in disc. In repeated attempts to collect on a delinquent loan, a bank employee allegedly shouted at the plaintiffs, spoke in angry tones, threatened to attach the plaintiffs' homes and wages if the plaintiffs declared bankruptcy, and called one of the plaintiffs a liar. The plaintiffs sued the bank alleging intentional infliction of emotional distress and a violation of the Maryland Consumer Debt Collector Act. The Maryland Court of Special Appeals affirmed a trial court judgment for the bank because the employee's conduct, though rude, was not extreme and outrageous enough to support a count of intentional infliction

of emotional distress, nor was the language he used grossly abusive enough to sustain a count charging violation of the Consumer Debt Collector Act. Dick v. Mercantile-Safe Dep. & Trust, 63 Md.App. 270, 492 A.2d 674, 677.

Md.Spec.App.1985. Com. (f) quot. in case quot. in sup. (Erron. cit. as com. (5).) A civil servant sued the county and several county supervisory employees on several claims, including one for intentional infliction of emotional distress, arising out of the civil servant's termination of employment. The plaintiff was a part-time worker who applied for, but was denied, a newly created full-time position. After the plaintiff took steps to appeal the county hiring panel's decision not to give the position to him, the plaintiff's part-time employment was terminated. The trial court dismissed all of the civil servant's claims. On appeal, this court affirmed the trial court's dismissal of the intentional infliction of emotional distress claim, stating that even if all of the facts alleged in the civil servant's complaint were true, the defendants' conduct was not sufficiently extreme and outrageous, nor was the civil servant sufficiently distressed, to allow recovery. This court reversed the trial court on other grounds, and remanded the case for further proceedings. Leese v. Baltimore County, 64 Md.App. 442, 497 A.2d 159, 174, cert. denied 305 Md. 106, 501 A.2d 845 (1985).

Md.Spec.App.1985. Coms. (e), (f), and (j) quot. in sup. Employees who were terminated because they refused to submit to polygraph examinations regarding inventory shortages sued their former employer and certain of its officers for wrongful discharge and intentional infliction of emotional distress. The trial court rendered a verdict in favor of the employees on both theories and awarded compensatory and punitive damages. The court of special appeals reversed in part, holding that the employer's officers were not liable for wrongful discharge, and affirmed only one of the employees' intentional infliction of emotional distress awards. The court held, inter alia, that only the employee who suffered such emotional distress that she was unable to perform her household chores had suffered a disabling emotional response severe enough, and yet reasonable in light of her devotion to her employer, to allow her to recover for intentional infliction of emotional distress in connection with being wrongfully discharged. Moniodis v. Cook, 64 Md.App. 1, 494 A.2d 212, 219, 220, 221, cert. denied 304 Md. 631, 500 A.2d 649 (1985).

Md.Spec.App.1984. Com. (d) quot. in case quot. in disc. After resigning his position, plaintiff sued three of his supervisors, alleging that defendants had coerced his resignation in retaliation for his having reported illegal activities of fellow employees. The complaint included charges of abusive discharge and intentional infliction of emotional distress. The trial court sustained defendants' demurrers and this court affirmed. In support of his claim of intentional infliction of emotional distress, plaintiff alleged that defendants had threatened, harassed and assaulted him, appointed one of the people he had reported to police as his supervisor, and deceived him into resigning with promises of reinstatement. The court observed that extreme and outrageous conduct may arise from a defendant's abuse of a position of authority, but found that the conduct alleged did not meet the standards required to establish the tort charged. Beye v. Bureau of National Affairs, 59 Md.App. 642, 477 A.2d 1197, 1205, certiorari denied 301 Md. 639, 484 A.2d 274 (1984).

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Md.Spec.App.1982. Coms. (d) and (f) quot. in sup. An employee brought suit for assault and battery, intentional infliction of emotional distress, and other tort actions against his employer and several of his supervisors. Under company policy, employees were given annual performance ratings by their supervisors. The plaintiff was given a rating of "competent," which was later changed to a "needs improvement" rating. Based on that rating the plaintiff was not given a raise in salary for that year, and the plaintiff brought suit against the defendants for fraud and deceit. The plaintiff alleged that after bringing the action he was subjected to daily harassment until one day one of his supervisors screamed in the plaintiff's face and pushed him repeatedly. The plaintiff added the torts of assault and battery and intentional infliction of emotional distress to his action against the defendants. The trial court directed a verdict for the defendants on the emotional distress count, and a jury returned a verdict for the plaintiff on the assault and battery count against the defendant supervisor. Both parties appealed. This court affirmed the trial court on both counts. As to the assault and battery count, the court held that there was sufficient evidence from which a jury could conclude that such torts had occurred. On the emotional distress count, a directed verdict had been proper because the defendant's conduct had not been sufficiently extreme or outrageous. Continental Cas. Co. v. Mirabile, 52 Md.App. 387, 449 A.2d 1176, 1186.

Md.Spec.App.1979. Com. (f) quot. in part in sup. Plaintiff instituted suit for fraud, negligent misrepresentation, assault and battery, and intentional infliction of emotional distress. The trial court granted the defendant's motion for a directed verdict on the count alleging emotional distress and, after the jury returned a verdict for the plaintiff on the court charging negligent misrepresentation, granted the defendant's motion for a judgment n.o.v. and the plaintiff appealed. The court reversed and remanded, holding, inter alia, that the directed verdict was erroneously granted, since although the evidence did not establish that the defendant intentionally inflicted emotional injury upon the plaintiff, whether he did so with extreme and outrageously reckless conduct was a determination that should have been left to the jury, not made by the trial judge. Vance v. Vance, 41 Md.App. 130, 396 A.2d 296, 302, judgment affirmed in part, judgment reversed in part 286 Md. 490, 408 A.2d 728 (1979). See above case.

Md.Spec.App.1977. Quot. and fol., cit. in ftn. This was an action by an employee against his employer and supervisor for the intentional infliction of emotional distress allegedly resulting from the supervisor's mimicking of the employee's stuttering speech pattern and the way in which he shook his head when speaking. In reversing the lower court's verdict for the plaintiff, the court held that although the supervisor's conduct was intentional and intended to inflict emotional distress, and was outrageous and intolerable in form, the evidence of the employee's nervousness and irritation during the time the emotional distress was allegedly being inflicted was insufficient to show severe emotional distress or any causal connection. Jones v. Harris, 35 Md.App. 556, 371 A.2d 1104, 1106, aff'd 281 Md. 560, 380 A.2d 611 (See above case).

Mass.

Mass.2022. Quot. in case quot. in sup.; com. (*i*) cit. in case cit. in sup.; com. (j) quot. in case quot. in sup. and in conc. op. Purported descendant of subjects of 19th century daguerreotype photographs brought, among other things, a claim for reckless infliction of emotional distress against university, alleging that defendant dismissed plaintiff's ancestral connection to the photographs, which were created by defendant's faculty, and that defendant failed to contact plaintiff after using the photographs in publications. The trial court granted defendant's motion to dismiss. This court vacated in part and remanded, holding that plaintiff stated a claim for reckless infliction of emotional distress. Citing Restatement Second of Torts § 46, the court observed that it was appropriate to examine defendant's historical connection to the photographs in determining whether its present conduct was extreme and outrageous, and explained that the fact that defendant's faculty created the photographs by treating the subjects in a dehumanizing fashion was relevant to the analysis. The concurring opinion cited § 46 in pointing out that defendant's present violation of ethical codes governing research institutions further informed the extreme and outrageous nature of its conduct. Lanier v. President and Fellows of Harvard College, 191 N.E.3d 1063, 1075, 1084.

Mass.2014. Illus. 4 quot. in sup. Property owners brought a claim for, among other things, intentional infliction of emotional distress against neighbor, alleging that defendant made a "verbal attack" against plaintiffs when police responded to defendant's report that plaintiffs' car prevented him from pulling out of his driveway. The trial court granted defendant's motion to dismiss that claim. Affirming that portion of the decision, this court held that, because plaintiffs did not describe the content of the verbal attack, their allegation supported nothing more than mere "insults" or "threats" of the sort that failed to establish extreme and outrageous conduct. Polay v. McMahon, 468 Mass. 379, 387, 10 N.E.3d 1122, 1130.

Mass.2012. Com. (d) quot. in case quot. in sup. Veterinarian brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against private college, after she was excluded from a continuing-veterinary-education lecture on its campus because she had not paid a bill she owed to college for its care of her horse. The trial court granted summary judgment for defendant. Affirming, this court held that the alleged conduct of college officials in accusing plaintiff of cruelty and malpractice in connection with her horse that had developed cancer, cursing, and making statements that were generally dismissive of her integrative veterinary practices, along with college assistant director's exclusion of plaintiff from the lecture under threat of arrest, did not approach the type of behavior that could be considered extreme and outrageous for purposes of sustaining her IIED claim. Roman v. Trustees of Tufts College, 461 Mass. 707, 718, 964 N.E.2d 331, 341.

Mass.2010. Coms. (d) and (j) quot. in case cit. in sup. Terminated sewer department official brought a claim of intentional infliction of emotional distress (IIED), inter alia, against newspaper publisher and reporters, alleging that defendants made defamatory statements in certain newspaper articles about his having stored inappropriate images on computers owned by the sewer department. The appeals court affirmed the trial court's denial of defendants' motion for summary judgment on plaintiff's IIED claim. This court reversed, and directed that judgment be entered

for defendant, holding that plaintiff's IIED claim failed because it rested on the same newspaper articles on which plaintiff's defamation claim was based, and the court had already held that, save one sentence in one of the articles, the articles were fair and accurate reports of official actions and statements. The court additionally concluded that the one erroneous statement that had been made did not constitute "extreme and outrageous" conduct sufficient to support an IIED claim. Howell v. Enterprise Publishing Co., LLC, 455 Mass. 641, 672, 920 N.E.2d 1, 28.

Mass.1997. Com. (d) quot. in case quot. in sup. Blood relatives of a testator brought an action for, in part, intentional infliction of emotional distress against the testator's wife and against the law firm that drafted his estate planning documents. Affirming the trial court's grant of summary judgment for defendants, this court held, inter alia, that the wife's conduct in asking the testator to put his home in both of their names shortly before he died did not constitute the extreme or outrageous conduct necessary to prevail on a claim of intentional infliction of emotional distress. The court also held that the law firm's attorney who prepared the documents for the testator believed that he was acting consistently with the testator's intent and thus was not liable for intentional infliction of emotional distress. Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 466, 681 N.E.2d 1189, 1197.

Mass.1994. Com. (d) quot. in case quot. in sup. Husband and wife who were arrested, prosecuted, and acquitted of charges of receiving stolen property sued arresting officers, among others, for intentional infliction of emotional distress, inter alia. The trial court granted summary judgment for defendants. On transfer from the intermediate appellate court, this court affirmed in part, holding that defendants' conduct was, as a matter of law, not extreme and outrageous. The court said that neither applying for an arrest warrant nor making an arrest pursuant to an issued warrant could be considered utterly intolerable in a civilized community. Sena v. Com., 417 Mass. 250, 629 N.E.2d 986, 994.

Mass.1993. Subsec. (2) cit. in disc. Two brothers sued defendant and defendant's mother and aunt for negligence and intentional infliction of emotional distress, alleging that defendant's sexual molestation of the older brother severely traumatized him and caused him to sexually molest his younger brother. The jury awarded plaintiffs damages against all defendants. After transferring the case from the appeals court on its own initiative, this court affirmed the trial court's judgment n.o.v. for defendant as to the younger brother's claims and reversed judgment for the older brother against defendant's mother and aunt and dismissed that claim, holding, inter alia, that the younger brother was not entitled to emotional distress damages because he was not present at the time of defendant's misconduct toward his older brother, and there was no evidence that he suffered a severe emotional response on learning of defendant's molestation of his older brother. Anthony H. v. John G., 415 Mass. 196, 199, 612 N.E.2d 663, 665.

Mass.1988. Com. (d) quot. in case quot. in disc. An at-will employee sued his former employer for wrongful discharge and intentional infliction of emotional distress, alleging that he was fired from his sales position after complaining to his superiors about false shortage claims made by store managers, manufacturers, and suppliers. The trial court directed a verdict for the defendant.

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Affirming in part and reversing in part, this court held, inter alia, that the evidence did not warrant a finding that the employer's conduct was sufficiently extreme in degree or outrageous in character to cause the plaintiff to lose his sales accounts and therefore suffer emotional distress. Mello v. Stop & Shop Companies, Inc., 402 Mass. 555, 524 N.E.2d 105, 109.

Mass.1988. Subsec. (2) cit. in disc. and quot. in ftn., caveat quot. in ftn. A sexually abused child and her mother and brother sued the abuser for assault and battery, and intentional and negligent infliction of emotional distress. The trial court awarded damages to the abused child, but denied the mother's and brother's claims for infliction of emotional distress. Affirming, this court held that because the mother did not suffer physical harm and did not witness the injury or come upon the injured child promptly after she suffered the injury, she could not recover for negligent infliction of emotional distress; and that the mother could not recover for intentional infliction of emotional distress because she was not present when the extreme and outrageous conduct was directed at her daughter. Nancy P. v. D'Amato, 401 Mass. 516, 517 N.E.2d 824, 827.

Mass.1987. Com. (c) quot. in ftn. to conc. and diss. op., com. (d) quot. in sup., com. (e) cit. in ftn. to conc. and diss. op., com. (h) cit. in conc. and diss. op., com. (j) quot. in conc. and diss. op. After an employee reported to her supervisor that a coemployee had sexually assaulted her in a conference room at their workplace, criminal charges of rape and assault and battery were filed against the accused employee; however, a jury returned verdicts of not guilty. The accused employee's wife sued the employer for loss of consortium, arising from the employer's alleged intentional infliction of emotional distress on her husband. The trial court entered judgment on a jury verdict for the plaintiff. Reversing and remanding in part, this court held that there was insufficient evidence that the employer's conduct toward the employee ever rose to the level of extreme and outrageous conduct requisite for the tort of intentional infliction of emotional distress. Two concurring and dissenting opinions argued that the majority erred when it reversed the jury's finding that the defendant's conduct was extreme and outrageous. They reasoned that this was a question of fact and the factfinder's judgment should not have been disturbed. Foley v. Polaroid Corp., 400 Mass. 82, 508 N.E.2d 72, 82, 84, 87.

Mass.1985. Com. (d) cit. in disc. Tenants filed a class action against a landlord and his agents for violating the state consumer protection act by including deceptive and illegal clauses in the defendants' standard apartment lease. An individual plaintiff brought an additional action for intentional infliction of emotional distress. The trial court found for the class of plaintiffs, awarding treble damages, and for the defendants on the emotional distress claim. This court affirmed the class finding, concluding that the plaintiffs had suffered an injury, but disallowed the award of treble damages. The court also concluded that the defendants' conduct was not “beyond all possible bounds of decency” and thus did not constitute intentional infliction of emotional distress. Leardi v. Brown, 394 Mass. 151, 474 N.E.2d 1094, 1106.

Mass.1985. Com. (d) cit. in conc. and diss. op. A church employee sued her employer on several grounds after she was terminated from her job as a writer for a church-published newspaper, allegedly because she was a lesbian. The trial court denied the employer's motion for summary

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judgment and dismissal. Reversing in part, this court held that the church had a right to terminate the employee because of her sexual preference. Affirming in part this court held that although the allegations in the employee's complaint failed to state causes of action against the church defendants for defamation and intentional infliction of emotional distress, the employee would be given the opportunity to replead her claims on these issues. A concurring and dissenting opinion argued that the employee had no cause of action for defamation because the newspaper's supervisors were conditionally privileged to discuss the employee's sexual preference, and that there was no cause of action for intentional infliction of emotional distress because the church defendants' conduct fell far short of being so outrageous and extreme as to incur tort liability. Madsen v. Erwin, 395 Mass. 715, 481 N.E.2d 1160, 1171.

Mass.1982. Com. (d) cit. in disc. The plaintiffs brought suit against the defendant, seeking damages for emotional distress and injuries they allegedly suffered after the defendant erroneously commenced a collection action against the plaintiffs on behalf of his client. The defendant filed a motion to dismiss the plaintiffs' claims on the ground that they failed to state any claim upon which relief could be granted. The trial court granted the defendant's motion to dismiss, and the plaintiffs appealed. This court stated that one who, without a privilege to do so, by extreme and outrageous conduct intentionally caused severe emotional distress to another, with bodily harm resulting from such distress, was subject to liability for such emotional distress and bodily harm. This court found that the defendant's conduct could not be characterized as extreme and outrageous. Therefore, he court upheld the lower court's dismissal of the plaintiff's complaint. Judgment affirmed. Beecy v. Pucciarelli, 387 Mass. 589, 441 N.E.2d 1035, 1040.

Mass.1982. Cit. in disc., com. (i) quot. in disc. The plaintiffs in this action were daughters of women who, while pregnant, ingested the drug DES. The plaintiffs sought damages for their emotional distress arising from the statistical likelihood of their suffering abnormalities of the reproductive organs or contracting clear cell adenocarcinoma. The plaintiffs had not yet exhibited symptoms of these disorders. Some plaintiffs submitted to regular early-detection examinations, which were expensive and traumatic for them, on the advice of their physicians. The plaintiffs asserted that the defendant manufacturers were negligent in marketing the drug without adequate testing or warnings. The federal district court, where the suit was filed, certified questions of law to this court. This court first determined that the plaintiffs' alleged injuries were inadequate to permit recovery. After examining the various methods of treating such claims, the court concluded that a plaintiff seeking recovery for negligent infliction of emotional distress must also introduce evidence of physical harm resulting from the conduct which caused the emotional distress. Secondly, the court declared that the fact that a plaintiff would probably not have been born had her mother not ingested DES would act to bar that plaintiff's recovery. In so concluding, the court rejected the plaintiffs' interpretation of the “would-be rescuer” doctrine, in which a duty of reasonable care is imposed to protect the endangered person from being placed in a worse position due to the rescuer's intervention. Thirdly, the court recognized a right of action for injury to a plaintiff in utero. Finally, the court rejected the theory of market share liability advanced by the plaintiffs. The court based its ruling in part on the deleterious effect which the imposition of

such broad liability could have on the development and marketing of new drugs. Payton v. Abbot Labs, 386 Mass. 540, 437 N.E.2d 171, 177.

Mass.1982. Cit. in sup. and coms. (d) and (i) cit. in sup. The plaintiff landlord began summary proceedings to evict the defendant tenant for nonpayment of rent. The tenant counterclaimed for damages for injuries, based upon a claim that water and sewage had flooded her basement apartment approximately thirty times. The defendant did not suffer physical injury because of the flooding, but testimony indicated that she had suffered serious emotional injury as a result of her living conditions. The jury awarded the defendant damages, based, inter alia, upon her claim for reckless infliction of emotional distress. The plaintiff landlord appealed. This court stated that a plaintiff may recover for emotional distress if he can show (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was likely to result from his conduct, (2) that the conduct was extreme and outrageous, (3) that the defendant's actions caused the plaintiff's distress, and (4) that the plaintiff's emotional distress was severe. Therefore, proof of physical injury is not required. The court stated that the jury could have found, inter alia, that the landlord knew or should have known that unless it fixed the porous wall, flooding would occur, and that floods of sewage and water were very likely to cause emotional harm. The jury could also have found that the landlord had displayed, over a long and repetitious course, such a pattern of indifference that its conduct was outrageous, beyond all possible bounds of decency. The court therefore found that the jury had been warranted in holding the landlord liable for reckless infliction of emotional distress. Simon v. Solomon, 385 Mass. 91, 431 N.E.2d 556, 561, 562.

Mass.1982. Com. (i) cit. in case quot. in sup., com. (d) cit. in sup. In a summary process action by a landlord against tenants for nonpayment of rent, the trial court denied the tenants' counterclaim for damages for intentional infliction of emotional distress. The tenants appealed, arguing that the landlord knew or should have known that his failure to alleviate a problem of rodent infestation would cause the tenants severe emotional distress. This court rejected the argument and affirmed the dismissal of the tenants' claim. The court found that the conduct of the landlord was not so outrageous as to form a basis for liability. The landlord did eventually take action to alleviate the problem, and there was insufficient evidence for a finding that he had intended to cause the tenants any emotional distress. Wolfberg v. Hunter, 385 Mass. 390, 432 N.E.2d 467, 471, 472.

Mass.1980. Subsec. (1) and (2) cit. in ftn. A wife and her two children filed a complaint alleging that her husband, their father, had been injured as a result of the negligent, wilful, wanton and reckless conduct of his employer. The plaintiffs had been notified that the victim had been injured, they rushed to the hospital and found the victim paralyzed. The plaintiffs claimed that the injures to the victim caused, inter alia, the wife's loss of consortium and the children's loss of society. The trial court denied the defendant's motions for summary judgment on the claims for the loss of consortium and loss of society but granted the defendant's motions to dismiss the claims of mental anguish and impaired health. This court affirmed the denial of summary judgment on the consortium claim. The court examined the loss of society claim more carefully because it was a case of first impression in Massachusetts. The court stated that allowing recovery for loss of society may create a multiplicity of suits, extortionary litigation, vague guidelines concerning when a

child becomes an adult and the possibility that juries would be unable to fix damages which are so speculative. The court noted, however, that a child can recover in a wrongful death action, and found that a minor's loss of society was an extension of that doctrine. The court looked to the children's dependence on their father and stated that not only economic considerations but also filial needs for nurture and guidance should be considered. Therefore the court held that children should be able to recover for the reasonable expectation of parental society when a parent suffers a severe but nonfatal injury. The court then discussed the claims of mental anguish and impaired health. The court noted that the plaintiffs had not been at the scene of the accident but stated that the effect of seeing the victim a few minutes later at the hospital was just as injurious. The court stated that as long as the plaintiffs' shock immediately followed the accident, whether at the scene of the accident or at the hospital, the injury to the plaintiffs was foreseeable. The defendant argued that the Workmen's Compensation Act precluded all of the plaintiffs' claims. The court rejected this argument and stated that a victim, who had accepted such payments, had waived his right to sue, but that his wife and children had not waived their rights. Their claims were consequential to claims which might have arisen if the victim had sued for lost wages. The court noted that the plaintiffs alleged wilful, wanton and reckless infliction of emotional distress but stated that it did not appear that there were sufficient facts to support this claim. The court stated that it was not ruling on the validity of a claim for intentional infliction of mental distress through conduct directed at a third party because it was not reaching that issue in this case. The court therefore affirmed the denial of the defendant's motion for summary judgment for the loss of consortium and the loss of society, but reversed the grant of summary judgment on the claims of mental anguish and impaired health. Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690, 697.

Mass.1980. Subsec. (1) quot. in ftn. and com. (d) quot. in part in sup. The plaintiff brought an action for severe emotional distress allegedly caused by the outrageous conduct of his employer following his discharge. Plaintiff's attendance record was poor and several times he had not notified the office that he would not be present. At least some of the absences were caused by a nervous condition. Because the plaintiff was on a six-month probationary period, it was determined that he was not a good risk for long term employment because of the attendance problems and also because there was a doubt about his ability to withstand the strain of the position. The trial court granted summary judgment for the defendants. The issue to be considered was whether the trier of fact could have reasonably found that the supervisors' conduct toward the plaintiff was so outrageous in character and extreme in degree as to go beyond the bounds of decency, be regarded as atrocious and utterly intolerable in a civilized community. It was found that the plaintiff failed to make out a plausible case of “outrage” and the judgment of the trial court was affirmed. Richey v. American Auto. Ass'n, Inc., 380 Mass. 835, 406 N.E.2d 675, 676-678.

Mass.1979. Com. (d) and (h) cit. in disc. and com. (f) and illus. (9) through (11) cit. in sup. The plaintiff brought an action for intentional or reckless infliction of emotional distress against a private investigator engaged in investigating the plaintiff's brother-in-law. The trial court entered judgment for the plaintiff. This court affirmed the trial court's judgment and held that it was for the jury to decide whether the plaintiff's conduct was such as could be characterized as “extreme and outrageous.” Boyle v. Wenk, 378 Mass. 592, 392 N.E.2d 1053, 1055-1057.

Mass.1976. Cit. in sup., coms. (i), (d), (j), (h) cit. in disc. and com. (b) cit. in ftn. in disc. A wife brought suit against an employer-restaurant for mental anguish and emotional distress resulting from her summary dismissal from employment and her husband sued for the loss of services and companionship of his wife. On appeal from dismissal of their claims, the court held that mental anguish, even without resulting physical injury, caused by defendant's extreme and outrageous conduct and without privilege subjects defendant to liability for such emotional distress. It is for plaintiff to show that defendant's conduct was of such a nature to, and did indeed, cause her distress. If it should be found that she has a cause of action against defendant, her spouse also has a cause of action for loss of consortium arising out of the distress. Agis v. Howard Johnson Co., 355 N.E.2d 315, 317, 318.

Mass.1971. Cit. and subsec. (1) quot. and coms. (e), (f) and (j) cit. andquot. in sup. and com. (d) Rptr's. notes quot. in part in sup. Plaintiff brought suit to recover damages for emotional distress and resultant physical injuries caused by defendants. The defendants sold goods to plaintiff's emancipated son on credit. They then falsely alleged that plaintiff had guaranteed to pay her son's debt, and in an attempt to intimidate her, began to harass her by constant telephone calls, letters, and other tactics. Plaintiff's health deteriorated, and she sustained a heart attack. Plaintiff's attorney warned defendants that plaintiff's health had deteriorated, but defendants continued to harass the plaintiff. Plaintiff alleged that as a result she sustained another heart attack. Plaintiff sued on the theory that the defendants intentionally caused her emotional distress which resulted in her physical injuries. The trial court sustained defendants' demurrer. On appeal, the court reversed, holding that one who intentionally causes another severe emotional distress by extreme and outrageous conduct is liable for the emotional distress and resulting physical injuries, even though he has committed no other common law tort. George v. JordanMarsh Company, 268 N.E.2d 915, 921, 46 A.L.R.3d 762.

Mass.App.

Mass.App.2018. Com. (d) quot. in sup. Former employee of university brought a claim for intentional infliction of emotional distress against university and individuals associated with its student newspaper, after the newspaper published articles reporting that he had allegedly taken photographs of women on the campus without their permission. The trial court granted summary judgment for defendants. Reversing in part, this court held that a trier of fact could reasonably find that newspaper's publication, both online and in print, of plaintiff's photographs alongside allegations that he was surreptitiously photographing women on campus was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community, as required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. Butcher v. University of Massachusetts, 111 N.E.3d 294, 303.

Mass.App.2007. Quot. in part in case quot. in sup., cit. in ftn., com. (d) quot. in case quot. in sup. (general cites). After landlord served a notice to quit on tenant and sued tenant for possession of the premises and unpaid rent despite having been repeatedly informed by tenant that her section 8 subsidy had been terminated wrongfully and that her rent should be adjusted accordingly, landlord, on the day of trial, effectively settled all rental issues. The trial court entered judgment on tenant's counterclaim for statutory interference with quiet enjoyment, awarded her emotional-distress damages, and then doubled the award. This court affirmed, holding, inter alia, that the trial court's finding that landlord's actions were extreme and outrageous and caused tenant severe distress were warranted. The court pointed to landlord's "contumacious" refusal to correct the mistake, and the disastrous nature of the eviction threat to a single mother with children. Homesavers Council of Greenfield Gardens, Inc. v. Sanchez, 70 Mass.App.Ct. 453, 459, 874 N.E.2d 497, 503.

Mass.App.2003. Com. (d) quot. in case quot. in ftn. Commercial lessee sued lessor for breach of lease agreement and constructive eviction, claiming, inter alia, intentional infliction of emotional distress in connection with lessor's alleged attempts to cause lessee to break lease. Trial court dismissed emotional-distress claim. Affirming, this court held, inter alia, that excerpts from individual lessee's discovery transcripts supported lower court's ruling that lessor's conduct was not so extreme or outrageous as to support claim for intentional infliction of emotional distress. Northern Associates, Inc. v. Kiley, 57 Mass.App.Ct. 874, 884, 787 N.E.2d 1078, 1086.

Mass.App.2001. Com. (d) quot. in case quot. in disc. Surviving spouse of patient sued hospital and physicians for, in part, intentional infliction of emotional distress, alleging that scope of husband's autopsy for which she had given written consent had been exceeded. Affirming in part the trial court's grant of summary judgment for defendants, this court held, inter alia, that nothing in plaintiff's deposition testimony or defendant physician's statements to autopsy team supported a theory that physician had recklessly misled plaintiff or that he had actual knowledge that the procedure would be so intrusive, and thus his conduct did not rise to the level of outrageousness necessary to maintain a claim for intentional infliction of emotional distress. Kelly v. Brigham & Women's Hosp., 51 Mass.App.Ct. 297, 311, 745 N.E.2d 969, 979.

Mass.App.2000. Com. (d) quot. in disc. Husband brought tort action against man with whom wife was engaged in an extramarital affair. The trial court dismissed the complaint for failure to comply with the applicable statute of limitations. Affirming, this court held that, while the action was timely, the allegations amounted to the torts of alienation of affections and criminal conversation, and thus the complaint failed to state a claim upon which relief could be granted, and that an extramarital affair, even if conducted for the purpose of hurting the other spouse, did not rise to the level of outrageousness necessary to support an action for intentional infliction of emotional distress. Quinn v. Walsh, 49 Mass.App.Ct. 696, 732 N.E.2d 330, 339.

Mass.App.1999. Coms. (d) and (i)-(k) cit. in ftn., illus. 1, 15, 16, 19 cit. in ftn. After a teenage boy died while having sexual relations with a married woman, the woman drove to the boy's home and left his body in the gutter in front of the house. The boy's mother suffered a nervous breakdown upon learning of the circumstances of the discovery of her son's body. She sued the

woman and the woman's homeowners' insurer for wrongful death and intentional infliction of emotional distress. After the insurer settled the wrongful-death claim, trial court granted the insurer summary judgment on the emotional-distress claim, holding that coverage for injuries resulting from the woman's disposal of the body was precluded under the exclusion for injuries expected or intended by the insured. This court affirmed, holding, inter alia, that the plaintiff's emotional distress was not a "bodily injury" within the meaning of the policy. Richardson v. Liberty Mutual Fire Insurance Company, 47 Mass.App.Ct. 698, 716 N.E.2d 117, 120.

Mass.App.1994. Com. (d) cit. in sup. and in ftn., coms. (e) and (f) cit. in disc., com. (j) cit. in ftn., illus. 1-13 cit. generally in disc. Bookkeeper quit job after employer asserted that she had diverted inventory and sold it for her own account, or had collaborated with employer's shipping manager in selling inventory for his account. When contacted by employment agency as to why he would not rehire woman, employer's president stated that circumstances surrounding woman's leaving were the subject of a police investigation. Woman sued employer and president, alleging, inter alia, malicious prosecution and intentional infliction of emotional distress. Jury found for plaintiff except as to defamation count. The trial court entered judgment n.o.v. for defendants as to malicious prosecution and emotional distress counts. Affirming in part, this court held, in part, that judgment n.o.v. was proper as to emotional-distress claim, since investigation and reporting of suspected theft was founded in reasonable apprehension based on objective facts. Furthermore, defendants handled plaintiff with comparative graciousness, as they did not fire her, vilify her, or take steps to maximize her shame in her co-workers' eyes. Conway v. Smerling, 37 Mass.App.Ct. 1, 635 N.E.2d 268, 273.

Mass.App.1992. Com. (d) quot. in case cit. in sup. Plaintiffs, who attributed their financial difficulties to various acts of a bank, sued the bank for intentional infliction of emotional distress, inter alia. Affirming the trial court's entry of summary judgment for defendant, this court held that the facts upon which plaintiffs based their claim did not rise to the level required for liability. Botschafter v. F.D.I.C., 33 Mass.App.Ct. 595, 603 N.E.2d 235, 237.

Mass.App.1974. Cit. in sup. The plaintiff, the father of a minor who had been killed in a motorcycle accident, brought an action against the defendant newspaper and the county medical examiner for extreme and outrageous conduct causing emotional distress. The newspaper had printed the medical examiner's statement, without revealing the victim's name, that the victim had a long history of involvement with drugs. The court sustained the defendants' demurrer to the complaint, holding that, assuming the existing of such a cause of action, in the absence of bodily harm resulting from the defendants' conduct, the alleged conduct was neither extreme and outrageous nor indicative of an intent to harm the plaintiff. Casamasina v. Worcester Tel. & Gazette, Inc., 307 N.E.2d 865, 866.

Mich.

Mich.1985. Quot. in disc., cit. but dist., cit. in conc. op., cit. generally in case quot. in ftn. to conc. op., cit. in ftn. to conc. op.; coms. (d), (g), and (j) quot. in disc., com. (k) cit. in disc., coms. cit. generally in conc. op., coms. (e) and (f) cit. in ftn. to conc. op.; illus. cit. generally in conc. op., illus. 1, 2, 3, 5, 7, and 9 quot. in ftn. to conc. op., illus. 7, 12, and 14 cit. in ftn. to conc. op., illus. 12 cit. in conc. op. Plaintiffs' daughter was struck by a car while riding her bicycle. The defendant insurance company paid the medical bills, but denied plaintiffs' claim for replacement services benefits under the state no-fault insurance statute. Plaintiffs sued for breach of the insurance contract and claimed damages for intentional infliction of emotional distress. The trial court entered judgment for the plaintiffs; the court of appeals affirmed. The supreme court reversed, holding that the defendant's failure to provide application forms for the benefits did not constitute extreme and outrageous conduct. Since the plaintiffs merely became angry, but did not suffer grief, depression, or disruption of life style, or need treatment for anxiety, they did not sufficiently prove severe emotional distress. One concurring justice would have the court join the trend in recognizing the tort of intentional infliction of emotional distress, but another concurring justice questioned the wisdom of extending this tort to cover unfair insurance claim settlement practices. Roberts v. Auto-Owners Ins. Co., 422 Mich. 594, 374 N.W.2d 905, 908, 909, 911-913, 915, 916, 920, 921.

Mich.App.

Mich.App.2003. Com. (d) quot. in case quot. in sup. After boyfriend surreptitiously videotaped intimate acts of sexual relations with three of his girlfriends without their consent, former girlfriends sued boyfriend for common-law right to privacy and intentional or reckless infliction of emotional distress. Trial court entered judgment on jury verdict for plaintiffs. This court affirmed, holding, inter alia, that the act of secretly videotaping plaintiffs having sexual relations was deceptive and a breach of trust, and a reasonable person could conclude that such an act would cause emotional distress. Lewis v. Legrow, 258 Mich.App. 175, 670 N.W.2d 675, 689.

Mich.App.2002. Com. (d) quot. in sup. Hospital visitor who had inadvertently left her wedding ring and watch at the hospital sued hospital and the security company to which the hospital turned over the jewelry, alleging conversion, breach of bailment, and intentional infliction of emotional distress, inter alia. The trial court granted defendants' summary disposition, concluding that the plaintiff failed to prove that her claim exceeded the court's $25,000 statutory jurisdictional minimum. This court affirmed, holding that, because defendants' failure to locate plaintiff's jewelry was not extreme and outrageous conduct, plaintiff could not establish emotional-distress claim so as to meet the court's jurisdictional limit. Bernhardt v. Ingham Regional Medical Center, 249 Mich.App. 274, 278, 641 N.W.2d 868, 870.

Mich.App.1999. Com. (d) quot. in case cit. in disc. Former employees of department of corrections sued supervisor for racial discrimination and intentional infliction of emotional distress. The trial court entered summary judgment for defendant. Affirming in part, reversing in part, and remanding, this court held that material factual issues existed as to whether defendant discriminated against plaintiffs because of their race and because of their associations with persons

of other races; however, the court could not say that defendant's actions were sufficiently extreme or outrageous as to support a claim for intentional infliction of emotional distress. Graham v. Ford, 237 Mich.App. 670, 604 N.W.2d 713, 716, appeal after remand 2004 WL 790313 (Mich.App.2004).

Mich.App.1999. Com. (h) cit. in case cit. in sup. Parishioner brought suit for, in part, intentional infliction of emotional distress against minister who had engaged in a sexual relationship with her. Affirming the trial court's grant of summary disposition in favor of minister, this court held, inter alia, that defendant's behavior did not rise to the level of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress. Teadt v. Lutheran Church, 237 Mich.App. 567, 603 N.W.2d 816, 824.

Mich.App.1996. Cit. in headnote, com. (j) quot. and cit. in sup. Orthopedic surgeon sued his co-worker, a nurse, for intentional infliction of emotional distress following a two-year period during which nurse threatened doctor and his fiancee with physical harm, left lingerie on doctor's car and outside his home, and left a hatchet, and later an axe, on the fiancee's vehicle. The trial court entered judgment for doctor. Affirming, this court held that nurse's conduct was so extreme and outrageous as to exceed the bounds of acceptable behavior, and that doctor had established that he suffered mental distress so severe that no reasonable person could be expected to endure it. Haverbush v. Powelson, 217 Mich.App. 228, 551 N.W.2d 206, 206, 209.

Mich.App.1992. Cit. in case cit. in sup. Physician who had opened a family practice clinic under an arrangement with a hospital sued the hospital for intentional infliction of emotional distress, inter alia, after it discharged her. Affirming the trial court's granting of summary disposition for defendant, this court held that plaintiff did not specifically allege conduct that was sufficiently extreme or outrageous to establish liability in tort. The court also stated that in a contractual setting a tort claim must rest on a breach of duty distinct from contract. Kamalnath v. Mercy Memorial Hosp. Corp., 194 Mich.App. 543, 487 N.W.2d 499, 506.

Mich.App.1992. Com. (d) quot. in case quot. in sup. Former employee sued former employer and supervisor for sexual and religious harassment and intentional infliction of emotional distress. Trial court granted partial summary disposition for defendants on the harassment charges and granted summary disposition for defendants on the emotional distress claim. Reversing in part, this court held that plaintiff's claim for incidents occurring before 1984 was not barred by the statute of limitations because defendants' course of discriminatory conduct constituted a continuing violation. The court affirmed the grant of summary judgment for defendants on the emotional distress claim, holding that where the supervisor and other employees continually made derogatory comments to plaintiff concerning her gender and religion, these actions were not sufficiently extreme and outrageous to support a claim for emotional distress. Meek v. Michigan Bell Telephone Co., 193 Mich.App. 340, 483 N.W.2d 407, 410, appeal denied 440 Mich. 872, 486 N.W.2d 743 (1992).

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Mich.App.1991. Com. (d) quot. in disc., com. (g) cit. in case quot. in disc. In the presence of another employee, the immediate supervisor of a credit union employee told her that she was being terminated because of allegations of theft made against her by two credit union members. The employee sued her employer and supervisor alleging negligent termination, defamation, breach of contract, and intentional infliction of emotional distress. The trial court granted summary judgment in favor of the defendants. Affirming, this court held, inter alia, that the defendants' conduct was not sufficiently outrageous to constitute a cause of action for intentional infliction of emotional distress. The court noted that the defendants' conduct occurred in the presence of only a small group of business principals, and that allegations of wrongdoing by the plaintiff were not bandied about unnecessarily in an outrageous manner. Gonyea v. Motor Parts Fed. Credit Union, 192 Mich.App. 74, 480 N.W.2d 297, 301.

Mich.App.1988. Coms. (d) and (g) cit. in case quot. in disc. After an insurance company repeatedly threatened to cut off an insured's workers' compensation benefits and demanded that he repay them a large sum of money, the insured sued the insurance company on a claim of intentional infliction of emotional distress. The trial court denied the defendant's motion for summary judgment. Affirming, this court held that the plaintiff alleged sufficient facts of a deliberate pattern of harassment by the defendant to satisfy the threshold requirement of extreme and outrageous conduct, which is conduct that goes beyond all possible bounds of decency. Atkinson v. Farley, 171 Mich.App. 784, 431 N.W.2d 95, 97.

Mich.App.1988. Coms. (d) and (g) quot. in case quot. in sup. A noncustodial divorced mother sued her ex-husband, who had custody, for intentional infliction of emotional distress, alleging that he used his psychiatric training to destroy the relationship between the children and their mother. The trial court granted summary disposition for the custodial parent. Reversing and remanding, this court held that a jury could find that the deliberate destruction of the parent-child relationship constituted outrageous conduct sufficient to support a claim for intentional infliction of emotional distress. Bhama v. Bhama, 169 Mich.App. 73, 425 N.W.2d 733, 735.

Mich.App.1988. Cit. and quot. in disc., com. (d) quot. in disc., coms. (j) and (k) cit. in case quot. in disc. An individual negotiated with the Amateur Hockey Association of the United States (AHAUS) to purchase the exclusive right to distribute posters of the gold-medal-winning 1980 United States Olympic Hockey Team. The AHAUS then sold to an automobile company the right to use the team in a television advertisement promoting its products. Despite having knowledge of the individual's exclusive poster rights, the automobile company procured a team photograph and created a poster to give away at its dealerships. The individual sued the company and the AHAUS for tortious interference with a business relationship and intentional infliction of emotional distress. The trial court dismissed the emotional distress claim and entered judgment for the plaintiff on the claim for tortious interference. Affirming, this court held, inter alia, that the defendants intentionally and improperly interfered with the plaintiff's exclusive rights to distribute posters; however, their conduct was not sufficiently outrageous to state a cause of action for emotional distress. Bonelli v. Volkswagen of America, Inc., 166 Mich.App. 483, 421 N.W.2d 213, 228, 229.

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Mich.App.1988. Cit. in disc., quot. in diss. op., com. (d) cit. in sup. and quot. in case quot. in diss. op., com. (i) quot. in diss. op. After several years of receiving benefits from an insurance company, a claims agent suggested to the plaintiff that she have her leg amputated rather than endure continued treatment. She sued the insurance company for intentional infliction of emotional distress, claiming that the statements made to induce the amputation created suicidal thoughts. The trial court granted the defendant summary judgment. Affirming, this court held that merely insensitive remarks would not create liability and said that relating an unpleasant option was not atrocious or intolerable. The dissent contended that the claims agent, by discussing amputation, may have abused his authority over the plaintiff at a time when the insurer was dilatory in the payment of benefits due to the plaintiff, and that this could be deemed both outrageous and in deliberate disregard of a high probability of causing emotional distress. Grochowalski v. Detroit Auto. Inter-Ins., 171 Mich.App. 771, 430 N.W.2d 822, 824, 826, 827.

Mich.App.1988. Com. (d) quot. in disc. and generally in sup. A male supervisor allegedly made a sexually suggestive comment to a female auto worker, who was discharged when she refused to accede to his suggestion. When she sued him for intentional infliction of emotional distress, the trial court denied the defendant's motion for summary judgment. Reversing and dismissing the claim, this court determined, inter alia, that the trial court erred in concluding that the defendant's conduct would support such a claim. The court reasoned that although the defendant's overture was repulsive, his statements made in the atmosphere of an adult workplace were insufficient to meet the standard of extreme and outrageous conduct required for a cause of action for intentional infliction of emotional distress. Trudeau v. Fisher Body Div., General Motors Corp., 168 Mich.App. 14, 423 N.W.2d 592, 594.

Mich.App.1987. Quot. in sup., com. (j) quot. in sup., com. (k) cit. in sup. Plaintiff sued his co-worker for intentional infliction of emotional distress after defendant, apparently unhappy with plaintiff's performance as a union steward, made continual complaints and accusations against him at work and harassed him and his family at home. The abuse continued from August 1980 up to the time of trial. This court affirmed the trial court's award of damages to the plaintiff, holding that the evidence was sufficient for a jury to determine that defendant's actions were extreme and outrageous, and that this conduct caused plaintiff to suffer severe emotional distress as manifested by his change in behavior and his medical treatment for stress-related symptoms. Dickerson v. Nichols, 161 Mich.App. 103, 409 N.W.2d 741, 743.

Mich.App.1987. Com. (d) quot. in case quot. in sup. A man who was acquitted of a crime sued a state trooper for malicious prosecution and intentional infliction of emotional distress, claiming that the trooper excluded some exculpatory facts from his incident report. Affirming the trial court's dismissal of the claims, this court held that the conduct of the defendant was not sufficiently "extreme or outrageous" to constitute intentional infliction of emotional distress. The court also held that proof of malicious intent was necessary to support a claim for malicious prosecution for the protection of the interests of the public and of private people aiding prosecutions; in this case the evidence showed that the trooper wrote his report in good faith, not with malice. King v. Arbic, 159 Mich.App. 452, 406 N.W.2d 852, 854.

Mich.App.1987. Coms. (d) and (g) quot. in case quot. in sup. A mortgagor sued its mortgagee for intentional infliction of emotional distress, having received numerous threatening and abusive phone calls concerning alleged nonpayment, despite timely payment. The trial court granted the defendant's motion to dismiss on the ground that the conduct was insufficiently extreme and outrageous to permit recovery. Reversing, this court argued that such conduct could be regarded as sufficiently extreme and outrageous within the criteria for intentional emotional distress; this was a proper question for the trier of fact, and summary disposition was inappropriate. Margita v. Diamond Mortgage Corporation, 159 Mich.App. 181, 406 N.W.2d 268, 271.

Mich.App.1986. Quot. in part in disc., coms. (d) and (g) quot. in case quot. in disc. A motorist had a bowel movement in his clothing in the presence of his fiancee and a police officer when the policeman detained the motorist to write out a speeding ticket. The motorist sued the policeman for intentional infliction of emotional distress. The trial court granted the defendant's motion for summary judgment, on the grounds that the motorist had failed to state a claim. Affirming, this court held that the policeman was not liable for intentional infliction of emotional distress simply because he had refused to allow the motorist to use a restroom while he wrote out the ticket. Cebulski v. City of Belleville, 156 Mich.App. 190, 401 N.W.2d 616, 618, 619.

Mich.App.1986. Com. (d) quot. in case quot. in sup. An insurance company refused to pay a policy holder's fire damage claim, alleging that he had exaggerated the loss, and had purposely caused the fire. The policy holder sued the company for breach of contract and resultant intentional infliction of emotional distress. The trial court granted summary judgment for the plaintiff and awarded damages. This court reversed, holding that the defendant's conduct was not sufficiently outrageous to support a claim of intentional infliction of distress where the plaintiff rested his mental distress damages claim on the insurer's failure to reasonably investigate his claim and the allegation that the insurer accused the plaintiff of arson and fraud when it had no evidence to support those allegations. Crossley v. Allstate Ins. Co., 155 Mich.App. 694, 400 N.W.2d 625, 628.

Mich.App.1986. Quot. in disc., com. (d) quot. in disc., com. (g) quot. in case quot. in sup. After an insurer successfully defended a lawsuit brought by a man claiming to be disabled, the insurer sued the man's doctors for insurance fraud. When the doctors prevailed, they sued the insurer for, inter alia, intentional infliction of emotional distress and invasion of privacy. The trial court granted summary judgment to the insurer. Affirming, this court held that the insurer was not liable for inflicting emotional distress where it had done no more than to insist upon its legal rights in a permissible way, and even if this conduct were not privileged, the act of filing suit was not sufficiently outrageous to sustain a claim for emotional distress. Early Detection Ctr. v. N.Y. Life Ins., 157 Mich.App. 618, 403 N.W.2d 830, 833, 834.

Mich.App.1986. Com. (d) quot. in sup. The plaintiffs were arrested for robbery after the employees of a restaurant wrongly identified them as the perpetrators of an earlier robbery. The plaintiffs sued the restaurant for false imprisonment, intentional infliction of emotional distress, and false light invasion of privacy. The trial court denied the defendant's motion for summary

judgment. Reversing, this court held that the employees did not commit a false arrest in merely supplying information to the police because it was the police who had to act on the information. The court also held that the defendant's employees' conduct was not so outrageous as to justify a claim for intentional infliction of emotional distress, and that the plaintiffs' false light claim was groundless because communications between a citizen and the police are privileged. Hall v. Pizza Hut of America, Inc., 153 Mich.App. 609, 396 N.W.2d 809, 812.

Mich.App.1986. Subsec. (1) quot. in case cit. in sup., coms. (d) and (j) quot. in case cit. in sup. A maintenance supervisor who suffered an injury on the job collected workers' compensation benefits until he was fired after he attempted to return to work and his benefits were cut off. He sued his employer, the workers' compensation insurer, and the insurer's servicing agent, alleging that they had conspired to cut off his benefits and that resulted in his suffering emotional distress. The trial court denied the defendants' motions for summary judgment. This court reversed, holding that the defendants' alleged conduct was not sufficiently outrageous or atrocious to support a claim of intentional infliction of emotional distress, even though the conduct would call into serious question the business practices of the defendants. Lisecki v. Taco Bell Restaurants, Inc., 150 Mich.App. 749, 389 N.W.2d 173, 174, 175.

Mich.App.1986. Cit. in case cit. in disc. An insured's diesel tractor rig was damaged when the vehicle jackknifed. The insured sued his insurer for breach of contract, negligence in adjustment, and intentional infliction of emotional distress in willfully failing to settle the plaintiff's collision claim in a timely and proper manner. The trial court dismissed the plaintiff's intentional infliction of emotional distress claim. This court affirmed in part and reversed in part, holding that the plaintiff failed to adequately plead the elements of an independent cause of action for intentional infliction of emotional distress. The court reasoned that the plaintiff's allegation that the defendant negligently adjusted his claim fell short of the requirement that the conduct be intentional or reckless, and that the defendant's alleged intentional or willful refusal to settle the plaintiff's claim did not constitute outrageous conduct. Wendt v. Auto Owners Ins. Co., 156 Mich.App. 19, 401 N.W.2d 375, 378.

Mich.App.1985. Cit. in disc., com. (d) quot. in case quot. in sup. The plaintiff sued an insurance company and its attorneys for bringing a subrogation action against her. The defendants had mistaken the plaintiff for another woman with the same name who had been involved in an accident, and they had pursued the action despite the plaintiff's numerous protestations that she had not been involved. The plaintiff won judgments on all counts, and this court affirmed the judgments for breach of contract, malicious prosecution, and defamation. The court held that "special injury" for purposes of defamation meant actual harm. The court reversed judgment for intentional infliction of emotional distress, however, because it felt that the defendants' conduct had not been sufficiently extreme or outrageous. It reversed the judgment for invasion of privacy because the defendants had not discovered any secret or private matter. Hall v. Citizens Ins. Co. of America, 141 Mich.App. 676, 368 N.W.2d 250, 254.

Mich.App.1985. Com. (d) quot. in case cit. in sup. A physician brought an action against his attorney and the firm that represented him in a medical malpractice action. The physician alleged that his attorney wrote a defamatory letter and distributed the letter to the physician's insurer, to codefendants' attorneys, and to a nonparty. The physician brought counts of defamation, publicity placing him in a false light, infliction of emotional distress, and legal malpractice. The trial court granted summary judgment for the attorney on the legal malpractice claim, but denied it for the other allegations. This court affirmed in part and reversed in part, granting summary judgment for defendants on all counts. The defamation and false light publicity claims failed because the court held that the letter did not injure the physician's reputation, and that its distribution was limited rather than publicly disseminated. The intentional infliction of emotional distress claim failed because the court held that the defendants' conduct was not extreme or outrageous. The court dismissed the legal malpractice claim for prematurity because it was based on a medical malpractice action that was still pending. Sawabini v. Desenberg, 143 Mich.App. 373, 372 N.W.2d 559, 565.

Mich.App.1984. Quot. in sup., com. (d) quot. in sup. The plaintiffs joined the defendant's health spa pursuant to a contract in which the defendant reserved the right to make future rules and regulations. After the defendant instituted a dress code, the plaintiffs sued for intentional infliction of emotional distress. The defendant's motion for summary judgment was granted on the theory that plaintiffs had failed to state a claim upon which relief could be granted. This court affirmed. Noting that the plaintiffs had to allege that the defendant's actions were extreme and outrageous, the court observed that the complaints alleged merely that the defendant had enforced the dress code. This court held that these allegations were insufficient to establish extreme and outrageous conduct. Ferrell v. Vic Tanny International, Inc., 137 Mich.App. 238, 357 N.W.2d 669, 673-674.

Mich.App.1984. Quot. in disc., com. (d) quot. in sup. Plaintiff was discharged as general manager of defendant's store for failure to correct inventory shortages. In a suit for wrongful discharge, defamation, and intentional infliction of emotional distress, the trial court granted summary judgment for defendant on all counts. This court affirmed, holding, inter alia, that defendant had a legal right to terminate plaintiff's employment with or without cause. On the defamation count, plaintiff admitted that she did not know who had been told that she was discharged for inventory shortages. The court held that plaintiff had not established the necessary elements of defamation, including the defamatory words, colloquium, and publication. On the issue of intentional infliction of emotional distress, the court noted that no liability would be imposed when the actor did no more than insist on his legal rights, and agreed with the trial court that defendant's conduct was not sufficient to meet the “extreme and outrageous” requirement. Ledl v. Quik Pik Food Stores, Inc., 133 Mich.App. 583, 349 N.W.2d 529, 532, 533.

Mich.App.1984. Subsec. (1) quot. in case quot. in disc., com. (d) quot. in case quot. in disc., coms. (e), (f), (g) cit. in case quot. in disc. A widow sued her husband's brothers and their accountants and attorneys for breach of contract, breach of fiduciary duties, and intentional infliction of emotional distress. One count of the plaintiff's complaint alleged that the defendants engaged in extreme and outrageous conduct to inflict emotional distress for the purpose of forcing her to sell her stock in

the various corporations and business ventures with which her husband had been involved. The trial court granted the defendant's motion for summary judgment on the ground that the plaintiff's claims did not present the type of gross or outrageous conduct required to support a claim for intentional infliction of emotional distress. This court reversed and reinstated that count. The court found that questions of material fact precluded summary judgment, which is not appropriate in cases involving intent, credibility, or state of mind. Rosenberg v. Rosenberg Bros. Special Account, 134 Mich.App. 342, 351 N.W.2d 563, 567-568.

Mich.App.1984. Quot. in ftn. in sup., com. (d) quot. in ftn. in sup. The plaintiff, a pre-trial detainee in a suicidal state who was kept disrobed in her cell for several days, sued for intention infliction of emotional distress. The trial court granted the defendant a directed verdict. Affirming, this court held that the conduct of which the plaintiff complained was not outrageous and was a precautionary measure to protect detainee in a suicidal state. Rushing v. Wayne County, 138 Mich.App. 121, 358 N.W.2d 904, 909, 910, appeal denied 430 Mich. 867, 449 N.W.2d 106 (1988), order vacated on reconsideration 433 Mich. 917, 449 N.W.2d 410 (1989).

Mich.App.1984. Cit. in case quot. in sup., com. (d) quot. in case quot. in sup. A teacher sued the parent of a student, alleging that statements in the parent's letter written to the principal pursuant to an established grievance procedure were libelous and intended to inflict emotional distress upon the teacher. The trial court granted summary judgment for the parent and the intervening school board. Affirming, this court held that the parent's use of a school district's complaint procedure cannot, as a matter of law, be regarded as so outrageous and extreme to support a claim for intentional infliction of emotional distress. Swenson-Davis v. Martel, 135 Mich.App. 632, 354 N.W.2d 288, 292.

Mich.App.1983. Quot. in sup., com. (d) quot. in sup. Decedent, a minor employee, was assisting his co-workers in moving an overloaded cart when the 2,500 pounds of glass loaded on the cart fell on him. Decedent's co-workers delayed taking him to a hospital and cleaned up the accident site to mislead police. Decedent's parents brought suit against decedent's employer and co-workers alleging negligence and intentional torts committed against decedent, and intentional infliction of emotional distress committed against themselves. The trial court granted accelerated judgment for the defendants on the negligence and emotional distress counts. Affirming in part and reversing in part, this court found error only in the trial court's granting of accelerated judgment for intentional infliction of emotional distress. Such claim, belonging only to the parents, was not derivative and was outside the scope of the wrongful death act and the Workers' Disability Compensation Act. Barnes v. Double Seal Glass Co. Inc., Plant 1, 129 Mich.App. 66, 341 N.W.2d 812, 817.

Mich.App.1983. Com. (g) cit. in disc. An insurance company was to provide plaintiff benefits for replacement services pursuant to the settlement of a lawsuit. When the insurance company demanded daily, detailed reports of the services, plaintiff protested. The company offered a reduction in benefits as an alternative to the reports, and plaintiff brought suit for breach of the settlement agreement and for intentional infliction of emotional distress. A jury returned a verdict for the plaintiff. This court reversed in part and held that the settlement agreement constituted

a commercial contract, therefore barring any recovery for emotional distress. The court added that one was not liable for intentional infliction of emotional distress where he had only insisted upon his legal rights in a permissible way, even though he knew that such insistence would cause emotional distress. Butt v. Detroit Auto. Inter Insurance Exch., 129 Mich.App. 211, 341 N.W.2d 474, 478.

Mich.App.1983. Cit. in sup., com. (d) cit. in sup. An insured sued a no-fault insurer for breach of contract and intentional infliction of emotional distress, claiming that defendant refused to pay or delayed payments of personal injury benefits to plaintiff. Defendant's motion for partial summary judgment on the emotional distress count was denied. The appellate court reversed, holding that defendant was entitled to partial summary judgment because defendant's alleged acts did not, as a matter of law, rise to the level of extreme and outrageous conduct necessary to sustain a claim of intentional infliction of emotional distress. Harris v. Citizens Ins. Co., 141 Mich.App. 110, 366 N.W.2d 11, 12-13.

Mich.App.1983. Quot. in disc. and com. (d) quot. in disc. An employee was sexually assaulted by her supervisor and brought suit against the supervisor and her employer. Plaintiff moved to amend her complaint to allege violations of civil rights and intentional infliction of emotional distress. The trial court denied the motion and dismissed the complaint for lack of jurisdiction. This court reversed, holding that plaintiff could amend her complaint to add the allegation of civil rights violations. As for intentional infliction of emotional distress, however, plaintiff could amend her complaint to add the allegation against her supervisor, but not against the employer. This court stated that an employer was liable only for the acts of its employee committed within the scope of his employment, not outside such scope as here. McCalla v. Ellis, 129 Mich.App. 452, 341 N.W.2d 525, 528.

Mich.App.1983. Com. (h) quot. in sup. A bicyclist, injured when she was struck by an automobile, and her parents sued and recovered a judgment against the insurer for breach of contract and intentional infliction of mental distress. On appeal, the insurer argued that a breach of an insurance contract is insufficient to support a claim for intentional infliction of mental distress. This court affirmed, holding that the case involved more than a mere failure to pay benefits, as it was based on allegations that the insurer intentionally attempted to frustrate the claimants' application for benefits. The jury's determination that the insurer's conduct was extreme and outrageous was found to be supported by credible evidence. Roberts v. Auto Owners Ins. Co., 135 Mich.App. 595, 354 N.W.2d 271, 273, reversed 422 Mich. 594, 374 N.W.2d 905 (1985). See above case.

Mich.App.1982. Quot. in disc., com. (d) quot. in disc., com. (g) cit. in case quot. in disc. An injured worker brought an action against a workers' compensation carrier to recover for the intentional infliction of emotional distress in the handling of the plaintiff's workers' compensation benefits claim. The trial court granted the insurance company's motion for a directed verdict, and the court of appeals affirmed. The worker could not recover for intentional infliction of emotional distress in the handling of his claim, since the unjustified termination of the worker's benefits for over three months when he failed to attend vocational rehabilitation, and did not provide the proper medical

authorization to justify the failure, did not establish an intent to cause the worker severe emotional distress and was not done in reckless disregard of the consequences. The insurance company's refusal to guarantee payment of the worker's doctor bills without a report from the doctor stating that the treatment was for a work-related injury was not intended to cause the worker the requisite emotional distress nor was it intended to harass him. The insurance company's conduct could have been viewed as a proper attempt to protect its interests. Holmes v. Allstate Ins. Co., 119 Mich.App. 710, 326 N.W.2d 616, 618.

Mich.App.1982. Quot. and com. (d) quot. in sup.; com. (c) cit. in ftn.; coms. (e) through (g) cit. in disc. The plaintiff brought an action against a shopowner who had called the plaintiff a "nigger" and had ejected him from the store. The plaintiff alleged, inter alia, intentional infliction of emotional distress and invasion of privacy. The trial court granted summary judgment for the defendant, and the plaintiff appealed. This court reversed as to the count for intentional infliction of emotional distress. The court noted that while a racial slur alone was not actionable if characterized as mere "rough language," the slurs here could be considered by a jury to be extreme and outrageous. The circumstances of this case, with the slur having been delivered in the act of throwing the plaintiff out of a public place, were held sufficient to preclude summary judgment. The court then affirmed the grant of summary judgment for the defendant on the invasion of privacy claim. The plaintiff had proceeded on the theory of public disclosure of private facts. The court noted that the offensive remarks merely revealed that the plaintiff was black, which was not a private fact. Further, there were no allegations that revealing the plaintiff's race would be highly offensive to a reasonable person. Ledsinger v. Burmeister, 114 Mich.App. 12, 318 N.W.2d 558, 561, 562.

Mich.App.1982. Cit. in case quot. in disc. A plaintiff filed a civil complaint against the defendants alleging "perjury/false swearing" and conspiracy to commit the same. The plaintiff subsequently sought to amend the complaint. The trial court denied the plaintiff's motion and granted accelerated judgment for the defendants; the plaintiff appealed. On appeal, the plaintiff argued that the trial court erred in denying the plaintiff's motion to file an amended complaint alleging intentional infliction of emotional distress and interference with economic advantage. According to this court, a claim for intentional infliction of emotional distress was defined as follows: one who by extreme and outrageous conduct intentionally or recklessly caused emotional distress to another was subject to liability for such emotional distress, and if bodily harm to the other resulted from it, for such bodily harm. Liability was confined to conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as a atrocious, and utterly intolerable in a civilized community. The court found that the defendants' act of circulating a judicial opinion to several hundred members of the community could not be characterized as "outrageous" or "extreme" conduct so as to expose the defendants to liability for intentional infliction of emotional distress. Thus, since the plaintiff could not have succeeded in his suit against the defendants, it would have been futile to allow the plaintiff to amend his complaint to include the intentional infliction of emotional distress tort, and it was not error to refuse to permit amendment. Judgment affirmed. Meyer v. Hubbell, 117 Mich.App. 699, 324 N.W.2d 139, 142.

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Mich.App.1980. Quot. in case quot. in sup. The plaintiff brought an action against the defendant newspaper for invasion of privacy and intentional infliction of emotional distress arising from the publication of a newspaper story concerning her husband's accidental death. The article stated that a body believed to be that of the plaintiff's husband was removed from a fire which destroyed a cottage. The report stated that a second body, believed to be that of a named woman had also been recovered. The story stated that the victims' cars were found near the cottage and that the victims had been seen together the night before the fire. The defendants filed a motion for summary judgment. The lower court found that any right of privacy of the plaintiff's husband terminated upon his death and found that plaintiff and her children did not have a reasonable expectation of privacy concerning the information in the article. The lower court also held that there had not been a tortious act on which the plaintiff could base recovery. The plaintiff appealed the lower court's grant of summary judgment on both counts. This court stated that in order for an invasion of privacy claim to be grounded on the public disclosure of embarrassing private facts about the plaintiff, the plaintiff must show that the information disclosed was highly offensive to a reasonable person and of no legitimate concern to the public. Additionally, a cause of action for the invasion of privacy could exist where there had been an unreasonable intrusion upon the seclusion of another or publication which placed one in false light or the appropriation of one's name or likeness. Liability for the tort of invasion of privacy is limited though to private information about an individual which has in fact been kept private by the plaintiff and that matter cannot be of legitimate concern to the public. The court held that because the publication of matters concerning the plaintiff and her children was obtained from a public record, was not highly offensive to a reasonable person and was briefly mentioned in an article of legitimate public interest, there was no support for plaintiff's claim of invasion of privacy. The court held that the portion of the article which concerned the woman could not support the plaintiff's allegations because an action for invasion of privacy cannot be maintained by a relative of the person concerned unless the relation was brought into unjustifiable publicity. The lower court's grant of summary judgment was therefore affirmed. Fry v. Ionia Sentinel-Standard, 101 Mich.App. 725, 300 N.W.2d 687, 691.

Mich.App.1976. Quot. and fol., com. (d) quot. in sup. and com. (g) quot. in part in sup. Cit. in ftn. in disc. Plaintiffs brought suit against a mobile home village owner for breach of contract and intentional infliction of emotional distress after defendant refused to approve the prospective purchasers of plaintiffs' mobile home as new tenants on defendant's mobile home site, pursuant to defendant's right to approve new tenants. From dismissal of the complaint, plaintiffs appealed. The court affirmed. Liability for emotional distress may be found only where defendant's conduct has been “extreme and outrageous.” The causation of plaintiff's distress was in conflict, and, therefore, it could not be said that the court's ruling was clearly erroneous. It is not clear that an unfriendly attitude and name calling constitute extremely outrageous conduct. It is also possible that defendant was simply relying on his legal right to refuse a prospective tenant. Finally, realizing the importance of the trial judge's role as fact finder, the court would not disturb the decision that there was not a contract implied in fact or in law. Warren v. June's Mobile Home Village and Sales, 66 Mich.App. 386, 239 N.W.2d 380, 382, 383.

Minn.

Minn.2007. Subsec. (1) adopted in case cit. in disc. In this case in which this court recognized the tort of negligent credentialing against a hospital, relying, in part, on the tort of negligent selection of an independent contractor, as outlined in Restatement Second of Torts § 411, the court cited Restatement Second of Torts § 46(1) for the proposition that it had frequently relied on the Restatements of Torts to guide its development of tort law in areas that it had not previously had an opportunity to address. Larson v. Wasemiller, 738 N.W.2d 300, 306.

Minn.2003. Subsec. (1) and com. (d) cit. in disc., com. (e) cit. and quot. but dist., com. (j) cit. in sup. and adopted in case quot. in sup. After former employee of radio station sued station and its principal owner for, in part, sexual harassment, owner counterclaimed for intentional infliction of emotional distress. The trial court entered judgment on a jury verdict for owner on his counterclaim. The court of appeals affirmed. Reversing and remanding, this court held that the trial court erred in submitting the counterclaim to the jury. The court said that allegations by owner that employee made false reports to police about him, repeatedly threatened him with legal action, and frequently engaged him in loud workplace arguments did not describe the requisite extreme and outrageous conduct; furthermore, there was no causal connection between employee's conduct and owner's emotional distress. Langeslag v. KYMN Inc., 664 N.W.2d 860, 864-866, 869.

Minn.1999. Com. (b) quot. in disc., com. (j) cit. and quot. in diss. op. Arrestees brought action for, in part, intentional infliction of emotional distress against arresting officers, among others. The trial court entered judgment for defendants; the court of appeals reversed in part. Reversing, this court held, inter alia, that jury's findings that defendants engaged in intentional infliction of emotional distress during brawl leading to arrests but acted without malice were not inconsistent, and that, in absence of malice, defendants were entitled to official immunity. The dissent argued that a new trial was necessary because the jury's findings were inconsistent. Kelly v. City of Minneapolis, 598 N.W.2d 657, 663, 666.

Minn.1993. Cit. in sup., subsec. (1) quot. in sup. and cit. in case cit. in sup., subsec. (2) cit. in ftn. and in syllabus and cit. and quot. in sup., com. (d) cit. in disc., coms. (j) and (l) quot. in sup. A wife whose husband was killed when struck by a car while changing a flat tire sued the motorist and the underinsured motorist carrier, seeking damages for intentional and negligent infliction of emotional distress. The court of appeals affirmed the trial court's entry of judgment on a jury verdict for the wife; reversing, this court held that the motorist's reckless driving was not intentionally directed at the husband or any other third person as needed to state a claim for reckless or intentional infliction of emotional distress. Furthermore, the motorist was not aware of the wife's presence, as she was sitting inside the car at the time of the collision. The court stated that mere reckless driving was directed, if at all, only at the driving community generally rather than at a particular individual. Dornfeld v. Oberg, 503 N.W.2d 115, 116-120.

Minn.1990. Com. (j) quot. in case quot. in disc. A pickup truck driver sued three law enforcement officers and their governmental employers arising from an incident in which he was mistakenly chased, fired at, and arrested by the officers. The trial court granted summary judgment in favor of the defendants on all federal and state tort claims. The intermediate appellate court affirmed in part but vacated the award of summary judgment as to one of the officers. This court reversed the intermediate appellate court's decision reinstating the plaintiff's federal and state claims against the officer with the exception of his state assault claim, which was remanded for trial. The court held, inter alia, that the driver's "signs and symptoms of depression" fell far short of the type of distress needed to successfully maintain an action for intentional infliction of emotional distress. It noted that the plaintiff's comments at the time of his arrest and in a later deposition indicated that he regarded the whole situation as a "joke." Johnson v. Morris, 453 N.W.2d 31, 41.

Minn.1986. Cit. in case quot. in disc. A machinist sued his employer after he suffered an injury during the course of his employment. After the case settled out of court, the machinist alleged that he was the object of racial slurs by other employees, and that several unfounded rules-violation investigations were brought against him that eventually resulted in his discharge. He sued his employer for intentional infliction of mental distress based on its harassment and surveillance. The trial court denied the defendant's motion to dismiss the emotional distress claim on the ground that state court jurisdiction in the matter was preempted by the Railway Labor Act. The intermediate appellate court and this court affirmed on this issue, holding that the harassment claim transcended the collective bargaining dispute terms of the act, and was outside its administrative procedures because the act provided no remedy for conduct that constituted the intentional infliction of emotional distress. Pikop v. Burlington Northern R. Co., 390 N.W.2d 743, 750, cert. denied 480 U.S. 951, 107 S.Ct. 1616, 94 L.Ed.2d 800 (1987).

Minn.1983. Subsec. (1) quot. in disc., cit. in sup., and cit. in ftn.; com. (d) cit. in sup. and cit. in case quot. in disc.; com. (j) cit. in sup. and quot. in disc.; subsec. (2) cit. in ftn. A discharged employee brought an action against his former employer, claiming that he suffered emotional distress which was intentionally inflicted by his supervisors. The plaintiff also asserted that he was discriminated against because of his alcoholism and that he was discharged in retaliation for filing complaints. The jury returned a verdict in the plaintiff's favor on his emotional distress claim and determined, in an advisory capacity, that the defendant had discriminated against the plaintiff on the basis of an alcoholism disability. The trial court held that the employer was liable for retaliation, adopted the jury's advisory findings, and entered judgment for the plaintiff on all his claims. On appeal, this court for the first time recognized the independent tort of intentional infliction of emotional distress, and, having determined that the Restatement sufficiently narrowed the possibilities for recovery, adopted the Restatement definition set forth in s 46(1). The court ruled that the plaintiff's evidence failed to satisfy any of the tort's elements, particularly the requirements for extreme and outrageous conduct and for severe emotional distress. The supervisors' acts, even when considered altogether, failed to rise to the requisite level of outrage, and despite the plaintiff's allegations of injury, he never missed work or saw a physician. Finally, the defendant's ample evidence of its prior, long-standing dissatisfaction with the plaintiff's managerial abilities both precluded the plaintiff from establishing a prima facie discrimination claim and successfully rebutted the

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plaintiff's prima facie retaliation claim. Reversed. Hubbard v. United Press Intern., Inc., 330 N.W.2d 428, 437-440.

Minn.1979. Com. (d) cit. in ftn. The plaintiff brought an action against his insurer to recover under the no-fault provisions of an automobile liability policy. The plaintiff also claimed damages for the intentional infliction of emotional distress caused by the nonpayment of his claims, and for punitive damages. The plaintiff had been severely injured by electrical wires when he tried to enter a pickup truck. The trial court entered judgment on a jury's verdict for the plaintiff and the insurance company appealed. This court affirmed in part, reversed in part and remanded the case. The court held that there was sufficient evidence to support the jury's finding that the injury occurred while the plaintiff was entering an automobile and that those injuries were covered under the no-fault provisions of the policy. The court found however, that the insured was not entitled to damages for the intentional infliction of emotional distress nor was he entitled to punitive damages because such recovery was usually allowed only in cases where the breach was accompanied by an independent tort and that situation was not present here. The court stated that a remand was necessary because the plaintiff was entitled to a ten percent statutory penalty for the delay in the payment of his benefits. Haagenson v. Nat. Farmers U. Property & Cas., 277 N.W.2d 648, 652.

Minn.App.

Minn.App.2006. Com. (j) cit. in cases quot. in sup. Former farm employee sued former employer for, in part, intentional infliction of emotional distress, and the trial court found defendant liable on the claim. Affirming that portion of the decision, this court held, inter alia, that plaintiff demonstrated that defendant's extreme and outrageous conduct caused him severe emotional distress of a kind that no reasonable person could be expected to endure. The court pointed out that plaintiff, who had a mental impairment that materially limited his social and economic opportunities, suffered mental distress in the form of nightmares, crying spells, and hurt feelings as a result of defendant's constant name calling and taunting, and that the record showed that plaintiff suffered from post-traumatic stress disorder and that his experiences working for defendant constituted the traumatic stressor for the disorder. Wenigar v. Johnson, 712 N.W.2d 190, 207, 208.

Minn.App.2001. Com. (j) quot. in case quot. in disc. City council member sued city and three individuals for malicious prosecution and intentional infliction of emotional distress, among other claims, alleging that defendants caused a document to be prepared containing member's forged signature, which led to a criminal investigation of the member. Trial court granted defendants' motion to dismiss. This court affirmed, holding, inter alia, that plaintiff failed to state a claim for intentional infliction of emotional distress, because even if the creation of a document with her forged signature, which allegedly set her up for criminal prosecution, was extreme and outrageous, there was no showing that defendants' conduct caused plaintiff to suffer severe emotional distress. Stead-Bowers v. Langley, 636 N.W.2d 334, 343.

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Minn.App.1994. Com. (j) quot. in case cit. in sup. Plaintiff, who was present when his friend was run over and killed by an oil tanker driven by defendant, brought suit for intentional infliction of emotional distress, inter alia. Reversing in part the trial court's grant of summary judgment for defendant, this court held that fact issues as to whether defendant's intentional act of leaving the accident scene surpassed the bounds of decency and caused plaintiff to suffer severe distress precluded summary judgment on the emotional-distress claim. Iacona v. Schrupp, 521 N.W.2d 70, 73.

Minn.App.1992. Cit. generally in case cit. in disc., subsecs. (1) and (2) quot. in sup., com. (j) quot. in disc. Automobile passenger who was present when her husband, while changing a flat tire, was struck and killed by a car operated by a drunk driver sued her underinsured motorist carrier and the driver for intentional infliction of emotional distress, inter alia. Affirming the trial court's entry of judgment on a jury verdict awarding plaintiff damages, this court held that, although plaintiff did not suffer physical injury, she could recover for emotional distress because she was within the zone of danger. The court stated that the jury apparently rejected defendants' argument that plaintiff could not recover because she was particularly susceptible to emotional distress and found instead that plaintiff's recovery was warranted because she experienced severe emotional distress as a result of defendant driver's conduct. Dornfeld v. Oberg, 491 N.W.2d 297, 300, reversed in part 503 N.W.2d 115 (Minn.1993). See above case.

Minn.App.1992. Com. (j) cit. generally in case cit. in sup. Patient's wife sued doctor and clinic, alleging, inter alia, intentional infliction of emotional distress arising from doctor's notations on patient's medical charts regarding possible child abuse by patient's wife; the notations caused the couple's health insurance application to be denied and the wife to suffer anxiety. The trial court granted defendants summary judgment, finding that doctor's conduct could not be considered outrageous and that wife failed to show severe emotional distress. Affirming on the claim of intentional infliction of emotional distress but reversing and remanding on claims of defamation and negligent infliction of emotional distress, this court held that, while wife's allegations might have supported a finding of malice, they did not amount to extreme or outrageous conduct, and that her embarrassment and anxiety were not in themselves a sufficient basis for a claim of intentional infliction of emotional distress. Strauss v. Thorne, 490 N.W.2d 908, 913.

Minn.App.1987. Com. (d) cit. in case quot. in disc., com. (j) quot. in case quot. in disc. A former employee sued his former employer, officers, shareholders, and other employees, alleging inter alia, intentional infliction of emotional distress arising mainly from verbal abuse that stated or implied that his sexual preference was other than heterosexual. The trial court granted summary judgment for the defendants and dismissed the complaint. Affirming in part, reversing in part, and remanding, this court held, inter alia, that summary judgment was properly granted on the claim of intentional infliction of emotional distress. The court discussed the extreme nature of the conduct and the severity of the consequent mental distress that are required to prove a claim for intentional infliction of emotional distress and concluded that summary judgment was properly granted because the plaintiff did not prove that his paranoid disorder was caused by the alleged

harassment. Bohdan v. Alltool Mfg. Co., 411 N.W.2d 902, 908, appeal after remand 1989 WL 23330 (Minn.App.1989).

Minn.App.1985. Subsec. (1) quot. in sup., coms. (f) and (j) quot. in sup. An employee sued his employer for intentional infliction of emotional distress after being terminated for allegedly exercising poor judgment that led to a theft of cash from his office. The trial court entered judgment for the employer, and the court of appeals affirmed. The court held, inter alia, that the employer was not liable for intentional infliction of emotional distress arising out of the employee's termination even though the employee suffered severe emotional distress, because the employee's distress was exaggerated in comparison to that which a reasonable man would have experienced under the circumstances. The court stated that the employer would not be liable for such exaggerated distress unless it resulted from a peculiar susceptibility to such distress of which the employer had knowledge. Cafferty v. Garcia's of Scottsdale, Inc., 375 N.W.2d 850, 853-854.

Minn.App.1985. Subsec. (1) cit. in disc. Passenger sued airline for negligent infliction of emotional distress after an airliner dove 34,000 feet in an uncontrolled tailspin. Plaintiff alleged that as a result of the incident he experienced anxiety on flights, which manifested itself as adrenaline surges, sweaty hands, and elevated pulse and blood pressure. Defendant appealed a jury verdict for plaintiff. This court affirmed. It rejected defendant's argument that a plaintiff under a negligent infliction of emotional distress theory must meet the intentional infliction of emotional distress burden of proving severe emotional distress. The court held that plaintiff had satisfied the physical injury or symptom requirement, which was imposed as an obstacle to false claims. The court reasoned that the unusually disturbing experience plaintiff endured combined with his physical symptoms assured that his claim was real. Quill v. Trans World Airlines, Inc., 361 N.W.2d 438, 442.

Minn.App.1984. Quot. in disc., quot. in case quot. in sup. The president of the defendant corporation and the plaintiff agreed on an employment arrangement that the parties intended to be permanent, so long as the plaintiff performed his duties satisfactorily, until retirement. Four years after the plaintiff began work, the defendant fired him. The plaintiff sued for wrongful termination of employment and claimed intentional infliction of emotional distress. This court affirmed the trial court's dismissal of this claim, reasoning that the emotional distress that the plaintiff suffered was not sufficiently severe to sustain this tort action. Eklund v. Vincent Brass and Aluminum Co., 351 N.W.2d 371, 378, 379.

Minn.App.1984. Cit. in sup., com. (e) quot. in part in sup. The trial court awarded debtors damages against a collection agency for emotional distress suffered as a result of statutory violations. This court affirmed, holding that the debtors sustained their burden of proving the elements necessary to recover for infliction of severe emotional distress. Evidence that the agency made abusive telephone calls to the debtor and attempted to collect interest on the debtors' account when the agency was not authorized to do so and after it received notice that the principal amount was paid in full was sufficient to justify the jury's findings that the conduct was extreme and outrageous and

that the agency exceeded its legal rights and recklessly or intentionally inflicted severe emotional distress on the debtors. Venes v. Professional Service Bureau, Inc., 353 N.W.2d 671, 674.

Miss.

Miss.2021. Com. (d) quot. in diss. op. Former employee brought, among other things, a claim for intentional infliction of emotional distress (IIED) against employer and affiliated companies, alleging that plaintiff's supervisor terminated her on the basis of her pregnancy, replaced her with a non-pregnant employee, commented that her pregnancy was a disease, and that women with children did not belong in the workplace. The trial court granted defendants' motion to dismiss. This court affirmed in part, holding that supervisor's remark that pregnancy was a disease did not rise to the level of outrageousness necessary to sustain a claim for IIED. Citing Restatement Second of Torts § 46, Comment *d*, the dissent argued that plaintiff satisfactorily alleged her IIED claim because supervisor's conduct rose to an outrageous and revulsive level above an employment dispute. Spiers v. Oak Grove Credit, LLC, 328 So.3d 645, 657.

Miss.2018. Com. (d) quot. in case quot. in sup. Former firefighters and their family members brought a claim for, among other things, intentional infliction of emotional distress against city and others in connection with firefighters' termination, based on allegations that fire chief threatened to cut off one plaintiff's head, that city's mayor made disparaging comments about plaintiffs, and that an article was published in city's newspaper regarding one plaintiff's termination. The trial court granted summary judgment for defendants. Affirming, this court held that plaintiffs had not alleged any facts that would support outrageous or revolting conduct sufficient to create a genuine issue of material fact as to the issue of intentional infliction of emotional distress under Restatement Second of Torts § 46. Collins v. City of Newton, 240 So.3d 1211, 1220.

Miss.2013. Com. (d) quot. in case quot. in sup. Former employees of law firm brought multiple claims against firm, its individual partners, and its office administrator in connection with the presence of toxic mold in two of the offices in which the firm had worked. The trial court denied defendants' motion to dismiss. On interlocutory appeal, this court reversed and rendered judgment dismissing all claims against defendants, holding, among other things, that plaintiffs' claim for intentional infliction of emotional distress failed as a matter of law, because, while defendants' handling of the mold problem might have been negligent, plaintiffs' allegations did not rise to the level of outrageous and extreme conduct that was necessary to support a claim for intentional infliction of emotional distress. The fact that defendants attempted to remediate the mold issue, and ultimately decided to relocate their offices due to the mold, led to the inevitable conclusion that defendants' actions were not done with the actual intent to inflict emotional distress on plaintiffs. Bowden v. Young, 120 S.W.3d 971, 980.

Miss.2001. Com. (d) quot. in case quot. in sup. Employee who was fired for allegedly stealing inventory and selling it for profit sued former employer and its president for defamation, intentional infliction of emotional distress, actionable words, and false imprisonment. Trial court granted a

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directed verdict for defendants on the emotional-distress claim because plaintiff was a terminable-at-will employee and there was no evidence that president acted in bad faith. This court affirmed, holding, inter alia, that plaintiff's emotional-distress claim failed because president's conduct was not extreme and outrageous, he did not attempt to inflict emotional distress, and he did what was necessary to resolve a serious problem. Clark v. Luvel Dairy Products, Inc., 821 So.2d 827, 831.

Miss.2001. Cit. in ftn., com. (d) quot. in case quot. in sup. Volunteer fireman sued fire chief for slander and intentional infliction of emotional distress after chief called him a thief and a liar. Trial court entered judgment on jury verdict for plaintiff. Appellate court reversed. Affirming, this court held, inter alia, that defendant's conduct was not so outrageous or extreme as to support finding of intentional infliction of emotional distress. Speed v. Scott, 787 So.2d 626, 629, 630.

Miss.1999. Quot. in disc. After discovering that the former property owner disposed of oil field waste on the property, property buyer sued a bank and several oil companies that contracted with the prior owner, alleging strict liability, negligence per se, and outrageous conduct, among other claims. Trial court dismissed plaintiff's complaint, concluding, inter alia, that Mississippi did not recognize the tort of outrageous conduct. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that the trial court erred in dismissing plaintiff's emotional-distress claim, because Mississippi recognized "outrageous conduct" as the tort more commonly known as intentional infliction of emotional distress. Plaintiff sufficiently alleged that defendants willfully and wantonly caused the property to become contaminated and that he suffered personal injury, anxiety, distress, fear, aggravation, and inconvenience. Donald v. Amoco Production Co., 735 So.2d 161, 178.

Miss.1997. Cit. in sup., cit. in case cit. in sup.; com. (d) cit. in headnote, quot. in sup., quot. in case quot. in sup. A doctor sued a hospital that had decided to revoke his surgical privileges, alleging breach of contract and intentional infliction of emotional distress, among other claims. The trial court dismissed plaintiff's claims, holding that the factual bases of the claim did not evoke the outrage or revulsion necessary to sustain the claim. This court affirmed, holding, inter alia, that the hospital's conduct did not rise to the level of willful, wanton, malicious, or intentional wrong sufficient to evoke outrage or revulsion. Furthermore, plaintiff failed to place into the record any proof of his mental anguish, a necessary element of the claim. Wong v. Stripling, 700 So.2d 296, 297, 306, 307.

Miss.1996. Cit. in headnotes, cit. in disc., quot. but dist. Farmer who was dissatisfied with the magnets and water filters that he had recently purchased sued sales representative to recover damages sustained as a result of the mental anguish farmer allegedly suffered when representative refused to grant him a full refund. The trial court entered judgment on a jury verdict for farmer. Reversing and remanding, this court held that the evidence was insufficient to support an award of damages for mental anguish, since farmer failed to show that representative's conduct was so intolerable, outrageous, and extreme as to go beyond all possible bounds of decency. Morrison v. Means, 680 So.2d 803, 803-805, 805-806.

Miss.1995. Subsec. (1) quot. but dist. Borrower who breached the obligations of his loan agreement by incurring additional debt without first securing the consent of his lender sued lender for, inter alia, breach of fiduciary duty and intentional infliction of emotional distress when lender accelerated his outstanding indebtedness. The trial court entered judgment on a jury verdict for borrower but this court reversed and remanded, holding that the lower court misinstructed the jury as to lender's duty since there was generally no fiduciary relationship between lender and borrower and borrower here failed to show, by clear and convincing evidence, that one existed. In addition, the issue of emotional distress should not have been submitted to the jury as the behavior borrower complained of was not extreme and outrageous. Peoples Bank and Trust Co. v. Cermack, 658 So.2d 1352, 1365.

Miss.App.

Miss.App.2008. Quot. in case quot. in sup. Home buyers brought claim for intentional infliction of emotional distress, inter alia, against real-estate agent for sellers, alleging that agent should have disclosed that the house was not 3,000 square feet as was stated in the marketing for the house, the disclosure statement, and the parties' contract for sale. The trial court granted summary judgment for defendant, and this court affirmed, holding that defendant could not have caused plaintiffs emotional distress, because they knew that the house was not 3,000 square feet when they closed on it, and they chose to buy it even though sellers offered to let them out of the contract. Waters v. Allegue, 980 So.2d 314, 319.

Miss.App.1999. Com. (d) quot. in cases quot. in disc. Former employee sued former employer for breach of contract and intentional infliction of emotional distress, alleging that she was terminated on the basis of age and gender. The trial court entered summary judgment for defendant. Affirming, this court held that plaintiff was an at-will employee who was terminable without cause, and that discharge for allegedly discriminatory reasons did not rise to the level of outrageousness needed to support an action for intentional infliction of emotional distress. Brown v. Inter-City Federal Bank, 738 So.2d 262, 265.

Mo.

Mo.1996. Cit. in headnote, cit. in disc. Twenty-eight-year-old woman who came to remember that her father had sexually abused her during childhood sued father for, inter alia, child molestation, sexual abuse, incest, and intentional infliction of emotional distress. The trial court treated plaintiff's complaint as stating a cause of action for battery and dismissed, concluding that the applicable statute of limitations had expired. On transfer from the intermediate appellate court this court affirmed, holding that plaintiff's battery claim was barred. Furthermore, plaintiff's claim for intentional infliction of emotional distress was legally insufficient, as it was based on the same facts underlying her battery claim and failed to allege an independent tort. K.G. v. R.T.R., 918 S.W.2d 795, 796, 799.

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Mo.1980. Cit. in diss. op. The plaintiffs contracted with the defendant real estate company to buy a lot in a development. Prior to purchasing the lot, the plaintiffs asked the defendant whether water was available for the house that they planned to build on the lot. The defendant assured them that water service would be installed by the time their home was completed. After completion of the home, the plaintiffs' request for water service was denied by the public district. The defendant broker contacted the defendant seller to try and get water service. The plaintiffs had not spoken to the defendant seller prior to signing the contract, but the seller's name did appear on the contract. Eventually, the plaintiffs and a neighbor built a common well and split the cost. The plaintiffs sued based upon fraudulent misrepresentation in the sale of real estate. The trial court ordered the defendants to pay actual and punitive damages. The appeal was transferred from the intermediate court to this court to determine whether there was a submissible case on the stated cause of action. This court stated that in order to prevail on a fraudulent misrepresentation claim, the plaintiffs must prove that there was a false representation, that the defendant knew of the falsity or was ignorant of its truth, that the defendant intended that it should be relied upon by the plaintiffs, that the plaintiffs were unaware of the falsity, that the plaintiffs relied on the statement and that the statement proximately caused the plaintiffs' injuries. The plaintiffs conceded that they did not try the case on the premise that the defendant knew of the falsity, but rather that the defendant did not know if the representations were true or false. Evidence showed that the defendant seller had based his statements on the only two authorities available, the water district and the Department of Health. Thus, this was a case of negligent misrepresentation, not fraudulent misrepresentation. The plaintiffs had not alleged negligent misrepresentation because by claiming fraud they had the opportunity to recover punitive damages which was the bulk of the award. This court reversed the judgment in favor of the plaintiffs. The dissenting opinion agreed that there was insufficient evidence to prove whether the defendants knew of the falsity of their statements but argued that the case should have been remanded to determine whether negligent misrepresentation had occurred. The dissent argued that the facts justified a remand to permit the plaintiff to seek recovery under a more appropriate theory of liability. The dissent stated that negligent misrepresentation merely requires that one failed to obtain the truth of a communicated statement but that he need not be aware that it was false, as required for a fraudulent misrepresentation claim. The dissent argued that Missouri should recognize an action for a monetary loss suffered by one who has relied on the statement of another in a business transaction, if reasonable care was not exercised by the advisor when he made his statement. Huttegar v. Davis, 599 S.W.2d 506, 513.

Mo.1977. Cit. in disc. Plaintiff, an employee of a general contractor which had a contract to perform a job which included laying underground cables for the defendant telephone company, was injured when the wall of a trench in which he was working caved in on him. The plaintiff sued the telephone company and an engineering firm which designed the project and which had a contract with the telephone company to inspect the job and make sure that it was built in accordance with the plans and specifications. The lower court entered judgment on a verdict in favor of the employee after the jury was instructed to grant recovery if it found that the telephone company had the right to control the trenching and excavating and negligently failed to brace the trench properly. On appeal, the court noted that the state case law had clearly recognized a cause of action against one who contracts for work to be done by an independent contractor for breach of

the employer's nondelegable duty imposed by law where performance of the contract necessarily involves inherently dangerous activity, and that this cause of action is an exception to the general rule that the employer is not ordinarily liable for the acts or omissions of an independent contractor. The court held that the evidence presented a jury question as to whether the telephone company was liable under the inherent danger exception to the general rule, and that the furtherance of justice required that the case be reversed and remanded as to the telephone company to afford the plaintiff an opportunity to seek recovery under the inherent danger theory. The court also held that the engineering firm could not be held liable, and that judgment was reversed. Smith v. Inter-Cty. Telephone Co., 559 S.W.2d 518, 525.

Mo.1969. Quot. in sup. Plaintiffs drove their car to defendant's shop to have it repaired. Defendant put the car on a lift, and refused to return it, and defendant also subjected plaintiffs to verbal abuse in front of other people. Plaintiffs suit for false imprisonment and mental distress was dismissed. On appeal, the court sustained the dismissal of the count of false imprisonment, holding that plaintiffs had other means of leaving the shop. The court reversed the order dismissing the count of mental distress, holding if defendant's conduct could be proven, it could be considered outrageous, and could be actionable. Warrem v. Parrish, 436 S.W.2d 670, 672, 673.

Mo.1969. Cit. in sup. and quot. in sup. The plaintiff, a schoolteacher, was not rehired by a local school board, apparently for publishing a speech deploring the emphasis on athletics in the public schools. The plaintiff sued the board for emotional and physical damages resulting from her dismissal. The court ruled, inter alia, that absent extreme or outrageous conduct, a plaintiff must suffer a traumatic physical injury, but remanded on other grounds. Williams v. School District of Springfield R-12, 447 S.W.2d 256, 266, 267.

Mo.1969. Cit. in sup. This was an action for damages for invasion of privacy from alleged oppressive and unreasonable telephone calls against the employer of the callers. The court held that the recipient of the telephone calls failed to make a submissible case under the theory of invasion of privacy where no person other than herself heard what was said to her, but where she had shown a state of facts which might entitle her to recover. If the case were brought upon a proper theory, the case would be remanded. Zimmerman v. Associates Discount Corp., 444 S.W.2d 396, 398.

Mo.1967. Subsec. (1) and com. (d) quot. in sup. The plaintiff lessee of a grocery store sought a declaratory judgment relative to his interest in the lease and to recover damages for an alleged trespass and mental anguish resulting therefrom against the defendant-lessors, who were constructing a new building to be leased to the lessee at the same rent. In reversing a judgment for the plaintiff lessee, the court held that the lower court had erred in reforming the lease by inserting a description of the lessors' entire lot as being covered by the lease and that the lessors were not liable for trespass in constructing the new building, even though they violated the agreement by raising the rental rate. Nelson v. Grice, 411 S.W.2d 117, 125.

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Mo.App.

Mo.App.1998. Cit. in disc., com. (j) cit. and quot. in disc. Property owner challenged the entry of an order of protection against him providing that he would not stalk, abuse, threaten to abuse, molest, or disturb the peace of his neighbor. Reversing, this court held that the order, which was issued pursuant to § 455.010(10) of the Adult Abuse Act, should not have been entered where neighbor failed to establish that property owner harassed her by engaging in a course of conduct directed at her that served no legitimate purpose and that would cause a reasonable person to suffer substantial emotional distress. Wallace v. Van Pelt, 969 S.W.2d 380, 386.

Mo.App.1997. Subsec. (1) cit. in sup., com. (d) quot. in sup. and quot. in case quot. in sup., com. (h) quot. in sup. Children's mother, who had arranged for an airline to release the children to their grandfather after their flight, brought, together with the grandfather, an action for, in part, intentional infliction of emotional distress against the children's father and his wife, alleging that defendants picked up the children at the airport following the flight and prevented plaintiffs from contacting them for three weeks. Affirming the trial court's grant of summary judgment for the children's father's wife, this court held, inter alia, that defendant wife's conduct could not be characterized as so extreme or outrageous as to be tortious for the purpose of plaintiffs' claim for intentional infliction of emotional distress. Hyatt v. Trans World Airlines, Inc., 943 S.W.2d 292, 297, 298.

Mo.App.1997. Cit. in headnote, com. (d) quot. in sup. and quot. in case quot. in diss. op., com. (h) quot. in sup. Whistleblower who discovered and reported that her supervisor was falsifying reports to their employer's board of directors, making employer appear more successful than it actually was, sued employer for intentional infliction of emotional distress. The trial court dismissed the complaint. Reversing and remanding, this court held that defendant's conduct, which included confiscating files from plaintiff's office, altering vacation records relating to her vacation time, following her to the bathroom, making prank calls to plaintiff while she was on sick leave, misrepresenting to plaintiff's co-workers that she was the cause of defendant's lack of success, and demoting plaintiff, was sufficiently outrageous to support a cause of action for the intentional infliction of emotional distress. Dissent did not believe that defendant's behavior was so extreme as to go beyond all possible bounds of decency. Polk v. Inroads/St. Louis, Inc., 951 S.W.2d 646, 647-649.

Mo.App.1994. Cit. in disc., com. (d) quot. in part in case quot. in disc. Former employee sued former employer under statute providing that former employer's provision of letter of discharge that failed to provide reason for discharge was equivalent to letter's nonissuance, for which punitive damages were available. Jury awarded punitive damages. This court affirmed the trial court's entry of judgment on jury award for plaintiff, rejecting defendant's contention that it was entitled to directed verdict on punitive damages, holding that degree of outrageousness needed for punitive submission in intentional tort case was not same, high threshold needed for compensatory damages

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in intentional infliction of emotional distress case. Ryburn v. General Heating & Cooling, Co., 887 S.W.2d 604, 608.

Mo.App.1993. Cit. in case cit. in sup., com. (d) quot. in part in case quot. in sup. A dentist and his wife sued the author and publisher of a dental newsletter, alleging, among other claims, intentional infliction of emotional distress on the wife, who miscarried the couple's child after reading the allegedly libelous article. Affirming a dismissal for failure to state a cause of action, this court held, inter alia, that the article, which allegedly concerned an IRS investigation of the dentist and referred to him as a "yo-yo," "wacko," and "axe murderer," was not so outrageous in character or so extreme in degree as to go beyond all bounds of decency, as required to support the emotional distress claim. The court reasoned that the article included only generalized statements not particularly directed at the dentist, who was not identified by name, and much of it was written in a humorous vein. May v. Greater Kansas City Dental Soc., 863 S.W.2d 941, 948.

Mo.App.1992. Cit. in case cit. in ftn., com. (d) quot. in sup. A man sued his employer, a railroad, pursuant to the Federal Employers' Liability Act, alleging the infliction of emotional distress through harassment and intimidation by his supervisors. The trial court granted summary judgment to the defendant, holding that the plaintiff had failed to state a claim sufficient to withstand various defenses advanced by the defendant. Affirming, this court held that the defendant's alleged conduct was not sufficiently outrageous to permit recovery for emotional distress. Morris v. Union Pacific R. Co., 825 S.W.2d 911, 916.

Mo.App.1989. Cit. in sup., cit. and quot. in ftn., com. (d) quot. in sup., com. (e) quot. in disc., com. (f) quot. in case quot. in sup., com. (l) cit. in sup. A woman believing herself to be pregnant consulted a pregnancy center and was shown a film featuring mutilated advanced fetuses by the clinic in spite of the fact that she informed them that she had previously had an abortion, suffered emotional problems as a result, which had required hospitalization and continuing medication, and that she would not terminate this pregnancy if found pregnant. The woman sued the clinic and the director for intentional infliction of emotional distress. The trial court granted the defendants' motion to dismiss without specifying its reasons. Reversing and remanding in part, this court held, inter alia, that the complaint was improperly dismissed as to the clinic. The court reasoned that the defendant clinic knew the plaintiff was vulnerable to emotional distress, satisfying the standard for extreme and outrageous conduct required for intentional infliction of emotional distress. Boes v. Deschu, 768 S.W.2d 205, 207, 208.

Mo.App.1989. Quot. in case cit. in disc. After the medical records of a former employee's ex-husband, possibly indicating treatment for a venereal disease, were disclosed during discovery in the employee's suit for wrongful discharge against her former employer, a partnership of medical doctors, she brought this suit against the former employer for intentional infliction of emotional distress. The trial court granted summary judgment for the defendant. Affirming, this court held that the defendant's conduct was not so extreme or outrageous as to justify an action based on that conduct. The court stated that there was nothing in the record to indicate that anyone other than the plaintiff's attorney saw the medical records, and medical records pertaining to the plaintiff and

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her former husband were sometimes kept by the defendant on the same card. J.R. v. P.B.A., 773 S.W.2d 235, 236.

Mo.App.1987. Com. (d) cit. in disc. Parents were invited by a minister to confide their family problems in him. The minister later divulged the confidential communications to various other people, spread untrue information about the parents, encouraged their children to claim that they were abused so that they would be removed from the home, and encouraged the parents' employees to quit. The parents sued the minister for, inter alia, intentional infliction of emotional distress. The trial court dismissed the claim. This court affirmed, holding that the plaintiffs' allegations in the distress claim alone did not represent conduct sufficiently extreme and outrageous to support the claim, and that supporting it by incorporating allegations made in other claims in the suit, such as defamation, would be to allow, not an alternative remedy, but a redundant and duplicative remedy. Hester v. Barnett, 723 S.W.2d 544, 560.

Mo.App.1987. Cit. in disc. (Erron. cit. as § 96 on p. 517.) When a sum of money was found missing from one of the cash drawers at a savings and loan association, an employee was suspected and subjected to intimidating interviews and a polygraph test and was then fired. Alleging that she suffered emotional stress, the employee sued the savings and loan association on theories of intentional infliction of emotional distress and prima facie tort. The jury found for the plaintiff and the trial court overruled the defendant's motions for judgment n.o.v. and a new trial. Reversing, this court stated that, since Missouri recognized the tort of intentional infliction of emotional distress, the plaintiff must sue on that theory and not on the more general prima facie tort theory. Moreover, the elements of a prima facie tort were insufficiently shown. The court stated that, in an evaluation of the plaintiff's claim for intentional infliction of emotional distress, the nature of the harm, the interests promoted by the defendant's conduct, the means used by the defendant, and its motive must be balanced. Here, there was no specific intent to injure the plaintiff, no physical threat, and only temporary harm. The defendant did not exceed the bounds of legitimate interrogation and had a valid motive, seeking the truth. Kiphart v. Community Fed. Sav. and Loan Ass'n, 729 S.W.2d 510, 516, 517.

Mo.App.1987. Cit. in sup. A father of three children sued his former wife, the custodial parent, for damages on the ground that she interfered with his visitation and temporary custody rights. The trial court dismissed the petition for failure to state a claim upon which relief could be granted. Affirming, this court held that a noncustodial parent could not maintain an action for interference with custody rights under s 700 of the Restatement (Second) of Torts. The court suggested that if money damages were a goal, the plaintiff could have sued for intentional infliction of emotional distress or brought the enigmatic action of prima facie tort. Politte v. Politte, 727 S.W.2d 198, 201.

Mo.App.1987. Quot. in sup., coms. (d) and (h) cit. in sup. A health club member who had a history of back problems suffered an episode of back pain while showering at the facility. The club member sued the health club for intentional infliction of emotional distress allegedly caused by the defendant's treatment of him at the time of his back pain. This court affirmed the trial court's dismissal of the action, holding that the defendant's conduct in allowing the plaintiff to lie on a

bench in the shower room, unattended, for two or three hours before an ambulance was called, in refusing to allow the plaintiff's girlfriend in to see him, and in telling the plaintiff he would have to get off the floor, was not so outrageous as to be utterly intolerable in a civilized community. Viehweg v. Vic Tanny Intern. of Missouri, 732 S.W.2d 212, 213.

Mo.App.1985. Cit. and quot. in disc., com. (d) quot. in disc. An employee sued a convenience store operator and its supervisor for intentional infliction of emotional distress arising from her termination from employment at the store and the administration of a polygraph test before her termination. The trial court entered judgment for the employee. Reversing, this court ruled that the polygraph testing and later firing were not such extreme and outrageous conduct on the part of the defendants as to justify a decision for the employee. Gibson v. Hummel, 688 S.W.2d 4, 5, 7.

Mo.App.1985. Cit. and quot. in part but dist., coms. (a) and (b) cit. in sup. A borrower/wife sued a bank for wrongful foreclosure when the bank failed to obtain credit life insurance on her deceased husband in order to cover the unpaid balance of a note due on their home. This court reversed and remanded a jury decision for the plaintiff. Analogizing this cause of action to wrongful interference with property, the court held that recovery for emotional distress unaccompanied by physical injury was inappropriate in this case because there was no evidence of conscious or reckless wrongdoing, and severe emotional distress was not a natural or probable consequence of the defendant's conduct. Medlock v. Farmers State Bank of Texas County, 696 S.W.2d 873, 878.

Mo.App.1984. Cit. in sup., coms. (d) and (h) cit. in sup. An employee of a television station sued the station and its general manager for intentional infliction of emotional distress. The plaintiff had been hired by the station as an art director and then reassigned to work as a camera operator, a position for which he did not possess the requisite training. Consequently, he could not perform the technical assignment and was subjected to ridicule. The plaintiff further alleged that he suffered severe physical and mental pain because the reassignment required standing for extended periods, even though he had a partially amputated foot. The trial court granted the defendants' motion for summary judgment, and this court affirmed, holding that the station's alleged conduct was not of the extreme and outrageous nature contemplated by the Restatement. Frye v. CBS, 671 S.W.2d 316, 319, 320.

Mo.App.1984. Subsec. (1) and coms. (d), (h), and (j) quot. in disc. Plaintiff, discharged from her job for informing a job seeker about an opening in her department without authorization, sued her former supervisor and her employer alleging outrageous conduct and prima facie tort. This court affirmed a summary judgment for defendants, holding that neither defendants' conduct, though not above reproach, nor plaintiff's consequent humiliation and emotional distress were sufficient to make out a cause of action. Rooney v. National Super Markets, Inc., 668 S.W.2d 649, 651.

Mo.App.1982. Cit. in disc., com. (d) quot. in ftn. Upon her escape, a crime victim reported to the police her abduction by an unknown armed male. Although the assailant was still at large, the police disclosed this information to a newspaper reporter without the victim's consent. Following the newspaper's publication of the story, including the victim's name and address, the assailant

appeared on numerous occasions outside her home and place of work. The victim brought an action against the city, charging the police with negligent disclosure of her name and address, and against the newspaper, charging negligent publication. The trial court dismissed the complaint for failure to state a claim. On appeal, this court reversed and remanded. Initially, the court determined that the plaintiff's report was not a public record, thus its disclosure by the police was wholly gratuitous. The court ruled that the plaintiff's petition pleaded a state of facts which would give rise to a duty by the city police to foresee that their disclosure of the plaintiff's identity and address would expose her to an unreasonable risk of criminal aggression by the assailant. As to the defendant newspaper, the court weighed the public's right to know against the individual's right to personal security and concluded that in these circumstances, the victim's name and address were of such trivial public concern that the defendant owed a duty to use reasonable care not to give likely occasion for the assailant to injure the plaintiff. Hyde v. City of Columbia, 637 S.W.2d 251, 267, 270, certiorari denied 459 U.S. 1226, 103 S.Ct. 1233, 75 L.Ed.2d 467 (1983).

Mo.App.1982. Quot. in sup. An associate professor brought an action against officials at the university where he was employed, claiming that the defendants wrongfully refused to recognize his earned doctorate degree. The trial court granted the defendants' motion to dismiss the complaint for failure to state a claim. On appeal, this court held that the plaintiff was entitled to provide evidence as to his breach of contract claim. However, the court affirmed the dismissal of the plaintiff's claim seeking recovery for the defendants' outrageous conduct, since it had determined that the defendants' acts, as set forth in the complaint, failed to rise to the requisite standard of outrage. Kemp v. Board of Regents of Northwest, 644 S.W.2d 675, 678.

Mo.App.1982. Cit. in disc., com. (d) quot. in sup., com. (h) quot. in part in sup. The owner of an automobile damaged in a collision with the defendant's bus sought to recover damages. The lower court granted the defendant's motion to dismiss the count for emotional distress allegedly caused by the defendant's outrageous conduct in refusing to settle the claim. The plaintiff appealed, but this court affirmed. The court noted that the state recognized a cause of action for outrageous conduct, but held that the defendant's conduct was not extreme or outrageous. The court also noted that the state recognized the doctrine of prima facie tort, but the plaintiff never pleaded any of the elements necessary to support this claim. Wilt v. Kansas City Area Transportation Authority, 629 S.W.2d 669, 671.

Mo.App.1981. Quot. in sup. and coms. (f) and (h) quot. in part in sup. The plaintiff was the wife of a man who had been employed by the defendant corporation. The defendants herein were the corporation and several employees. The plaintiff's husband had allegedly stolen a car from the defendant corporation and employees of the defendant corporation went to the plaintiff, allegedly making loud and angry statements. The plaintiff became very upset and developed a rash. The employees knew that the plaintiff had been under medical care for emotional problems. The lower court directed a verdict in favor of the defendants and the plaintiff appealed. This court recognized the tort of outrageous conduct, stating that one who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress, is liable for any resulting emotional distress or bodily harm. The conduct here by the employees could be characterized as

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extreme and outrageous because the conduct arose from the actor's knowledge of another's peculiar susceptibility to emotional distress. Here, the employees were aware of the plaintiff's peculiar susceptibility. The employees also could be charged with committing an intentional outrageous act or acting with reckless disregard which caused the emotional distress. The court stated that generally where reasonable men may differ it is for a jury to determine whether the conduct was sufficiently extreme and outrageous to result in liability. The court therefore reversed the lower court and remanded the case. LaBrier v. Anheuser Ford, Inc., 612 S.W.2d 790, 793, 794.

Mo.App.1981. Quot. in sup., cit. generally in sup., com. (d) quot. in part in sup. and com. (h) cit. in sup. The plaintiffs' child was injured and died as a result of those injuries. The adjuster for the defendant insurance company repeatedly contacted the plaintiffs in an attempt to settle their wrongful death claim before the plaintiffs had talked with an attorney. Most of the adjuster's actions took place shortly after the death of the child. The plaintiffs alleged, inter alia, that the adjuster's actions were an unreasonable intrusion upon the plaintiffs' solitude and seclusion, causing the plaintiffs severe emotional distress. The lower court dismissed this claim and the plaintiffs appealed. This court stated that the adjuster's actions were inconsiderate and unkind but not utterly intolerable in a civilized community. The court found that the adjuster had been callously indifferent but held that his actions did not measure up to the extreme and outrageous conduct which the law recognizes to be actionable. Affirmed. Luster v. Columbia Mut. Ins. Co., 624 S.W.2d 890, 891-893.

Mo.App.1979. Cit. in sup. and com. (i) cit. in sup. Property owners brought suit against a pro forma corporation, seeking equitable and legal relief with respect to buildings allegedly allowed to deteriorate. The plaintiffs' petition was based upon the claimed action of the defendant allowing buildings in an historic district to deteriorate in order that the defendant could obtain authority to demolish them. The plaintiffs allege, inter alia, that the conduct of the defendant was willful, extreme, outrageous, and beyond all possible bounds of decency and has affected the plaintiffs' mental and emotional well being, and that the plaintiffs have incurred physical and mental harm as a result of stress and fear. The plaintiffs now appeal from the action of the trial court dismissing that portion of the complaint. The court affirmed the action of the lower court, finding that there was no allegation by the plaintiffs that the conduct of the defendant was engaged in with any intent to injure anyone, and it was, therefore, insufficient to state a cause of action. In its discussion, the court remarked that the tort of outrageous conduct causing severe emotional distress requires that the outrageous actions be committed intentionally or recklessly with the desire to inflict severe emotional distress or in deliberate disregard of a high degree of probability that the emotional distress will follow. Kelly v. Boys' Club of St. Louis, Inc., 588 S.W.2d 254, 256.

Mo.App.1978. Cit. and quot. in disc. Com. (d) quot. in disc. Appeal by funeral director from verdicts in favor of plaintiffs granting actual and punitive damages for mental anguish sustained from the improper burial of plaintiffs' mother where, as a result of the negligence of defendant, the decedent was not buried in a vault as called for by the contract, but rather was buried in a shallow grave, and where her body was uncovered by heavy equipment and parts of it could be seen by plaintiffs at the grave site. The court affirmed, finding that defendant's conduct was extreme and

outrageous enough to sustain the verdict, and it held that one of the children of the decedent, who was not personally present to testify, could recover. In addition, the court reversed and remanded an order of the trial court dismissing, as a plaintiff, the decedent's sister, who had assisted the decedent's minor children in making the arrangements for the burial, holding that she was qualified as a member of the decedent's "immediate family." Golston v. Lincoln Cemetery, Inc., 573 S.W.2d 700, 705, 709, 710.

Mo.App.1978. Cit. in dictum, subsec. (1) quot. but dist., cit. in case cit. in sup., com. (d) cit. in dictum and quot. in part but dist. (Erron.cit. as Torts) Plaintiff sued defendant newspaper publisher for damages, alleging outrageous conduct in the publishing of his name and address as a sole witness to a murder while the suspects were still at large. A lower court sustained defendant's motion for summary judgment, and plaintiff appealed. This court affirmed, holding that the alleged acts did not constitute outrageous conduct as a matter of law because, although it may have been unwise, the publication did not go beyond the bounds of human decency. Hood v. Naeter Bros. Pub. Co., 562 S.W.2d 770, 771.

Mo.App.1978. Cit. in sup. and fol.; coms. (d) and (j) quot. in sup. Debtor and debtor's employer each filed a separate lawsuit against a creditor for damages due to the creditor's conduct in his efforts to collect notes signed by the debtor. The employer's claim was based on a theory of outrageous conduct, and the debtor's claim was submitted on theories of outrageous conduct and invasion of privacy. The creditor counterclaimed for the unpaid balance of the note. After the cases were consolidated for trial, the trial court entered judgment in favor of the plaintiffs and judgment in favor of the defendant on its counterclaim against the debtor, and all parties appealed. The creditor contended that the employer's claim for outrageous conduct was beyond her pleadings, and that the evidence presented did not support a finding of outrageous conduct. The court noted that Missouri does recognize a cause of action for outrageous conduct as defined by Section 46 of the Restatement, and that the elements of this action are that the defendant must have, by extreme and outrageous conduct, intentionally or recklessly caused severe emotional distress to the plaintiff from which bodily harm results. The court found that the conduct of the creditor in attempting to collect the notes signed by the debtor, whereby the creditor's agents called the home of the debtor's employer several times after unsuccessfully attempting to reach the debtor at home, subsequently went to the beauty shop where the debtor worked and, mistaking the debtor's employer for the debtor since both parties had the same last name, talked to the employer in an allegedly rude and loud voice for a few minutes about her delinquent account before realizing their mistake and leaving, and waited outside the shop for the debtor after the employer refused to let them talk to the debtor, was not so outrageous as to give rise to a cause of action by the employer against the creditor for damages. The court also noted that such a cause of action arises only when the plaintiff has been caused by severe emotional distress. The court found that since the employer complained of no loss of working time, she required only tranquilizers for merely two or three days and she was back to normal in a week following her confrontation with the collection agents, she did not suffer the severe emotional distress required to give her a cause of action against the creditor for the outrageous conduct of its agents. Accordingly, the court held, inter alia, that a cause of action on theory of outrageous conduct did not exist since the employer failed to show that the defendant's

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conduct was extreme, outrageous, atrocious, utterly intolerable, and beyond all possible bounds of decency, and that portion of the trial court's judgment was reversed. Leonard v. Pioneer Finance Co., 568 S.W.2d 937, 940, 942.

Mo.App.1978. Cit. in sup. The plaintiff, a credit card holder, brought an action against the credit card company for intentional infliction of emotional distress. The plaintiff alleged that the company's conduct, while attempting to collect a bill from her, consisted of letters from the company, three telephone calls from the company's credit department, three form letters from a financial collection agency, all of which were admittedly nonabusive in nature, and three telephone calls from the agency. The plaintiff testified that the letters and calls "upset" her. The lower court awarded the plaintiff damages against the credit card company, and the company appealed. The court noted that the standard of liability for outrageous conduct, adopted from Section 46 of the Restatement, is conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. The court also noted that mere insults, indignities, inconsiderations, or petty oppressions do not rise to the level of the outrageous conduct essential to a plaintiff's right of recovery. The court found that the alleged outrageous conduct which "upset" the plaintiff was not, as a matter of law, of the extreme and outrageous nature contemplated by Section 46 of the Restatement, where all of the communications took place over the course of twelve months and where the telephone calls were made during usual working hours. Accordingly, the court held, inter alia, that the alleged conduct did not give rise to a cause of action for intentional infliction of emotional distress, and that the judgment against the company should be reversed. Smith v. Standard Oil, Div. of Amoco Oil Co., 567 S.W.2d 412, 415, 416.

Mo.App.1977. Cit. and com. (d) cit. but dist. In an action for conversion brought by plaintiff against defendant bank for its appropriation of ten dollars which plaintiff had deposited in her savings account, the trial court awarded plaintiff actual damages in the amount of $1,500. On appeal, the court held, inter alia, that an award for damages for injury to plaintiff's economic reputation was unwarranted, since plaintiff introduced no evidence of refusal of credit or action by the defendant which might have affected her credit rating, that plaintiff's testimony that she was upset, angry, and embarrassed by defendant's action was entirely too speculative to support an award of damages for severe emotional distress, and the court, therefore, reduced the amount of actual damages to ten dollars. Young v. Mercantile Trust Co. Nat. Ass'n, 552 S.W.2d 247, 250, appeal after remand 598 S.W.2d 482 (1980).

Mo.App.1976. Cit. in ftn. in sup. A debtor brought this action against his creditor alleging intentional infliction of mental distress resulting from defendant's alleged harassment and humiliation of the plaintiff which aggravated the plaintiff's medical condition. The lower court dismissed the action. On appeal, the court reversed, saying that the debtor's petition complied with the rule that the petition set forth a short and plain statement of the facts, showing that the pleader is entitled to relief. Watson v. Franklin Finance Co., 540 S.W.2d 186, 189.

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Mo.App.1975. Cit. but dist. A department store brought suit and obtained judgment against defendant for unpaid bills. Defendant counterclaimed, alleging that plaintiff's prior efforts to collect the balance due by telephone constituted harassment, thus violating federal law. The counterclaim was denied, and defendant appealed. This court affirmed, holding that the calls were not made solely for the purpose of harassment. The court noted that there was a legitimate business purpose in making them, and that the calls were not "repeated" in the sense in which the statute had been interpreted. R.H. Macy & Co. v. Bell, 531 S.W.2d 58, 63.

Mo.App.1974. Cit. and subsec. (1) and com. (d) quot. in sup. A borrower brought this action against a loan company to recover actual and punitive damages as a result of the loan company's effort to collect payment. The trial court rendered judgment on a verdict in favor of the loan company, and the borrower appealed. This court affirmed, holding that the trial court gave a correct statement of the law when it instructed that the borrower was required to show (a) that the loan company's conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community and (b) that the conduct was intentional, reckless, and malicious. Kuehner v. Denny Loan Corp., 518 S.W.2d 94, 96.

Mo.App.1973. Cit. and com. (d) quot. in part in sup. In an action by a loan company on a promissory note, the borrower counter-claimed for invasion of privacy and unnecessary harassment. A jury verdict was given in favor of the loan company, and the trial court granted the borrower's motion for a new trial on the ground that the verdict was against the weight of the evidence. The court affirmed, holding that where there was evidence that the loan company's president used violent and abusive language in talking on the telephone with the borrower at the borrower's place of employment, where he made numerous calls within an hour or an hour and a half, where he threatened to harm borrower's teenage daughter, and where he was told by a policeman who listened to one of the conversations to collect the debt through legal channels and stop harassing borrower, there was substantial evidence to support a verdict for borrower based on invasion of privacy, and the trial court had not abused its discretion in granting a new trial. Liberty Loan Corporation of Antioch v. Brown, 493 S.W.2d 664, 667.

Mont.

Mont.2021. Com. (j) cit. in case cit. in sup. Vehicle owners sued repair provider, alleging, inter alia, that they suffered extreme emotional harm when defendant negligently gave the keys to plaintiffs' vehicle to a person falsely claiming to be their son, resulting in the third party absconding with the vehicle and stealing plaintiffs' handgun, ammunition, sensitive documents, and house keys stored in the vehicle. The district court entered judgment on a jury verdict for plaintiffs. The court of appeals certified a question to this court. This court answered, holding that defendant's negligent treatment of plaintiffs' vehicle did not support an award of parasitic emotional-distress damages, because plaintiffs failed to set forth any evidence that the stolen property was intertwined with their identity or family dynamic. The court noted that the level of outrageousness necessary to support

parasitic emotional-distress damages was less than the high bar set by a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46, Comment *j*. Childress v. Costco Wholesale Corporation, 493 P.3d 314, 316.

Mont.2013. Coms. (j) and (k) quot. in cases quot. in sup. Customer brought claims for, inter alia, intentional and negligent emotional distress against bank, alleging that she suffered extreme physical and emotional distress as a result of bank's negligent supervision of its employee, who pled guilty to federal fraud and money-laundering charges in connection with customer's loan from bank, as well as other loans, and the FBI's questioning of her about her knowledge of the employee's financial dealings. The trial court granted summary judgment for defendant. Affirming, this court held that plaintiff failed to produce substantial evidence tending to show that her emotional distress was so severe that no reasonable person could be expected to endure it, when she testified in her deposition that she was scared after being interviewed by the FBI, that she was worried about her financial situation and what others would think of her, that she experienced headaches, that her sleep was interrupted, that the stress caused tightness in her shoulders, and that she took herbal remedies for anxiety. Feller v. First Interstate Bancsystem, Inc., 2013 MT 90, 299 P.3d 338, 344, 345.

Mont.2009. Com. (j) adopted in case quot. in sup. Individual who sustained injuries in an automobile accident caused by insured motorist sued motorist's insurer, seeking compensatory damages for statutory and common-law bad faith, intentional and negligent infliction of emotional distress, and actual malice. The trial court granted summary judgment for defendant on plaintiff's emotional-distress claims on grounds that plaintiff failed to prove serious or severe emotional distress. Reversing that portion of the decision and remanding, this court held, inter alia, that the "serious or severe" standard applied only to independent claims of negligent or intentional infliction of emotional distress, and not to an emotional-distress claim parasitic to an underlying tort such as the bad-faith claim asserted here. Jacobsen v. Allstate Ins. Co., 2009 MT 248, 351 Mont. 464, 215 P.3d 649, 663.

Mont.2008. Com. (g) cit. in sup. and quot. in case cit. and quot. in sup. After railroad sued owner/operator of weed-spraying business for indemnification in connection with its settlement of an action by employee who was injured when he stepped into a hole covered by high grass, and a jury returned a verdict in favor of business, owner sued railroad for intentional infliction of emotional distress (IIED), inter alia. The trial court granted summary judgment for defendant. Affirming, this court held that an actor did not engage in outrageous or extreme conduct simply by exercising a legal right, and a privileged action could not be the basis of an IIED claim. Judd v. Burlington Northern and Santa Fe Ry. Co., 343 Mont. 416, 2008 MT 181, 186 P.3d 214, 218.

Mont.2008. Com. (j) adopted in case cit. in disc. In this case in which horse owner was found not strictly liable for injuries allegedly sustained by horse-bite victim, this court noted that defendant's argument that Restatement Second of Torts § 509, regarding harm done by abnormally dangerous domestic animals, had not been adopted in Montana and was not binding did not end the court's analysis, since the court had previously adopted other sections of the Restatement, including

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Restatement Second of Torts § 46, Comment *j*; nevertheless, the court concluded that this was not an appropriate case in which to consider and adopt § 509. Peterson v. Eichhorn, 2008 MT 250, 344 Mont. 540, 189 P.3d 615, 620.

Mont.2007. Cit. in sup., subsec. (1) and com. (j) quot. in sup., com. (b) cit. in disc., com. (d) cit. and quot. in sup., com. (k) cit. in sup. Owners of a subdivision lot sued adjoining landowners for violation of restrictive covenants; adjoining landowners counterclaimed for, in part, intentional infliction of emotional distress (IIED). The trial court entered judgment for counterplaintiffs on their counterclaim. Affirming, this court held that counterplaintiffs established a compensable claim for IIED on proof that they endured an unrelenting barrage by counterdefendants of intentional and outrageous behavior consisting of obscene gestures, vile verbal abuse, and ongoing surveillance of their every outdoor activity for over four years, and that counterplaintiff wife exhibited physical manifestations of severe emotional distress, consisting of lost weight and sleep and shaking hands, and her husband suffered serious emotional distress in feeling extreme anger and apprehension. Czajkowski v. Meyers, 339 Mont. 503, 172 P.3d 94, 100-102.

Mont.2007. Com. (j) adopted in case cit. in disc. In a case where this court adopted Restatement Second of Torts § 929 and its Comment *b* as a flexible measure of damages to adequately compensate injured property owners whose land was contaminated by benzene that had migrated from oil company's neighboring refinery, the court cited case authority adopting Restatement § 46, Comment *j*, for the proposition that it had previously adopted other Restatement sections. Sunburst School Dist. No. 2 v. Texaco, Inc., 338 Mont. 259, 165 P.3d 1079, 1088.

Mont.2004. Com. (j) cit. in case cit. in sup., com. (k) quot. in sup. Mother whose three-year-old son was injured at state-university library when he slipped between stairway balusters of second-story open stairwell and fell 20 feet to the concrete floor sued state for, in part, negligent infliction of emotional distress, seeking to recover damages for her emotional distress, loss of consortium, and posttraumatic stress disorder (PTSD) related to her son's fall. The trial court entered judgment on a jury verdict for plaintiff. Affirming in part, this court held, inter alia, that although the jury instruction on emotional distress erroneously failed to state that the severe-or-serious standard applied, the fact that plaintiff suffered a physical manifestation of bodily harm in the form of PTSD was sufficient evidence that her emotional distress was genuine and severe. Henricksen v. State, 2004 MT 20, 319 Mont. 307, 84 P.3d 38, 55.

Mont.2004. Coms. (j) and (k) quot. in case quot. in sup. After her adult son died as a passenger in a car accident, his mother sued driver's estate for negligence and negligent infliction of emotional distress. Trial court granted defendant summary judgment. This court affirmed, holding, inter alia, that the negligent-infliction-of-emotional-distress claim failed because there was insufficient evidence that plaintiff suffered severe emotional distress. There was no evidence of any physical manifestation of grief, no counseling was sought or recommended, plaintiff chose not to take antidepressants, her use of Valium had not dramatically increased, she did not have continuous nights of sleeplessness or days without appetite, and she maintained close relationships with family

members and friends. Renville v. Fredrickson, 2004 MT 324, 324 Mont. 86, 101 P.3d 773, 776, 777.

Mont.2003. Com. (j) cit. in disc. After a car struck a seven-year-old child, child's father sued the driver and driver's insurer for negligent infliction of emotional distress, alleging that he suffered severe emotional distress as a result of driver's negligent operation of his car. Trial court granted insurer summary judgment, holding that father was not a foreseeable plaintiff because he had not witnessed the accident. This court reversed and remanded for a determination whether father was a foreseeable plaintiff, holding that, although the father did not actually witness the accident, he could state a claim for negligent infliction of emotional distress. The court noted that father met the requirement that he suffered severe emotional distress. Wages v. First Nat. Ins. Co. of America, 318 Mont. 232, 79 P.3d 1095, 1098.

Mont.2000. Com. (d) quot. in disc., com. (j) adopted in case quot. in sup. Prospective purchasers sued president of real-estate agency for, in part, tortious interference with their first-option to buy parcel of land from owner, after defendant arranged for sale of land to third party without first offering it to plaintiffs. Affirming in part the trial court's award of economic, punitive, and emotional-distress damages to plaintiffs, this court held, inter alia, that plaintiffs' property interest sufficiently involved use and enjoyment of land to warrant award of emotional-distress damages under Montana law for defendant's acts of interference, given plaintiffs' testimony that they suffered "shock, worry, anger, disappointment, and frustration" when the parcel, on which they had planned to build their retirement home, was sold to third party. Maloney v. Home and Investment Center, Inc., 298 Mont. 213, 994 P.2d 1124, 1135, 1136.

Mont.2000. Com. (j) quot. in disc. Property sellers sued real estate agent and agency, alleging that defendants misled them regarding a counteroffer made on their property. Defendants counterclaimed, alleging breach of listing agreement. The trial court granted defendants summary judgment. Affirming in part, reversing, and remanding, this court held, inter alia, that plaintiffs did not establish the "serious or severe" requirement necessary for negligent and intentional infliction of emotional distress, and issues of fact remained regarding whether defendants misrepresented information, thereby precluding summary judgment on negligent-misrepresentation claim. May v. Era Landmark Real Estate of Bozeman, 302 Mont. 326, 15 P.3d 1179, 1186.

Mont.1997. Com. (j) quot. in case quot. in sup. Husband and wife were riding their bicycles together when husband was struck and killed by a passing automobile. Although wife received $25,000 pursuant to the "Each Person" limitation of liability contained in motorist's automobile insurance policy, she sought a declaration that the emotional distress she experienced as a result of witnessing the accident constituted an independent injury that was subject to the policy's $50,000 "Each Accident" provision. The trial court entered summary judgment for wife. Affirming, this court held that wife's cause of action for negligent infliction of emotional distress stemmed from an injury that was separate and apart from that sustained by her husband, and therefore the "Each Accident" provision applied. Treichel v. State Farm Mut. Auto. Ins., 280 Mont. 443, 930 P.2d 661, 664.

Mont.1995. Com. (j) cit. in case cit. in disc. Deceased's family sued funeral homes for negligent preparation of deceased's body, emotional-distress damages, and breach of contract. Trial court granted defendants summary judgments. This court affirmed in part and reversed in part, holding, inter alia, that one who negligently removes, withholds, mutilates, embalms, provides funeral, burial, or crematory services, or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to the deceased person's close relatives for resulting emotional distress. The court determined that the right to damages for negligent infliction of emotional distress resulting from the mishandling of a corpse did not require that the distress be accompanied by physical injury. Contreraz v. Michelotti-Sawyers, 271 Mont. 300, 896 P.2d 1118, 1120.

Mont.1995. Cit. in headnote, com. (d) cit. in case quot. in sup., com. (j) cit. and quot. in sup. Former newspaper reporter sued newspaper and its owners as well as a police officer, alleging civil-rights violations, defamation, and intentional infliction of emotional distress. Trial court, among other rulings, granted defendants summary judgment on the claim of intentional infliction of emotional distress. This court reversed and remanded, holding, inter alia, that the better approach to intentional infliction of emotional distress as an independent cause of action was to require that the same basic elements be proven in an action for intentional infliction of emotional distress as in a cause of action for negligent infliction of emotional distress—that an independent cause of action for intentional infliction of emotional distress would arise under circumstances where serious or severe emotional distress was the reasonably foreseeable consequence of the defendant's intentional act or omission. Sacco v. High Country Independent Press, 271 Mont. 209, 896 P.2d 411, 412, 425-427, 429.

Mont.1993. Cit. in disc., com. (d) quot. in part in case quot. in sup. A church member injured on church property sued the church for breach of fiduciary duty, fraud, negligent misrepresentation, and intentional infliction of emotional distress after the church allegedly promised to pay her medical bills if she submitted to a physical examination, but then refused to pay and attempted to dissuade her from bringing suit, threatening her with excommunication. The trial court dismissed all claims except a claim for breach of fiduciary duty. Affirming in part, this court held, inter alia, that, even if Montana recognized intentional infliction of emotional distress as a separate tort, the church's conduct here was not so outrageous as to support such a claim. Davis v. Church of Jesus Christ of Latter Day Saints, 258 Mont. 286, 294, 852 P.2d 640, 645.

Mont.1993. Com. (j) cit. in sup. An attorney sued a newspaper for allegedly libelous articles concerning a client's complaint charging him with professional misconduct and concerning his alleged violation of the city building code. This court affirmed a grant of summary judgment for the newspaper, holding, inter alia, that the attorney could not recover for intentional infliction of emotional distress, as his visit to a hospital emergency room for stress and other problems and his missing a meeting of a client's board of directors shortly after one of the articles appeared were not evidence of severe emotional distress, and the newspaper's truthful reporting did not constitute outrageous conduct. Lence v. Hagadone Inv. Co., 258 Mont. 433, 444, 853 P.2d 1230, 1237.

Mont.1993. Com. (j) cit. in sup. A former delivery driver sued his employer, alleging various tort claims including intentional infliction of emotional distress from working swing shifts. This court affirmed a grant of summary judgment for the employer, holding, inter alia, that the employer's refusal to alter the work schedule and its subsequent discharge of him was not sufficiently outrageous conduct to support recovery of emotional distress damages, even though the employer was aware that the employee had sought counseling and was prescribed medication while working the schedule he was assigned. Lueck v. United Parcel Service, 258 Mont. 2, 11, 851 P.2d 1041, 1046.

Mont.1992. Cit. in case cit. in sup., com. (d) quot. in case cit. in sup. Discharged employee sued her former employer and supervisor for intentional infliction of emotional distress, inter alia. The trial court directed a verdict for defendants. Reversing in part and remanding, this court held that the trial court erred in concluding that plaintiff's claim was subject to a directed verdict solely on the basis that it was brought as a separate cause of action and stated that the evidence established the threshold level of conduct necessary to survive a motion for a directed verdict. Foster v. Albertsons, Inc., 254 Mont. 117, 835 P.2d 720, 728.

Mont.1992. Quot. and cit. in sup., subsec. (2) cit. in sup., subsec. (2)(a) cit. in disc., com. (l) cit. in case cit. but dist., Caveat quot. in disc. Mother, individually and as guardian of retarded woman raped by employee of state mental institution, sued state for negligence and infliction of emotional distress under vicarious liability theory. The trial court directed a verdict that state was liable and allowed mother to maintain action for emotional distress. Reversing in part, this court declined to extend to this case the nondelegable duty exception to respondeat superior, holding that the state was not liable under principles of respondeat superior, since rape was outside scope of employment. Moreover, plaintiff could not maintain an action for emotional distress, since she was not present at time of conduct and the institution owed no direct duty to her as patient's mother. Maguire v. State, 254 Mont. 178, 835 P.2d 755, 761, 762.

Mont.1992. Quot. in disc., cit. in case quot. in disc., com. (j) quot. in disc. and cit. in case quot. in disc. Store owner brought an action for intentional infliction of emotional distress, inter alia, against the owner of an adjacent establishment after a third party drove his automobile into the building that housed both businesses. Affirming in part the trial court's dismissal of the claim and remanding, this court held that defendant's pressuring plaintiff to reopen her business quickly after the accident and to accept the third party's insurance settlement claim did not constitute extreme and outrageous conduct. The court said that plaintiff's embarrassment and worry as well as her stress-induced acne flare-up were not sufficiently severe to warrant a claim for intentional infliction of emotional distress, stating that a reasonable person in this society should be expected to endure the problems plaintiff suffered. McNeil v. Currie, 253 Mont. 9, 830 P.2d 1241, 1247.

Mont.1991. Quot. in sup., coms. (d) and (j) quot. in sup. The former superintendent of a school district sued the school district and two school board trustees for intentional infliction of emotional distress and denial of due process based on constructive discharge, alleging that the defendants

made his working conditions intolerable, forcing him to take a medical disability retirement. The trial court entered judgment on a jury verdict for plaintiff. Reversing and remanding for a new trial, the supreme court held that the trial court erroneously instructed the jury on the due process claim, and that, where plaintiff's evidence tended to show that the defendant trustees engaged in a campaign to oust plaintiff from his position, undermine his credibility, and circumvent his authority by criticizing him to the school board, the media, and the community, their actions did not reach the level of outrageousness necessary to establish a prima facie case of intentional infliction of emotional distress. Doohan v. Bigfork School Dist. No. 38, 247 Mont. 125, 805 P.2d 1354, 1362, 1363, 1365-1366.

Mont.1990. Cit. in disc., cit. but not fol., com. (d) quot. in case quot. in disc., com. (j) cit. in sup. After a restaurant was destroyed in a gas explosion that allegedly was caused by the negligence of a utility company employee, the married couple who owned the restaurant sued the utility for damages. The trial court entered judgment on a jury verdict awarding damages to the plaintiffs for property destruction, to the plaintiff wife for personal injuries, and to the plaintiff husband for emotional distress damages. Reversing in part, this court denied the award of emotional distress damages, declining to extend recovery for emotional distress damages to cases where the defendant negligently damaged or destroyed real property and the plaintiff suffered no physical injury. Day v. Montana Power Co., 242 Mont. 195, 789 P.2d 1224, 1226, 1227.

Mont.1990. Coms. (d) and (g) quot. in sup. Borrowers sued a bank, its owner, and the bank's credit service for intentional infliction of emotional distress, inter alia, claiming that the bank continued to loan, and encouraged them to borrow, more money at the same time that the bank and its credit service planned to liquidate the borrowers' assets and foreclose on their debt. The trial court granted the defendants' joint motion for summary judgment, dismissing the plaintiffs' complaint with prejudice, and granting the bank's motion for summary judgment on its counterclaim for foreclosure. This court affirmed, stating that the plaintiffs failed to produce evidence of outrageous, extreme, unlawful, or unreasonable acts by the defendants. Noting that the bank did not stand to gain anything from its actions but was simply exercising sound business judgment as a creditor in acting to foreclose a problem loan, the court said that the defendant bank could not be said to have acted beyond all possible bounds of decency where it merely exercised a legal right to foreclose on a mortgage and notes. Lachenmaier v. First Bank Systems, Inc., 246 Mont. 26, 803 P.2d 614, 619, 620.

Mont.1989. Com. (b) cit. in disc., com. (j) quot. in sup. and adopted. The president of a company personally guaranteed loans to the company. When the bank and the president began liquidation negotiations, the president accepted the bank's offer to take a trust indenture for the company's real property in exchange for releasing the president's guaranty. After the company was purchased and some property sold, the bank sued the president on his guaranty for the amount of the loan still outstanding. The trial court entered judgment on a jury verdict for the defendant and awarded him damages on his counterclaim for the bank's alleged bad faith and constructive fraud. Reversing, this court held that there was insufficient evidence to support the defendant's counterclaims and that most of the evidence submitted by the defendant in opposition to the plaintiff's claims was

inadmissible. The court stated that the trial court erred in submitting the issue of emotional distress damages to the jury, since the evidence was insufficient to raise a question of fact about the existence of severe emotional distress. First Bank (N.A.)—Billings v. Clark, 236 Mont. 195, 771 P.2d 84, 91.

Mont.1988. Cit. and quot. but dist., com. (d) quot. but dist. An employee sued her former employer and supervisors for several causes of action relating to the termination of her employment, and for intentional infliction of emotional distress. The trial court granted the defendants summary judgment on all counts. Affirming, this court held that emotional distress under state law had been, and remained, primarily an element of damages rather than a distinct cause of action, yet heard the plaintiff's argument that an earlier case had opened the door for emotional distress as a singular cause of action if the defendant's conduct could be characterized as outrageous. The court concluded that here the defendants' conduct could not be so characterized. Frigon v. Morrison-Maierle, Inc., 233 Mont. 113, 760 P.2d 57, 63, 64.

Neb.

Neb.2006. Cit. in disc., com. (d) cit. in sup. Niece sued her uncle, asserting several claims relating to sexual abuse he allegedly committed against her between 1967 and 1974. The trial court entered judgment on a jury verdict awarding plaintiff damages on her claim that defendant intentionally inflicted emotional distress upon her by contacting her in 2002 and threatening her. Affirming, this court held that, in light of evidence that plaintiff was particularly susceptible to mental distress as defendant's past victim, defendant's conduct in 2002 was sufficiently extreme and outrageous to support plaintiff's emotional-distress claim; in addition, the trial court did not err in refusing to give defendant's tendered instruction citing the Restatement for the definition of outrageous conduct, since the substance of the proposed instruction was contained in the instructions actually given. Roth v. Wiese, 271 Neb. 750, 762, 767, 716 N.W.2d 419, 432, 435.

Neb.2006. Com. (b) quot. in case quot. in sup. Former nursing-home employee sued former employer, alleging that she was discharged in retaliation for reporting an incident in which a patient was injured. The trial court entered a jury verdict awarding plaintiff, among other things, noneconomic damages for mental suffering. This court affirmed, holding, inter alia, that it was not necessary for plaintiff to show severe emotional distress or that she sought medical treatment or counseling in order for her to recover for mental suffering. The court reasoned that, while severe emotional distress was an element of the torts of negligent or intentional infliction of emotional distress, it was not an element of the tort of retaliatory discharge in contravention of public policy; thus, there was no threshold limitation based on the degree or severity of mental suffering in order for it to be recoverable as past and present damages. Wendeln v. The Beatrice Manor, Inc., 271 Neb. 373, 392, 712 N.W.2d 226, 242.

Neb.2005. Com. (d) cit. in sup. and cit. in case cit. in sup. Natural son of deceased sued stepson, a licensed funeral director, and others for intentional infliction of emotional distress, alleging that

stepson transported and embalmed father's body without son's consent and in breach of statutory duties. This court affirmed the trial court's dismissal of the action, holding that son failed to allege facts giving him control of the remains and that stepson's alleged failures to obtain permit and file timely death certificate were, at best, unprofessional or careless, but not outrageous. The court noted that the facts must have been such that, when heard, an average member of the community would resent the actor; minor indignities suffered as a result of living in society did not rise to the level of extreme and outrageous conduct. Heitzman v. Thompson, 270 Neb. 600, 605, 705 N.W.2d 426, 431.

Neb.2005. Coms. (b) and (j) quot. in disc. Pharmaceutical sales representative sued physician for civil battery, alleging physician molested her in his office during a sales call. After the jury returned a verdict for plaintiff and awarded damages for emotional distress, the trial court granted physician's motion for a new trial, determining that the jury was not properly instructed on the standard for actionable emotional distress. This court reversed and remanded for reinstatement of the verdict, holding that, in contrast to a claim for intentional infliction of emotional distress, the tort of battery did not require plaintiff to prove severe emotional distress in order to recover compensatory damages caused by the battery; plaintiff's testimony as to the emotional effects of the alleged incident on her life, including a subsequent fear of being alone with male customers, was sufficient to submit the issue to the jury. Kant v. Altayar, 270 Neb. 501, 505, 506, 704 N.W.2d, 537, 540, 541.

Neb.2000. Coms. (d)-(f), (h) and (j) cit. in sup. Mother of rape victim who was murdered after reporting rape sued county and sheriff for negligence, wrongful death, and intentional infliction of emotional distress, alleging that defendants failed to protect victim despite knowledge of threats against victim's life, and that sheriff's crude and dehumanizing language, expressions of disbelief, and irrelevant questions while interviewing victim constituted extreme and outrageous conduct. Trial court awarded damages for negligence, but denied recovery on the emotional-distress claim. This court reversed in part and remanded, holding, inter alia, that trial court erred in not holding as a matter of law that sheriff's conduct was extreme and outrageous, and that this error removed important evidence as to whether the victim sustained emotional distress. Brandon ex rel. Estate of Brandon v. County of Richardson, 261 Neb. 636, 656, 662, 624 N.W.2d 604, 621, 624, appeal after remand 264 Neb. 1020, 653 N.W.2d 829 (2002).

Neb.1994. Cit. in disc. The children of a warehouse worker allegedly injured from contact with agricultural chemicals sued the storer of the chemicals, seeking loss of consortium damages and asserting a claim for negligent infliction of emotional distress. After ordering bypass of the intermediate appellate court, this court affirmed the trial court's dismissal, holding, inter alia, that the storer of chemicals could not be liable, as there was no allegation that the worker suffered her injury suddenly, and the manner in which the children became aware of it was not sudden, shocking, or startling so as to have produced emotional distress so severe that no person could be expected to endure it. Vosburg v. Cenex-Land O'Lakes Agronomy, 245 Neb. 485, 488, 513 N.W.2d 870, 873.

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Neb.1993. Quot. in sup., cit. in case cit. in disc., cit. in diss. op., subsec. (2) cit. in disc., com. (i) quot. in diss. op. The mother of a passenger killed in a traffic accident sued the motorist for intentional infliction of emotional distress after motorist dragged passenger's body from accident scene and told no one of accident. This court, affirming trial court's entry of judgment on jury verdict for mother, held, inter alia, that mother was not required to be at the accident scene in order to recover, since an intimate familial relationship existed between victim and plaintiff, defendant's actions nullified any chance of victim's survival, and the shock plaintiff suffered when she learned the details surrounding her daughter's death exacerbated and finalized the anxiety that began nine hours earlier when defendant telephoned plaintiff at 5:45 a.m., concealed the fact of victim's death, and falsely accused victim of stealing his vehicle. Dissent argued that motorist's conduct was not intended by him to inflict emotional distress and that he could not be said to have been certain or substantially certain that severe emotional distress would result from his actions. Nichols v. Busse, 243 Neb. 811, 819, 838, 503 N.W.2d 173, 180, 181, 190, 191.

Neb.1985. Cit. but dist., com. (d) cit. in diss. op., com. (e) quot. in diss. op., com. (f) cit. in case quot. in diss. op. The wife of an employee injured on the job brought an action for outrage against her husband's employer, alleging that the employer's claims agent placed telephone calls to her threatening that her husband's benefits would be revoked if he did not accept the offer of a new position. This court upheld a summary judgment for the employer, holding that the employer's conduct was not outrageous where the employer attempted to assert its legal rights in a permissible way. The dissent argued that a genuine issue of fact existed regarding the nature of the employer's conduct and that the issue should have gone to the jury. Gall v. Great Western Sugar Co., 219 Neb. 354, 363 N.W.2d 373, 376, 379, 380.

Neb.1983. Cit. in sup., coms. (d) and (j) cit. in case quot. in sup. The plaintiff wife and the defendant husband were married for about 30 years until their divorce in 1977. Shortly thereafter, the defendant began to harass the plaintiff, and when the plaintiff remarried in 1979 the harassment intensified. The plaintiff brought suit against the defendant seeking to recover damages for severe emotional distress caused by the harassment. The trial court entered judgment in favor of the plaintiff and the defendant appealed. This court reversed and remanded. The court held that although the harassment had caused the plaintiff to be embarrassed and humiliated, and resulted in her crying, losing sleep, and consulting a psychiatrist, she had not shown that her distress was so severe that no reasonable person could have been expected to endure it. Hassing v. Wortman, 214 Neb. 154, 333 N.W.2d 765, 767, 768.

Neb.1981. Cit. and quot. in sup. and coms. (d) and (j) quot. in part in sup. The plaintiff was injured when a gas station attendant removed the radiator cap on the plaintiff's vehicle and hot fluid splashed onto the plaintiff. The lower court did not submit the plaintiff's claim for mental distress to the jury, but the jury awarded damages to the plaintiff based upon other claims. The plaintiff appealed, arguing that the trial court erred by refusing to submit her claim for mental distress. The plaintiff asserted that she had to remove some of her clothing after the incident and repeatedly had to request something to cover herself before the attendant complied. In addition, the plaintiff was delayed because the attendant had removed a part from the engine to prevent it from starting until

the plaintiff returned the covering she borrowed. This court stated that an action for intentional infliction of mental distress would not lie unless the defendant's actions were outrageous and the plaintiff's resulting emotional distress was severe. The court stated that the conduct necessary to support such a claim must exceed that which a reasonable person could be expected to endure. The court held that the attendant's conduct did not rise to the level of extreme and outrageous conduct necessary to be actionable. Affirmed. Davis v. Texaco, Inc., 210 Neb. 67, 313 N.W.2d 221, 223.

Neb.App.

Neb.App.1993. Com. (j) quot. in part in disc. The insured under a homeowners' policy sued the insurer for coverage and mental distress damages after the insurer denied coverage for replacement costs when the home collapsed while being reconstructed. Affirming judgment for the insured, this court held, inter alia, that the insured was entitled to mental distress damages, as the coverage denial was in bad faith and the impoverished, disabled insured lived a "makeshift" existence for over three years, farming out her children and wondering whether she would ever be able to rebuild her home. Bailey v. Farmers Union Co-op. Ins. Co. of Nebraska, 1 Neb.App. 408, 498 N.W.2d 591, 604.

Neb.App.1992. Subsecs. (1) and (2)(a) quot. in sup., com. (l) cit. in disc. Husband brought action against wife's employer, seeking recovery for, inter alia, intentional infliction of emotional distress arising from employer's alleged sexual harassment of wife and wife's consequent development of posttraumatic stress disorder. The trial court sustained employer's demurrer and dismissed the action. Affirming, this court held that husband did not plead a cause of action to support recovery under a theory of intentional infliction of emotional distress, since he failed to allege that he was present when employer's alleged harassment occurred. Carlson v. Chain, 490 N.W.2d 469, 473, 474.

Nev.

Nev.2020. Com. (d) quot. in case quot. in sup. Attorney and law firm brought a lawsuit against, among others, president of corporation that published articles and videos discussing attorney, alleging, inter alia, that defendant intentionally inflicted emotional distress upon attorney by stating in the articles and videos that attorney acted badly, violated ethical rules, bullied a family-court judge, and covered up dubious behavior by sealing her cases. The trial court granted defendant's special motion to dismiss under anti-SLAPP statutes. This court affirmed in part, holding that plaintiffs failed to demonstrate that their claims had minimal merit, because defendant's statements amounted to petty insults and indignities that were not actionable under Restatement Second of Torts § 46, Comment *d*. Abrams v. Sanson, 458 P.3d 1062, 1070.

Nev.2017. Coms. (j) and (k) cit. and quot. in sup. and adopted. Taxpayer who had moved from California to Nevada sued California's Franchise Tax Board, alleging, among other things, that defendant intentionally inflicted emotional distress upon him during audits of his California tax

returns. The trial court entered judgment on a jury verdict in favor of plaintiff. This court affirmed in part, holding that plaintiff sufficiently established that he suffered severe emotional distress by presenting testimony from multiple people as to how defendant's treatment physically and emotionally affected him. The court rejected defendant's argument that plaintiff was required to present medical records in support of such a claim, explaining that, under the sliding-scale approach described in Restatement Second of Torts § 46, when, as here, the defendant's conduct was more extreme, less evidence of the physical injury suffered by the plaintiff was required. Franchise Tax Board of State of California v. Hyatt, 407 P.3d 717, 741.

Nev.2017. Coms. (j) and (k) adopted, cit. and quot. in sup. Taxpayer who had moved from California to Nevada filed, inter alia, a claim of intentional infliction of emotional distress (IIED) against California tax agency in connection with its audits of his state-tax returns, alleging, among other things, that defendant had improper motives for conducting the audits. The trial court entered judgment on a jury verdict for plaintiff. On remand from the United States Supreme Court, this court affirmed in part, holding that medical records were not mandatory in order to establish an IIED claim where a defendant's acts were sufficiently severe, and that substantial evidence supported the jury's findings as to liability for IIED and its award of damages. The court adopted the sliding-scale approach set forth in Restatement Second of Torts § 46, Comments *j* and *k*, and determined that, here, the facts supported the conclusion that defendant's actions were at the more extreme end of the scale, such that less proof of emotional distress was required. Franchise Tax Board of California v. Hyatt, 401 P.3d 1110, 1134.

Nev.2014. Coms. (j) and (k) cit. and quot. in sup. Taxpayer sued state's franchise tax board, alleging, among other things, that defendant was liable for intentional infliction of emotional distress in connection with its conduct while auditing his state tax returns. The trial court entered judgment on a jury verdict for plaintiff. While reversing in part and remanding for a new trial on damages, this court held that plaintiff provided sufficient evidence from which a jury could reasonably determine that he suffered severe emotional distress under the definition set forth in Restatement Second of Torts § 46. The court pointed to evidence that plaintiff's mood changed dramatically, that he became distant and much less involved in various activities, that he started drinking heavily, that he suffered severe migraines and stomach problems, and that he became obsessed with his legal issues involving defendant. Franchise Tax Bd. of Cal. v. Hyatt, 335 P.3d 125, 147, 148.

Nev.2000. Com. (k) cit. in disc. and quot. in ftn. Construction worker who was attacked and threatened at gunpoint by site owner sued owner for assault and battery and intentional infliction of emotional distress. The trial court entered judgment for plaintiff. Affirming, this court held, in part, that the damages awarded as compensation for the serious emotional distress that plaintiff suffered as a result of defendant's tortious conduct were not excessive. Olivero v. Lowe, 116 Nev. 395, 995 P.2d 1023, 1026-1027.

Nev.1981. Subsec. (2) cit. in disc. A suit was brought against the defendant to recover for assault and battery. The plaintiff also sued as guardian ad litem for her daughter, a witness to the attack,

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for intentional infliction of emotional distress. The trial court awarded the plaintiff damages and awarded the daughter $300.00. The defendant appealed, arguing, inter alia, that the daughter should not be entitled to recover under an intentional infliction of emotional distress cause of action. The court reversed the judgment in favor of the daughter. The court held that, while recovery on the part of a third party witness to an outrageous act is permitted if that third party is a close relative of the person against whom the outrageous act was directed, an assault of the kind presented on this appeal is, as a matter of law, insufficiently outrageous to warrant recovery by the witness to such an assault. Star v. Rabello, 97 Nev. 124, 625 P.2d 90, 92.

Nev.1980. Subsec. (1) cit. in sup. The plaintiff sued her attorney for malpractice alleging that the defendant had been negligent in failing to prosecute the appeal of a summary judgment against her, in dismissing a claim against an opposing party and in advising her to release certain funds. A jury awarded her damages. The defendant's motion for a new trial was granted because a jury instruction improperly allowed compensation for mental anguish. The plaintiff appealed the order granting the new trial and the court's grant of partial summary judgment concerning the defendant's failure to prosecute the appeal. This court stated that the plaintiff's claims were predicated on ordinary negligence and, because she had not attempted to prove that the defendant's conduct was extreme or outrageous, the lower court should not have instructed the jury concerning mental anguish. This court found that the lower court should not have granted partial summary judgment for the defendant because it was up to a jury to determine whether the defendant's conduct was below that of a reasonable attorney. The court therefore affirmed the order which granted the new trial, but reversed the order of partial summary judgment. Selsnick v. Horton, 96 Nev. 944, 620 P.2d 1256, 1257.

N.H.

N.H.2011. Com. (d) quot. in sup. After attorney and his wife agreed to give up personal assets to attorney's former client's new lawyers in exchange for lawyers' promise that they would not report attorney's purported misappropriation of client's assets, lawyers nonetheless reported attorney to authorities; wife sued lawyers for intentional infliction of emotional distress (IIED), inter alia, alleging that lawyers subjected her to constant and continuous threats that deprived her of property and caused her hospitalization. The trial court dismissed plaintiff's claim. Affirming in part, this court, noting that the only conduct that plaintiff alleged in her complaint involved threats made to her husband, held that such threats did not constitute conduct sufficiently outrageous in character to support an IIED claim. Tessier v. Rockefeller, 162 N.H. 324, 33 A.3d 1118, 1131.

N.H.2009. Coms. (d) and (e) quot. in sup. Administrator of the estate of seventh-grade student who committed suicide sued student's special-education teacher, guidance counselor, and school, alleging that, shortly before student's death, teacher misused her position of authority over student by making a false report of misconduct—namely, that student had referred to two mints on his desk as medicine—in an effort to affect his disciplinary record and eventually expel him from the school, and that this false report was a substantial cause of the suicide. The trial court granted defendants'

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motion to dismiss plaintiff's claim for intentional infliction of emotional distress (IIED). Affirming, this court held, inter alia, that, while false accusations could be grounds for liability under an IIED claim, the alleged false accusation at issue here, even coupled with teacher's position of authority, did not rise to the level of extreme and outrageous conduct necessary to sustain an IIED claim. Mikell v. School Administrative Unit No. 33, 158 N.H. 723, 972 A.2d 1050, 1055.

N.H.1999. Subsec. (1) and coms. (h) and (j) cit. in disc. Former wife sued former husband for violations of New Hampshire's wiretapping and eavesdropping statute and for common-law invasion of privacy after defendant secretly taped recorded telephone conversations between plaintiff and parties' daughter. The trial court entered judgment on a jury verdict for plaintiff. Reversing and remanding, this court held that the lower court erred in instructing the jury as to the mens rea required for a finding of statutory liability; that plaintiff could claim a reasonable expectation of privacy in her telephone conversations with daughter, even though daughter was likely to discuss those conversations with her court-appointed therapist or guardian ad litem; that plaintiff was not required to establish severe mental distress in order to prove that she sustained emotional harm; and that the lower court's failure to define “acquiescence” did not invalidate the jury charge on the doctrine of implied consent. Fischer v. Hooper, 143 N.H. 585, 732 A.2d 396, 401.

N.H.1991. Cit. in case cit. in disc., quot. in sup. and adopted, com. (j) quot. in sup., Appendix cit. in disc. Spouses sued the husband's former wife for intentional infliction of emotional distress from actions including alleged harassing telephone calls and scratching the paint on the plaintiffs' vehicle. The trial court found that a tort had been committed, whether it was called harassment, invasion of privacy, or outrageous conduct. It awarded the plaintiffs limited damages. This court adopted the tort of intentional infliction of emotional distress but reversed, because neither plaintiff had suffered severe mental distress. The court also concluded that the trial court erred in grounding its decision on a privacy theory, because privacy issues were not advanced in the plaintiffs' original declarations. Morancy v. Morancy, 134 N.H. 493, 593 A.2d 1158, 1159.

N.H.1985. Subsec. (1) quot. in disc. The plaintiff's decedent committed suicide after police officers allegedly falsely arrested and battered him. The plaintiff sued the officers and the town for wrongful death. Questions were certified to this court regarding the plaintiff's ability to maintain a tort action seeking damages resulting from the suicide of another. The court held that the plaintiff might maintain an action for wrongful death by suicide where the plaintiff could demonstrate that the tortfeasor, by extreme and outrageous conduct, intentionally wronged a victim, and that this conduct caused severe emotional distress in the victim, which was a substantial factor in bringing about his suicide. The court reasoned that liability for suicide was an extension of the recognized tort liability for intentional infliction of mental distress. Mayer v. Town of Hampton, 127 N.H. 81, 497 A.2d 1206, 1210.

N.H.1984. Com. (j) cit. in sup. In an action for wrongful death and emotional distress, the lower court transferred without ruling the question whether parents could recover for emotional distress when their child died shortly after arrival at the defendant hospital, allegedly due to malpractice by

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the defendant doctors. This court held that the parents could not recover under a theory of negligent infliction of emotional distress because they had not witnessed the death and were informed of it shortly after their arrival at the hospital. Dismissed. Natter v. Frisbie Memorial Hospital, 474 A.2d 584, 587.

N.H.1983. Cit. in sup. A woman moved to another state with her two minor children in violation of a divorce decree awarding custody of the children to her husband. The husband brought suit against his ex-wife's parents, alleging that they aided and abetted his wife in depriving him of the rightful custody of his children. The trial court granted the defendants' motion to dismiss, stating that the plaintiff had failed to state a cause of action cognizable under state law. This court reversed, holding that a parent was entitled to a remedy for injuries sustained as a result of another's intentional interference with the parent's custody of his or her child. Recovery would be permitted even where the defendant did not directly interfere, but intentionally aided and abetted another in interfering with the parent's custodial rights. The court noted, however, that the plaintiff's claim for emotional distress should be treated as a separate cause of action. Plante v. Engel, 124 N.H. 213, 469 A.2d 1299, 1302.

N.H.1982. Cit. in sup. The plaintiffs brought an action against their insurance company, asserting several contract and tort claims based on the defendant's refusal to reimburse certain medical expenses. The insurance company moved to dismiss all but the plaintiffs' breach of contract claim for failure to state a cause of action. The trial court transferred, without ruling, the defendant's challenge to this court. The court dismissed the plaintiffs' tort claims based, in part, on its finding that an insurer's wrongful refusal to pay a claim did not give rise to a cause of action in tort. The plaintiff wife's charge of intentional infliction of emotional distress was rejected because the insurance company's actions failed to meet the requirement for “outrageous conduct.” The plaintiff wife was also denied recovery for the negligent infliction of emotional distress. Finally, the plaintiffs' claim of fraud was rejected for failure to set forth specific factual grounds. The court remanded the case for consideration of the plaintiffs' bad-faith breach of contract claim, pending the outcome of a declaratory judgment action seeking to ascertain whether the policy covered the plaintiffs' medical expenses. Jarvis v. Prudential Ins. Co. of America, 122 N.H. 648, 448 A.2d 407, 409.

N.J.

N.J.2004. Com. (j) quot. in case quot. in disc. Former female employee of car dealership filed sexual-harassment suit against dealership and its owner, alleging she was harassed by male employees. Trial court dismissed plaintiff's claim for emotional-distress damages, entered judgment on a jury verdict finding dealership liable for the harassment, and granted plaintiff attorney's fees as the prevailing party. The appellate division, inter alia, reversed the dismissal of plaintiff's emotional-distress claim, and remanded for a new trial on those damages. Affirming in part, this court held, inter alia, that a trial on damages was warranted, as an emotional-distress claim under the discrimination statute had a lower standard of proof than that necessary for a tort

claim, such that a victim could recover for all natural consequences, including intangible injuries, resulting from the discrimination. Tarr v. Ciasulli, 181 N.J. 70, 853 A.2d 921, 924.

N.J.1998. Com. (d) cit. in headnote, quot. in case quot. in disc., and quot. in case quot. in conc. and diss. op., com. (j) quot. in case quot. in disc. An African-American county sheriff's officer sued the county sheriff for intentional infliction of emotional distress after the sheriff called her a "jungle bunny." The trial court granted defendant summary judgment, and the intermediate appellate court affirmed. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that plaintiff's proffered evidence was sufficient to establish fact issues regarding her emotional-distress claim. The court determined that a rational factfinder could find that defendant's conduct would have caused severe emotional distress to the average African-American. An opinion concurring in part and dissenting in part argued that a single racial epithet, though uttered by a superior, would not cause severe emotional distress to an African-American of ordinary experience and of normal constitution, sensitivity, and susceptibilities. Taylor v. Metzger, 152 N.J. 490, 706 A.2d 685, 685, 694, 696, 703.

N.J.1992. Quot. in case quot. in diss. op. After parent publicly questioned school teacher's fitness and competency, teacher sued parent for infliction of emotional distress and defamation, and parent's insurer refused to defend her. In the instant suit, parent sued insurer for breach of contractual duty to defend. Trial court granted defendant's motion for summary judgment, but intermediate appellate court reversed, disagreeing with trial court's conclusion that the underlying complaint alleged only defamation. Affirming, this court held that the complaint also alleged intentional and negligent infliction of emotional distress and therefore defendant was obligated to defend plaintiff. Dissent argued that teacher's allegations against plaintiff did not meet the stringent requirements of intentional infliction of emotional distress, and thus the claim was one for defamation, for which there was neither coverage nor a duty to defend under plaintiff's homeowner's policy. Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 607 A.2d 1255, 1266.

N.J.1988. Cit. and quot. in sup., coms. (d) and (j) cit. and quot. in sup., com. (k) cit. in sup. A bank customer sued his bank for intentional and negligent infliction of emotional distress caused by the wrongful dishonoring of checks that the plaintiff had written to his wife. The jury returned a verdict for the plaintiff on the intentional infliction of emotional distress claim and the trial court entered a judgment. Reversing and remanding, the intermediate appellate court ruled that the trial court had failed to delineate the distinction between mistake and intentional breach or between willful, wanton, or reckless misconduct. Modifying the judgment of the intermediate appellate court, this court remanded for the entry of an order dismissing the complaint, holding that a bank customer could not be compensated for the intentional infliction of emotional distress when a bank wrongfully dishonored a check, unless the bank's conduct was both intentional and reckless or outrageous, and unless the distress was severe or resulted in bodily injury. The court reasoned that the slight distress arising from the occasional dishonoring of a check was one of the aggravations of contemporary life; the plaintiff's allegations that he suffered aggravation, embarrassment, an unspecified number of headaches, and loss of sleep did not warrant compensation for the

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intentional infliction of emotional distress. Buckley v. Trenton Saving Fund Soc., 111 N.J. 355, 544 A.2d 857, 863, 864.

N.J.Super.App.Div.

N.J.Super.App.Div.2020. Com. (j) quot. in case quot. in sup. Patient who had been implanted with four screws and washers to stabilize a broken femur sued surgeon who later operated on him to remove the screws, after learning approximately four years following the surgery that surgeon had left the washers in his leg. The trial court granted summary judgment for surgeon. Affirming, this court held that patient failed to demonstrate that he suffered compensable damages as a result of the retained washers. The court pointed out that patient acknowledged that he was seeking damages related only to emotional distress, and that, under Restatement Second of Torts § 46, generally, for conduct to be actionable, the emotional distress had to be so severe that no reasonable person could be expected to endure it. Clark v. Nenna, 244 A.3d 291, 295.

N.J.Super.App.Div.2011. Com. (i) cit. in sup. Former employee sued former employer for, inter alia, intentional infliction of emotional distress (IIED), alleging that she suffered emotional injury when employer told her to remove pictures of her deceased daughter and to no longer speak of her daughter at work, because it was a disruption in the workplace. The trial court granted summary judgment for defendant. Affirming, this court held that although defendant might have been insensitive, there was no evidence that he intended to cause plaintiff emotional distress, and his conduct did not rise to the level of recklessness so as to support a claim of IIED; although a reasonable employer should have known that telling a grieving mother not to talk about her deceased daughter might cause emotional distress, a severe reaction was not a risk that one should have predicted, and an employer was not charged with a duty to avoid all emotional distress to employees, but only such distress that was extreme, outrageous, and utterly intolerable in a civilized community. Ingraham v. Ortho-McNeil Pharmaceutical, 422 N.J.Super. 12, 25, 25 A.3d 1191, 1198.

N.J.Super.App.Div.2009. Com. (j) quot. in case quot. in sup. Physician whose patients were primarily women of the Orthodox Jewish faith sued Jewish newspaper and others, after newspaper falsely published that a rabbinical court had issued an order of contempt against him for refusing to comply with an order to give his wife a religious divorce. The trial court granted defendants' motions to dismiss, finding that adjudication of plaintiff's claims would entail excessive entanglement of the court into religious affairs and practices. Affirming, this court held, as to plaintiff's claim for intentional infliction of emotional distress, that no jury could evaluate whether defendants' conduct was “extreme and outrageous,” or whether the conduct caused plaintiff to suffer “severe” emotional distress, without understanding whether the conduct would be viewed as “extreme and outrageous” within the Orthodox Jewish community or whether such conduct would cause a person of that faith to suffer “severe” emotional distress. Abdelhak v. Jewish Press Inc., 411 N.J.Super. 211, 234, 985 A.2d 197, 210.

N.J.Super.App.Div.2006. Com. (j) quot. in case cit. in sup. Jewish funeral home brought a collection action against son-in-law of deceased for nonpayment of its bill for services that it discounted for its failure to fulfill an orthodox Jewish ritual that required the body of the deceased to be accompanied at all times until it was buried. The trial court entered summary judgment in favor of home, and dismissed defendant's counterclaim for, in part, breach of contract. Reversing and remanding, this court held, inter alia, that, unlike in a claim for intentional infliction of emotional distress, there was no requirement of a heightened showing of emotional distress in a tort or contract action seeking consequential damages for emotional distress, and, therefore, the damages alleged by son-in-law could be sufficient as a matter of law to warrant an award. Menorah Chapels At Millburn v. Needle, 386 N.J.Super. 100, 116, 899 A.2d 316, 325.

N.J.Super.App.Div.2005. Com. (j) quot. in case quot. in disc. Children who witnessed mother's highway death after a stray tire crashed into their minivan, crushing minivan's windshield header downward and fracturing mother's skull, brought crashworthiness products-liability action against minivan manufacturer. After a first trial in which the jury returned a verdict for plaintiffs, the trial court granted defendant a new trial on damages only, and entered the second jury's lesser damages awards. This court reversed in part and restored the first jury's damages awards on the children's emotional-distress claims, holding that the awards were not excessive in light of a record that showed that the children suffered severe emotional distress, both as direct victims in the accident and as bystanders to their mother's gruesome death. Boryszewski ex rel. Boryszewski v. Burke, 380 N.J.Super. 361, 401-402, 882 A.2d 410, 434.

N.J.Super.App.Div.2005. Com. (d) quot. in disc. and quot. in case quot. in disc. Members of decedent's family sued funeral home and decedent's adopted daughter and her husband for, in part, negligent and intentional infliction of emotional distress, after plaintiffs were not told that they could have a private viewing with decedent's body. Trial court granted summary judgment for defendants. Affirming, this court held, inter alia, that as to plaintiffs' intentional-infliction-of-emotional-distress claim, plaintiffs failed to show any evidence that they suffered severe emotional trauma as a result of not attending a private viewing, or that defendants' actions were so extreme or outrageous as to go beyond all bounds of decency. Cole v. Laughrey Funeral Home, 376 N.J.Super. 135, 148, 869 A.2d 457, 465.

N.J.Super.App.Div.2005. Com. (d) quot. in case quot. in sup. Former employee sued former employer for intentional infliction of emotional distress and other claims in connection with her termination. The trial court granted summary judgment for defendant. Affirming, this court held as a matter of law that the conduct referenced by plaintiff, that former supervisor commented that plaintiff was close to retirement and was not in it for the long haul, clearly did not meet the enhanced standard of outrage that was required to recover for intentional infliction of emotional distress in New Jersey. Young v. Hobart West Group, 385 N.J.Super. 448, 468, 897 A.2d 1063, 1074.

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N.J.Super.

N.J.Super.2002. Cit. in case cit. in sup. Employee who had acted as a whistleblower sued employer for retaliation under Conscientious Employee Protection Act (CEPA) and for intentional infliction of emotional distress. This court dismissed plaintiff's claims, holding, inter alia, that her emotional-distress claim failed because the underlying facts were the same facts that formed basis of CEPA claim; thus, CEPA's waiver provision applied to both claims. Even if defendant's conduct was not in retaliation for plaintiff's whistleblowing activities, defendant's actions were not extreme and outrageous. While workplace environment became annoying and emotionally oppressive to plaintiff, extreme and outrageous conduct did not extend to indignities, threats, annoyances, petty oppressions, or other trivialities. Cokus v. Bristol Myers Squibb Co., 362 N.J.Super. 366, 391, 827 A.2d 1173, 1188, affirmed 362 N.J.Super. 245, 827 A.2d 1098 (2003).

N.J.Super.2001. Coms. (d) and (j) quot. in case quot. in sup. Caucasian employee sued employer and her African-American supervisor for intentional infliction of emotional distress, among other claims, alleging that supervisor's racially charged comment and sexual misconduct involving unwanted physical contact created a hostile work environment and caused her severe mental anguish. Trial court granted defendants summary judgment. This court reversed in part and remanded, holding, inter alia, that jury could reasonably find that supervisor's conduct was extreme and outrageous, given supervisor's knowledge that plaintiff was child-abuse victim. Testimony that plaintiff visited a psychologist after the incident, that she suffered from nightmares, insomnia, and depression, and that she was unable to work sufficiently established severe emotional distress. Flizack v. Good News Home For Women, Inc., 346 N.J.Super. 150, 162, 163, 787 A.2d 228, 234, 235.

N.J.Super.2001. Coms. (d) and (j) quot. in case quot. in sup. Appliance-store salesman who was discharged for selling a television set to his brother-in-law for below cost sued former employer and managers for intentional infliction of emotional distress. The trial court entered judgment on a jury verdict for plaintiff. Reversing and dismissing the complaint, this court held that evidence that managers incorrectly characterized plaintiff's role in the sale of the television set as “stealing” and that their personal dislike of plaintiff motivated their decision to fire him fell far short of showing the degree of outrageousness required to support plaintiff's claim, and plaintiff failed to show that he suffered any greater emotional distress than a person ordinarily would experience as a result of losing a job. Griffin v. Tops Appliance City, Inc., 337 N.J.Super. 15, 25, 26, 766 A.2d 292, 298.

N.J.Super.1999. Com. (d) quot. in disc. (erron. cit. as § 4b). A husband was led to believe that children born during his marriage were his own, when, in fact, they were products of an ongoing affair between his wife and her paramour. The wife filed for divorce, and the husband brought a third-party complaint against the paramour for intentional infliction of emotional distress, among other claims. This court denied the paramour's motion to dismiss, holding, inter alia, that keeping the duration of the affair a secret from plaintiff, as well as suppressing the true paternity of the first-born child for almost three years, including four months after the paternity of the second-born

child had been disclosed, without regard to the high degree of probable harm to defendant, would constitute outrageous behavior. C.M. v. J.M. v. W.P., 320 N.J.Super. 119, 726 A.2d 998, 1002.

N.J.Super.1999. Com. (d) quot. in case quot. in disc. Owners of beach club sued neighboring homeowner for, inter alia, defamation and intentional infliction of emotional distress in connection with defendant's efforts to rally official and community support against defendants' expansion of the facility. The trial court entered judgment on a jury verdict for plaintiffs. Reversing and remanding, this court held, in part, that none of the statements included in defendant's flyers or letters to public officials was capable of a defamatory meaning, and that defendant, who was doing nothing more than exercising her legal right to protest a certain land use application, could not be said to have acted outrageously. LoBiondo v. Schwartz, 323 N.J.Super. 391, 733 A.2d 516, 530.

N.J.Super.1998. Com. (d) cit. in disc. A police officer sued the city for intentional infliction of emotional distress, defamation, invasion of privacy, and violations of 42 U.S.C. § 1983. After the officer's wife filed a domestic-violence claim, alleging that he had violated a restraining order, had slashed four tires of a family car, and had attempted to cut telephone and cable television wires, the police officer's superiors ordered the officer to undergo psychological treatment and drug testing. The trial court dismissed plaintiff's complaint. This court affirmed, holding, inter alia, that plaintiff made no prima facie showing that defendants intended to cause plaintiff distress or that they deliberately disregarded the risk that severe emotional distress would occur, nor was there any conduct rising to the level of outrageousness on defendants' part. Thus, plaintiff failed to establish two essential elements of the tort of intentional infliction of emotional distress. Hart v. City of Jersey City, 308 N.J.Super. 487, 706 A.2d 256, 258.

N.J.Super.1998. Com. (j) quot. in case quot. in disc. A store manager was fired and became the subject of a police investigation after the bank did not receive the store's deposit receipt for $1,325.52. The missing receipts were later found. The manager sued the bank and the store for negligence, defamation, and intentional and negligent infliction of emotional distress. The defamation and emotional-distress claims were dismissed, and the jury awarded plaintiff damages for negligence. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that the trial court properly dismissed the emotional-distress claims. Although plaintiff was “acutely upset” by reason of the incident, her emotional distress was not so severe that no reasonable man could be expected to endure it. Schillaci v. First Fidelity Bank, 311 N.J.Super. 396, 709 A.2d 1375, 1380.

N.J.Super.1997. Quot. in case quot. in disc. Woman who contracted with agency to provide a caretaker for her disabled husband while she was away sued agency for, inter alia, consumer fraud, negligent hiring, negligent and intentional infliction of emotional distress, and invasion of privacy after the caretaker agency assigned to husband abandoned him and stole various items from couple's home. The trial court dismissed the complaint. Affirming in part, reversing in part, and remanding, this court held that plaintiff had stated a claim for consumer fraud and negligent hiring; however, the couple's emotional distress was not sufficiently severe for purposes of the torts of negligent and intentional infliction of emotional distress, and they could not sustain a claim for

invasion of privacy where they invited caretaker into their home. Lingar v. Live-In Companions, Inc., 300 N.J.Super. 22, 692 A.2d 61, 67.

N.J.Super.1996. Com. (d) quot. in case quot. in disc. Highly dissatisfied owners of newly constructed homes sued real estate agency, individual realtors, and builder for violations of the state Consumer Fraud Act (Act), common law fraud, and intentional and negligent infliction of emotional distress. Following dismissal of all claims but the claim against real estate agency under the Act, the trial court held a bench trial and entered judgment for plaintiffs. Affirming in part and reversing in part, this court held, inter alia, that individual realtors materially misrepresented builder's experience and qualifications; real estate agency was vicariously liable for the misrepresentations since they were within realtors' purview and seemingly authorized by agency; and punitive damages could be assessed against agency in the form of the treble damages allowed under the Act; however, plaintiffs' emotional-distress claims against agency were properly dismissed for lack of evidence that agency acted intentionally or outrageously or that plaintiffs experienced severe emotional distress. Gennari v. Weichert Co. Realtors, 288 N.J.Super. 504, 672 A.2d 1190, 1213.

N.J.Super.1995. Com. (d) quot. in conc. and diss. op. Wife brought an action for the dissolution of her marriage and asserted tort claims against her husband for damages. The trial court struck plaintiff's tort claims on statute-of-limitations grounds. Affirming in part and reversing in part, this court held, inter alia, that the statute of limitations could be tolled on proof by plaintiff that she suffered from "battered-woman's syndrome." The concurring and dissenting opinion saw no need for the creation of a new tort cause of action for battered-woman's syndrome, arguing that emotional encounters within a marriage should not form a basis for the imposition of tort liability unless one of the parties had engaged in conduct that could support a claim for assault, battery, or intentional infliction of emotional distress; here, the kind of verbal abuse that defendant allegedly directed at plaintiff, though offensive, was not sufficiently outrageous to provide the basis for a claim for intentional infliction of emotional distress. Giovine v. Giovine, 284 N.J.Super. 3, 35, 663 A.2d 109, 126.

N.J.Super.1993. Cit. in sup. Former county department director sued county board and officials, alleging constructive discharge based on his political affiliation and seeking to recover damages for intentional infliction of emotional distress, inter alia. Affirming in part the trial court's dismissal of plaintiff's claims, this court held, inter alia, that plaintiff's claims of severe humiliation, anxiety, and distress from alleged harassment were not sufficient to support an emotional distress claim. Morgan v. Union Cty. Bd. of Chosen Freeholders, 268 N.J.Super. 337, 354, 633 A.2d 985, 993.

N.J.Super.1992. Coms. (d) and (j) quot. in case cit. in disc. A former employee of a package delivery service who was discharged for stealing packages brought an action for intentional infliction of emotional distress, inter alia, against, among others, his employer for discharging him on the ground of dishonesty, an arbitration panel for upholding the discharge, and several employees for signing with the employer's knowledge and approval criminal complaints against him for theft and assault. The court dismissed the claim, holding that, because probable cause

existed to prosecute the plaintiff, he could not show the kind of outrageous conduct by the defendants necessary to maintain his action, nor did he prove that his emotional distress was so severe that no reasonable man could be expected to endure it. Fleming v. UPS, 255 N.J.Super. 108, 604 A.2d 657, 686.

N.J.Super.1991. Com. (h) cit. in disc., com. (d) quot. in sup. A husband sued his wife for divorce on the ground of adultery, and subsequently filed an amended complaint that included a claim for intentional infliction of emotional distress. This court dismissed the complaint based on the tort of intentional infliction of emotional distress. The court held, inter alia, that one spouse may sue the other in a divorce action for intentional infliction of emotional distress, even in absence of physical injury. Nonetheless, it concluded that the wife's engaging in an adulterous affair that lasted 11 years of the marriage failed to reach the level of outrageousness necessary for liability under the tort of intentional infliction of emotional distress. The court commented that a recitation of the facts of this case to an average member of the community would not lead him to exclaim, "Outrageous!" Ruprecht v. Ruprecht, 252 N.J.Super. 230, 599 A.2d 604, 607, 608.

N.J.Super.1991. Cit. and quot. in sup., com. (b) cit. and quot. in sup. A teacher was suspended from her teaching duties and directed to undergo psychiatric examinations as a result of the claims of several parents concerning her alleged lack of fitness. The teacher sued the parents for the embarrassment, humiliation, emotional distress, and the mental anguish she suffered as a result of the claims. After settling the suit, one of the parents brought a declaratory judgment action against her insurer seeking to hold the insurer responsible for reimbursement of all defense costs as a result of its failure to defend her in accordance with its obligations under her homeowner's policy. The trial court granted summary judgment for the insurer holding that the complaint alleged defamation, which was not covered under the insuring agreement. Reversing and remanding, this court held, inter alia, that the torts of outrage and negligent infliction of emotional distress were alleged as separate causes of action and that the mental anguish she claimed to suffer qualified as "bodily injury" under the policy; therefore the insurer had the duty to defend. Voorhees v. Preferred Mut. Ins., 246 N.J.Super. 564, 588 A.2d 417, 422, certification denied 126 N.J. 340, 598 A.2d 897 (1991), judgment affirmed 128 N.J. 165, 607 A.2d 1255 (1992). See above case.

N.J.Super.1989. Cit. but dist. Plaintiff sued two private investigators and their employer for invasion of privacy and negligent and intentional infliction of emotional distress caused by their surveillance of her activities. Defendants had been retained by an insurance company to investigate plaintiff's personal injury claims. The trial court granted summary judgment for the defendants. Affirming, this court held that the evidence was insufficient as a matter of law to support a finding of severe mental distress resulting from an insurance investigation, and that the defendants' private surveillance from such public places as a street, a parking lot, and a highway did not support an invasion of privacy claim. Figured v. Paralegal Tech. Serv., 231 N.J.Super. 251, 555 A.2d 663, 665, certification granted117 N.J. 118, 564 A.2d 847 (1989).

N.J.Super.1987. Cit. in disc. When a bank wrongfully dishonored two support checks a husband had sent to his separated wife and children, he was widely criticized by relatives and friends for not

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providing for his family. The husband sued the bank for intentional infliction of emotional distress, and he was awarded substantial damages. Reversing and remanding, this court held that the judge's instructions failed to distinguish between mistake and intentional breach or to adequately address the subject of proximate causation. The court stated that, regardless of whether wrongful dishonor gave rise to a tort claim or an action for breach of contract, under the U.C.C. the plaintiff could recover all consequential damages from wrongful dishonor, including damages for emotional distress, if they were proximately caused. Buckley v. Trenton Sav. Fund Soc., 216 N.J.Super. 705, 524 A.2d 886, 891, certification granted 108 N.J. 211, 528 A.2d 31 (1987).

N.J.Super.1985. Cit. in sup. A divorced father sued a hospital and certain staff members, a parochial school, its principal, a pastor, and one of its teachers. He sought compensatory and punitive damages from the hospital and staff members of its Center for Evaluation and Counseling on grounds of negligence and malpractice in the preparation of a report recommending that his children be transferred to a public school. He sought damages for negligent infliction of emotional distress from all the defendants. The trial court dismissed all claims, and this court affirmed. It held that the plaintiff had failed to show a proximate causal relationship between the alleged negligence and the damages he had sustained. Henderson v. Morristown Memorial Hosp., 198 N.J.Super. 418, 487 A.2d 742, 749, certification denied 101 N.J. 250, 501 A.2d 922 (1985).

N.J.Super.1984. Quot. in disc., com. (d) quot. in sup. The plaintiffs appealed a dismissal of their complaint for failure to state a claim upon which relief could be granted. This court affirmed in part, reversed in part, and remanded. The plaintiffs, husband and wife, had taken a neighbor's child to a circus. The child was killed when attacked by a circus cat. The husband, who had had a close relationship with the child, had tried to rescue the boy from the animal's mouth. Both plaintiffs suffered severe, permanent psychological trauma. This court affirmed as to the wife, but reversed and remanded as to the husband. The court held that because the husband's rescue attempt was a reasonably foreseeable result of the defendants' negligence, his injuries were compensable. While noting that compensability for emotional harm was not limited to harm from fear for one's own safety, this court held that the wife had no cause of action under theories of negligence, outrageous conduct, or the harboring of wild animals. Eyrich for Eyrich v. Dam, 193 N.J.Super. 244, 473 A.2d 539, 547.

N.J.Super.1981. Cit. and quot. in sup. and com. (d) quot. in part in case quot. in sup. The plaintiffs complaint alleged that the defendant doctor told the plaintiffs, the parents of the patient, that their child was suffering from a rare disease, knowing that the child had nothing more than a mildly infected appendix, and the plaintiffs sought damages for intentional infliction of emotional distress. The defendant moved for summary judgment. This court stated that New Jersey recognizes emotional distress as an element of damages in actions based either on negligence or an intentional tort and that the existence or nonexistence of an underlying independent cause of action is not essential to a cause of action for the intentional infliction of emotional distress. The court stated that substantial bodily injury is also not an essential element but rather, it is sufficient that the conduct produced severe emotional distress. The court held that the complaint stated a cause of

action for intentional infliction of emotional distress which precluded summary judgment against the parents. Hume v. Bayer, 178 N.J.Super. 310, 428 A.2d 966, 968, 970.

N.J.Super.1980. Cit. in disc. (erron. cit. as § 47), quot. in disc. and com. (1) quot. in part in disc. The defendant and his wife agreed to sell their home to the plaintiffs, and they signed a contract of sale. Thereafter, the defendant's wife was found buried in the backyard of this property and the plaintiffs refused to consummate the purchase because they believed that the defendant had murdered his wife. The plaintiffs sued, alleging breach of the agreement, because the property was not able to be conveyed in the same condition as when the agreement was signed, and therefore sought rescission. The plaintiffs also sought damages for the intentional infliction of mental and physical distress and for intentional damage to the property. The defendant moved to dismiss the damage claims, alleging that they did not state a claim upon which relief could be granted. This court stated that there was doubt as to whether the tort for the intentional infliction of emotional distress, the tort of outrage, had been recognized in New Jersey. The court stated that indirect victims of intentional misconduct have been permitted to recover only when the conduct occurred in their presence. The court found that the plaintiffs were not the persons toward whom any outrageous actions by the defendant were directed, they were not members of the defendant's family, nor were they present at the time of the alleged murder. The court held that the plaintiffs could not recover for their emotional distress. The court also held that the plaintiffs' demand for rescission and for damages relating to the real property should not be dismissed as a matter of law, although the plaintiffs must elect between rescission or damages. Calliari v. Sugar, 180 N.J.Super. 423, 435 A.2d 139, 140, 141, 142.

N.J.Super.1977. Sec. and coms. cit. in ftn. in sup. in disc. This was an appeal by the parents of a baby who died at a hospital from the trial court's dismissal of their complaint against the hospital as failing to state a claim for which relief could be granted. The Superior Court, without addressing the merits of plaintiffs' case, reversed and remanded for further proceedings. The court held that it was error to have dismissed the complaint without having afforded the plaintiffs an opportunity to amend or granting additional time for discovery where the gravamen of the cause of action for damages arising from the hospital's method of informing them of their baby's death, its failure to locate the baby's body or to confirm the death for a period of some weeks, could have been stated, in an amended complaint, so as to conform to the requirements for a cause of action in malpractice, negligence, or some other theory of liability. Muniz v. United Hospitals, Etc., 153 N.J.Super. 79, 379 A.2d 57, 59.

N.J.Super.1976. Subsec. (1) quot. in sup. and illus. (1) cit. in sup. Erron. cit. in part of op. as § 416A. The parents of a premature baby, who died shortly after birth, brought an action against the hospital in which the baby died for recovery under the tort of "outrage." The plaintiffs alleged negligent deviation from standard methods of hospital administration, labeling the hospital's handling of the death as callous and inhumane. This court found that the hospital's telephone call to the plaintiffs announcing the death could only be called careless in that the message was conveyed without any prior warnings. This conduct might demonstrate negligence if the defendant realized that this conduct involved an unreasonable risk of bodily harm and even if such risk existed, no

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bodily harm had occurred. The court observed that generally negligence is not actionable without its production of physical consequences to an emotional disturbance. The suit was thus dismissed as the facts did not constitute a cause of action. Muniz v. United Hosp. Med. Ct.-Presby. Hosp., 146 N.J.Super. 512, 370 A.2d 76, 79, 80, 86.

N.J.Super.1975. Com. (d) quot. in part and fol. This was an action brought by a widow against her deceased husband's son and daughter-in-law for intentional infliction of mental distress and wrongful interference with a wife's right to receive support from her husband. Plaintiff alleged that defendants moved her husband to defendant's home after he had suffered a stroke and prevented plaintiff from seeing him. Defendants' motion for summary judgment as to the support payments was denied but was otherwise granted. It was held, inter alia, that plaintiff's complaint did not make out a cause of action of the intentional infliction of mental distress, but rather one for alienation of affections, which was proscribed by the Heart Balm Act. The court held, as a matter of law, that the defendants' conduct was not of the type required by the tort of intentional infliction of mental distress. An essential element of that tort requires the wrongful conduct to be so extreme and outrageous "as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." Hafner v. Hafner, 135 N.J.Super. 328, 343 A.2d 166, 169.

N.M.

N.M.2007. Cit. in disc., quot. in sup., cit. in case cit. in disc., adopted in case quot. in disc., subsec. (2) cit. in disc., com. (e) quot. in disc., com. (g) quot. in sup., com. (*l*) cit. but dist. Firefighters who responded to a pipeline explosion in which 12 members of an extended family camping near the pipeline either were killed outright or died later from severe burns, and witnessed the conscious survivors' visible agony brought suit for, in part, intentional infliction of emotional distress (IIED) against natural-gas company that owned and operated the pipeline. The trial court dismissed the IIED claim, and the court of appeals reversed with respect to that claim. Affirming and remanding, this court adopted a policy-based reformulated firefighter's rule whereby a firefighter could recover damages proximately caused by intentional or reckless conduct. The court concluded that plaintiffs in this case alleged sufficient facts to support each element of a claim for IIED. Baldonado v. El Paso Natural Gas Co., 143 N.M. 288, 176 P.3d 277, 280, 282, 283, 285-286.

N.M.1998. Coms. (d) and (j) quot. in case quot. in disc. Sales representative sued former employer and former supervisors for, inter alia, violations of Title VII, defamation, and intentional infliction of emotional distress in connection with employer's failure to promote her and defendants' actions vis-à-vis her new employer. The trial court entered summary judgment for defendants. Affirming in part and reversing in part, this court held that material factual issues existed as to whether employer engaged in gender discrimination by promoting a male employee to a management position for which plaintiff was allegedly qualified, and that plaintiff's defamation claim, based on a letter sent by former supervisors to her new employer and calling plaintiff a liar, gossip, and problem employee, survived the motion for summary judgment; however, plaintiff failed

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to establish that defendants' conduct caused her to suffer severe mental distress. Silverman v. Progressive Broadcasting, Inc., 125 N.M. 500, 964 P.2d 61, 70, 71.

N.M.1997. Cit. in case cit. in disc. Siblings of decedent who was buried in family plot sued mortuary for, inter alia, breach of contract, intentional infliction of emotional distress, and prima facie tort after defendant, in interring decedent, disturbed the grave of plaintiffs' mother and exposed her remains. The trial court entered summary judgment for defendant. Affirming, this court held, in part, that, while defendant breached the contract of burial for plaintiffs' mother, plaintiffs incurred no damages as a result; that defendant's conduct was not extreme or outrageous, nor was plaintiffs' mental distress sufficiently severe to give rise to a cause of action for intentional infliction of emotional distress; and that plaintiffs failed to establish the "intent to cause injury" requirement necessary to sustain a prima facie tort action. Jaynes v. Strong-Thorne Mortuary, Inc., 124 N.M. 613, 954 P.2d 45, 50.

N.M.1994. Com. (j) cit. in case cit. in sup. A decedent's wife and children sued a funeral director for, among other claims, breach of contract and infliction of emotional distress, alleging that the director had failed to embalm the decedent's body completely as required by the contract for funeral services. After trial court set aside jury's initial award and granted a new trial on the damages issue, this court reversed and remanded a reduced award of compensatory damages, holding, inter alia, that damages for mental anguish caused by the alleged breach were recoverable and that mental distress in connection with exhumation was a general damage arising from the breach, making a showing of foreseeability unnecessary. The court stated that compensation for only serious mental distress from breach of contract should be implied in fact as within the contemplation of the parties to a funeral and burial contract, and, in this case, decedent's wife presented evidence of long-term, severe distress associated with the condition of her husband's body and her feelings that his body was disgraced and dishonored. Flores v. Baca, 117 N.M. 306, 871 P.2d 962, 969.

N.M.1990. Cit. in disc. A property owner in a three-party land exchange filed an action in interpleader against the accountant involved in the transaction, among others, when he used a note payable to another party as collateral for a loan on which he defaulted and on which the bank collected causing injury to the other parties involved. A second party filed a cross-claim against the bank, among others, in negligence. The trial court directed a verdict in favor of the defendants and ruled in favor of the cross-claimants on their negligence claim. Affirming, this court held that prima facie tort was recognized in New Mexico. The court noted that, in recognizing this tort, the court was acting within the tradition of the development of tort law in this jurisdiction, since New Mexico previously had recognized the torts of inducing breach of contract, intentional interference with prospective contractual relations, and intentional infliction of emotional distress, relying on the Restatement views of those torts. Schmitz v. Smentowski, 109 N.M. 386, 785 P.2d 726, 736.

N.M.1989. Quot. in sup., com. (d) quot. in case cit. in sup. A discharged employee sued his employer for intentional or reckless infliction of emotional distress, inter alia. The trial court directed a verdict for the employer. Affirming, this court held that the employer's conduct in discharging the plaintiff in a loud voice on the sales floor did not constitute the extreme and

outrageous conduct necessary to satisfy the standard for intentional or reckless infliction of emotional distress. Newberry v. Allied Stores, Inc., 108 N.M. 424, 773 P.2d 1231, 1239.

N.M.1989. Cit. in case quot. in disc. Neighbors had an argument about the location of a roadway easement giving one of them access to a highway. The owner of the dominant estate sued the owners of the servient estates, seeking to resolve the placement of the easement and seeking damages for intentional infliction of emotional distress. The trial court ruled on the easement location and denied the plaintiff's emotional distress claim. Affirming, this court stated that, even if the defendants had provoked the plaintiff while knowing that he was suffering from a stress-related disorder, the defendants' behavior was not sufficiently outrageous as to support the emotional distress claim. Sanders v. Lutz, 109 N.M. 193, 784 P.2d 12, 15.

N.M.1969. Cit. com. (j) in sup. This was an action for malicious prosecution. Defendant instigated criminal proceedings against plaintiff as a result of which plaintiff was arrested. The trial court found plaintiff to be suffering from embarrassment and humiliation. The court in affirming for plaintiff held, inter alia, that he could recover general damages for injury to reputation and for emotional distress. Sweitzer v. Sanchez, 80 N.M. 408, 456 P.2d 882, 884.

N.M.App.

N.M.App.2008. Com. (d) quot. in case quot. in sup. Property owner sued city after city's sewer system backed up, causing a pool of sewer water to accumulate under the bathroom floor of owner's home. The trial court entered judgment on a jury verdict awarding owner damages for the injury to the property and for the emotional distress that he suffered as a result of the property damage. Reversing the judgment as to the emotional distress damages, this court held that a plaintiff could not recover for emotional distress based solely on a claim for negligent damage to property; here, plaintiff offered no proof of personal injury and there were no allegations or proof of willful, wanton, or malicious conduct that would support an action for intentional infliction of emotional distress. Castillo v. City of Las Vegas, 2008-NMCA-141, 145 N.M. 205, 195 P.3d 870, 876.

N.M.App.2006. Cit. and quot. in sup., subsec. (1) cit. in sup. and disc., subsec. (2) cit. in disc. and cit. but not fol, com. (*l*) cit. and quot. in sup., caveat cit. and quot. in disc. Firefighters who responded to a pipeline explosion in which 12 members of an extended family camping near the pipeline either were killed outright or died later from severe burns, and witnessed the conscious survivors' visible agony brought suit for, in part, intentional infliction of emotional distress (IIED) against natural-gas company that owned and operated the pipeline. This court reversed the trial court's dismissal of the IIED claim, overruling the “fireman's rule” it had adopted in a previous case and concluding that plaintiffs stated a claim for IIED. The court held that the tort of IIED did not require that a defendant's conduct be directed at a plaintiff, or that a plaintiff be present at the time of the injury to a third person; in addition, plaintiffs' allegations of defendant's indifference to a potential failure of its pipeline were sufficient to plead the element of outrageous conduct. Baldonado v. El Paso Natural Gas Co., 143 N.M. 297, 176 P.3d 286, 294, 295.

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N.M.App.1999. Adopted in cases cit. in disc., subsec. (1) and com. (d) quot. in sup., coms. (e), (g), and (h) cit. in disc., com. (f) cit. in sup. Husband brought damages action for, in part, intentional infliction of emotional distress against friend for having engaged in pattern of intrusive and oftentimes sexual behavior with plaintiff's wife, former wife, and former fiancee. Affirming trial court's dismissal of complaint, this court held, inter alia, that defendant's participation in consensual sexual relations with adult women who had a past or present relationship with plaintiff was not so extreme and outrageous as to permit plaintiff to recover for intentional infliction of emotional distress. Padwa v. Hadley, 127 N.M. 416, 981 P.2d 1234, 1237-1239, 1241, 1999-NMCA-067.

N.M.App.1998. Quot. in sup., com. (d) quot. in disc., com. (f) quot. in sup., com. (g) cit. in disc., illus. 12 cit. in sup. Nanny who ruptured her colon while in parents' employ sued parents for negligence and breach of contract. Plaintiff also asserted a claim for intentional infliction of emotional distress, alleging that defendants terminated her services while she was in the hospital recovering from abdominal surgery, and lied to the Department of Labor about her employment. The trial court granted defendants' motion for summary judgment. Affirming in part, reversing in part, and remanding, this court held that defendants were under no duty to warn plaintiff of the dangers associated with lifting their infant son or the risks posed by overwork, and that summary judgment was properly entered on the contract claim; however, material factual issues existed as to whether defendants' discharge of plaintiff while she was recuperating from surgery constituted extreme and outrageous conduct. The court noted that defendants' alleged lying to the Labor Department could have been privileged. Stock v. Grantham, 125 N.M. 564, 964 P.2d 125, 135-136.

N.M.App.1995. Quot. in case quot. in sup. Village council member who was also the promoter of a for-profit motorcycle race sued newspaper and reporter for, inter alia, intentional infliction of emotional distress in connection with reporter's investigations for and articles published about plaintiff's activities. Affirming the trial court's dismissal, this court held that neither the reporter's cooperation with the IRS regarding plaintiff's suspected tax law violations nor his writing of three accurate articles concerning newsworthy events was so obnoxious or intolerable as to give rise to a claim of intentional infliction of emotional distress. Andrews v. Stallings, 119 N.M. 478, 892 P.2d 611, 624.

N.M.App.1995. Com. (d) quot. in case quot. in sup. Newspaper reporter who was promoted to special-projects reporter sued newspaper for intentional infliction of emotional distress, inter alia, after defendant assigned plaintiff so many beat stories and daily assignments that insufficient time remained for her to research and write special-project stories, contrary to defendant's assurances of fewer daily beats. Affirming the trial court's grant of summary judgment for defendant, this court held, in part, that defendant's conduct did not reach the level of extreme and outrageous behavior necessary to support plaintiff's claim for intentional infliction of emotional distress. Stieber v. Journal Pub. Co., 120 N.M. 270, 901 P.2d 201, 205.

N.M.App.1993. Quot. in case quot. in disc., coms. (d) and (j) quot. in case quot. in disc. A former employee sued her former employer for sexual harassment, alleging that the harassment embarrassed, shamed, and degraded her and caused her mental anguish. Trial court dismissed plaintiff's complaint on the ground that plaintiff failed to exhaust her administrative remedies under the New Mexico Human Rights Act (NMHRA). Reversing and remanding, this court held that, although trial court correctly determined that plaintiff could not sue under the NMHRA unless she exhausted her administrative remedies, plaintiff's complaint sufficiently stated an independent common law claim for relief as to the tort of intentional infliction of emotional distress. The court noted, however, that whether the alleged conduct satisfied the claim could not be determined from the complaint's bare allegations, so that the trial court had to determine whether defendant, by extreme and outrageous conduct, intentionally or recklessly caused plaintiff severe emotional distress. Phifer v. Herbert, 115 N.M. 135, 848 P.2d 5, 9-10.

N.M.App.1993. Quot. in part in sup. and com. (d) quot. in part in sup. A commercial tenant's employee sued the tenant and its landlord to recover for injuries incurred in an attack by an intruder on the premises and for intentional infliction of emotional distress. Affirming the trial court's grant of the landlord's motion to dismiss and an award of attorney fees incurred by the employee in obtaining a default judgment that later was set aside, this court held, inter alia, that the landlord's failure to provide adequate security on the premises was not extreme and outrageous conduct that would support an emotional distress claim. The court noted that nothing indicated a special relationship between the landlord and employee giving rise to a duty to protect the employee from criminal acts of third parties. Rummel v. Edgemont Realty Partners, Ltd., 116 N.M. 23, 859 P.2d 491, 496.

N.M.App.1991. Cit. and quot. in disc., cit. in spec. conc. op., subsec. (2) cit. in disc., illus. 4 quot. in sup., illus. 13 quot. in disc. and sup., com. (j) cit. in sup. Following numerous marital conflicts, a husband sued his wife for divorce. The wife counterclaimed, seeking damages for intentional infliction of emotional distress. The trial court granted the divorce and awarded the wife damages. This court reversed the damages award, holding that the husband's insults and outbursts failed to meet the requisite legal standard of outrageousness when taken in the marital context in which they arose. Hakkila v. Hakkila, 112 N.M. 172, 812 P.2d 1320, 1323, 1324, 1327, 1329, 1330.

N.M.App.1989. Cit. in disc. A nontenured university professor sued members of the university administration, alleging that the reasons given for failing to renew his teaching contract were pretextual and that the real reason for nonrenewal was his speech activity of frequently voicing criticism of the university administration. The trial court awarded the plaintiff damages for emotional distress, and this court affirmed, concluding that the damages award was supported by substantial evidence, and noting that whether a plaintiff has established emotional distress damages was a question for the fact finder. Jacobs v. Meister, 108 N.M. 488, 775 P.2d 254, 262, certiorari denied 108 N.M. 582, 775 P.2d 1299 (1989).

N.M.App.1984. Quot. in part in disc., subsec. (1) cit. in disc. A patient sued a physician who had removed a cataract from his eye for malpractice and intentional infliction of emotional distress.

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The physician moved for partial summary judgment, and the trial court denied his motion. On appeal, the physician argued that the trial court had erred in refusing to consider the affidavit of a physician who had previously treated the patient and in concluding that the patient's allegation of emotional distress stated a claim upon which relief could be granted, since the conduct alleged was neither extreme nor outrageous and the plaintiff had failed to allege any attendant physical injury. This court affirmed in part and reversed in part. The court held that the affidavit was not privileged and should have been allowed and that the complaint sufficiently alleged a claim of intentional infliction of emotional distress. Remanding, the court concluded that the trial court had not erred in denying the physician's motion, since, in considering the sufficiency of a claim, the court accepts as true all facts pleaded. Trujillo v. Puro, 101 N.M. 408, 683 P.2d 963, 969, 970, certiorari denied 101 N.M. 362, 683 P.2d 44 (1984).

N.M.App.1981. Quot. in sup., cit. in sup., com. (c) quot. in part in sup., coms. (d) and (j) quot. in sup. The plaintiff, a Mexican national employed as the director of a senior citizens' program, brought this action against the defendant, a member of the Board of Trustees which supervised the program, alleging, inter alia, defamation of reputation and the intentional infliction of emotional distress. At a public meeting of the Board of Trustees and later during a closed session, the defendant made statements to the effect that the plaintiff was not suited for her employment because she was a Mexican, and that the program director should not be a Mexican because the program was funded with American tax dollars. The defendant also interrogated the plaintiff at the meeting concerning her payment of income and property taxes, whether she applied for United States citizenship, and whether she had registered to vote in the United States. The trial court granted summary judgment in favor of the defendant. This court reversed and remanded. On the intentional infliction of emotional harm issue, this court found there was an issue of fact precluding summary judgment. This court stated that the defendant's position of authority over the plaintiff, the plaintiff's freedom to flee from the defendant's remarks, the social conditions of the geographic area, and the plaintiff's own susceptibility should be considered on remand. Dominguez v. Stone, 97 N.M. 211, 638 P.2d 423, 426, 427.

N.M.App.1972. Quot. but dist. and com. c and d quot. in part but dist. Plaintiff, after having a mastectomy performed by defendant physician, brought this action pressing numerous claims against defendant. In affirming judgment for defendant, the court held, inter alia, that defendant's alleged failures of disclosure and diagnosis did not constitute “extreme and outrageous conduct” so as to entitle plaintiff to have the jury instructed on her claim of intentional infliction of severe mental suffering and anguish. Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68, 75.

N.Y.

N.Y.2021. Quot. in conc. op.; com. (*l*) cit. and quot. in conc. op. After bringing claims of negligence and wrongful death against building owner and others arising from an incident where falling building debris struck and killed a child, the child's grandmother, among others, filed a motion for leave to amend the complaint, seeking to add a claim for negligent infliction of emotional distress

(NIED) and alleging that she was in the proximity of the child at the time of the incident. The trial court granted plaintiffs' motion for leave to amend. The court of appeals reversed. This court reversed, holding that it extended the definition of "immediate family member" for the purpose of NIED claims to include grandmothers who contemporaneously witnessed the death of their grandchildren. The concurring opinion observed that Restatement Second of Torts §§ 46 and 436 left open the possibility of any person with sufficiently strong emotional ties to the victim to recover under an NIED claim, so long as their emotional distress caused them bodily harm. Greene v. Esplanade Venture Partnership, 168 N.E.3d 827, 842, 844, 850.

N.Y.2008. Com. (d) quot. in case quot. in sup. Synagogue member brought suit for intentional infliction of emotional distress (IIED), inter alia, against synagogue and rabbi employed by synagogue, alleging that she had acquiesced in a sexual relationship with rabbi as a "course of sexual therapy" to assist her in her quest to attain marriage and a family, and that he had threatened to "have her placed in a straight jacket" and banned from the synagogue if she disclosed their sexual arrangement. The trial court denied defendants' motion to dismiss; the appellate division reversed. Affirming, this court held that plaintiff's complaint did not establish that rabbi's conduct rose to the level of extreme and outrageous conduct necessary to support a claim for IIED. Marmelstein v. Kehillat New Hempstead, 11 N.Y.3d 15, 23, 862 N.Y.S.2d 311, 892 N.E.2d 375, 379.

N.Y.1993. Adopted in case cit. in disc., subsec. (1) quot. in disc., coms. (h) and (f) cit. in disc., com. (g) quot. in sup., com. (d) quot. in case cit. in sup. A patient at a private psychiatric facility who appeared incidentally in a photograph published by a newspaper sued the newspaper for invasion of privacy and intentional infliction of emotional distress. Affirming the appellate division's affirmance of dismissal of the action, this court held, inter alia, that the newspaper's qualified privilege extended to publication of the photograph even though it revealed the confidentially-kept fact that the patient was undergoing psychiatric treatment, and privileged conduct could not be the basis for liability for intentional infliction of emotional distress. Howell v. New York Post Co., Inc., 81 N.Y.2d 115, 121, 122, 125, 596 N.Y.S.2d 350, 353, 354, 356, 612 N.E.2d 699, 702, 703, 705.

N.Y.1985. Subsec. (1) quot. in disc. A newspaper company obtained information from confidential court records of the plaintiff's divorce proceedings and published three articles reporting charges of mental and physical cruelty and adultery. The plaintiff, owner of a well-known baking company, alleged 12 causes of action, including intentional infliction of emotional distress. The trial court granted the newspaper company's motion for summary judgment on the emotional distress claim, and the appellate division affirmed, holding that the plaintiff did not sufficiently prove that the publications constituted outrageous conduct. This court also affirmed, holding that liability for the intentional infliction of emotional distress must be based on extreme and outrageous conduct, and that the newsworthy content of the articles constituted sufficient justification for their publication and warranted summary judgment. Freihofer v. Hearst Corp., 65 N.Y.2d 135, 490 N.Y.S.2d 735, 741, 480 N.E.2d 349, 355.

N.Y.1983. Subsec. (1) quot. in sup., com. (d) quot. in sup. A discharged employee brought an action to recover for abusive discharge, prima facie tort, intentional infliction of emotional distress,

breach of contract, and age discrimination. The trial court dismissed all causes of action except that for abusive discharge. The appellate court modified by dismissing all causes of action and affirmed. This court held that the New York courts did not recognize a cause of action for abusive discharge, and the complaint did not state a cause of action for prima facie tort or intentional infliction of emotional distress. This court further held that there was no implied obligation of good faith in an at-will contract of employment. The appellate court's judgment was modified to reinstate the plaintiff's age discrimination claim. Murphy v. American Home Products Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232, 236, 448 N.E.2d 86.

N.Y.1978. Subsec. (1) quot. in part in sup., cit. in sup., com. (d) quot. in part in sup., com. (e) cit. in sup. Plaintiff, a tenant and shareholder in a residential co-operative corporation, brought suit against the individual members of the board of directors of the corporation, alleging, inter alia, that the directors had commenced a defamation action against him deliberately to malign, harass, and intimidate him and thereby intentionally to inflict great mental and emotional distress. A lower court refused to dismiss this cause of action on the ground that it presented questions of fact which could be resolved only after a trial. This court concluded that plaintiff's allegations were not sufficient to state a cause of action for intentional infliction of severe emotional distress under any proper definition of the doctrine, and granted summary judgment in favor of defendants dismissing the complaint. Fischer v. Maloney, 43 N.Y.2d 553, 402 N.Y.S.2d 991, 992, 993, 373 N.E.2d 1215.

N.Y.Sup.Ct.App.Div.

N.Y.Sup.Ct.App.Div.2018. Com. (d) quot. in case quot. in sup. Member of yacht club and member's domestic partner who had used club as a guest brought an action against club, club board, and individual club members, asserting, inter alia, a claim for intentional infliction of emotional distress (IIED) after a complaint was filed against plaintiffs that resulted in a hearing and a one-year ban of domestic partner from club. The trial court granted defendants' motions to dismiss. This court affirmed, holding, inter alia, that domestic partner did not have a cause of action for IIED. The court quoted Restatement Second of Torts § 46, Comment *d*, for the standard of conduct necessary to support an IIED claim, determining that defendants' alleged conduct was not sufficiently outrageous and extreme to support a finding of liability. Nachbar v. Cornwall Yacht Club, 75 N.Y.S.3d 494, 496.

N.Y.Sup.Ct.App.Div.2017. Com. (d) quot. in case quot. in disc. A preceding for pre-action disclosure was brought on behalf of a minor student against high school, seeking the names of unidentified individuals who allegedly disseminated a photograph depicting an unclothed portion of the minor's body to students and faculty at the school and elsewhere and identified the minor in the photograph for the purpose of causing her emotional distress. The trial court granted plaintiff's petition. Affirming, this court held that plaintiff's requested disclosure was limited to obtaining the identity of prospective defendants and that the petition set forth sufficient facts to support a cause of action for intentional infliction of emotional distress (IIED). The court quoted Restatement Second

of Torts § 46, Comment *d*, in describing the level of extreme and outrageous conduct necessary to support an IIED claim. Matter of Leff v. Our Lady of Mercy Academy, 55 N.Y.S.3d 392.

N.Y.Sup.Ct.App.Div.2017. Com. (d) quot. in case quot. in sup. Tenant who had a dispute with landlords regarding his entitlement to a parking space filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against landlords, alleging that defendants defamed him in a letter that they sent to various people, including plaintiff's friends and relatives, by describing him as quixotic, self-absorbed, and narcissistic, among other things. The trial court granted defendant's motion to dismiss. This court affirmed, holding that plaintiff failed to allege conduct that was sufficiently extreme and outrageous to support an IIED claim based on the standard set forth in Restatement Second of Torts § 46, Comment *d*. Scialdone v. Derosa, 48 N.Y.S.3d 471, 473.

N.Y.Sup.Ct.App.Div.2015. Cit. in sup. Stalking victim brought a claim for intentional infliction of emotional distress (IIED) against stalker, seeking to recover damages after stalker pled guilty to various crimes in connection with an incident in which he entered victim's home and threatened her with a weapon. The trial court granted summary judgment for defendant, finding that plaintiff's IIED claim was time-barred, and denied plaintiff's cross-motion to amend the complaint to replace the time-barred IIED claim with claims for reckless infliction of emotional distress and negligent infliction of emotional distress. Affirming as modified, this court held that the trial court did not abuse its discretion in denying plaintiff's cross-motion to amend her complaint. The court reasoned, in part, that, under Restatement Second of Torts § 46, reckless conduct was encompassed within the tort of IIED and did not constitute a separate and distinct cause of action. James v. Flynn, 19 N.Y.S.3d 618, 620.

N.Y.Sup.Ct.App.Div.2015. Cit. and quot. in sup., cit. in case quot. in sup., subsec. (1) quot. in sup., com. (d) quot. in case quot. in sup. Property owners brought claims for, among other things, intentional infliction of emotional distress against neighbors in connection with allegations that neighbors' tenants breached the peace and engaged in illegal activity by hosting large parties that lasted all hours of the night, impeded traffic, and involved loud music, public alcohol consumption, and the open use and sale of illegal drugs. The trial court denied defendants' motion for summary judgment. Reversing, this court held that defendants' alleged failure to mediate the continuing conflict between plaintiffs and tenants was not sufficiently extreme or outrageous to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. Taggart v. Costabile, 14 N.Y.S.3d 388, 393, 394.

N.Y.Sup.Ct.App.Div.2014. Com. (d) quot. in case quot. in sup. Plaintiff brought claims for malicious prosecution, false arrest, defamation, and intentional infliction of emotional distress against his sister and brother-in-law, alleging that he was arrested and held overnight but then released without being charged after defendants informed police officers that he had refused to return their vehicle despite his breach of an oral agreement in which he would make monthly loan and insurance payments on the vehicle in return for the right to use the vehicle. The trial court granted defendants' motion to dismiss. Affirming, this court held, among other things, that plaintiff failed to state a claim for intentional infliction of emotional distress, because none of defendants'

alleged acts was sufficiently extreme or outrageous to state such a claim under Restatement Second of Torts § 46. The court pointed out that defendants merely furnished information to the officers, who were then free to exercise their own judgment as to how to act, and defendants' alleged conduct did not rise to the level of undue zeal such that the officers' arrest of plaintiff was not of the officers' own volition. Zapata v. Tufenkjian, 998 N.Y.S.2d 435, 438.

N.Y.Sup.Ct.App.Div.2012. Com. (d) quot. in case quot. in sup. Former employee sued employer, asserting, inter alia, a claim for intentional infliction of emotional distress (IIED). The trial court denied defendant's motion to dismiss. Reversing, this court held that plaintiff failed to state a cause of action to recover damages for IIED, since defendant's alleged conduct in unlawfully terminating plaintiff from her position in retaliation for reporting illegal and incorrect activities on the part of two of defendant's officers was not so outrageous in character, and so extreme in degree, as to qualify as IIED. Klein v. Metropolitan Child Services, Inc., 100 A.D.3d 708, 954 N.Y.S.2d 559, 562.

N.Y.Sup.Ct.App.Div.2011. Com. (d) quot. in case quot. in sup. Residents of a beachfront townhouse development who opposed developer's plans to develop the property between the lake and plaintiffs' lots sued developer, asserting a claim for intentional infliction of emotional distress (IIED). The trial court denied the parties' cross-motions for summary judgment. This court modified the trial court's order by granting summary judgment for defendant, and, as so modified, affirmed, holding that plaintiffs failed to plead conduct sufficient to establish a prima facie claim of IIED; defendant's alleged conduct, including constructing a fence to block access to the beach, stripping all the grass from the beach area, and constructing a 20-foot-high boat rack directly in front of plaintiffs' home, fell squarely within the bounds of the traditional torts of nuisance and trespass. Doin v. Dame, 82 A.D.3d 1338, 1340, 918 N.Y.S.2d 253, 254.

N.Y.Sup.Ct.App.Div.2011. Com. (d) quot. in case quot. in sup. School district employee and his wife sued district and district's director of facilities, who was employee's supervisor, alleging that supervisor used his position with district to “conduct a reign of terror” upon plaintiffs. The trial court denied district's motion to dismiss. This court reversed in part, holding that district was not liable for intentional infliction of emotional distress (IIED) based on either direct or vicarious liability. The court reasoned as to the former that, although supervisor's conduct in allegedly vandalizing plaintiffs' property on five different occasions, menacing plaintiffs with phone calls, and threatening their personal safety was sufficiently outrageous to support a claim for IIED against supervisor, district's mere inaction after receiving complaints about supervisor was not sufficiently extreme and outrageous to support a direct claim against district. Gray v. Schenectady City School Dist., 86 A.D.3d 771, 772, 773, 927 N.Y.S.2d 442, 445.

N.Y.Sup.Ct.App.Div.2011. Subsec. (1) cit. in sup. Parents of two 15-year-old students who were killed while passengers in a motor vehicle accident brought claims for, among other things, intentional infliction of emotional distress against school district, after it published statements in a high school newspaper that suggested that the two students were an example of what happened when kids drank and drove, despite the fact that they had no drugs or alcohol in their systems

at the time of their deaths. The trial court granted defendant's motion to dismiss. Affirming, this court held that, even accepting the facts as alleged in the complaint as true, according plaintiffs the benefit of every possible inference, and according the complaint a liberal construction, defendant's conduct, as alleged by plaintiffs, did not constitute extreme and outrageous conduct. Reilly v. Garden City Union Free School Dist., 89 A.D.3d 1075, 934 N.Y.S.2d 204, 206.

N.Y.Sup.Ct.App.Div.2010. Com. (d) quot. in case quot. in sup. Parents of mentally challenged adult son sued, among others, employees of a group home where son resided, alleging intentional infliction of emotional distress arising from employees' report of son's allegations that mother sexually abused him. The trial court denied in part defendants' motion for summary judgment. This court modified the trial court's order to grant the motion as to plaintiffs' claim for intentional infliction of emotional distress, holding that defendants were immune from such a claim as to their report of the alleged sexual abuse, and that any other conduct allegedly committed by defendants, unrelated to the report, did not, as a matter of law, support plaintiffs' claim, because that conduct was not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Marilyn S. v. Independent Group Home Living Program, Inc., 73 A.D.3d 895, 904 N.Y.S.2d 70, 72.

N.Y.Sup.Ct.App.Div.2010. Com. (d) quot. in case quot. in sup. Parents of mentally challenged adult son who resided at a group home sued home's operator and employees, alleging that defendants improperly restricted their visitation rights with son by requiring them to provide advance notice before any visit and limiting each visit to three hours. The trial court granted in part summary judgment for defendants. Affirming as to plaintiffs' claim for intentional infliction of emotional distress, this court held that defendants' conduct in implementing and enforcing the visitation restrictions was not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Marilyn S. v. Independent Group Home Living Program, Inc., 73 A.D.3d 892, 903 N.Y.S.2d 403, 406.

N.Y.Sup.Ct.App.Div.2010. Subsec. (1) quot. in case quot. in sup. Female former employees of plumbing and heating company sued company and its owner for intentional infliction of emotional distress (IIED) and constructive discharge, alleging that owner installed a video camera in company's restroom to tape their use of the restroom. The trial court entered judgment on a jury verdict in favor of plaintiffs. Affirming, this court held, as to the IIED claim, that owner's conduct in installing a video camera in a workplace restroom in order to surreptitiously view and record plaintiffs while they used the restroom was conduct that was unquestionably outrageous and extreme, and the evidence was sufficient, as a matter of law, to establish that this conduct caused plaintiffs severe emotional distress. Sawicka v. Catena, 79 A.D.3d 848, 849, 912 N.Y.S.2d 666, 667.

N.Y.Sup.Ct.App.Div.2009. Subsec. (1) quot. in case quot. in sup. After former employees commenced an action against former employer, alleging sexual harassment in a hostile work environment and assault and battery, employer sued employees for, among other things, intentional

infliction of emotional distress (IIED), inter alia. Granting employees' motion to dismiss, this court held that the documentary evidence contradicted any finding that employer suffered the intentional infliction of emotional distress by employees. The court cited an affidavit attached to employer's pleadings in which employer admitted, among other things, sending sexually suggestive e-mails to employees, and reasoned that employer could not sustain an IIED claim based on acts that he himself initiated. Kaisman v. Hernandez, 61 A.D.3d 565, 566, 878 N.Y.S.2d 305, 307.

N.Y.Sup.Ct.App.Div.2008. Com. (d) quot. in case quot. in sup. Corporate tenant and its principal sued landlords, alleging that, after landlords' legal proceedings to evict tenant and invalidate its lease were unsuccessful, landlords deprived tenant of basic services to which it was entitled under the lease and engaged in practices aimed at driving it out of business. The trial court denied defendants' motion to dismiss plaintiffs' claim for intentional infliction of emotional distress. Reversing that portion of the decision, this court held that, while defendants' attempts to terminate the lease were potentially unfounded or improper, they were not so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Benyo v. Sikorjak, 50 A.D.3d 1074, 1077, 858 N.Y.S.2d 215, 218.

N.Y.Sup.Ct.App.Div.2008. Com. (d) quot. in case quot. in sup. In a sexual-harassment action brought by two ex-waitresses against restaurant and others for, among other things, allegedly ordering female employees to be weighed to keep track of their weight, this court affirmed the trial court's grant of plaintiffs' motion to dismiss several of defendants' counterclaims, including one for intentional infliction of emotional distress (IIED). The court held that defendants failed to specify sufficiently the conduct alleged to be extreme and outrageous; furthermore, the conduct complained of—making statements to news media about this litigation—fell far short of the standard of extreme and outrageous conduct required to sustain the claim. McRedmond v. Sutton Place Restaurant and Bar, Inc., 48 A.D.3d 258, 851 N.Y.S.2d 478, 479.

N.Y.Sup.Ct.App.Div.2007. Com. (d) quot. in case quot. in sup. Employee who lost her job when her position was eliminated sued employer for employment discrimination, breach of contract, and intentional infliction of emotional distress. The trial court denied defendant's motion for summary judgment. Reversing, this court held, inter alia, that plaintiff's intentional-infliction-of-emotional-distress claim failed; termination of employment alone could not form the basis of an intentional-infliction cause of action in an at-will employment situation such as the one in this case, and plaintiff presented no evidence to support her claims of the requisite outrageous behavior on the part of defendant. Bailey v. New York Westchester Square Medical Centre, 38 A.D.3d 119, 125, 829 N.Y.S.2d 30, 35.

N.Y.Sup.Ct.App.Div.2007. Com. (d) quot. in diss. op. Congregant brought, inter alia, claim for intentional infliction of emotional distress against synagogue and its founder/spiritual leader, alleging that, after she sought counseling from leader, he induced her to enter a sexual relationship as purported therapy toward achieving her goals of marriage and children, and then physically and emotionally abused her. The trial court denied defendants' motion to dismiss this claim. This court reversed and dismissed the action, holding that the complaint alleged nothing more than thinly

veiled claims of seduction barred by New York's Civil Rights Law. The dissenting opinion argued that the allegations that leader repeatedly advised plaintiff that her "only hope" of achieving her goal of getting married and having children was to engage in a course of "sexual therapy" with him were of the type of conduct held sufficient to survive a motion to dismiss under the statute. Marmelstein v. Kehillat New Hempstead, 45 A.D.3d 33, 36, 841 N.Y.S.2d 493, 496, affirmed 862 N.Y.S.2d 311, 11 N.Y.3d 15, 892 N.E.2d 375 (N.Y.2008).

N.Y.Sup.Ct.App.Div.2006. Com. (d) quot. in case quot. in sup. Parents and sisters of a woman who died suddenly in her home brought suit against decedent's husband for, in part, intentional infliction of emotional distress, alleging that husband obstructed their access to decedent's remains for further testing after the medical examiner failed to determine the cause of death, and surreptitiously had decedent's heart removed by a retired medical investigator with whom husband was friendly. The trial court, inter alia, granted defendant summary judgment dismissing the claim. Affirming, this court held, inter alia, that defendant proved his entitlement to summary judgment by demonstrating that his conduct was not sufficiently outrageous to state a claim for intentional infliction of emotional distress, and plaintiffs failed to submit adequate evidence in admissible form to raise a triable issue of fact. Jorbel v. Kopko, 31 A.D.3d 611, 612, 819 N.Y.S.2d 96, 98.

N.Y.Sup.Ct.App.Div.2005. Com. (d) quot. in case quot. in disc. Employee sued his employer to recover damages for violation of the state whistleblower's act, and also asserted a claim for intentional infliction of emotional distress. The trial court granted defendant's motion for summary judgment, and this court affirmed. The court held, inter alia, that defendant's alleged conduct was not outrageous so as to support an action for intentional infliction of emotional distress; plaintiff failed to raise a triable issue of fact in opposition to defendant's submissions on this issue. Mazzacone v. Corlies Associates, 21 A.D.3d 1066, 1067, 802 N.Y.S.2d 182, 183.

N.Y.Sup.Ct.App.Div.2005. Com. (d) quot. in case quot. in sup. The trial court granted defendant city's motion to dismiss after plaintiff sued for emotional distress. This court affirmed, concluding that plaintiff failed to meet burden of proof necessary to sustain a complaint for emotional distress. Plaintiff provided only conclusory allegations, some of which were claims against civilians that did not constitute actions against the city, and none of which were so outrageous and extreme as to go beyond the bounds of decency, or to be regarded as atrocious and intolerable. Millan v. City of New York, 16 A.D.3d 290, 791 N.Y.S.2d 419, 420.

N.Y.Sup.Ct.App.Div.2005. Com. (d) cit. in sup. Plaintiff sued village and others with whom she had entered settlement agreement for, inter alia, intentional infliction of emotional distress, claiming, without factual allegations or other support, that defendants acted in concert or conspired to deprive her of her constitutional rights. The trial court granted defendants' motions to dismiss the complaint. Affirming, this court held that plaintiff failed to state a claim for intentional infliction of emotional distress because, even accepting plaintiff's allegations as true, defendants' conduct was not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Scarfone v. Village of Ossining, 23 A.D.3d 540, 542, 806 N.Y.S.2d 604, 606.

N.Y.Sup.Ct.App.Div.2004. Subsec. (1) quot. in disc., com. (d) quot. in case quot. in disc. Restaurants, restaurateurs, and employees who were subjects of university professor's research study, in which he sent letters to the restaurants to elicit their responses to fake food-poisoning complaints from putative customers, sued professor and university for, in part, intentional infliction of emotional distress. The trial court denied in part defendants' motion to dismiss. Affirming, as modified, this court held that an adequate factual basis existed to allow a jury to decide whether defendants' conduct was sufficiently outrageous to sustain a claim for intentional infliction of emotional distress. Although professor did not intend to harass plaintiffs, his reckless disregard of the potential consequences of his conduct might have resulted in a campaign of harassment, since making a claim of food poisoning could destroy a restaurant's viability in a highly competitive trade. 164 Mulberry Street Corp. v. Columbia University, 4 A.D.3d 49, 56, 771 N.Y.S.2d 16, 21.

N.Y.Sup.Ct.App.Div.2004. Com. (d) quot. in case quot. in disc. Teenager who was a guest on television talk show sued host, program, television studio, and program employees for various torts suffered after she was allegedly raped by one of the show's employees. The trial court dismissed three of plaintiff's five claims, namely, negligent infliction of emotional distress, negligence per se, and slander per se. Affirming in part, this court held that plaintiff made no showing of negligent infliction of emotional distress, as plaintiff's allegations that defendants wanted her to act provocatively on the show, and allowed her to be introduced to the employee and meet with him again while no longer in defendants' custody, were not so extreme and outrageous as to be regarded as intolerable in a civilized community. Sheila C. v. Povich, 11 A.D.3d 120, 131, 781 N.Y.S.2d 342, 351.

N.Y.Sup.Ct.App.Div.2004. Com. (d) quot. in case quot. in disc. Husband and wife sued the pastor of their former church and various ecclesiastical entities and officials for intentional infliction of emotional distress, sexual battery, breach of fiduciary duty, and negligent supervision, alleging that they suffered damages due to pastor's adulterous relationship with the wife. Trial court granted pastor summary judgment. This court affirmed, holding, inter alia, that trial court properly dismissed the emotional-distress claim, because pastor's conduct was not extreme and outrageous. Wende C. v. United Methodist Church, 6 A.D.3d 1047, 776 N.Y.S.2d 390, 392-393, affirmed 4 N.Y.3d 293, 794 N.Y.S.2d 282, 827 N.E.2d 265 (2005), certiorari denied 546 U.S. 818, 126 S.Ct. 346, 163 L.Ed.2d 57 (2005).

N.Y.Sup.Ct.App.Div.2002. Com. (d) quot. in case quot. in sup. After criminal charges against former employee for unauthorized use of a customer's credit card were dropped, former employee sued former employer for, in part, malicious prosecution and intentional infliction of emotional distress. The trial court denied dismissal of the malicious-prosecution claim, but did not rule on defendant's request to dismiss the emotional-distress claim. Reversing, this court held that the claim for intentional infliction of emotional distress should have been dismissed, since plaintiff's allegation that defendant's loss-prevention manager gave false information to the police, even if true, did not describe conduct sufficiently outrageous to support the claim. Brown v. Sears Roebuck and Co., 297 A.D.2d 205, 212, 746 N.Y.S.2d 141, 148.

N.Y.Sup.Ct.App.Div.2002. Com. (d) quot. in case quot. in sup. Employee who was discharged after employer allegedly received an anonymous letter accusing employee of participating in a kickback scheme sued employer and others for defamation, unpaid pension and severance benefits, and intentional infliction of emotional distress. The trial court denied defendants' motion to dismiss. Affirming as modified, this court held, inter alia, that plaintiff's claim for intentional infliction of emotional distress should have been dismissed, because the actions complained of were not sufficiently outrageous to support the claim. Skarren v. Household Finance Corp., 296 A.D.2d 488, 490, 745 N.Y.S.2d 556, 558.

N.Y.Sup.Ct.App.Div.2001. Com. (d) quot. in case quot. in sup. Adult children of decedent's first marriage brought an action against decedent's third wife and widow for, in part, undue influence and intentional infliction of emotional distress, based on transfers of funds by decedent, while mentally impaired during his final illness, from an individual retirement account (IRA) of which plaintiffs were partial beneficiaries to an IRA of which defendant was sole beneficiary. Affirming the trial court's dismissal of the complaint, this court held, inter alia, that defendant's alleged conduct did not rise to the level of being atrocious and utterly intolerable in a civilized community, and thus did not support an action for intentional infliction of emotional distress. Thea v. Thea, 284 A.D.2d 245, 246, 726 N.Y.S.2d 655, 656.

N.Y.Sup.Ct.App.Div.2000. Com. (d) quot. in case quot. in sup. Property owner who was involved in disputes with a neighbor over the erection of a fence and alleged damage to his walls sued the neighbor for intentional infliction of emotional distress, trespass, and violation of the Human Rights Law. The trial court denied defendant's motion for summary judgment. Affirming as modified, this court held, inter alia, that alleged acts of vandalism and threats by defendant were not sufficiently outrageousness to give rise to plaintiff's emotional-distress claim, which should have been dismissed. Seltzer v. Bayer, 272 A.D.2d 263, 709 N.Y.S.2d 21, 23.

N.Y.Sup.Ct.App.Div.1999. Subsec. (1) quot. in disc. Employees who were terminated for falsifying time sheets sued former employer for, inter alia, intentional infliction of emotional distress. The trial court denied defendant's motion for summary judgment. Reversing, this court held, in part, that the conduct complained of, which included defendant's security personnel questioning plaintiffs and then escorting them to their desks to retrieve personal items, was not so extreme and outrageous as to go beyond all bounds of decency and be considered intolerable in civilized society. Arrington v. Liz Claiborne, Inc., 260 A.D.2d 267, 688 N.Y.S.2d 544, 546.

N.Y.Sup.Ct.App.Div.1999. Com. (d) quot. in case quot. in disc. Trial court granted defendants' motion to dismiss plaintiff's suit for intentional infliction of emotional distress and prima facie tort. This court affirmed in a slip opinion, holding that defendants' conduct was not extreme and outrageous. Cunningham v. Mertz, 265 A.D.2d 370, 696 N.Y.S.2d 839, 839.

N.Y.Sup.Ct.App.Div.1998. Com. (d) quot. in case quot. in disc. A government public relations employee who was fired from her job sued her supervisor and two other government officials,

alleging, among other claims, intentional infliction of emotional distress. Plaintiff had argued with an executive department official in a restaurant, and the official induced plaintiff's supervisors to fire her. Trial court granted defendants' motions to dismiss for lack of jurisdiction. This court affirmed as modified, holding, inter alia, that even if the executive department official influenced or ordered the deputy commissioner of the public relations department to fire her, knowing that he had no legal basis for doing so, because she had insulted him during an after-hours discussion, those actions did not constitute outrageous conduct. Cavanaugh v. Doherty, 243 A.D.2d 92, 675 N.Y.S.2d 143, 150.

N.Y.Sup.Ct.App.Div.1998. Cit. in headnotes, com. (d) quot. in case quot. in disc. Teenager who was expelled from a synagogue-run cross-country tour after affirming her belief in Jesus Christ and fundamentalist Christian teachings sued synagogue for intentional infliction of emotional distress. The trial court denied defendant's motion to dismiss. Reversing, this court held that, under the circumstances, the expulsion did not constitute intentional, deliberate, and outrageous behavior sufficient to satisfy the "extreme and outrageous conduct" element of the cause of action pleaded. Cohn-Frankel v. United Synagogue, 246 A.D.2d 332, 667 N.Y.S.2d 360, 361, 362,.

N.Y.Sup.Ct.App.Div.1998. Com. (d) cit. in disc. A woman sued her employer and its owners, alleging "quid pro quo" and "hostile work environment" sexual harassment and intentional infliction of emotional distress. The trial court granted defendants' motion to dismiss. This court affirmed in part and modified in part, holding that plaintiff failed to state a cause of action for intentional infliction of emotional distress. While some of defendants' conduct was questionable, it was not extreme or outrageous. Ferrandino v. Alvin J. Bart & Sons, Inc., 247 A.D.2d 428, 668 N.Y.S.2d 99, 100.

N.Y.Sup.Ct.App.Div.1998. Subsec. (1) quot. in case quot. in sup. Farmers sued neighboring landowner for, inter alia, tortious interference with contract and intentional infliction of emotional distress after defendant began a campaign against the aerial spraying of pesticides. The trial court denied defendant's motion for summary judgment. Affirming, this court held that material factual issues existed as to whether defendant knew of plaintiffs' contract with their aerial sprayer, and whether defendant's alleged harassing telephone calls constituted outrageous conduct sufficient to support an action for intentional infliction of emotional distress. Gill Farms Inc. v. Darrow, 256 A.D.2d 995, 682 N.Y.S.2d 306, 308.

N.Y.Sup.Ct.App.Div.1997. Com. (d) quot. in case quot. in disc. Adult-care-facility administrator who was removed from his position by the Department of Social Services for allegedly abusing an elderly patient sued state for, inter alia, intentional infliction of emotional distress. The trial court dismissed the complaint. Affirming, this court held, in part, that plaintiff's claim was untimely and that, in any event, where the act complained of constituted official conduct, public policy prohibited the maintenance of a suit for intentional infliction of emotional distress against the state. Furthermore, even if such a cause of action did exist, defendant's conduct was not so outrageous and extreme as to go beyond all possible bounds of decency. Augat v. State, 244 A.D.2d 835, 666 N.Y.S.2d 249, 251.

N.Y.Sup.Ct.App.Div.1997. Cit. in headnote, subsec. (1) quot. in sup., com. (i) cit. in disc. Female marina patron who discovered that marina had installed surveillance cameras in its rest rooms sued marina for negligent and reckless infliction of emotional distress, breach of contract, and sex discrimination in violation of Executive Law § 296. The trial court granted defendant's motion to dismiss the complaint inasmuch as plaintiff alleged violations of Executive Law § 296. Affirming as modified, this court held, in part, that, to the extent plaintiff alleged defendant's conduct violated General Business Law § 395-b (2), she had stated a claim for negligent infliction of emotional distress, and that New York recognized reckless infliction of emotional distress as a valid a cause of action as well; however, plaintiff's breach of contract claim failed, since the only harm alleged was the mental anguish she endured. Dana v. Oak Park Marina, Inc., 230 A.D.2d 204, 660 N.Y.S.2d 906, 907, 909, 910.

N.Y.Sup.Ct.App.Div.1997. Com. (d) quot. in case quot. in disc. Parents of 13-year-old student sued school district and student's teacher for, inter alia, intentional infliction of emotional distress after teacher allegedly told student that "… you Polish Nazis are smart." The trial court denied defendants' motion to dismiss. Reversing, this court held, in part, that, while teacher's alleged remark was inappropriate and irresponsible, it was not so outrageous and extreme as to be considered utterly intolerable in civilized society. Harville v. Lowville Cent. School Dist., 245 A.D.2d 1106, 667 N.Y.S.2d 175, 176.

N.Y.Sup.Ct.App.Div.1996. Com. (d) quot. in case quot. in sup. Insured sued insurer for intentional infliction of emotional distress in connection with the manner in which insurer processed insured's claim for no-fault benefits. The trial court dismissed the complaint. Affirming, this court held that, while insurer's conduct might have been questionable, it was not so extreme or outrageous as to support a claim for intentional infliction of emotional distress. Citron v. Allstate Ins. Co., 226 A.D.2d 577, 641 N.Y.S.2d 569, 569.

N.Y.Sup.Ct.App.Div.1996. Com. (d) quot. in case quot. in disc. Plaintiff sued defendant for intentional infliction of emotional distress. The trial court dismissed. Affirming in a memorandum opinion, this court held that defendant's words and actions were not so outrageous and extreme in degree as to go beyond all possible bounds of decency, and to be regarded as utterly intolerable in a civilized community. Fried v. Schlossberg, 232 A.D.2d 607, 648 N.Y.S.2d 1018, 1018.

N.Y.Sup.Ct.App.Div.1996. Subsec. (1), com. (d) quot. but dist. In action to recover damages for, inter alia, intentional infliction of emotional distress, the trial court granted defendants' motion for summary judgment. Affirming, this court held that plaintiff was not entitled to recovery because the conduct she complained of was not so extreme or outrageous as to go beyond all bounds of decency, such that it would be considered intolerable by a civilized society. Glendora v. Walsh, 227 A.D.2d 377, 642 N.Y.S.2d 545, 545.

N.Y.Sup.Ct.App.Div.1996. Cit. in headnote, com. (d) quot. in case quot. but dist. Grown daughters of professional baseball manager sued manager for, inter alia, intentional infliction of emotional

distress in connection with manager's failure to resume relationship with them or mention them to the press. The trial court dismissed the complaint. Affirming, this court held that manager's behavior was not so outrageous or extreme as to go beyond all possible bounds of decency. LaRussa v. LaRussa, 232 A.D.2d 297, 648 N.Y.S.2d 567, 567, 568.

N.Y.Sup.Ct.App.Div.1996. Com. (d) quot. in case quot. in diss. op., com. (f) cit. in diss. op. A man who was suffering the physical and emotional effects of cancer and major surgery was threatened by his neighbor during an ongoing dispute concerning a murky condition in a lake that abutted their adjoining properties. The man and his family sued the neighbor and his family for intentional infliction of emotional distress. Trial court entered judgment on a jury verdict awarding compensatory and punitive damages. This court affirmed as modified, holding, inter alia, that the jury could rationally conclude that neighbor's conduct was extreme and outrageous and that he had engaged in a deliberate and malicious campaign of harassment and intimidation directed at plaintiffs. Dissent argued that a new trial should be had, at which plaintiffs would have to prove that defendants' conduct within the statute-of-limitations period was performed with the requisite culpability, rose to the level necessary to justify the imposition of liability, and caused plaintiffs serious emotional distress. Plaintiffs would have to show their susceptibility to injury and defendants' awareness of plaintiffs' vulnerability. Stram v. Farrell, 223 A.D.2d 260, 646 N.Y.S.2d 193, 198.

N.Y.Sup.Ct.App.Div.1995. Subsec. (1), com. (d) quot. but dist. Hospital patient sued nontreating physician for, inter alia, intentional infliction of emotional distress after physician, without consent, used patient's medical records in his own divorce action in an attempt to establish that his wife and patient were having an affair. The trial court denied physician's motion to dismiss but this court reversed, holding that while physician's conduct could not be condoned, it did not rise to the level of outrageous and extreme behavior necessary to sustain a claim of intentional infliction of emotional distress. Andrews v. Bruk, 220 A.D.2d 376, 631 N.Y.S.2d 771, 772.

N.Y.Sup.Ct.App.Div.1995. Com. (d) quot. in case quot. in sup. Plaintiff, who claimed that defendants sexually harassed and discriminated against her, sued defendants for intentional infliction of emotional distress, inter alia. The trial court denied defendants' motions to dismiss. This court modified the trial court's order and as modified affirmed, granting defendants' motions to dismiss plaintiff's cause of action for intentional infliction of emotional distress on the ground that defendants' alleged acts were legally insufficient to support plaintiff's claim. The court said that, although defendants' conduct alleged in the complaint was wholly inappropriate, it was not so outrageous in character and so extreme in degree as to be utterly intolerable in a civilized community. Foley v. Mobil Chemical Co., 214 A.D.2d 1003, 626 N.Y.S.2d 906, 907.

N.Y.Sup.Ct.App.Div.1995. Com. (d) cit. in headnotes and quot. in case quot. in sup. Museum volunteers complained to museum officials that the museum's supervisor of volunteers had made anti-Semitic remarks to them. After the museum fired the supervisor, she sued the museum and the volunteers for, among other claims, intentional infliction of emotional distress. Trial court granted museum summary judgment but denied the volunteers' motions for summary judgment.

This court affirmed in part but dismissed the emotional-distress claim, holding, inter alia, that while defendants' alleged conduct of falsely labeling plaintiff as a user of ethnic slurs was clearly reprehensible, it did not rise to the level of outrage required to recover under a cause of action that was limited to only the most egregious of acts. Herlihy v. Metropolitan Museum of Art, 214 A.D.2d 250, 633 N.Y.S.2d 106, 108, 114.

N.Y.Sup.Ct.App.Div.1994. Cit. in sup. A person who allegedly clapped her hands in approval after a neighbor struck an infant who had gratuitously insulted the neighbor and his wife was sued by the infant and others for intentional infliction of emotional distress. Reversing the trial court's denial of defendant's motion for summary judgment and dismissing, this court held that these facts failed to establish any of the elements of the tort of intentional infliction of emotional distress. Clennan v. Cooke, 202 A.D.2d 467, 609 N.Y.S.2d 44, 45.

N.Y.Sup.Ct.App.Div.1994. Com. (d) quot. in sup. Landowner sued town for intentional infliction of emotional distress, inter alia, after she entered settlement whereby court issued order directing her to abide by town zoning law in town's civil action seeking a permanent injunction against her. This court affirmed the trial court's granting of defendant's motion for summary judgment, holding that town's commencement of both criminal and civil actions seeking enforcement of zoning laws and, in the process, sending copies of the town inspector's report to 26 people including each member of the town board, planning board, zoning board of appeals, the assessor, and two neighbors who had complained was not outrageous conduct. Deising v. Town of Esopus, 204 A.D.2d 940, 611 N.Y.S.2d 964, 965.

N.Y.Sup.Ct.App.Div.1994. Com. (d) quot. in part in case quot. in sup. A physician sued a hospital, asserting infliction of emotional distress in his discharge and other claims. Reversing the trial court's denial of defendant's motion for summary judgment, this court held, inter alia, that defendant's failure to award plaintiff disability benefits and its sending to plaintiff two letters setting forth “ground rules” for future contact between the parties and advising plaintiff that his appointment was terminated did not constitute outrageous conduct that would support an emotional distress claim. Mangla v. Univ. of Rochester, 202 A.D.2d 1019, 609 N.Y.S.2d 476, 477.

N.Y.Sup.Ct.App.Div.1994. Com. (d) quot. in case quot. in sup., com. (h) cit. in headnote and in sup. Employee whose wife had died of granulocytic leukemia sued employer for intentional infliction of emotional distress, inter alia, after employer obtained decedent's medical records against employee's wishes. Affirming the trial court's grant of summary judgment for employer, this court held that, since it was undisputed that employer extended compassionate support to employee during and after decedent's illness and that employer obtained decedent's medical records to aid it in the defense of a claim brought against it by another worker diagnosed with the same rare form of leukemia, employer's actions did not rise to the level of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Waldron v. Ball Corp., 210 A.D.2d 611, 619 N.Y.S.2d 841, 842, 844.

N.Y.Sup.Ct.App.Div.1993. Subsec. (1), com. (d) cit. in case quot. in sup. The former director of a county veterans' service agency sued the county and its officials, alleging, inter alia, wrongful discharge and intentional infliction of emotional distress. This court affirmed summary judgment dismissing the complaint, holding that plaintiff was an employee at will whose employment could be terminated at any time, and plaintiff failed to allege any extreme or outrageous conduct by defendants sufficient to support a claim for intentional infliction of emotional distress. Moore v. County of Rockland, 192 A.D.2d 1021, 1023, 596 N.Y.S.2d 908, 911.

N.Y.Sup.Ct.App.Div.1990. Subsec. (1) quot. in disc. A woman who was sexually abused by her stepfather when she was a child sued her stepfather for battery and intentional infliction of emotional distress. The trial court entered judgment for the plaintiff on both claims and awarded her $200,000 in compensatory damages and $275,000 in punitive damages. Reversing, this court held, inter alia, that although the defendant intentionally or recklessly caused the plaintiff severe emotional distress and was subject to liability for such emotional distress, the trial court's award of compensatory damages was excessive in view of the absence of the plaintiff's proof of special damages and the paucity of proof of permanent psychological damages. While also determining that punitive damages were appropriate, the court reduced the amount of the award, stating that in light of the large size of both the compensatory and punitive awards, a certain amount of duplication likely existed and the jury was likely motivated by passion in the award of punitive damages. Laurie Marie M. v. Jeffrey T.M., 159 A.D.2d 52, 559 N.Y.S.2d 336, 338-339.

N.Y.Sup.Ct.App.Div.1990. Subsec. (1), com. (d) quot. in case quot. in sup. A man stopped paying spousal and child support, as required by a separation agreement, after his ex-wife remarried and moved with the children to a county 35 miles away. The ex-wife sued to recover arrears in maintenance and reimbursement for expenses incurred on behalf of the children, and the man counterclaimed, alleging, inter alia, intentional infliction of emotional distress caused by his ex-wife's sale of her engagement ring and mink coat, making disparaging remarks to the children, and changing her address after remarriage. This court modified the trial court's order denying both parties summary judgment, dismissed the counterclaim and affirmed the order as modified. The court held, as a matter of law, that the conduct alleged in the man's complaint failed to state a cause of action. Partridge v. Myerson, 162 A.D.2d 507, 556 N.Y.S.2d 707, 710, appeal denied 76 N.Y.2d 710, 563 N.Y.S.2d 61, 564 N.E.2d 671 (1990).

N.Y.Sup.Ct.App.Div.1990. Subsec. (d) quot. in case quot. in disc. An employee who alleged that she had been harassed and discharged from her employment because of her pregnancy sued her former employer for intentional infliction of emotional distress, inter alia. The trial court denied the defendant's motion to dismiss. This court reversed, holding that the plaintiff had failed to allege the requisite extreme and outrageous conduct. The court said that the law did not compensate one for threats, annoyances, or petty oppressions that must necessarily be expected and were incidental to modern life. Ruggiero v. Contemporary Shells, Inc., 160 A.D.2d 986, 554 N.Y.S.2d 708, 709.

N.Y.Sup.Ct.App.Div.1989. Subsec. (1) and com. (i) cit. in disc., com. (d) quot. in case cit. in disc., com. (j) cit. and quot. in disc. A father sued the defendant on behalf of his infant daughter for

intentional infliction of emotional distress after the defendant pleaded guilty to sexual abuse in the second degree. The trial court denied the father's motion for partial summary judgment, holding that the admissions the defendant made in pleading guilty did not preclude him from contesting his civil liability. Affirming, this court held that the defendant's guilty plea did not collaterally estop him from litigating issues not decided by virtue of the prior judgment, such as whether the defendant's conduct went beyond all possible bounds of decency, whether he intended or knew that his conduct would result in emotional distress, whether the infant suffered severe emotional distress, and whether the defendant's conduct caused the distress. Richard L. v. Armon, 144 A.D.2d 1, 536 N.Y.S.2d 1014, 1015, 1016.

N.Y.Sup.Ct.App.Div.1988. Subsec. (1) and com. (d) quot. in case quot. in sup. A former employee sued her employer for wrongful termination of employment and intentional infliction of emotional distress. The trial court denied the defendant's motion for summary judgment. Reversing, this court held that, because the plaintiff had no employment contract, her employment was at will. The court also stated that the defendant's conduct was not sufficiently outrageous to support a claim for emotional distress. Hartman v. R.P. McCoy Apparel, Ltd., 145 A.D.2d 464, 535 N.Y.S.2d 423, 425.

N.Y.Sup.Ct.App.Div.1988. Com. (d) quot. in case quot. in sup. Following divorce proceedings, an ex-husband who owned a one-half interest in former marital property sued the purchasers of his ex-wife's one-half interest in the same property in order to rescind a sheriff's deed that had conveyed the ex-wife's one-half interest to the purchasers for a price far below the property's value. The trial court granted the motion by one defendant purchaser to dismiss several causes of action asserted. Affirming, this court held that the plaintiff's causes of action for intentional infliction of emotional distress were properly dismissed because the acts alleged were not so outrageous in character, nor so extreme in degree, as to have gone beyond all possible bounds of decency, and to have been regarded as atrocious and utterly intolerable in a civilized society. Schlotthauer v. Sanders, 143 A.D.2d 84, 531 N.Y.S.2d 334, 336.

N.Y.Sup.Ct.App.Div.1988. Com. (d) quot. in case quot. in disc. An attorney sued an opposing attorney who had instituted a libel action against him for libel and emotional distress, alleging that the defendant's libel action had been brought to coerce an unconscionable settlement in a matrimonial action. The trial court dismissed the plaintiff's libel claim, but not the emotional distress claim. Reversing, this court dismissed the entire complaint, holding that the plaintiff failed to prove an unlawful interference with his person or property sufficient to support a claim of abuse of legal process, and that he failed to show that the defendant's conduct was sufficiently extreme and outrageous to support a claim for intentional infliction of emotional distress. Siegel v. Smith, Panish & Shapiro, P.C., 136 A.D.2d 620, 523 N.Y.S.2d 866, 868.

N.Y.Sup.Ct.App.Div.1987. Subsec. (1), com. (d) quot. in sup. A law firm that represented a hospital brought a collection action against a former patient. The action was dismissed because the court lacked in personam jurisdiction over the patient. After the patient sued the firm for intentional infliction of extreme emotional distress, the trial court granted the defendant's motion to dismiss for failure to state a cause of action. Affirming, this court stated that intentional infliction of extreme

emotional harm required proof of conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. The court reasoned that the allegations in the plaintiff's complaint did not rise to that level. Crandall v. Bernard, Overton & Russell, 133 A.D.2d 878, 520 N.Y.S.2d 237, 239, appeal dismissed 70 N.Y.2d 940, 524 N.Y.S.2d 672, 519 N.E.2d 618 (1988).

N.Y.Sup.Ct.App.Div.1987. Cit. in disc. A woman was discharged by her employer. She sued for intentional infliction of emotional distress based on the allegation that her dismissal was a breach of her employment contract. The trial court denied the defendant's motion to dismiss the claim. This court reversed, holding that the employee failed to allege sufficient evidence to sustain a cause of action for intentional infliction of emotional distress. Gibouleau v. Society of Women Engineers, 127 A.D.2d 740, 511 N.Y.S.2d 932, 933.

N.Y.Sup.Ct.App.Div.1987. Subsec. (1) cit. in sup. After defendant driver ran into plaintiffs' car, he threatened to harm plaintiff wife's writing career if they pursued any claims against him. Defendant's girlfriend, a publisher, then told plaintiff wife that one of her articles could not be published until the matter of the car collision was settled. The plaintiffs sued the defendant for, inter alia, intentional infliction of emotional distress, and tortious interference with contractual relations; the trial court denied the defendant's motion for summary judgment. Modifying and affirming, this court dismissed a number of plaintiffs' claims, including the emotional distress claim, holding that the defendant's conduct, as a matter of law, was simply not outrageous enough to support such a claim. Novak v. Rubin, 129 A.D.2d 780, 514 N.Y.S.2d 523, 524, appeal denied 133 A.D.2d 223, 518 N.Y.S.2d 771 (1987).

N.Y.Sup.Ct.App.Div.1986. Subsec. (1) cit. in disc. A seller of art objects sued a buyer for breach of contract. The trial court granted the seller's motion for summary judgment and awarded damages totaling $34,500, representing breach of contract damages, traveling expenses, and punitive damages. The buyer appealed, and this court affirmed and modified the damages award. The court stated that the trial court's breach of contract award unjustly enriched the seller, that its award of travel expenses was excessive, and that, since the buyer had no control over the behavior of the bank manager that caused the buyers' humiliation, punitive damages assessed against the buyer were improper. Charles Adams Importers, Ltd. v. Dana, 121 A.D.2d 279, 503 N.Y.S.2d 53, 55.

N.Y.Sup.Ct.App.Div.1986. Com. (d) quot. in disc. A tenant sued his landlord and the landlord's attorney for intentional infliction of emotional distress, alleging that the defendants had engaged in conduct designed to interfere with the quiet enjoyment of his tenancy. The trial court denied the defendants' motion to dismiss. Affirming, this court held, inter alia, that the plaintiff's allegations of baseless eviction proceedings and of drastic deterioration of the tenant's living conditions were evidence of sufficiently extreme and outrageous conduct to support a cause of action for intentional infliction of emotional distress. Green v. Fischbein Olivieri Rozenholc & Badillo, 119 A.D.2d 345, 507 N.Y.S.2d 148, 152.

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N.Y.Sup.Ct.App.Div.1986. Quot. in case quot. in disc. An employee brought eight causes of action against his former employer, alleging that he had been unlawfully accused of stealing and harangued into resigning. The employer moved to dismiss the employee's second through eighth causes of action. The trial court dismissed counts four to seven, but not counts two and three. On appeal, this court found that, although the trial court erred in not dismissing the employee's third cause of action for tortious interference with contract, the trial court was correct in not dismissing the employee's second cause of action for intentional infliction of emotional distress, since a trier of fact could find that the acts complained of amounted to extreme and outrageous behavior that could not be tolerated in a civilized community. Kaminski v. United Parcel Service, 120 A.D.2d 409, 501 N.Y.S.2d 871, 873.

N.Y.Sup.Ct.App.Div.1986. Subsec. (1) and com. (d) cit. in case quot. in sup. After having worked as the controller of an association for several years, an employee was told by the executive director that his job performance was unsatisfactory. Within a month he was abruptly fired in the middle of a working day, and told not to return to his office. The employee sued the association and its director for intentional infliction of emotional distress, alleging that his dismissal was deliberately humiliating. This court affirmed the trial court's dismissal of that cause of action, holding that the defendants' conduct and method of firing the plaintiff had not been sufficiently extreme or outrageous, nor had the plaintiff's emotional distress been sufficiently extreme, for an emotional distress cause of action to lie. Lapidus v. New York City Chapter, 118 A.D.2d 122, 504 N.Y.S.2d 629, 633.

N.Y.Sup.Ct.App.Div.1986. Subsec. (1), com. (d) quot. in disc. A boy committed suicide two months after leaving a church training program, and his father sued the church on behalf of his deceased son, alleging intentional infliction of emotional distress. The trial court denied the church's motion to dismiss, but this court reversed, stating that liability for the infliction of emotional distress required extreme and outrageous conduct intentionally or recklessly causing severe emotional distress to another, and that the church's requisite program of physical and mental training, entered into by individuals voluntarily, could not be deemed outrageous and extreme. Meroni v. Holy Spirit Ass'n for Unification, 119 A.D.2d 200, 506 N.Y.S.2d 174, 176.

N.Y.Sup.Ct.App.Div.1986. Subsec. (1) quot. in sup. After a nurse was discharged from her job, she sued her former employer on theories of unlawful age discrimination, breach of contract, and intentional infliction of emotional distress. The lower court denied the employer's motion for partial summary judgment. This court modified, granting summary judgment for the cause of action for intentional infliction of emotional distress. Although the court reasoned that one who, by extreme and outrageous conduct, intentionally or recklessly caused severe emotional distress to another was subject to liability for such emotional distress, the employer's conduct consisted only of withholding appropriate staff assistance in an effort to compel the nurse's retirement, which was not indicative of outrageous conduct. Oakley v. St. Joseph's Hosp., 116 A.D.2d 911, 498 N.Y.S.2d 218, 220.

N.Y.Sup.Ct.App.Div.1986. Subsec. (2) cit. in disc. A dentist sued the defendants for alleged injuries that occurred to the dentist during his professional association with the defendants and termination thereof. The defendants submitted a motion for summary judgment as to counts three through five of the complaint, the trial court denied the motion, and the defendant appealed. This court affirmed in part and reversed in part, holding, inter alia, that the dentist's third cause of action should have been dismissed. This court stated that the third count, seeking damages for fraud, was insufficiently pleaded as to any cause of action for fraud, intentional infliction of emotional distress, or of prima facie tort. The court also found that the dentist failed to submit any proof of actual pecuniary injury, which was the sole compensable form of damages in a fraud action. Stich v. Oakdale Dental Center, P.C., 120 A.D.2d 794, 501 N.Y.S.2d 529, 531.

N.Y.Sup.Ct.App.Div.1986. Com. (d) cit. in case quot. in disc. An insurance company suspected a physician of insurance claim fraud and hired investigators to collect evidence. The investigators presented their case to the district attorney's office, which terminated its investigation without indictment because of insufficient evidence. The physician sued the insurance company for intentional infliction of emotional distress. The trial court granted the insurance company's motion for summary judgment. Affirming, this court held that the insurance company's conduct did not amount to the depraved conduct necessary to maintain an action for intentional infliction of emotional distress and that there was no evidence to suggest that the defendants had acted with malice. Torian v. Lumbermen's Mut. Cas. Co., 120 A.D.2d 820, 502 N.Y.S. 2d 105, 107.

N.Y.Sup.Ct.App.Div.1986. Subsec. (1) cit. in sup., com. (d) cit. in sup. and quot. in case quot. in sup. A teacher sued a school superintendent for intentional infliction of emotional distress, alleging that the superintendent had said that the teacher was unfit to be a member of the teaching profession. The lower court granted the superintendent's motion for summary judgment. Affirming, this court held that the alleged facts were insufficient to meet the standard of extreme and outrageous conduct required for a cause of action for intentional infliction of emotional distress. Van Swol v. Delaware Valley Cent. School, 117 A.D.2d 962, 499 N.Y.S.2d 274, 275, 276.

N.Y.Sup.Ct.App.Div.1985. Com. (d) cit. in disc. Police officer sued city and city employees, asserting various theories of liability arising from the disclosure of plaintiff's personnel records to third parties. When plaintiff appealed various summary judgments granted to defendants, this court affirmed, holding, inter alia, that the state civil rights law protecting the confidentiality of personnel records did not create a private cause of action. The court also held that the conduct alleged did not meet the test of extreme and outrageous conduct required to establish the tort of intentional infliction of emotional distress, especially in light of the fact that the legislature had not provided for a private cause of action for such violations of the civil rights law. Carpenter v. Plattsburgh, 484 N.Y.S.2d 284, 287.

N.Y.Sup.Ct.App.Div.1985. Subsec. (1) and coms. (b), (d), and (i) cit. in sup. Plaintiff female lived with defendant male for 14 years. Although they never married, plaintiff maintained their home and cared for defendant's children from a prior marriage. Relations between the parties disintegrated and plaintiff moved out, suing defendant for conversion of personal property and intentional

infliction of emotional distress. The trial court awarded plaintiff damages for conversion and emotional distress. The appellate division affirmed, but modified as to the amount of damages. The court held that defendant's extreme and outrageous conduct, including property destruction, forcible entry, threats, assaults and abusive conduct, caused plaintiff severe emotional distress and defendant so desired such effect. The court reduced damages for emotional distress because there was no evidence that plaintiff's injuries were permanent. Murphy v. Murphy, 486 N.Y.S.2d 457, 459.

N.Y.Sup.Ct.App.Div.1984. Com. (d) quot. in case quot. in disc. A divorced husband sued the newspaper that had published his name and picture, together with allegations made by him and his wife in affidavits submitted during their divorce proceeding. The plaintiff alleged infliction of emotional distress, abuse of process, and violations of the state Domestic Relations Law and Civil Rights Law. The trial court dismissed the abuse of process and Domestic Relations Law claims, granted the newspaper summary judgment on the emotional distress claim, and denied the newspaper summary judgment on the Civil Rights Law claim. Affirming, this court held that the law prohibiting an officer of the court from copying documents filed in a divorce action did not apply to a newspaper. The court concluded that the plaintiff had failed to show that the defendant's conduct had been sufficiently outrageous to sustain a claim for emotional distress and pointed out that an alleged Civil Rights Law violation must be decided on a case-by-case basis, including a factual determination. Freihofer v. Hearst Corp., 477 N.Y.S.2d 847, 849, judgment modified and affirmed 65 N.Y.2d 135, 490 N.Y.S.2d 735, 480 N.E.2d 349 (1985). See above case.

N.Y.Sup.Ct.App.Div.1984. Subsec. (2)(a) cit. in disc. Plaintiff brought a tort action to recover for mental suffering allegedly incurred as a result of the defendant shooting of the plaintiff's brother. The trial court dismissed the complaint for failure to state a cause of action, and the plaintiff appealed. This court modified the trial court's ruling by granting the plaintiff leave to amend, and it affirmed as modified. The prerequisites for maintaining this cause of action, said the court, are that the plaintiff either must have witnessed or have become instantaneously aware of the injury to his family member, and must himself have been physically in the “zone of danger” at the time of the incident. Maney v. Maloney, 477 N.Y.S.2d 436, 438.

N.Y.Sup.Ct.App.Div.1982. Subsec. (1), com. (d) quot. and cit. in disc. Former employees of a contractor brought an action in tort arising from the defendant company's publishing of a memorandum prohibiting the employment of any of the plaintiffs on the defendant's property by the defendant or any other individual. The trial court denied the defendant's motions to strike certain allegations of the complaint as prejudicial and to dismiss causes of action in intentional infliction of emotional distress and interference with contractual rights. This court modified and affirmed. The plaintiffs failed to state a cause of action for intentional infliction of emotional distress where their allegation that the publication exceeded all reasonable bounds of decency was conclusory and not factual, and where their allegation that the memorandum was published to inflict severe emotional distress related to the defendant's motivation in publishing the memorandum, and as such, did not constitute conduct within the scope of the rule. The plaintiffs stated a cause of action for interference with contract property rights, since alleged that they

were the third-party beneficiaries of contracts between the union and the contractors and therefore suffered economic injury by reason of the defendant's inducing others not to deal with them without justifiable cause. Burba v. Rochester Gas and Elec. Corp., 90 A.D.2d 984, 456 N.Y.S.2d 578, 579.

N.Y.Sup.Ct.App.Div.1981. Subsec. (1) and com. (d) quot. in part in diss. op. The plaintiffs, as tenants, sued their landlord, alleging harassment and the intentional infliction of emotional distress. The lower court, inter alia, granted the defendant's motion to dismiss for failure to state a cause of action. This court reversed, having found that the allegations were sufficient to state a cause of action for the intentional infliction of severe emotional distress. The dissent argued that the plaintiffs had not alleged conduct so outrageous or atrocious as to transcend all bounds of decency. The dissent would have affirmed the lower court, but without prejudice, so that the plaintiffs could replead their cause of action. Carter v. Andriani, 84 A.D.2d 513, 443 N.Y.S.2d 157, 159, appeal after remand 88 A.D.2d 799, 450 N.Y.S.2d 494 (1982).

N.Y.Sup.Ct.App.Div.1981. Cit. in disc. The plaintiff brought an action against his former employer and his union. The plaintiff alleged that the employer wrongfully discharged him on account of the union's malicious acts directed against the plaintiff, and that other employers would not hire the plaintiff because of the defamatory remarks made by the union and the employer. The trial court dismissed the action and the plaintiff appealed. This court found that the plaintiff's cause of action with regard to his wrongful discharge was a federal claim preempted by the National Labor Relations Act; thus it was not within the state court's jurisdiction. But the plaintiff's complaint also included counts which alleged slander and intentional infliction of emotional distress. The court distinguished between the two causes of action, noting that when a defendant's conduct upon which the action for libel is based is extraordinarily vindictive, it may be regarded as so outrageous as to give rise to an action for emotional distress. The court modified the judgment and remanded, as it found that the plaintiff had sufficiently established a cause of action for slander but not for intentional infliction of emotional distress. Dazzo v. Meyers, 83 A.D.2d 14, 443 N.Y.S.2d 245, 250.

N.Y.Sup.Ct.App.Div.1981. Subsec. (1) cit. in sup. The plaintiff sued his wife for alleged wrongful conversion of property. The wife counterclaimed, inter alia, for the intentional infliction of emotional distress, based upon the husband's loud and abusive language and numerous acts which resulted in the wife's severe emotional distress and physical debilitation. The lower court denied the husband's motion to dismiss this counterclaim, and the husband appealed. This court stated that, absent physical contact or direct physical injury, the acts complained of did not amount to a cognizable action in tort unless they were beyond all reasonable bounds of decency. The court stated that a necessary element of the tort is an allegation that the conduct alleged exceeded all bounds usually tolerated by decent society or that it is extreme and outrageous. The court found that the wife's allegations were no more than disputes which would best be resolved by bringing an action under the Domestic Relations Law or Family Court Act. Reversed. Wiener v. Wiener, 84 A.D.2d 814, 444 N.Y.S.2d 130, 131.

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N.Y.Sup.Ct.App.Div.1980. Subsec. (1) and com. (d) quot. in sup. During a custody proceeding a psychiatrist submitted an affidavit to the court stating that the mother had severe emotional problems and should not retain custody of her children. Two years later the mother sued the psychiatrist for severe emotional distress and injury to her reputation which was caused by his public affidavit. The trial court granted the defendant's motion for summary judgment. This court found that the plaintiff's complaint did not establish a cause of action for the intentional infliction of emotional distress because the psychiatrist's conduct was neither extreme nor outrageous. The court also held that the plaintiff had not established a prima facie tort in that her complaint had not alleged particular losses which were related to the alleged tortious acts and such a request for special damages was an essential element of the tort. The court found that the plaintiff's last claim, of defamation, was barred by the one year statute of limitations. The decision of the trial court was therefore affirmed. Luciano v. Handcock, 78 A.D.2d 943, 433 N.Y.S.2d 257, 258.

N.Y.Sup.Ct.App.Div.1979. Subsec. (1) quot. in sup., com. (d) quot. in sup. and coms. (e) and (f) cit. in sup. Individual, who had been involved in prior litigation, brought an action against the opposing attorney to recover for intentional infliction of mental and emotional distress. The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed. Affirming, the court held, inter alia, that the complaint, which alleged that the attorney for the opposing party had approached the plaintiff during a recess in the prior trial and made remarks indicating that the plaintiff's rejection of an offer of settlement was going to cause him to lose his business, did not state a cause of action for intentional infliction of emotional distress. Nestlerode v. Federal Ins. Co., 66 A.D.2d 504, 414 N.Y.S.2d 398, 400.

N.Y.Sup.Ct.App.Div.1975. Cit. but dist. Plaintiff bank sued on a note, and defendant counterclaimed that plaintiff intentionally inflicted emotional distress in threatening to encourage Internal Revenue Service action against defendant unless additional security for the note was provided. The lower court dismissed the counterclaim, and this court affirmed, holding that the conduct did not constitute the tort charged, being intended only to secure an economic benefit for the bank, not to injure defendant's reputation or property, and it was not outside all reasonable bounds of decency as would make it actionable. Lincoln First Bank v. Barstro & Associates Contracting, Inc., 49 App.Div.2d 1025,374 N.Y.S.2d 485, 487.

N.Y.Sup.Ct.App.Div.1972. Subsec. (e) cit. in sup. The plaintiff debtor brought this action against defendant creditor for infliction of emotional distress upon plaintiff by a planned program of harassment to induce plaintiff to make payments in excess of what she could afford. On defendant's appeal from a denial of a motion to dismiss, the court modified the order by dismissing plaintiff's counts charging a criminal offense and negligence, but allowing plaintiff's action to stand as to the intentional infliction of mental distress. The court held that alleged infliction of mental distress arising out of a debtor-creditor relationship is actionable in New York. Long v. Beneficial Finance Company of New York, 39 App.Div.2d 11, 330 N.Y.S.2d 664, 667.

N.Y.Sup.Ct.App.Div.1970. Cit. in sup. in conc. op. The State Division of Human Rights in two proceedings sought the enforcement of the order of the Commissioner of the State Division of

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Human Rights directing respondent to pay compensatory damages to a person he discriminated against. The court set aside the order, stating that the commissioner had no authority to award damages for mental anguish. The concurring opinion contended that the commissioner had such power, but that the proof of discrimination alone was not enough to found a claim for damages for mental anguish. State Division of Human Rights v. Luppino, 35 A.D.2d 107, 313 N.Y.S.2d 28, 35, rev'd State Com. for Human Rights v. Speer, 29 N.Y.2d 555, 324 N.Y.S.2d 297, 272 N.E.2d 884 (1971), and aff'd 29 N.Y.2d 558, 324 N.Y.S.2d 298, 272 N.E.2d 885 (1971).

N.Y.Sup.Ct.

N.Y.Sup.Ct.2018. Com. (d) quot. in case quot. in sup. Member of volleyball club's travel team brought claims for, among other things, breach of fiduciary duty and negligent infliction of emotional distress against club in connection with allegations that, when she was a minor, she had a sexual relationship with the team's assistant coach during tournaments set up by club where she and coach stayed with the team at hotels. This court granted club's motion to dismiss member's claim for negligent infliction of emotional distress, holding that that claim was essentially duplicative of member's claim for breach of fiduciary duty. The court noted that, under New York law and Restatement Second of Torts § 46, a plaintiff seeking to assert a claim for intentional infliction of emotional distress had to allege conduct that was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Mulligan v. Long Island Fury Volleyball Club, 76 N.Y.S.3d 784, 788.

N.Y.Sup.Ct.2011. Com. (d) quot. in case quot. in sup. Residents of condominium apartment sued owner of nearby building and building's tenant, seeking to have a cell-phone tower adjudged a common-law nuisance and removed from the building's rooftop on their allegations that the towers had caused high levels of radio frequency (RF) radiation in their apartment resulting in various physical and mental ailments to their family. Dismissing plaintiffs' additional claim for intentional infliction of emotional distress (IIED), this court, noting that defendants were in compliance with all applicable standards for RF emissions as established by the Federal Communications Commission, held that the facts alleged by plaintiffs did not rise to the level of outrageous conduct required to support an IIED claim. Stanley v. Amalithone Realty, Inc., 31 Misc.3d 995, 1005, 921 N.Y.S.2d 491, 500.

N.Y.Sup.Ct.2008. Com. (d) quot. in case quot. in disc. Congregant sued her pastor and another church employee for intentional infliction of emotional distress, alleging that defendants circulated among the congregation her criminal record. This court, after noting the extremely high burden of proof for this tort under New York law, entered summary judgment for defendants, holding that plaintiff's claim could not surmount at least two of several problematic obstacles. First, because the criminal record was a public document, its distribution, while embarrassing, could violate no constitutional right to privacy. Second, plaintiff, after significant discovery, was unable to establish

the requisite causal link between defendants and the distribution of the document. Guice-Mills v. Forbes, 21 Misc.3d 599, 605, 863 N.Y.S.2d 874, 879.

N.Y.Sup.Ct.2005. Com. (d) quot. in sup. and adopted in case cit. in disc. Client sued her former attorney for intentional infliction of emotional distress, among other claims, arising from consensual sexual relations between them on two occasions. Granting attorney's motion to dismiss, this court held, inter alia, that there was no credible evidence that attorney intended to inflict severe emotional distress upon client or had reason to know that his conduct was reasonably certain to have that effect, or that he did, in fact, inflict severe emotional distress upon client. In addition, the sexual encounters fell far short of the required threshold of outrageous conduct on the part of defendant, and emotional damages were not supported by competent medical evidence, as a social worker's affidavit was unreliable and inadmissible. Guiles v. Simser, 9 Misc.3d 1083, 1084, 804 N.Y.S.2d 904, 905, affirmed 35 A.D.3d 1054, 826 N.Y.S.2d 484 (3d Dep't 2006).

N.Y.Sup.Ct.2000. Com. (j) quot. but dist. In divorce proceedings, wife sued husband for, inter alia, intentional infliction of emotional distress, alleging that defendant tapped the phones in the couple's residence in order to gather evidence to use against her in the divorce. Dismissing the complaint, the court held, in part, that the conduct complained of was not sufficiently extreme or outrageous to permit recovery. Talmor v. Talmor, 185 Misc.2d 293, 712 N.Y.S.2d 833, 837.

N.Y.Sup.Ct.1999. Subsec. (1) cit. in headnote, com. (d) quot. in case quot. in sup. Congregant brought suit against two rabbis for, inter alia, intentional infliction of emotional distress, alleging that defendants disclosed confidential communications in violation of the clergy-penitent privilege to plaintiff's husband and in divorce proceeding. Denying in part defendants' motion for summary judgment, the court held that plaintiff's allegations described conduct that was outrageous in character and thus stated a claim for intentional infliction of emotional distress. Lightman v. Flaum, 179 Misc.2d 1007, 1008, 1018, 687 N.Y.S.2d 562, 564, 571, reversed 278 A.D.2d 373, 717 N.Y.S.2d 617 (2000).

N.Y.Sup.Ct.1996. Cit. generally in disc. After a bridal photograph of a radio station employee and her husband was published in the wedding section of a local newspaper, broadcasters at a rival radio station made derogatory remarks about the wife's physical attractiveness, as part the station's routine called the “Ugliest Bride Contest.” The wife sued the rival radio station and its employees for intentional infliction of emotional distress. This court granted plaintiff's motion for leave to serve an amended complaint, holding that plaintiff stated fact issues as to the emotional-distress claim, because she was demeaned and injured by the speech and conduct of defendants, not only as a woman, but as a bride and a human being at what ought to be one of the most beautiful and memorable occasions of life. The fact that plaintiff's name, address, place of employment, and the names of her supervisors were fully set forth raised the specter of a possibly high level of vindictiveness on defendants' part. Esposito-Hilder v. SFX Broadcasting, Inc., 171 Misc.2d 286, 654 N.Y.S.2d 259, 262, affirmed 236 A.D.2d 186, 665 N.Y.S.2d 697 (1997).

N.Y.Sup.Ct.1996. Subsec. (1), com. (d) quot. in case quot. in disc. Former chairperson of hospital anesthesiology department who claimed he was constructively discharged sued hospital for, inter alia, intentional infliction of emotional distress, alleging that hospital subjected him to a continuing campaign of harassment. Hospital moved for summary judgment. Granting the motion, the court held that chairperson could not sustain his claim because the conduct complained of, namely hospital's criticism of the workings of the anesthesiology department, was not so extreme or outrageous as to exceed all possible bounds of decency. Kripke v. Benedictine Hospital, 169 Misc.2d 98, 641 N.Y.S.2d 996, 1001, affirmed 255 A.D.2d 725, 680 N.Y.S.2d 687 (1998).

N.Y.Sup.Ct.1996. Subsec. (1) and com. (d) quot. in disc. After a topless dancer and frequent guest of a well-known radio talk show died, her sister gave half the cremated remains to a friend. The friend later appeared on the show with the remains and participated in the host's irreverent and tasteless tribute to the dancer, which used excerpts of her appearances on the show. These excerpts included the dancer's description of her alleged sexual encounters with females from outer space and clips of her partially disrobing to expose her tattoos. The sister sued the friend, the host, and the broadcast company for intentional infliction of emotional distress, among other claims. This court granted defendants' motion to dismiss, holding, inter alia, that while the program was certainly vulgar and disrespectful, the acts complained of were not sufficiently extreme and outrageous to constitute intentional infliction of emotional distress. Roach v. Stern, 171 Misc.2d 80, 653 N.Y.S.2d 532, 534, order reversed 252 A.D.2d 488, 675 N.Y.S.2d 133 (1998).

N.Y.Sup.Ct.1995. Cit. in headnotes and sup., subsec. (1) cit. in headnotes and sup., com. (d) cit. in sup.; cit. in disc. (1948 Supp.). A tenured member of a college faculty was demoted from full professor to associate professor, reduced in salary, and given restricted academic duties following an investigation which led the college to conclude that he had been guilty of serious professional misconduct. Professor sued college for breach of contract, intentional infliction of emotional distress, and prima facie tort. Trial court ordered that college and its officers were not liable for intentional infliction of emotional distress, but that plaintiff could add two professors who allegedly disclosed the false and defamatory plagiarism charges to members of the campus community to his emotional-distress claim. It held that an unprivileged publication of a charge of plagiarism in an academic community, if false or made with reckless indifference to its truth, met the threshold test of Restatement Second of Torts § 46 and, a jury could find, amounted to extreme and outrageous conduct. Klinge v. Ithaca College, 167 Misc.2d 458, 634 N.Y.S.2d 1000, 1001, 1004-1006.

N.Y.Sup.Ct.1994. Cit. in headnote, cit. and quot. in sup.; subsec. (1) cit. in headnote, quot. in sup., and quot. in cases quot. in sup.; com. (d) quot. in case quot. in sup.; com. (h) quot. in sup. and cit. in case quot. in sup. Plaintiff brought an action for intentional infliction of severe emotional distress against staff physician at the hospital where plaintiff underwent a vasectomy, alleging that defendant improperly accessed plaintiff's confidential hospital records and annexed them, without consent, as an exhibit to an affidavit in defendant's divorce action. Denying defendant's motion to dismiss, the court held that defendant's alleged actions constituted “extreme and outrageous conduct” necessary to state a claim for intentional infliction of severe emotional distress. Andrews

v. Bruk, 160 Misc.2d 618, 610 N.Y.S.2d 752, 752, 754-756, judgment reversed 220 A.D.2d 376, 631 N.Y.S.2d 771 (1995).

N.Y.Sup.Ct.1992. Cit. generally in case cit. in disc. A former secretary and her husband sued her employer and its executive for sexual harassment, alleging loss of consortium damages and intentional infliction of emotional distress, among other claims. Granting in part and denying in part partial summary judgment for the defendants, this court held, inter alia, that plaintiffs stated a cause of action for intentional infliction of emotional distress, since the alleged behavior of the executive in "courting" a married woman could be viewed as extreme and outrageous behavior. Collins v. Willcox, Inc., 158 Misc.2d 54, 58, 600 N.Y.S.2d 884, 885.

N.Y.Sup.Ct.1992. Subsec. (1) cit. in sup. Mother, individually and on behalf of her son, sued her parish priest and church for damages, alleging that the priest molested her son. On defendants' motion to dismiss, the court held, inter alia, that the free exercise clause of the First Amendment did not protect defendants from plaintiff's two causes of action for outrageous conduct causing severe emotional distress and that, since those causes of action were recognized intentional torts under New York law, there was no reason why they should be dismissed at this stage. Jones by Jones v. Trane, 153 Misc.2d 822, 591 N.Y.S.2d 927, 933.

N.Y.Sup.Ct.1983. Cit. in disc., subseq. (1) quot. in case quot. in sup., and com. (d) quot. in case quot. in sup. Plaintiff brought an action for damages claiming that the defendants had violated New York's General Business Law by maliciously procuring and serving process on him on Saturday, which day he observed as a holy time. The court ruled that for any civil liability to result from the defendants' actions, plaintiff would have to allege and prove a case of intentional infliction of emotional distress. Noting that the plaintiff had failed to make the necessary allegations, the court ruled as a matter of law that the conduct complained of was not so outrageous as to be deemed compensable. The court dismissed for failure to state a cause of action. Gurkin v. Siegel, 122 Misc.2d 302, 470 N.Y.S.2d 540, 542.

N.Y.Sup.Ct.1983. Subsec. (1) quot. in disc., com. (d) quot. in disc. The plaintiff brought suit against two former husbands seeking damages for her first and second husbands' alleged conspiracy to deprive her of alimony under a separation agreement with her first husband. The separation agreement called for payment of alimony until she remarried. The plaintiff also brought actions on behalf of her three children who were born of the first marriage, seeking damages for the children's alleged extreme emotional distress suffered as a result of the defendants' failure to deal honestly and fairly with the plaintiff. The second husband moved for summary judgment. This court found that even if it were assumed that all the plaintiff's claims were true, there was no basis upon which she could be afforded the relief she sought. Regarding the children's claims, this court cited s 46 of the Restatement of Torts 2d in stating that, to afford recovery, the defendant's conduct must be so outrageous in character as to be regarded as utterly intolerable in a civilized community. The court concluded that while the allegations of the plaintiff's complaint did not show the defendant's actions in a praiseworthy light, the defendant's conduct was not outrageous.

Therefore, the court held that the complaint as to the children had to be dismissed. The motion for summary judgment was granted. Langley v. Langley, 118 Misc.2d 559, 461 N.Y.S.2d 202, 204.

N.Y.Sup.Ct.1968. Cit. in sup. The plaintiff alleged that the defendant had intentionally inflicted mental distress upon him by making threatening gestures to him, laughing at him, driving his automobile very closely behind that of the plaintiff, and calling him on the telephone and hanging up or remaining silent, and he sued for physical and mental damages therefrom. The court, finding that the plaintiff had alleged acts sufficiently extreme and outrageous to constitute a cause of action, denied the defendant's motion to dismiss. Flamm v. Van Nierop,56 Misc.2d 1059, 291 N.Y.S.2d 189, 191.

N.Y.Ct.Cl.

N.Y.Ct.Cl.2001. Subsec. (d) quot. in ftn. Patient whose finger was pierced by a hidden hypodermic needle as she was getting into her bed at state university hospital sued state for negligent infliction of emotional distress, seeking to recover for her phobia of AIDS. Denying defendant's motion for summary judgment, this court held that genuine issues of material fact existed as to whether there were any "special circumstances" that would permit a finding of liability despite absence of proof that plaintiff was actually exposed to HIV. The court noted that, in contrast to an AIDS-phobia action, which arose from conduct that unreasonably endangered plaintiff's physical safety, an action for intentional infliction of emotional distress required proof that defendant's conduct was extreme and outrageous. Harris v. State, 187 Misc.2d 512, 513, 723 N.Y.S.2d 824, 827.

N.Y.Ct.Cl.1992. Subsec. (1), com. (d) cit. but dist. Former correction officer sued state officials for injuries that allegedly occurred when the state controverted his stress-related claim for workers' compensation benefits. This court dismissed the claims, holding that defendants' alleged actions in controverting plaintiff's workers' compensation claim and in calling his house and threatening him with the loss of his job if he did not return to work were not sufficiently serious to support a claim for prima facie tort, bad faith breach of the employment relationship, or intentional infliction of emotional distress, particularly where the calls were not necessarily made with an intent to harass, but to warn plaintiff of the possible outcome of his continued absence. Huzar v. State, 156 Misc.2d 370, 590 N.Y.S.2d 1000, 1004.

N.Y.Dist.Ct.

N.Y.Dist.Ct.1971. Cit. in sup. Plaintiff sought to recover for alleged emotional distress caused when school officials leaked to the general public the contents of statements made by plaintiff in confidence. The court denied defendant's motion to dismiss for failure to state a cause of action. Although the alleged disclosures are ordinarily not sufficient to sustain an action for emotional distress, they may constitute outrageous actionable conduct in view of the special confidential relationship existing between a student and his family and a school and its professional employees.

Blair v. Union Free School District#6, Hauppauge, Suffolk County, 67 Misc.2d 248, 324 N.Y.S.2d 222, 227.

N.Y.City Civ.Ct.

N.Y.City Civ.Ct.2005. Subsec. (2) cit. in disc. Mother and her daughter sued restaurant for slander and intentional infliction of emotional distress after the manager accused mother of passing counterfeit money, and otherwise denigrated her. Denying in part defendant's motion for summary judgment, this court held, inter alia, that cashier's accusation constituted slander per se, and, although mother's emotional-distress claim was duplicative of the defamation action, allegations that her daughter suffered emotional distress and contemporaneous physical harm—in the form of an asthma attack requiring medical attention—stated a claim for emotional distress on the part of daughter. The doctrine of transferred intent could be applied to the defamation claim, since the daughter was present when the incident happened and allegedly suffered a physical injury. Kinsler ex rel. Kinsler v. International House of Pancakes, Inc., 8 Misc.3d 836, 799 N.Y.S.2d 863, 866.

N.Y.City Civ.Ct.1980. Cit. in sup. This case involved two nonpayment proceedings concerning two adjoining apartments rented by a tenant for himself and his children. The tenant counterclaimed for a breach of the warranty of habitability and requested punitive damages, damages for emotional distress and attorney's fees. The tenant testified that almost from the inception of the tenancy for each apartment, the ceilings leaked and there was defective plaster in the ceilings and around the windows. All parties agreed that the primary source of the leaks was the terrace located above the two apartments. The owner's contractor had in fact recommended that the terrace be repaired but such repairs were not undertaken until the summer of 1980. The tenant also testified that one of the apartments did not have hot water for the summers of 1979 and 1980. The court held that the tenant was entitled to an abatement of rent based upon the conditions relating to the leaks, the damaged plaster and the lack of hot water. Because the delay in the repairs for the leaking terrace was a deliberate decision of the landlord the court also awarded the tenant punitive damages. The court considered the claim of emotional distress as the substantial equivalent of a claim for the intentional infliction of mental distress. The standard for such a claim is conduct that is so extreme and outrageous as to go beyond all possible bounds of decency and which is atrocious and utterly intolerable in a civil society. The court found that the landlord's conduct was reprehensible, but did not reach the required standard. Century Apartments, Inc. v. Yalkovsky, 106 Misc.2d 762, 435 N.Y.S.2d 627, 630.

N.C.

N.C.2016. Com. (e) quot. in sup. Husband who was found not guilty of first-degree murder of his wife by reason of self-defense brought a claim for intentional infliction of emotional distress (IIED) against law-enforcement agents who participated in the investigation and prosecution. The trial court granted defendants' motions to dismiss; the court of appeals reversed in part and reinstated the IIED claim. This court affirmed that portion of the decision. The court noted that,

under Restatement Second of Torts § 46, an abuse by an actor of a position that gave the actor power to affect the interests of another could constitute extreme and outrageous conduct, and plaintiffs' allegations—that defendants concocted a motive for plaintiff to murder his wife and a theory of how he carried it out, conducted experiments until they achieved a bloodstain pattern that supported their theory, and rewrote the conclusion of their earlier report—painted a picture of law-enforcement officials deliberately abusing their authority as public officials to manipulate evidence and distort a case for the purpose of reaching a foreordained conclusion of guilt. Turner v. Thomas, 794 S.E.2d 439, 446.

N.C.1994. Com. (a) cit. in case quot. in sup., com. (j) quot. in sup. After harassment by bank agent trying to repossess a car owned by woman who had obtained bank financing, the woman and her family sued bank and agent for, inter alia, intentional infliction of emotional distress and violation of state debt collection act. Trial court granted defendants summary judgment on emotional-distress claim, but jury found for plaintiffs on debt collection claim. Court of appeals affirmed summary judgment on emotional-distress claim. Affirming in part, this court held, in part, that defendants had shown that summary judgment against car owner on the emotional-distress claim was proper, but that summary judgment was improper on emotional-distress claims of other plaintiffs. Defendants demonstrated that car owner did not suffer severe and disabling emotional distress, but failed to cite to support in record for their assertion that other plaintiffs did not receive any medical treatment or experience any effects from the incident. Holloway v. Wachovia Bank & Trust Co., N.A., 339 N.C. 338, 452 S.E.2d 233, 242, 243.

N.C.1992. Cit. generally in sup., subsec. (1) cit. in disc., coms. (d) and (j) quot. in sup. Two female employees sued their supervisor for intentional infliction of emotional distress, inter alia, alleging that the defendant frequently used vulgar language and made lewd gestures to them. The trial court granted summary judgment for the defendant. The intermediate appellate court affirmed the summary judgment entered against one of the plaintiffs, but reversed the other. Reversing in part, this court held, inter alia, that the intermediate appellate court erred in reversing the summary judgment for the defendant because the plaintiff's forecast of evidence failed to show that she had suffered the requisite degree of emotional distress necessary to maintain her cause of action, as there was no forecast of any medical documentation of her alleged severe emotional distress nor evidence of any other severe and disabling psychological problems. Waddle v. Sparks, 331 N.C. 73, 414 S.E.2d 22, 27, 28.

N.C.1988. Quot. in case cit. in disc. A store customer and his wife sued the store on theories of false imprisonment, slander per se, and intentional infliction of emotional distress, alleging that the store manager accused them of stealing and threatened them with prosecution. The trial court granted a directed verdict for the store, and the intermediate appellate court affirmed. Affirming in part, reversing in part, and remanding, this court held that the plaintiffs asserted a valid claim of intentional infliction of emotional distress. The court stated that the store manager's confrontation with the wife after he was told that she was an outpatient at a local hospital, his refusal to acknowledge offered proof of purchase, and his threats of future arrests manifested extreme and outrageous conduct. West v. King's Dept. Store, Inc., 321 N.C. 698, 365 S.E.2d 621, 625.

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N.C.1981. Cit. and quot. in sup.; com. (a) cit. in disc.; and com. (i) cit. and quot. in part in sup. The plaintiff sought damages for intentional infliction of mental distress, alleging that he was handcuffed, beaten, and threatened with death and bodily injury by men wielding clubs and knives and that he was instructed to leave the state or be killed. The plaintiff's complaint was filed more than one year but less than three years after the incidents complained of occurred. The defendants moved for summary judgment, and much of the factual showing at the hearing for summary judgment related to assaults and batteries committed against the plaintiff by the defendants. The defendants' motions for summary judgment were allowed on the ground that the plaintiff's claim was for assault and battery and, therefore, was barred by the one-year statute of limitation applicable to assault and battery. The Court of Appeals agreed with the trial court's judgment that the plaintiff's action was grounded in assault and battery and affirmed the summary judgment for the defendants. The plaintiff appealed, arguing that the factual showing on the motion supported a claim for intentional infliction of mental distress—a claim which was governed by a three-year period of limitations and that, at least, his factual showing was such that it could not be said as a matter of law that he would be unable to prove such a claim at trial. The issue before the court was whether the evidentiary showing demonstrated as a matter of law that the plaintiff's only claim, if any, was for assault and battery; if the plaintiff, as a matter of law, had no claim for intentional infliction of mental distress but had a claim, if at all, only for assault and battery, then the plaintiff could not surmount the affirmative defense of the one-year statute of limitations and the defendants would be entitled to summary judgment on the ground of the statute. The court found that much of the factual showing at the hearing related to assaults and batteries committed by the defendants against the plaintiff; the physical beatings constituted batteries; the threats of bodily injury and death, being threats which created apprehension of immediate harmful or offensive contact, were assaults. Therefore, the plaintiff's recovery for injuries, mental or physical, caused by these actions would be barred by the one year statute of limitations. However, the court also found that the evidentiary showing on the summary judgment hearing did indicate that one of the defendants threatened the plaintiff with death in the future unless the plaintiff left the state. The Court of Appeals characterized this threat as being an immediate threat of harmful or offensive contact and a present threat of harm to the plaintiff, concluding that this threat was also an assault barred by the one-year statute of limitations. The court disagreed with the Court of Appeals characterization of this threat, finding that the threat was not one of imminent, or immediate harm, but rather a threat for the future apparently intended to and which allegedly did inflict serious mental distress and, therefore, it was actionable, if at all, as an intentional infliction of mental distress. Having concluded that the factual showing on the motions for summary judgment was sufficient to indicate that the plaintiff may have been able to prove at trial a claim for intentional infliction of mental distress, the court held that summary judgment for the defendants based upon the one-year statute of limitations was error, and the case was remanded for further proceedings on this issue. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325, 331-334.

N.C.App.

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N.C.App.2014. Com. (d) quot. in case quot. in sup. After a jury found husband not guilty of murdering his wife, by reason of self-defense, husband sued, among others, two special agents at the state bureau of investigation, alleging intentional infliction of emotional distress (IIED) and other claims. The trial court granted defendants' motions to dismiss. Reversing as to the IIED claim and remanding, this court held that plaintiff's complaint sufficiently alleged outrageous conduct, as required to state such a claim under Restatement Second of Torts § 46. The court pointed to plaintiff's allegations that defendants essentially manufactured evidence to establish guilt and to negate plaintiff's self-defense claim by performing unscientific tests designed to prove a theory that plaintiff's stab wounds were self-inflicted and the scene staged to look like self-defense, altering their initial report to reflect their new findings arising out of those tests, writing the altered report in a manner that hid the existence of the initial report, and bolstering the theory by making false statements in the altered report. Turner v. Thomas, 762 S.E.2d 252, 264.

N.C.App.2011. Com. (d) quot. in case quot. in sup. Wife sued husband and his attorney, alleging malicious prosecution, abuse of process, and intentional infliction of emotional distress. The trial court granted attorney's motion to dismiss. Affirming in part, this court held, among other things, that wife failed to state a claim for intentional infliction of emotional distress. The court reasoned that, while attorney's alleged conduct in procuring a criminal proceeding against her with malice and without probable cause, and in misusing legal process with an ulterior purpose after initiating a civil action against her, would be unprofessional and sufficient to give rise to other tort claims, it did not exceed all bounds of decency tolerated by society and therefore did not constitute extreme and outrageous conduct as a matter of law. Chidnese v. Chidnese, 708 S.E.2d 725, 738.

N.C.App.2003. Cit. generally in case quot. but dist., com. (j) quot. in case quot. in disc. Widow sued cemetery for intentional infliction of emotional distress and breach of fiduciary duty after cemetery, pursuant to exhumation order obtained by husband's mother, disinterred husband's body for reburial in Puerto Rico without notifying widow. Affirming trial court's grant of summary judgment for cemetery, court of appeals held that cemetery owed no fiduciary duty to widow at time of disinterment, and widow failed to submit any evidence in support of her unverified allegation of severe emotional distress. Pacheco v. Rogers and Breece, Inc., 157 N.C.App. 445, 449, 451, 579 S.E.2d 505, 508, 509.

N.C.App.2002. Com. (d) quot. in case quot. in sup. Former office assistant at correctional facility sued superintendent and supervisor for, in part, intentional infliction of emotional distress. Affirming the trial court's grant of summary judgment for defendants, this court held, inter alia, that plaintiff's allegations that she was forced to return to her assignment with supervisor after she had accused him of sexual harassment, was required to perform an excessive amount of work, and was given an unsatisfactory job evaluation did not describe conduct that was sufficiently outrageous to support a claim for intentional infliction of emotional distress. Wells v. North Carolina Dept. of Correction, 152 N.C.App. 307, 567 S.E.2d 803, 814.

N.C.App.2001. Com. (d) quot. in case quot. in sup. Teacher sued school board for intentional infliction of emotional distress, alleging that she was subjected to hostile atmosphere after parent

complained to principal about her. Principal changed conduct rules without teacher's consent, test scores of teacher's class were falsified and published to other teachers, and teacher was transferred to new school. Trial court granted board summary judgment. This court affirmed, holding that emotional-distress claim failed, because board's conduct in following procedures to evaluate and eliminate problematic teachers, even if done in bad faith, was not extreme or outrageous. Stamper v. Charlotte-Mecklenburg Bd. of Educ., 143 N.C.App. 172, 173, 544 S.E.2d 818, 820.

N.C.App.2000. Com. (d) quot. in case quot. in conc. and diss. op. Employee who sustained an on-the-job shoulder injury sued employer and employer's insurer for bad faith, deceptive trade practices, and intentional infliction of emotional distress, alleging that defendants conspired to alter and manipulate evidence presented to plaintiff's physician in a successful attempt to convince physician to list the injury as age-related, not work-related. The trial court entered judgment for defendants. Affirming in part and reversing in part, this court held that, with the exception of the claim for intentional infliction of emotional distress, the elements of which plaintiff had successfully pled, plaintiff's action was barred by the exclusivity provision of the workers' compensation statute. Concurring and dissenting opinion argued that defendants' alleged actions in doctoring evidence, while objectionable, were not extreme and outrageous. Groves v. Travelers Ins. Co., 139 N.C.App. 795, 535 S.E.2d 105, 108.

N.C.App.2000. Com. (j) quot. in case quot. in disc. After stepmother shot and killed their father, the victim's daughters sued stepmother for negligent infliction of emotional distress. Affirming the trial court's grant of summary judgment for defendant, this court held that plaintiffs, who alleged loss of sleep and loss of appetite but received no medical treatment, did not demonstrate the requisite level of severe and disabling emotional distress. Johnson v. Scott, 137 N.C.App. 534, 528 S.E.2d 402, 405.

N.C.App.1994. Com. (j) quot. in case quot. in sup. Estate of hospital patient who, nine days prior to his death, received a blood transfusion allegedly in contravention of his wishes based on his faith as a Jehovah's Witness sued the hospital and the treating physician for negligent infliction of emotional distress, inter alia. Affirming the trial court's grant of defendants' motions for directed verdict, this court held that plaintiff's evidence failed to establish that decedent suffered the requisite degree of emotional distress necessary to maintain plaintiff's cause of action, since it tended at best to show only that decedent was temporarily upset and did not show that decedent suffered distress so severe that no reasonable man could be expected to endure it. Clark v. Perry, 114 N.C.App. 297, 442 S.E.2d 57, 68, 69.

N.C.App.1993. Com. (d) cit. in sup. University's former employee who was found not guilty of a larceny charge for which he had been arrested at his place of employment on campus sued university for intentional infliction of emotional distress, inter alia. Affirming the trial court's dismissal of the claim, this court held, inter alia, that conduct of university officers in stopping and later arresting plaintiff was not so outrageous as to support an emotional distress claim. Furthermore, said the court, there was no evidence that the officers intended to cause severe

emotional distress in arresting plaintiff. Best v. Duke University, 112 N.C.App. 548, 556, 436 S.E.2d 395, 401.

N.C.App.1993. Com. (d) quot. in case quot. in sup. A former employee sued her employer and its owner/president for wrongful discharge and intentional infliction of emotional distress. The trial court entered summary judgment for defendants. Reversing in part and remanding, this court held that a genuine issue of fact existed regarding whether plaintiff's discharge violated public policy where plaintiff alleged that she was harassed and ultimately fired for expressing her willingness to testify honestly after being subpoenaed in a coemployee's lawsuit against the employer, but that defendants' conduct in taking away plaintiff's responsibilities, monitoring her activities, going through her desk, moving her to a smaller office with no telephone or heat, and making harassing telephone calls to plaintiff and her family was not so extreme or outrageous as to support an emotional distress claim. Daniel v. Carolina Sunrock Corp., 110 N.C.App. 376, 383, 430 S.E.2d 306, 311, reversed in part 335 N.C. 233, 436 S.E.2d 835 (1993).

N.C.App.1993. Quot. in sup., subsec. (1) cit. in sup., coms. (d) and (j) quot. in sup. Doctor who performed abortions and his family sued abortion protesters for intentional infliction of emotional distress, private nuisance, and injunctive relief after protesters picketed their home and directed threats towards them. Trial court granted the preliminary injunction, concluding that there was a reasonable likelihood that plaintiffs would prevail on the emotional distress and nuisance claims. Affirming in part and modifying in part, this court held, inter alia, that there was insufficient evidence to support trial court's decision that there was a likelihood that plaintiffs would succeed on their emotional distress claim. There was no evidence of any medical documentation of plaintiffs' alleged severe emotional distress or of any forecast of evidence of severe and disabling psychological problems. Plaintiff's mere allegations that they were frightened, intimidated, and upset, and had suffered severe and irreparable fear, embarrassment, and humiliation were insufficient to indicate a likelihood of meeting the requisite high standard of proof. Kaplan v. Prolife Action League, 111 N.C.App. 1, 431 S.E.2d 828, 836, 837.

N.C.App.1993. Com. (d) quot. in case quot. in sup. Plaintiff consulted a certified employee assistance professional at her workplace for emotional problems. After the professional shared alcohol and drugs and engaged in sexual relations with plaintiff, plaintiff sued the professional for professional malpractice and intentional infliction of emotional distress, and sued her employer for negligent retention of an employee. Affirming a grant of summary judgment for defendants, this court held, inter alia, that the professional's alleged conduct was not so extreme and outrageous as to give rise to liability for intentional infliction of emotional distress. Reich v. Price, 110 N.C.App. 255, 261, 429 S.E.2d 372, 376, cert. denied 334 N.C. 435, 433 S.E.2d 178 (1993).

N.C.App.1992. Cit. in case quot. in disc. Landowners built a fence which encroached on adjoining lots. After more than 20 years, the adjoining lots were sold. The new owners began harassing the landowners over the location of the fence; this harassment included obscene gestures, cursing, death threats, and initiating a proceeding against one of the landowners for criminal trespass. The landowners sued the neighbors for malicious prosecution, adverse possession, and intentional

infliction of emotional distress. The trial court granted the defendant landowner's wife's motion for directed verdict and dismissed the claim of intentional infliction of emotional distress by the plaintiff landowner's wife. It then entered judgment on a jury verdict for the plaintiffs, but refused to submit the punitive damages issue to the jury. Affirming in part, reversing in part, and remanding, this court held, inter alia, that there was sufficient evidence of extreme and outrageous conduct by the defendant landowner which intentionally or recklessly caused severe emotional distress for the plaintiffs. Wilson v. Pearce, 105 N.C.App. 107, 412 S.E.2d 148, 152.

N.C.App.1992. Com. (d) quot. in case quot. in disc. A college student who claimed that several members of a fraternity sexually assaulted her at a fraternity party sued the fraternity members, among others, for intentional infliction of emotional distress, inter alia. The trial court granted directed verdicts for the defendants. Affirming in part, this court held that the plaintiff did not prove her claim, since the record only presented some evidence of a sexual battery, and a sexual battery, standing alone, did not constitute on this record the required extreme and outrageous conduct. Wilson by Wilson v. Bellamy, 105 N.C.App. 446, 414 S.E.2d 347, 359, review denied 331 N.C. 558, 418 S.E.2d 668 (1992).

N.C.App.1991. Com. (i) quot. in case quot. in sup. Following a tornado, an employee of a neighboring company wandered onto the property of a local retail store, after being warned by police to keep away from the property. The store's security guards apprehended and searched the neighboring employee, and told police that he was picking up items of the store's merchandise. After subsequently being arrested for trespass and looting and found not guilty at trial, the employee sued the retail store alleging, among other things, intentional infliction of emotional distress. The trial court granted the retail store's motion for a directed verdict. Affirming, this court held, inter alia, that the refusal of the retail store's employees to listen to the plaintiff's explanations that he was looking for his company's lost property, although rude and officious, could not reasonably be regarded as extreme and outrageous conduct. The court reasoned that there was a state of emergency and that the guards' statements were not intended to cause extreme emotional distress. Shillington v. K-Mart Corp., 102 N.C.App. 187, 402 S.E.2d 155, 161.

N.C.App.1990. Quot. in case quot. in disc. A shopper at a department store who was accused of shoplifting sued the store and one of its employees for intentional infliction of emotional distress, inter alia. The trial court granted the defendants' motion for a directed verdict. Affirming, this court held that the plaintiff's evidence presented on her claim was insufficient as a matter of law to withstand the defendants' motion because she did not show that the defendants' conduct was outrageous and extreme. Lenins v. K-Mart Corp., 98 N.C.App. 590, 391 S.E.2d 843, 848.

N.C.App.1990. Com. (d) cit. in case quot. in disc. A newspaper article about a dispute between the plaintiff and her neighbor reported that the plaintiff had previously fled Europe after being charged in the alleged kidnapping and rape of a Mormon missionary. The paper drew its information about the plaintiff's alleged criminal history principally from wire services and daily newspapers. The plaintiff sued the paper and its editor for, inter alia, intentional infliction of emotional distress. The trial court granted the defendants' motion to dismiss the emotional distress claim, and this court

affirmed. The court said that, since the defendants merely reported information that had already been widely published in reputable newspapers, their actions as a matter of law did not amount to outrageous conduct. McKinney v. Avery Journal, Inc., 99 N.C.App. 529, 393 S.E.2d 295, 298, review denied 327 N.C. 636, 399 S.E.2d 123 (1990).

N.C.App.1989. Com. (k) quot. in disc. A husband who allegedly threatened his wife with a pistol and sexually abused her was convicted of assault with a deadly weapon inflicting serious injury. Affirming, this court held that the state presented sufficient evidence of physical or bodily injury and that the seriousness of the injury was properly placed before the jury. The court said that serious physical injury may be proven even when it was not evident immediately upon the impact of the assault, since physical injury may later manifest itself as the result of psychological trauma. State v. Everhardt, 96 N.C.App. 1, 384 S.E.2d 562, 570.

N.C.App.1987. Com. (d) quot. in case quot. in disc. A gas station owner who was allegedly threatened and insulted by a city-employed animal warden sued the warden for assault, defamation, and intentional infliction of emotional distress. The trial court dismissed the action. Affirming in part and reversing in part, this court held that the facts did not give evidence of the extreme conduct required to sustain an action for intentional infliction of emotional distress, and that it would not permit recovery for hurt feelings. The court further held that the plaintiff had stated a legally sufficient claim for assault, reasoning that the warden's words plus the fact that he was carrying a pistol were enough to cause the plaintiff to fear an imminent battery. Johnson v. Bollinger, 86 N.C.App. 1, 356 S.E.2d 378, 382.

N.C.App.1987. Cit. in disc. An employee whose employment had been abruptly terminated sued his ex-employer for breach of an employment contract and intentional infliction of emotional distress resulting from the unexplained dismissal. The trial court granted the defendant a directed verdict on the claim of intentional infliction of emotional distress, holding that the plaintiff failed to produce expert medical testimony that he suffered severe distress, but it allowed a jury to award damages on the breach of contract claim. Affirming as to both claims, this court held, inter alia, that although the plaintiff did not have to provide expert medical evidence where the distress was within the common knowledge of laymen, the defendant's conduct was not sufficiently outrageous to give rise to a cause of action for intentional infliction of emotional distress. McKnight v. Simpson's Beauty Supply, Inc., 86 N.C.App. 451, 358 S.E.2d 107, 109.

N.C.App.1986. Com. (d) quot. in disc., com. (h) cit. in disc. Former female employees of a country club sued for wrongful termination, intentional infliction of emotional distress, and negligent hiring and retention of abusive coemployees. The trial court entered summary judgment in favor of the employer. Affirming in part, reversing in part, and remanding, this court held that sexual advances toward and nonconsensual sexual touchings of one of the plaintiffs could reasonably be found to be sufficiently outrageous to permit recovery on a theory of intentional infliction of emotional distress. The court stated that whether the employer's conduct in retaining the abusive coemployee and declining to intervene signified an intention to ratify the coemployee's acts was a question for the jury. The court stated, however, that liability did not extend to mere insults,

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indignities, and threats and affirmed the entry of summary judgment against the other plaintiffs. Hogan v. Forsyth Country Club Co., 79 N.C.App. 483, 340 S.E.2d 116, 121, 123, review denied 317 N.C. 334, 346 S.E.2d 140 (1986).

N.C.App.1985. Com. (h) cit. in sup., coms. (d) and (f) quot. in sup. Plaintiffs whose only son was killed in an automobile accident sued a magazine and a writer for intentional infliction of emotional distress as a result of the publication of an article about their son. The trial court granted defendants' motion to dismiss and the court of appeals affirmed. The court held that whether the article was offensive was a question of law for the court, and although the article was offensive to the plaintiffs, it did not reach the levels of extreme and outrageous conduct necessary to sustain a cause of action for intentional infliction of emotional distress. Briggs v. Rosenthal, 73 N.C.App. 672, 327 S.E.2d 308, 311-312, certiorari denied 314 N.C. 114, 332 S.E.2d 479 (1985).

N.D.

N.D.2013. Cit. in case quot. in sup. Terminated employee brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against former employer and employer's CEO, alleging that CEO sexually assaulted her during an out-of-town work conference. The trial court granted summary judgment for defendants. Reversing as to this claim and remanding, this court held that genuine issues of material fact existed as to whether CEO's alleged conduct was sufficiently extreme and outrageous, whether it was sufficiently intentional or reckless, and whether it caused plaintiff severe emotional distress so as to preclude summary judgment on her IIED claim. Hysjulien v. Hill Top Home of Comfort, Inc., 2013 ND 38, 827 N.W.2d 533, 549.

N.D.2011. Cit. in case cit. in sup., coms. (d) and (h) quot. in case quot. in sup. (erron. cit. as coms. of Rptr's Notes). Former husband, who had adopted minor child of ex-wife during their marriage, brought a claim for intentional infliction of emotional distress (IIED) against ex-wife and child's biological father, alleging that defendants destroyed his relationship with child. Affirming the trial court's grant of summary judgment for defendants, this court held that ex-wife's alleged threats to disclose to child that defendant biological father was child's biological father were not, as a matter of law, sufficiently extreme or outrageous to sustain plaintiff's IIED claim, and plaintiff failed to provide facts that demonstrated how fostering a relationship between plaintiff's adopted child and the child's biological father was extreme and outrageous conduct. G.K.T. v. T.L.T., 2011 ND 115, 798 N.W.2d 872, 875-877.

N.D.2004. Cit. in disc., cit. in case cit. in disc., com. (d) quot. in case quot. in disc. Hospital physician who had reported a doctor for deficiencies in her medical practice sued hospital and doctor, alleging, in part, that hospital's retaliatory conduct and doctor's initiation and continuation of a series of meritless administrative actions against him constituted intentional infliction of emotional distress. Affirming in part the trial court's dismissal of plaintiff's complaint, this court held, inter alia, that plaintiff's emotional-distress claim failed because defendants' conduct did not

rise to the level of extreme and outrageous conduct. Vandall v. Trinity Hospitals, 2004 ND 47, 676 N.W.2d 88, 90, 96, 97.

N.D.2004. Com. (d) quot. in case quot. in sup. (Erron. cit. as com. (d) of Rptr's Notes.) Applicant for state employment sued state for, in part, intentional infliction of emotional distress, after state failed to interview him for a position. Affirming the trial court's dismissal of the complaint, this court held, inter alia, that state's decision not to interview applicant for an attorney position because his ranking was below the required level based on use of a scoring device giving credit for factors contained in a position-information questionnaire was not sufficiently extreme and outrageous to support plaintiff's claim for intentional infliction of emotional distress. Zuger v. State, 2004 ND 16, 673 N.W.2d 615, 622.

N.D.2003. Cit. in case quot. in sup., com. (d) quot. generally in case quot. in sup. Patient who had an outstanding account balance with a medical clinic for treatment rendered sued, among others, debt collector and its representatives, alleging, in part, that defendants' collection efforts on behalf of the clinic constituted intentional infliction of emotional distress. Affirming the trial court's grant of summary judgment for defendants on the emotional-distress claim, this court held, inter alia, that defendants' conduct in contacting plaintiff four times by letter, including a letter implying that defendants would seize her vehicles, and once on the telephone over a period of three months was not sufficiently extreme and outrageous to support plaintiff's claim. Weiss v. Collection Center, Inc., 2003 ND 128, 667 N.W.2d 567, 573.

N.D.2001. Com. (d) quot. in case cit. and quot. in sup. Recreational therapist sued employer and supervisor for retaliatory discharge, breach of contract, and intentional infliction of emotional distress, alleging that employer created an environment of intimidation and a workplace of fear and anxiety. Trial court granted defendants summary judgment. This court affirmed, holding, inter alia, that defendants' conduct was not so extreme and outrageous as to constitute intentional infliction of emotional distress. Plaintiff was an at-will employee, her termination was not outrageous, her allegations of a hostile work environment were conclusory, and she failed to show specific instances in which defendants' conduct was outrageous. Dahlberg v. Lutheran Social Services of North Dakota, 625 N.W.2d 241, 248-249.

N.D.1995. Com. (d) quot. in case quot. in sup. and cit. in headnote. The widow of a clinic's business manager who was involuntarily terminated sued the clinic for, among other claims, intentional infliction of emotional distress. Trial court granted clinic summary judgment. Affirming, this court held, inter alia, that trial court properly dismissed the emotional distress claim, because there was no evidence that the clinic engaged in extreme and outrageous conduct. Minutes from a meeting of the board of directors showed that manager was not satisfactorily performing his duties, and he admitted overpaying himself more than $40,000 by failing to deduct car lease payments from his salary. Hummel v. Mid Dakota Clinic, P.C., 526 N.W.2d 704, 705, 710.

N.D.1995. Cit. in headnote and in sup., com. (d) cit. in headnote and quot. in case quot. in sup., com. (g) cit. in headnote and quot. in sup. Lender sued borrowers to recover on a note

and foreclose its security interest in borrowers' personal property; borrowers counterclaimed for intentional infliction of emotional distress, inter alia, alleging that lender's refusal to release insurance proceeds for the purchase of a combine to replace one destroyed by fire prevented them from harvesting their crops. Affirming the trial court's dismissal with prejudice of borrowers' emotional distress counterclaim, this court held, in part, that lender's actions did not rise to the level of extreme and outrageous conduct, since lender was under no obligation to release the insurance proceeds to borrowers and its conduct reasonably could not be regarded as so extreme in degree as to be beyond all possible bounds of decency or to be utterly intolerable in a civilized society. Security Nat. Bank, Edgeley v. Wald, 536 N.W.2d 924, 924, 925, 927.

N.D.1993. Quot. in case cit. in sup., coms. (d), (e), (f), and (h) quot. in case cit. in sup., com. (d) quot. in part in spec. conc. op. A former employee sued her employer for gender discrimination, equal pay violations, and intentional infliction of emotional distress. Reversing in part summary judgment for the employer and remanding, this court held in a plurality opinion that issues of material fact precluded summary judgment on the emotional distress claim where the employee alleged that her supervisor discriminated against her, oppressed her repeatedly on the basis of her gender, continually reminded her of his plan to replace her with a male, ignored her, refused to discuss her employment situation, and knew of her unstable and deteriorating emotional condition. A specially concurring opinion asserted that reasonable jurors should have the opportunity to consider whether sex discrimination was outrageous and intolerable in current society. Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174, 181, 182, 185, 186, 188.

N.D.1992. Com. (h) quot. in ftn. (Erron. cit. as Rptr's Note.) Automobile accident victim's legal malpractice action against the attorney who initially represented him in his lawsuit against the other driver involved in the collision was dismissed without prejudice by the trial court as premature and the statute of limitations tolled until the action against the driver ended. When plaintiff again sued the attorney for legal malpractice, alleging infliction of emotional distress, after appeal had been taken and a mandate issued in the underlying action against the driver, the trial court dismissed on the ground that the statute of limitations had run. Reversing and remanding, this court held that since plaintiff's underlying action was not actually completed until appeal in that case had been taken and a mandate issued in 1988, the instant legal malpractice action should not have been dismissed on the ground that the statute of limitations had been tolled only until the 1987 entry of judgment by the trial court in the underlying action. Finch v. Backes, 491 N.W.2d 705, 707.

N.D.1989. Cit. in disc., quot. in ftn., coms. (d) and (h) quot. in sup., coms. (i), (j), and (k) cit. in sup. Family members of a woman who was found dead in a nearby river sued the detective who investigated the case and the city for intentional or negligent infliction of emotional distress, alleging that the detective failed to conduct a serious investigation of the death, which he concluded was a suicide but was later determined to have been a homicide, and gave them false information about the woman's death. The trial court granted summary judgment for the defendants. This court affirmed, holding that plaintiffs' evidence of loss of weight and sleep did not meet the requirement of bodily harm necessary for a claim for negligent infliction of emotional distress, and that the detective's conduct, while inconsiderate and unkind, did not rise to the level of egregious conduct

necessary to sustain an action for intentional infliction of emotional distress. Muchow v. Lindblad, 435 N.W.2d 918, 923, 924.

N.D.1988. Com. (b) quot. in sup. A child was injured when playing on a cage-style elevator. The parents sued the building's owners and the elevator manufacturer, seeking damages for loss of the child's society and companionship and for their own emotional distress. The trial court dismissed the parents' claims for damages on the ground that North Dakota law did not allow this type of recovery. Reversing, this court held that recent enactments permitting recovery for noneconomic damages arising from loss of society and companionship rendered judicial distinctions between economic and noneconomic aspects of the parent-child relationship implausible. Denying a petition for rehearing, this court held that, in the case of injury to a child, damages for emotional distress may arise along with damages for loss of society and companionship. Jacobs v. Anderson Bldg. Co., 430 N.W.2d 558, 560, appeal after remand 459 N.W.2d 384 (1990).

N.D.1983. Subsec. (1) cit. in ftn. The plaintiffs brought suit for intentional infliction of emotional distress arising from the defendant cemetery's removal of a headstone from the grave of the plaintiffs' relative. The defendant prevailed on a counterclaim which it interposed and appealed from a judgment awarding the plaintiffs compensatory damages. This award was set aside by the supreme court on the grounds that compensatory damages had not been pleaded and that no evidence supported the award. Accordingly, the judgment was modified in part and remanded; judgment as to the defendant's counterclaim was affirmed. Ouren v. Krebsbach, 338 N.W.2d 836, 837.

Ohio

Ohio, 1998. Subsec. (1) quot. in diss. op., com. (g) quot. in diss. op. A female employee and her husband sued the employer for intentional infliction of emotional distress, among other claims, after the company insisted that the employee get a second-opinion examination to determine whether her recto-vaginal fistula required surgery. The trial court granted defendants summary judgment, but the appellate court reversed and remanded for trial. This court dismissed the appeal sua sponte. The dissent argued that plaintiffs did not establish a prima facie case of intentional infliction of emotional distress, because the employer had a clear legal right to condition the employee's disability benefits on a second-opinion medical examination by a physician of the company's choosing. Neither the employer's general manager nor any other representative of the company ever threatened the employee with loss of her job for failure to submit to the second-opinion medical examination. Kovacs v. Bauer, 80 Ohio St.3d 1224, 687 N.E.2d 779, 781.

Ohio, 1995. Quot. in conc. op., coms. (d) and (j) quot. in conc. op. Former railroad employee sued railroad under Federal Employers' Liability Act (FELA) for emotional distress allegedly inflicted by employer and co-workers. The trial court entered judgment on a jury verdict awarding employee $500,000 but the intermediate appellate court vacated and entered judgment for employer. Reversing and remanding, this court held that employee, who suffered such debilitating

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depression that he could no longer work, could recover for negligent infliction of emotional distress upon a showing that he was in a zone of danger, i.e., that his injuries were caused by a threat of imminent physical impact resulting from employer's negligence. Concurrence believed that employee actually sought to recover for intentional infliction of emotional distress caused by his co-workers' threatening behavior that resulted from employer's negligent hiring, retention, or supervision and that, under FELA, intentionally inflicted, severe emotional harm that was caused in part by physically menacing behavior constituting unconscionable abuse was a compensable injury. Vance v. Consol. Rail Corp., 73 Ohio St.3d 222, 652 N.E.2d 776, 787, 788, cert. denied 516 U.S. 1073, 116 S.Ct. 776, 133 L.Ed.2d 728 (1996).

Ohio, 1991. Com. (d) quot. in case quot. in diss. op. An at-will employee was assured that the employer's process of inflating labor and capital costs in conjunction with its federal procurement contracts was legitimate; however, he was subsequently discharged for following those practices, and his name was given to federal authorities in connection with a contract fraud investigation. The employee sued his former employer alleging, inter alia, fraudulent misrepresentation and intentional infliction of emotional distress. The trial court entered judgment on a jury verdict for the employee, and the intermediate appellate court affirmed in part but remanded for a new trial on damages. Affirming on liability, this court held as to the emotional distress count that an at-will employee's action for intentional infliction of emotional distress against his employer was not foreclosed merely because his discharge was obtained in a lawful manner. It stated that the employer's conduct constituted extreme and outrageous conduct. The dissent argued that the employer's actions were not sufficiently outrageous because the employer's liability arose from its agents' conduct and, upon discovery of the fraud, the employer properly discharged the employee and turned him over to law enforcement officials. Russ v. TRW, Inc., 59 Ohio St.3d 42, 570 N.E.2d 1076, 1086-1087.

Ohio, 1984. Cit. in sup., cit. in ftn., cit. in conc. and diss. op., com. (d) quot. in sup. and cit. in conc. and diss. op., coms. (j) and (k) cit. in conc. and diss. op. After plaintiff's car was hit by a van, he obtained a rental car under the van driver's insurance. During negotiations for settlement, insurance agent threatened to take the rental car away if plaintiff refused to settle at agent's price. Finally, insurance agent stopped payment on the rental car, resulting in rental car agent's telling plaintiff that he had reported the car stolen and ordering him to return the car or he would “tear [plaintiff's] face off.” Plaintiff brought action for intentional infliction of emotional distress against insurance agent and rental car agent. This court reversed the trial court's judgment against insurance agent, but affirmed the judgment against rental car agent, holding that rental car agent's conduct was extreme and outrageous. A concurring and dissenting justice argued that rental car agent's conduct was not sufficiently outrageous to state a claim for emotional distress. Reamsnyder v. Jaskolski, 10 Ohio St.3d 150, 462 N.E.2d 392, 394-396, appeal after remand 1985 WL 7573 (1985).

Ohio, 1983. Subsec. (1) quot. in disc., com. (d) quot. in part in disc. A businessman brought an action for, inter alia, intentional infliction of emotional distress against a labor union whose members had allegedly made threats against the plaintiff and his family. Summary judgment for the defendant on this count was granted by the trial court and affirmed by the appeals court on

the ground that the tort was not actionable absent accompanying physical injury. The supreme court overruled previous case law and adopted the standard that liability existed if the defendant's conduct was "extreme and outrageous" and caused serious emotional distress. Accordingly, the judgment on this issue was reversed and the cause remanded. Yeager v. Local Union 20, Etc., 6 Ohio.St.3d 369, 453 N.E.2d 666, 671.

Ohio App.

Ohio App.2023. Quot. in case quot. in sup. Former public-school principal filed, among other things, a claim for intentional infliction of emotional distress against member of the board of education and its former human-resources director, alleging that plaintiff suffered severe emotional distress when defendants failed to investigate allegations made against her by parents of students she had disciplined before offering her the option to resign or be terminated. The trial court granted defendants' motion to dismiss. This court affirmed, holding that plaintiff failed to state a claim for IIED. Quoting Restatement Second of Torts § 46(1), the court explained that defendants' conduct did not rise to the requisite level of outrageousness necessary to sustain an IIED claim. Burks v. Dayton Public School Board of Education, 212 N.E.3d 1197, 1214.

OhioApp.

OhioApp.2022. Subsec. (1) quot. in case quot. in sup. Churchgoer who was involved in youth ministry at church sued church and pastor, alleging, among other things, intentional infliction of emotional distress, after pastor informed church leaders and parents of children who had interactions with plaintiff that plaintiff had an admitted history of sexually abusing male children and that pastor had spoken with unnamed professionals who indicated that plaintiff had an "incurable disease." The trial court granted defendants' motion for summary judgment. On appeal, this court affirmed, holding that defendants were not liable for intentional infliction of emotional distress, because plaintiff failed to present a genuine issue of material fact that pastor's conduct, arising out of church's internal investigation, rose to the level of extreme and outrageous conduct necessary to support such a claim under Restatement Second of Torts § 46. Tharp v. Hillcrest Baptist Church of Columbus, 204 N.E.3d 709, 730.

Ohio App.

Ohio App.2021. Com. (d) quot. in case quot. in sup. Former teacher sued board of education that formerly employed her, alleging, among other things, a claim for intentional infliction of emotional distress in connection with board's actions in investigating and firing her after multiple students accused her of making threatening statements. The trial court granted summary judgment for board on teacher's emotional-distress claim. Affirming, this court held that teacher failed to show that the board's conduct was extreme and outrageous, as required for her to be able to prevail on her claim against board for intentional infliction of emotional distress under Restatement Second of Torts §

46. The court reasoned that the board's actions taken in response to receiving credible evidence that she engaged in detrimental classroom conduct were simply actions with which she disagreed. Martcheva v. Dayton Board of Education, 179 N.E.3d 687, 705.

Ohio App.2021. Coms. (d) and (j) quot. in case quot. in sup. Mother, individually and as administrator of the estate of decedent who was fatally shot by members of a gang, sued mayor, whose grandsons were affiliated with the gang, and city police chief, alleging that mayor and chief used their public offices to obstruct the investigation of decedent's murder. The trial court denied chief's motion to dismiss mother's claims against him in his personal capacity on the basis of statutory immunity, holding that chief failed to show that mother could prove no set of facts to show that he acted with malicious purpose, in bad faith, or in a wanton or reckless manner relating to the investigation, such that an exception to immunity applied. While the court noted that chief was not immune from mother's claim for intentional infliction of emotional distress, it expressed no opinion as to whether mother could ultimately prove the elements of her claim under Restatement Second of Torts § 46. Para v. Jackson, 171 N.E.3d 452, 461.

Ohio App.2019. Com. (d) quot. in case quot. in sup. Neighbor's estate and relatives brought, among other things, claims of intentional infliction of emotional distress (IIED) against mother whose mentally-ill son murdered neighbor with defendant's firearm, alleging that defendant caused relatives extreme emotional distress when she failed to report the location of neighbor's body to authorities, initially concealed the murder weapon, and lied to authorities about the location of the weapon. The trial court granted defendant's motion for summary judgment. This court affirmed, holding that defendant's failure to report the body's location did not rise to the level of outrageous conduct necessary to sustain an IIED claim under Restatement Second of Torts § 46, Comment *d*, because she was not obligated to report the body, and her misconduct in lying to authorities, while wrongful, was not extreme or outrageous solely by the fact that it was criminal. Estate of Ciotto v. Hinkle, 145 N.E.3d 1013, 1035.

Ohio App.2018. Coms. (d) and (j) quot. in cases quot. in disc. Decedent's family members brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against funeral home services company, funeral-home operator, and their employees, alleging that company's driver damaged decedent's body by transporting it at extremely high speeds, company had a heated argument with plaintiffs regarding whether decedent's body should be embalmed, and company prevented plaintiffs from seeing decedent's body before the embalming process, and that operator and its employees rushed plaintiffs through the funerary process, left decedent's body in a highly unkempt state during the viewing ceremony, demanded that plaintiffs leave when they attempted to have a private moment with decedent, and made rude and unprofessional remarks immediately following the eulogy. The trial court granted defendants' motion for summary judgment. This court affirmed in part, holding that defendants' conduct did not rise to the high level of outrageousness required under Ohio law and Restatement Second of Torts § 46, and that plaintiffs' emotional distress was not attributable to defendants' conduct, but rather the deaths of other family members following decedent's. Clay v. Shriver Allison Courtley Co., 118 N.E.3d 1027, 1038, 1043.

Ohio App.2018. Com. (d) quot. in case quot. in disc. After a district court entered summary judgment against police officer regarding her federal sex-discrimination claims against her employer, supervisors, lieutenant, and sergeant, police officer brought an action in state court, alleging, inter alia, that defendants committed intentional infliction of emotional distress (IIED) when supervisors, lieutenant, and sergeant screamed at her in front of multiple people, grabbed a radio off her chest, cursed at her, made insensitive remarks about plaintiff's sister's death from cancer, and made sexually inappropriate remarks. The trial court granted defendants' motion for summary judgment. This court affirmed, holding that defendants' conduct did not rise to the level of extreme outrageousness required for an IIED claim. The court cited Restatement Second of Torts § 46, Comment *d*, in explaining that, although defendants' actions were disrespectful and inappropriate, plaintiff was expected to be hardened to a certain amount of rough language. Silvers v. Clay Township Police Department, 117 N.E.3d 954, 965-966.

Ohio App.2017. Subsec. (1) quot. in case quot. in sup.; com. (j) quot. in sup. Student at a training school for professional nannies and governesses brought a claim for intentional infliction of emotional distress against school and its executive director, alleging that defendants discouraged her from reporting an act of child abuse that she witnessed during a placement arranged by defendants and subsequently refused to place her with another family. The trial court entered judgment on a jury verdict in favor of plaintiff. Affirming in part, this court held that plaintiff presented sufficient evidence from which reasonable minds could find that she suffered severe and debilitating emotional distress under Restatement Second of Torts § 46, and that the question of whether the evidence proved that defendants' conduct caused plaintiff's emotional distress was for the jury to determine. Cruz v. English Nanny & Governess School Inc., 92 N.E.3d 143, 154, 155.

Ohio App.2017. Cit. and quot. in cases quot. in sup.; subsec. (1) quot. in sup. and in conc. op.; coms. (d) and (j) quot. in sup., cit. in cases quot. in sup. Homeowners filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against dozens of individuals, alleging that defendants harassed plaintiffs through phone calls, emails, and repeated car-horn honking, threatened physical harm, and defamed their reputations. The trial court granted summary judgment for defendants on plaintiffs' IIED claim. This court affirmed, holding that summary judgment was appropriate where the record demonstrated an absence of evidence specifically identifying defendants, the dates of occurrence when defendants allegedly drove by plaintiffs' house honking or making lewd gestures, and plaintiffs' damages. The court quoted Restatement Second of Torts § 46, Comments *d* and *j*, in setting forth the proposition that conduct giving rise to an IIED claim had to be extreme and outrageous. Krlich v. Clemente, 98 N.E.3d 752, 758, 759, 762.

Ohio App.2017. Subsec. (1) cit. in case quot. in sup. Emergency-room secretary filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against former employer, alleging that she was wrongfully terminated for allegedly engaging in inappropriate, threatening, and retaliatory behavior toward hospital staff members. The trial court granted defendant's motion to dismiss as to plaintiff's IIED claim. Affirming, this court held that defendant's alleged conduct related to its investigation of staff members' reports against plaintiff and its eventual termination of her employment did not rise to the level of extreme and outrageous necessary for a prima facie IIED

claim. The court cited Restatement Second of Torts § 46(1) in describing the conduct necessary for an IIED claim, explaining that the allegations of a defendant's conduct had to lead an average member of the community to exclaim, "Outrageous!" Meminger v. Ohio State University, 102 N.E.3d 642, 646.

Ohio App.2017. Coms. (d) and (j) quot. in sup. Licensed practical nurse filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against long-term residential-care facility that formerly employed her, alleging that she was terminated in retaliation for reporting an abuse by a nursing aide who raised all four rails of a resident's bed in order to confine the resident. The trial court granted defendant's motion to dismiss. This court affirmed, holding that the evidence did not create a genuine issue of material fact that defendant's conduct was sufficiently extreme and outrageous to support an IIED claim. The court relied on the standard of conduct necessary for an IIED claim as set forth in Restatement Second of Torts § 46, Comments *d* and *j*, concluding that the evidence did not establish that defendant's conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency such that it could be considered utterly intolerable in a civilized community. O'Malley-Donegan v. MetroHealth System, 89 N.E.3d 113, 123, 124.

Ohio App.2017. Cit. in case cit. in sup.; com. (d) quot. in case quot. in sup.; com. (e) cit. and quot. in disc.; com. (f) cit. in disc. Former assistant principal who was terminated by school district after complaints from a new principal about plaintiff's lack of professionalism and other conduct resulting in disciplinary charges brought, inter alia, a claim for intentional infliction of emotional distress (IIED) against district's board of education and administrative employees. The trial court granted summary judgment for defendants. This court affirmed, holding, inter alia, that plaintiff failed to plead sufficient facts to support her IIED claim. The court cited Restatement Second of Torts § 46 for the standard of proof applicable to IIED claims, noting that, under Comments *e* and *f*, actionable conduct could arise from abuse by a person in a position of authority, like defendants, but determined that, here, defendants' alleged conduct did not rise to the level of outrageousness necessary to support an IIED claim. Speller v. Toledo Public Schools Board of Education, 98 N.E.3d 1066, 1075, 1076.

Ohio App.2017. Com. (j) quot. in case quot. in sup. Children of decedent filed an action against physicians, among others, alleging that they suffered severe emotional distress by witnessing the apnea test physicians conducted on their mother to confirm that she was brain dead, which caused son to take three weeks of bereavement leave and, one year after her death, to seek one counseling session, and which worsened daughter's preexisting anxiety and depression, leading to an increased dosage of medication. The trial court granted summary judgment for defendants. This court affirmed, holding that the trial court did not err in finding that plaintiffs failed to establish a genuine issue of material fact regarding whether they suffered serious emotional distress due to defendants' conduct. The court quoted Restatement Second of Torts § 46, Comment *j*, in explaining that it was for the court to determine whether severe emotional distress could be found by a reasonable jury, and determined that expert testimony was necessary in this case to show that

defendants' actions, rather than decedent's death, were the cause of plaintiffs' harm. White v. Bhatt, 102 N.E.3d 607, 615.

Ohio App.2015. Com. (d) quot. in case quot. in sup. Car-accident victim filed a negligence claim against police officers who pursued a burglary suspect until suspect drove into the opposing traffic lane and crashed into plaintiff's car, alleging that defendants were wanton and reckless in pursuing a nonviolent suspect through residential and commercial areas. The trial court granted defendants' motion for summary judgment. This court affirmed, holding that defendants were not the proximate cause of plaintiff's injuries. The court determined that no reasonable jury could find that defendants' conduct was outrageous and extreme, as described by Restatement Second of Torts § 46, Comment *d*,which state law required for a claim to succeed against police officers involved in a pursuit. Argabrite v. Neer, 26 N.E.3d 879, 882.

Ohio App.2015. Quot. in case cit. and quot. in sup. Former mayor brought a claim for intentional infliction of emotional distress (IIED), inter alia, against city officials and others, stemming from defendants' disclosure of personal and confidential information about plaintiff regarding a closed police investigation. The trial court granted summary judgment for defendant. Citing Restatement Second of Torts § 46, Comment *d*, this court affirmed, holding that defendants' disclosure of the closed police investigation in response to a public records request did not constitute extreme or outrageous conduct sufficient to establish an IIED claim under Ohio law. Bentkowski v. Trafis, 56 N.E.3d 230, 242.

Ohio App.2015. Com. (d) quot. in sup. (general cite). Property owners brought a claim for intentional infliction of emotional distress against neighbors, alleging that defendants made over 100 false complaints about them to various governmental entities in order to harass them, made knowingly false statements about plaintiffs to others, videotaped and photographed plaintiffs in their fenced backyard, and intentionally interfered with plaintiffs' use of their property and residence. The trial court granted defendants' motion for judgment on the pleadings. This court reversed and remanded, holding that plaintiffs' allegations were sufficient to satisfy the threshold requirement of extreme and outrageous conduct required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. Mangelluzzi v. Morley, 40 N.E.3d 588, 600.

Ohio App.2015. Com. (d) quot. in cases quot. in sup. Former mayor of village filed a claim for intentional infliction of emotional distress (IIED) against village, village council, and others, alleging that defendants conspired and attempted to force her to resign from her position immediately upon taking office. The trial court granted defendants' motion for a directed verdict on plaintiff's IIED claim. This court affirmed, holding that, although plaintiff presented evidence that defendants were consistently inconsiderate, unkind, rude, and unprofessional toward her, defendants' actions were not, as a matter of law, sufficiently extreme and outrageous to support a claim for IIED under Restatement Second of Torts § 46. Mender v. Chauncey, 41 N.E.3d 1289, 1299.

Ohio App.2015. Com. (d) quot. in case cit. in ftn. Township fire chief who resigned after a report was issued that implicated her in the fire department's noncompliance with Ohio law filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against township and township's trustees, alleging that defendants caused her emotional distress by releasing the report to the public and violating the confidentiality provision of the parties' agreement, which had been provided in exchange for plaintiff's resignation. The trial court granted defendants' motion for summary judgment. This court affirmed, holding that the trial court did not err in finding that plaintiff's IIED claim was derivative of her separate breach-of-contract claim. The court noted that the trial court did not find that defendants' conduct was sufficiently "extreme and outrageous" to meet the standard of Restatement Second of Torts § 46, Comment *d*, but it declined to address that finding because it affirmed the dismissal on other grounds. Teodecki v. Litchfield Twp., 38 N.E.3d 355, 364.

Ohio App.2014. Com. (d) quot. in case quot. in sup. Former at-will employee who was fired because his employer believed he had deceptively attempted to obtain workers' compensation benefits for a non-work related injury brought, inter alia, an action for intentional infliction of emotional distress (IIED) against employer. The trial court granted summary judgment for defendant. Affirming that portion of the judgment, this court held that no reasonable factfinder could find that defendant's conduct rose to the level of outrageousness sufficient to support an IIED claim under Restatement Second of Torts § 46, Comment *d*. The court explained that, under the circumstances, defendant's actions in terminating an at-will employee did not go beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community. Onderko v. Sierra Lobo, Inc., 20 N.E.3d 322, 332.

Ohio App.2009. Com. (d) quot. in case quot. in sup. Current and former tenants sued owners of apartment building for, inter alia, intentional infliction of emotional distress based on defendants' alleged failure to maintain the property in habitable condition, which allowed for the accumulation of moisture and hazardous mold in their apartments. The trial court granted summary judgment for defendants. Affirming, this court held that plaintiffs were unable to present any evidence that they had suffered severe emotional distress, and thus had a complete failure of proof concerning an essential element of their case; there was no evidence that any plaintiffs ever sought treatment for their emotional distress, and none of them reported having been diagnosed with any mental or psychological condition at any point during or after their tenancy at the apartment building. Finley v. First Realty Property Mgt., Ltd., 185 Ohio App.3d 366, 382-383, 2009-Ohio-6797, 924 N.E.2d 378, 391.

Ohio App.2005. Com. (d) quot. in case quot. in disc. Former employee brought, inter alia, claim for intentional infliction of emotional distress against employer, its owners, and owners' business associate, alleging that associate exposed his penis to her and to others on employer's premises and used a banana to simulate a penis. The trial court granted summary judgment for employer and owners, and denied summary judgment for associate on the emotional-distress claim. This court reversed in part and remanded as to employer and owners, holding, inter alia, that, although it was unclear whether plaintiff, who suffered visual impairments, saw plaintiff's penis or merely a

banana, exposure of a penis or simulated penis in a work environment for the purpose of retaliation rose to the level of extreme and outrageous conduct as a matter of law, as did an employer's sanctioning of such conduct. Radcliff v. Steen Elec., Inc., 164 Ohio App.3d 161, 2005-Ohio-5503, 841 N.E.2d 794, 803.

Ohio App.2003. Com. (d) adopted in case quot. in disc. and quot. generally in case quot. in sup. Hospital employee sued hospital for intentional infliction of emotional distress and harassment in violation of public policy. Affirming the trial court's grant of summary judgment for defendant, this court held, inter alia, that behavior of defendant's personnel in telling plaintiff, a migraine sufferer, that she was missing a lot of work, repeatedly asking her how she was feeling, and sending her to a rehabilitation center for treatment did not constitute the extreme and outrageous conduct required to state a claim for intentional infliction of emotional distress. Scarabino v. E. Liverpool City Hosp., 155 Ohio App.3d 576, 579, 580, 802 N.E.2d 188, 190, 191.

Ohio App.2002. Com. (d) quot. in case quot. in disc. After a dock leveler collapsed and fell on employee's head, employer fired employee when he did not return to work at the end of 12 weeks of medical leave. Employee and his wife sued employer for intentional infliction of emotional distress, inter alia. Trial court granted employer summary judgment. This court reversed in part, holding, inter alia, that fact issues existed as to whether the number of phone calls made by employer's controller to plaintiffs and the substance of those calls constituted outrageous conduct. Plaintiffs alleged that employee got very upset and agitated over controller's numerous phone calls and his lack of understanding in repeatedly asking employee to return to work. Rigby v. Fallsway Equip. Co., Inc., 150 Ohio App.3d 155, 166, 779 N.E.2d 1056, 1064-1065.

Ohio App.2002. Subsec. (g) cit. in sup. (Erron. cit. as § 46.9(g).) Employee of state department of transportation brought suit for, in part, intentional infliction of emotional distress against department, alleging that his supervisor swore at him on a regular basis, called him derisive names, and directed sexually suggestive gestures toward him. Affirming the trial court's entry of judgment for defendant, this court held, inter alia, that, in determining whether supervisor's conduct was extreme and outrageous, the trial court properly considered the context in which supervisor's conduct occurred and plaintiff's own part in contributing to, if not creating, the crude, abusive environment about which he now complained. Strausbaugh v. Ohio Dept. of Transp., 150 Ohio App.3d 438, 445, 446, 782 N.E.2d 92, 97, 98.

Ohio App.2001. Com. (d) quot. generally in case quot. in disc. Former client sued attorneys for legal malpractice and intentional infliction of emotional distress, arising from defendants' failure in plaintiff's underlying wrongful-discharge suit to file a proof of claim during bankruptcy proceedings of plaintiff's former employer. The trial court dismissed plaintiff's emotional-distress claim. Affirming, this court held that there was no evidence that defendants intended to cause plaintiff emotional distress, or knew or should have known that their conduct in, among other things, failing to consult a bankruptcy attorney and ignoring plaintiff's inquiries into the progress of his case would result in serious emotional distress. Furthermore, their behavior did not

constitute the extreme and outrageous conduct necessary to support plaintiff's claim. Cunningham v. Hildebrand, 142 Ohio App.3d 218, 229, 755 N.E.2d 384, 392.

Ohio App.2001. Coms. (d) and (j) quot. in sup. Parents sued memorial company for, in part, intentional infliction of emotional distress, after a photograph of their son's headstone appeared in defendant's sales brochure. Affirming the trial court's grant of summary judgment for defendant, this court held, inter alia, that plaintiffs' claim for intentional infliction of emotional distress failed because plaintiffs did not present any specific facts showing that defendant intended to cause them emotional distress or knew or should have known that the actions taken would result in serious emotional distress to them. Walkosky v. Valley Memorials, 146 Ohio App.3d 149, 152, 765 N.E.2d 429, 432.

Ohio App.2000. Com. (l) quot. in case quot. in disc. Former husband sued former wife and her paramour for intentional infliction of emotional distress after discovering that paramour was father of child born during marriage. Trial court held defendants jointly and severally liable, and awarded plaintiff compensatory and punitive damages. Reversing, this court held, inter alia, that defendants' behavior did not rise to the level of "extreme and outrageous" conduct necessary to sustain finding of intentional infliction of emotional distress. Bailey v. Searles-Bailey, 140 Ohio App.3d 174, 181, 746 N.E.2d 1159, 1164.

Ohio App.2000. Com. (d) quot. in case quot. in disc. Blood donor who had been notified by Red Cross that he had tested positive for syphilis sued Red Cross for, in part, intentional infliction of emotional distress after subsequent test results were negative. Affirming the trial court's grant of summary judgment for defendant, this court held, inter alia, that defendant's communication to plaintiff of the test results did not rise to the level of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress, since defendant was simply following the regulations, dictated by the FDA, that required positive test results to be reported to the donor. Fisher v. Am. Red Cross Blood Serv., 139 Ohio App.3d 658, 662, 745 N.E.2d 462, 464.

Ohio App.2000. Com. (d) quot. in case quot. in disc. Due to a clerical error, county children services board falsely identified a white male as the father of an illegitimate African-American child, and threatened him to pay child support. He sued the board and a caseworker for, in part, intentional or reckless infliction of emotional distress. Trial court granted caseworker summary judgment, holding that he was protected by political subdivision employee tort immunity. This court reversed and remanded, holding that fact issues existed as to whether caseworker engaged in reckless conduct that could eliminate immunity by making official allegations of moral turpitude and potential criminal conduct against a citizen without any attempt to verify that the accused was the proper party. Irving v. Austin, 138 Ohio App.3d 552, 741 N.E.2d 931, 934.

Ohio App.1999. Coms. (d)-(f) quot. in cases quot. in sup. Former firefighter sued fire chief and department captain for intentional infliction of emotional distress. The trial court denied defendants' motions for summary judgment. Affirming, this court held that material factual issues existed as to whether the complained-of conduct, which included suggesting to co-workers that

plaintiff was a danger to others and arresting him for setting a recreational fire, supported recovery under a theory of intentional infliction of emotional distress. Garrison v. Bobbitt, 134 Ohio App.3d 373, 731 N.E.2d 216, 220, 223.

Ohio App.1999. Coms. (d) and (j) quot. in case quot. in disc. Elementary school teacher sued school board for discrimination based on age and disability. Plaintiff also asserted a claim for intentional infliction of emotional distress. The trial court entered summary judgment for defendant. Affirming in part, reversing in part, and remanding, this court held, inter alia, that material factual issues existed as to whether defendant made reasonable accommodations for plaintiff's bad back; however, allegations that plaintiff was ridiculed by supervisors and assigned difficult students did not rise to the level of outrageousness necessary to support an action for intentional infliction of emotional distress. McCafferty v. Cleveland Bd. of Edn., 133 Ohio App.3d 692, 729 N.E.2d 797, 808.

Ohio App.1999. Subsec. (1) cit. in sup. and cit. in ftn., com. (d) quot. in sup. and cit. in ftn., com. (j) quot. in sup. Restaurant patron sued owner for, inter alia, intentional infliction of emotional distress in connection with the crass and vulgar comments that defendant allegedly made to her. The trial court entered judgment on a jury verdict awarding plaintiff compensatory and punitive damages. Affirming, this court held, in part, that the evidence supported the jury's conclusion that defendant's conduct was extreme and outrageous and caused plaintiff to suffer severe emotional distress, or that, even if defendant's conduct was less than outrageous, he owed plaintiff a heightened duty of care by virtue of the proprietor-customer relationship. Meyers v. Hot Bagels Factory, Inc., 131 Ohio App.3d 82, 721 N.E.2d 1068, 1075, 1076.

Ohio App.1999. Com. (d) quot. in case quot. in appendix. City police officer sued city and police captain for, in part, intentional infliction of emotional distress, alleging that defendants' improper disclosure of confidential information, including accusations of sexual assault, contained in his background investigation file proximately caused him to suffer mental anguish. Affirming the trial court's grant of summary judgment for defendants on plaintiff's claim of intentional infliction of emotional distress, this court held, inter alia, that plaintiff failed to prove that defendants' conduct was extreme and outrageous, since he was unable to present clear evidence that city authorized disclosure of his background information, and since police captain's disclosure did not mention plaintiff's name. Patrolman “X” v. Toledo, 132 Ohio App.3d 374, 725 N.E.2d 291, 310-311.

Ohio App.1998. Coms. (d) and (j) cit. in headnotes and quot. in part in sup. After nurse whose silicone breast implants had been removed by plastic surgeon for whom she worked initiated litigation against breast-implant manufacturer, surgeon reassigned nurse's job duties to restrict her contact with his breast-implant patients. Nurse quit her job and subsequently sued surgeon for, in part, intentional infliction of emotional distress. Affirming the trial court's grant of summary judgment for surgeon, this court held, inter alia, that the reassignment of duties was based on justifiable business concerns and did not give rise to claim for intentional infliction of emotional distress. Takach v. Am. Med. Technology, Inc., 128 Ohio App.3d 457, 459, 471, 715 N.E.2d 577, 578, 586.

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Ohio App.1997. Com. (d) quot. in case quot. in disc. Discharged employee sued former employer for, inter alia, intentional infliction of emotional distress, alleging that employee's supervisor, knowing of employee's mental disorder, subjected him to coarse, angry language and threatening behavior. Defendant moved for summary judgment. Affirming in part, reversing in part, and remanding, this court held, among other things, that defendant's conduct was not so extreme and outrageous as to give rise to a cause of action for intentional infliction of emotional distress. Thatcher v. Goodwill Industries of Akron, 117 Ohio App.3d 525, 690 N.E.2d 1320, 1331.

Ohio App.1997. Cit. in headnote, subsec. (1) cit. in headnote and quot. in case quot. in disc., coms. (d) and (j) quot. in case quot. in disc. The buyer of a home sued the seller for specific performance of the contract to sell the house, and the seller brought a third-party claim against the real estate broker for intentional infliction of emotional distress arising out of an altercation between the broker and the seller's teenage son. The trial court granted summary judgment to the buyer and entered judgment for the seller on her emotional-distress claim. This court affirmed, holding that the trial court properly found that the broker's conduct was extreme and outrageous where, knowing that the seller was divorced, that she was having trouble with her ex-husband and son, and that she was being treated by a psychiatrist, the broker nevertheless initiated a violent argument with the son, placing the seller under such duress that she felt that the only way to save her household and her son and rid herself of the broker was to sign the contract for the sale of her home. Wilkins v. Ondrovich, 118 Ohio App.3d 93, 691 N.E.2d 1122, 1122, 1125.

Ohio App.1996. Cit. in headnote, com. (d) cit. in case cit. in disc. Graduate of nanny and governess school who was not considered for certain child-care positions sued school and placement agency for, inter alia, handicap-based discrimination and intentional infliction of emotional distress, alleging that, because she had a cerebral palsy-induced speech impediment, defendants refused to recommend her to families whose children were just beginning to develop language skills. The trial court entered summary judgment for defendants. Affirming in part and reversing in part, this court held, among other things, that material factual issues existed as to whether defendants engaged in discrimination on the basis of handicap, but that defendants' conduct was not so extreme and outrageous as to give rise to a claim for intentional infliction of emotional distress. Bryans v. English Nanny & Gov. School, 117 Ohio App.3d 303, 690 N.E.2d 582, 584, 592.

Ohio App.1996. Cit. in headnote, coms. (d) and (j) quot. in case quot. in sup., quot. in case quot. in diss. op., subsecs. (1) and (2) cit. in case quot. in diss. op. Employee who submitted to her employer's request for a second-opinion examination in order to receive disability benefits sued employer for intentional infliction of emotional distress. Plaintiff, who agreed to the exam against the advice of her treating physician, underwent a recurrence of her condition, which, in turn, caused her to undergo further surgery. The trial court entered summary judgment for defendant. Reversing and remanding, this court held that material factual issues existed as to whether defendant's actions were such as to support recovery under a theory of intentional infliction of emotional distress. Dissent believed that defendant did not act intentionally; that, because defendant's conduct was privileged under the circumstances, it could not be considered so extreme and outrageous as to

go beyond all bounds of decency; and that there was no evidence that plaintiff's mental distress was so severe as to give rise to an action for intentional infliction of emotional distress. Kovacs v. Bauer, 118 Ohio App.3d 591, 693 N.E.2d 1091, 1091, 1093, 1099, 1100, appeal dismissed 80 Ohio St.3d 1224, 687 N.E.2d 779 (1998). See above case.

Ohio App.1996. Com. (d) quot. in case quot. in disc. Employee sued his employer and supervisors for intentional infliction of emotional distress, among other claims. Plaintiff cited various incidents, including receipt of blow-up dolls, cartoons, and an item labeled a "penis warmer." He also alleged that the supervisors had restrained him on one occasion and proceeded to tickle and poke him in the stomach and chest areas. Trial court granted defendants summary judgment. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that plaintiff failed to set forth sufficient evidence that defendants' actions were outrageous and extreme. Retterer v. Whirlpool Corp., 111 Ohio App.3d 847, 677 N.E.2d 417, 422, appeal after remand 1999 WL 254412 (Ohio App.1999).

Ohio App.1996. Com. (d) cit. generally in headnote and quot. in case quot. in disc. Family members of a deceased airplane-crash victim sued the victim's wife, alleging wrongful disinterment, trespass, and intentional infliction of emotional distress. Trial court granted defendant summary judgment. This court affirmed, holding, inter alia, that the act of disinterment was not an outrageous and extreme act, because the wife had statutory authority to enter the gravesite and disinter her husband's remains. Scott v. Spearman, 115 Ohio App.3d 52, 684 N.E.2d 708, 712.

Ohio App.1995. Quot. in case quot. in disc. Individual sued vice president of local branch of national civil rights organization for defamation and intentional infliction of emotional distress, alleging that vice president attributed to plaintiff statements in which plaintiff purportedly expressed his ability to influence the sale of two radio stations. The trial court granted defendant's motion for summary judgment. Affirming, this court held that the alleged statements were subject to a qualified privilege, and that defendant's actions did not constitute outrageous behavior causing plaintiff severe mental distress. Burkes v. Stidham, 107 Ohio App.3d 363, 668 N.E.2d 982, 989-990.

Ohio App.1995. Subsec. (1) quot. in disc. A white former housing case supervisor sued the state's regional planning commission for firing him in violation of the state whistleblower statute, intentional infliction of emotional distress, reverse race discrimination, and fraud. Plaintiff alleged that defendant pursued a course of extreme and outrageous behavior by giving plaintiff a poor performance evaluation and offering to demote him because he had notified homeowners when contractors failed to properly perform work on their homes even though, in reality, plaintiff's performance as a supervisor was satisfactory. Trial court granted defendant summary judgment. This court affirmed, holding, inter alia, that defendant was not liable for intentional infliction of emotional distress, because the record did not support plaintiff's contentions. Plaintiff was at-will employee serving a six-month probationary period who received an unsatisfactory evaluation for the first three months and, at the end of the six-month probationary period, was offered a job

commensurate with his abilities. Bushman v. Mid-Ohio Reg. Planning Comm., 107 Ohio App.3d 654, 669 N.E.2d 305, 309.

Ohio App.1995. Com. (d) quot. in case quot. in disc. An applicant who was denied admission to law school because he had been charged with impersonating a police officer sued the township, the police department, and the arresting officers for intentional and negligent infliction of emotional distress, defamation, malicious prosecution, and invasion of privacy. Plaintiff had used a badge, handcuffs, and hunting gun to arrest individuals who were stealing his tree stand. Trial court granted defendants summary judgment. This court affirmed in part and reversed in part, holding, inter alia, that plaintiff failed to prove intentional infliction of emotional distress because the officers' arrest of plaintiff, which was supported by probable cause, was not extreme and outrageous. It stated that arrests of suspected criminals were necessary in keeping the community civilized. Piro v. Franklin Twp., 102 Ohio App.3d 130, 656 N.E.2d 1035, 1043.

Ohio App.1995. Coms. (d) and (j) quot. in case quot. in disc. A bank customer whose picture was published in a newspaper and broadcast on a local television station along with information that he was a suspect in a bank robbery sued the bank, bank employees, the bank security guard, and the guard's employer alleging, among other claims, intentional infliction of emotional distress. Trial court granted defendants summary judgment. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that plaintiff failed to state a cause of action for intentional infliction of emotional distress, because the bank's failure to carefully review its records before it provided the FBI with information did not rise to the level of outrageous conduct, without some showing of intent to misidentify plaintiff as the robber. Wigfall v. Soc. Natl. Bank, 107 Ohio App.3d 667, 669 N.E.2d 313, 318.

Ohio App.1994. Subsecs. (1) and (2) and coms. cit. in sup., com. (j) cit. in headnote and quot. in sup., coms. (d) and (j) quot. in cases quot. in sup. Union members who allegedly were intimidated and threatened by union officials and other union members because they crossed the picket line and worked during a strike sued unions for intentional infliction of emotional distress. The trial court entered judgment on a jury verdict awarding plaintiffs damages. Reversing, this court held, inter alia, that the verbal exchanges between plaintiffs and union officials amounted to nothing more than the type of robust language commonly found in any bitter strike activities and did not constitute the extreme and outrageous conduct required to support plaintiffs' claim; furthermore, even if the comments caused plaintiffs to suffer emotional distress, defendants were not liable, since the claimed injuries were not severe and debilitating or those with which a reasonable person, normally constituted, would be unable to cope adequately. Dickerson v. Internatl. United Auto Wkrs. Un., 98 Ohio App.3d 171, 172, 178, 183, 648 N.E.2d 40, 41, 45, 48.

Ohio App.1994. Subsec. (1) cit. in headnote and cit. in case quot. in sup. Patient sued hospital for intentional infliction of emotional distress, inter alia. Affirming in part the trial court's grant of summary judgment for hospital, this court held that hospital's provision of a lifesaving blood transfusion to patient contrary to her written instructions that no blood be administered during her

hospitalization was not extreme and outrageous conduct and thus did not support patient's claim. Perkins v. Lavin, 98 Ohio App.3d 378, 383, 648 N.E.2d 839, 839, 842.

Ohio App.1994. Com. (d) cit. in case quot. but dist. Hotel guest with AIDS and bleeding ulcer sued hotel owner for intentional infliction of emotional distress, among other claims, after defendant denied him access to his room because he had AIDS. The trial court dismissed for failure to prove actual damage. Reversing and remanding, this court held, inter alia, that while plaintiff's emotional damages did not rise to extreme level, they fell within category of cases that recognized recovery for lesser emotional damages based on relationship between plaintiff and defendant. Phillips v. Mufleh, 95 Ohio App.3d 289, 295, 642 N.E.2d 411, 415.

Ohio App.1994. Subsec. (1) cit. in case quot. in sup., coms. (d) and (g) quot. in case quot. in sup. Employee who was discharged after she consulted an attorney about an employment dispute sued her former employer for wrongful discharge and intentional infliction of emotional distress, inter alia. Affirming in part the trial court's grant of summary judgment for defendant, this court held, in part, that neither the conduct of plaintiff's co-workers leading to a food-throwing incident nor the manner in which plaintiff was fired by defendant rose to the level of extreme and outrageous behavior necessary to support plaintiff's claim for intentional infliction of emotional distress. Simonelli v. Anderson Concrete Co., 99 Ohio App.3d 254, 260, 261, 650 N.E.2d 488, 492, 493.

Ohio App.1994. Subsec. (1) quot. in case quot. in sup., com. (d) quot. in case quot. in sup. After a construction coordinator for a floral exposition was arrested for gross sexual imposition, rape, and kidnapping, he sued the project's construction management firm and its employees for, among other claims, intentional infliction of emotional distress due to the firm's employees' statements to the exposition organizer that plaintiff would not be able to function on the project after the arrest. Trial court granted defendants summary judgment. This court affirmed, holding, inter alia, that plaintiff failed to state an emotional-distress cause of action, because defendants' conduct was not extreme and outrageous, the employees' statements were qualifiedly privileged, and plaintiff did not suffer severe emotional distress. Smith v. Ameriflora 1992, Inc., 96 Ohio App.3d 179, 644 N.E.2d 1038, 1044-1045.

Ohio App.1994. Cit. in disc., coms. (d) and (j) cit. generally in headnote and quot. in case quot. in sup., com. (i) quot. in sup., coms. cit. generally in disc. Former employee sued state auditor for intentional infliction of emotional distress, claiming that she suffered severe emotional distress as a result of an involuntary sexual relationship with defendant, which was exacerbated by her forced participation in improper fundraising activities. Reversing the trial court's grant of summary judgment for defendant and remanding, this court held, inter alia, that genuine issues of material fact existed as to whether defendant's conduct was extreme and outrageous and whether defendant intended to cause emotional distress or knew or should have known that his conduct would result in serious emotional distress to plaintiff. Tschantz v. Ferguson, 97 Ohio App.3d 693, 694, 700, 702, 713, 647 N.E.2d 507, 508, 512, 513, 520.

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Ohio App.1993. Com. (g) cit. in sup. Supervisor whose employment was terminated sued employee and union steward, among others, for intentional infliction of emotional distress, inter alia, after employee filed a grievance concerning a dispute that occurred when supervisor attempted to give employee a written warning for refusing work. Affirming the trial court's granting of summary judgment for defendants, this court held that defendants' statements made during or in connection with the grievance process were subject to the defense of absolute privilege, thus barring plaintiff's claim. Stiles v. Chrysler Motors Corp., 89 Ohio App.3d 256, 624 N.E.2d 238, 244.

Ohio App.1992. Com. (j) quot. in part in sup. A waste oil collector sued a competitor and its customer for defamation, tortious interference with business relations, unfair trade practices, and negligent and intentional infliction of emotional distress after it learned that defendants were distributing copies of unfounded criminal complaints against plaintiff. Judgment for plaintiff was vacated in part and affirmed in part by this court, which held, inter alia, that evidence of anxiety on the part of plaintiff's owner, which was not so serious and persistent as to be intolerable, fell far short of that required to warrant judicial relief for infliction of emotional distress. Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc., 81 Ohio App.3d 591, 605, 611 N.E.2d 955, 965.

Ohio App.1992. Coms. (d) and (j) quot. in sup. A husband who entered into a negotiated marriage and was later ejected from the marital home sued the man who arranged the marriage, alleging fraud and intentional infliction of emotional distress. Affirming a dismissal of the complaint, this court held as a matter of public policy that the complaint could not be maintained, as it argued, in effect, that the woman was defective and thus impermissibly treated females as goods. Furthermore, said the court, even if the claims were actionable, the husband's claim for fraud was not stated with sufficient particularity to survive a motion to dismiss, and he failed to allege any conduct on defendant's part so extreme or outrageous as to support an action for emotional distress. Singh v. Singh, 81 Ohio App.3d 376, 382, 383, 611 N.E.2d 347, 351.

Ohio App.1991. Com. (d) quot. in disc. Father brought action seeking damages from his children's maternal grandparents, alleging, inter alia, that they inflicted on him mental distress by taking the children away in order to help their daughter violate a visitation order. The trial court directed a verdict for the grandparents. Reversing, this court held that the evidence could support a finding that the grandparents helped their daughter to violate the visitation order. It also found that although not every wrongful act was outrageous, reasonable minds could come to differing conclusions regarding whether the grandparents' actions constituted extreme and outrageous conduct that did gross violence to the norms of a civilized society. Brown v. Denny, 72 Ohio App.3d 417, 594 N.E.2d 1008, 1012.

Ohio App.1991. Subsec. (1) quot. and adopted in case quot. in sup., com. (d) quot. in case quot. in sup., com. (i) quot. in sup. Former employee sued former employer, benefits plan, and plan administrator alleging, inter alia, intentional infliction of emotional distress after employer cancelled plaintiff's medical insurance on the day of her scheduled surgery for colon and rectal cancer. The trial court granted summary judgment for defendants. Reversing in part, this court

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held that where employer, knowing of plaintiff's scheduled surgery, cancelled plaintiff's insurance effective the date of her surgery and had a union representative telephone plaintiff with the news as she was preparing to leave for the hospital, a question of fact was presented as to whether this conduct was so extreme and outrageous, and manifested the requisite intent, as to support a claim for intentional infliction of emotional distress. Clifton v. Van Dresser Corp., 73 Ohio App.3d 202, 208, 209, 596 N.E.2d 1075, 1078, 1079.

Ohio App.1991. Com. (d) cit. and quot. in case quot. in disc., com. (j) cit. in case quot. in disc. Family members sued a funeral home, alleging negligent and intentional infliction of emotional distress, after learning that their decedent's unembalmed body was not in the casket during calling hours. The trial court granted defendant's motion for summary judgment. Affirming, this court held, inter alia, that plaintiffs' claim for intentional infliction of emotional distress failed because defendant's conduct did not rise to that extreme level of outrageousness from which severe emotional distress would likely result. The court stated that defendant was simply taking those steps necessary to comply with the family's instructions not to embalm the body and that, while plaintiffs may have had reason to be upset, the law could not protect against and redress in damages all mental anguish a person may suffer. Davis v. Billow Co. Falls Chapel, 81 Ohio App.3d 203, 610 N.E.2d 1024, 1026.

Ohio App.1991. Com. (g) quot. in cases cit. in sup. Nursing assistant who was discharged for violating hospital's sexual harassment policy sued hospital for intentional infliction of emotional distress, inter alia. Affirming in part the trial court's granting of summary judgment for defendant, this court held that defendant's conduct, e.g., putting plaintiff on decisionmaking suspension, conducting an investigation, and advising him of his discharge, was not so extreme and outrageous as to go beyond all possible bounds of decency and that defendant's publication of defamatory statements that allegedly caused plaintiff emotional distress was protected by a qualified privilege. The court also held that, to the extent that defendant's conduct in discharging plaintiff and publishing the reason for the discharge was not merely an exercise of defendant's legal rights, that conduct was not so extreme and outrageous as to support plaintiff's claim. Hanly v. Riverside Methodist Hosp., 78 Ohio App.3d 73, 603 N.E.2d 1126, 1132.

Ohio App.1991. Com. (g) quot. in cases cit. in disc. Furloughed railroad employee brought an action for intentional infliction of emotional distress, inter alia, against the railroad, alleging that defendant's failure to recall plaintiff to a laborer position or submit the question of his fitness to a board of doctors was motivated by his handicap. The trial court dismissed the claim for lack of subject matter jurisdiction. Affirming, this court held that plaintiff's claim was preempted by the federal Railway Labor Act, since the basis for the claim, defendant's alleged delay in determining whether plaintiff could perform the functions of the position, depended on the terms of the collective bargaining agreement. Hatlestad v. Consolidated Rail Corp., 75 Ohio App.3d 184, 598 N.E.2d 1302, 1306.

Ohio App.1990. Coms. (d) and (j) quot. in case quot. in sup. A private duty nurse sued a hospital for, inter alia, intentional or negligent infliction of emotional distress in connection with her

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detention by hospital security guards for suspected shoplifting from the hospital gift shop. The trial court granted summary judgment in favor of the hospital. Affirming, this court held that the plaintiff had shown no extreme and outrageous conduct by the defendant. It noted that the plaintiff's complaint that a security guard used names such as "sweetheart" to address her hardly amounted to outrageous treatment and that the plaintiff's deposition testimony stated that she was neither mistreated nor physically threatened. Moreover, the court stated that the guards' actions were not negligent, since they had probable cause to detain the plaintiff. Ashcroft v. Mt. Sinai Medical Ctr., 68 Ohio App.3d 359, 588 N.E.2d 280, 282, 284.

Ohio App.1990. Subsec. (1) quot. in disc., com. (e) cit. in disc., coms. (d) and (f) quot. in sup. A former employee sued his former employer and supervisor for intentional infliction of emotional distress, inter alia, alleging that, following a work-related accident involving his exposure to a toxic chemical, he was threatened with discipline if he did not return to work even though he was still ill and experiencing anxiety in the accident's aftermath, that he was told to take his medicine in private and not to discuss the accident, that he was told to see company doctors rather than private doctors, and that he was constantly being pressured and told that he was not doing a good job. The trial court granted the defendants summary judgment, and this court affirmed, holding that, assuming the truth of the plaintiff's allegations, it was apparent that the defendants were exercising their legitimate right to criticize and correct their employee's work, and that the conduct alleged was not atrocious, utterly intolerable, or outrageous. Boggs v. Avon Products, Inc., 56 Ohio App.3d 67, 564 N.E.2d 1128, 1134.

Ohio App.1990. Subsec. (1) quot. in case cit. in sup., com. (d) quot. in sup. At-will employee who was discharged from his job as a cost estimator for a construction company sued the company, claiming, inter alia, that his termination constituted intentional infliction of emotional distress. Affirming the trial court's granting of summary judgment for defendant, this court held that defendant's unfulfilled promises did not constitute extreme or outrageous conduct or exceed the community's bounds of decency. The court stated that plaintiff's only basis for suit was his alleged reliance on promises made by defendant, which was insufficient for a cause of action; also, plaintiff's claim that he "suffered great loss" did not meet Ohio's definition of severe emotional distress. Colina v. McGraw Construction Co., Inc., 69 Ohio App.3d 422, 590 N.E.2d 1308, 1310.

Ohio App.1990. Com. (d) quot. generally in disc. A criminal defendant and his wife sued the complainant's attorney for invasion of privacy and intentional infliction of emotional distress, inter alia, after the attorney telephoned the plaintiff's home and called the criminal defendant a "son of a bitch." The trial court granted the attorney's motion for summary judgment. Affirming, this court held, in part, that plaintiff failed to state a cause of action for intentional infliction of emotional distress because the attorney's use of foul language did not "go beyond all possible bounds of decency" and, as a matter of law, would not be considered outrageous by an average member of the community. Haller v. Phillips, 69 Ohio App.3d 574, 591 N.E.2d 305, 307.

Ohio App.1990. Subsec. (1) quot. in sup., coms. (d)-(g) quot. in sup. Discharged employee sued his former employer for intentional infliction of emotional distress, inter alia, alleging that defendant's

conduct exacerbated plaintiff's preexisting mental illness. Affirming the trial court's granting of summary judgment for defendant, this court held that plaintiff's allegations that his supervisor told him that "You are going to present me with a problem" and admonished him to stay on long-term disability because no work was available did not as a matter of law establish the extreme and outrageous conduct necessary for a prima facie case of intentional infliction of emotional distress. The court also stated that defendant's conduct in discharging plaintiff, an at-will employee, was privileged and that the record did not demonstrate any genuine issue of fact as to whether defendant's conduct was in excess of the privilege. Mason v. United States Fid. & Guar. Co., 69 Ohio App.3d 309, 590 N.E.2d 799, 804.

Ohio App.1990. Subsec. (1) and com. (d) quot. in case quot. in sup. A supervisor sued his employer for, inter alia, intentional or negligent infliction of emotional distress after he was fired for allegedly instructing employees to wrongfully charge overtime. The trial court granted the employer's motion for summary judgment. Reversing and remanding on other claims, this court overruled the plaintiff's assignment of error on the summary judgment for emotional distress, holding, inter alia, that the plaintiff failed to allege emotional distress of a nature sufficient to state a cause of action when the sole basis of his claim was the fact that he was "plenty upset" at being discharged. It stated that, where the plaintiff never saw a doctor concerning any emotional difficulties due to his discharge and testified that "I don't think it [the discharge] affected my health in any way at all," summary judgment for the defendant was proper. Sheets v. Rockwell Internatl. Corp., 68 Ohio App.3d 345, 588 N.E.2d 271, 276-277.

Ohio App.1988. Subsec. (1) quot. in ftn. After a store's theft alarm was activated by a sensormatic tag that store personnel failed to remove from one of the items a shopper had purchased, the store's personnel detained the shopper until the tag was located. The shopper sued the store for, inter alia, intentional infliction of emotional distress. The trial court granted the defendant's motion for summary judgment on statute of limitations grounds. Affirming in part, reversing in part, and remanding, this court held, inter alia, that the plaintiff's claim for intentional infliction of emotional distress was fairly stated and was timely filed. Bowling v. Brendamour's, Inc., 40 Ohio App.3d 37, 530 N.E.2d 1338, 1339.

Ohio App.1988. Cit. in disc. A painter fell and severely injured his neck while painting the roof of a farmer's barn. The painter sued the farmer for failure to provide a safe place of employment and the farmer's liability insurers for breach of their duty of good faith in failing to settle the case. The trial court granted the defendants' motions for summary judgment. On appeal, the plaintiff asserted in its assignment of trial court error that the insurers wrongly claimed that the plaintiff was barred from suing them directly on a third-party beneficiary theory of liability, when, in fact, the insurers were being sued, instead, for their independent torts of bad faith and outrage. Affirming, this court held that the defendant farmer owed the plaintiff no duty of care that the farmer failed to perform; since as a matter of law the farmer was not liable to the plaintiff, the plaintiff's assignment of error was without merit. McDonald v. Fruth, 51 Ohio App.3d 121, 554 N.E.2d 1354, 1356.

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Ohio App.1988. Subsec. (1) and coms. (d), (e), and (g) quot. in disc. An employee sued his former employer and supervisor for damages on a theory of intentional infliction of emotional distress, inter alia, after his supervisor allegedly grabbed his wrist and used other employees to block him in his office while discharging him and denied the plaintiff's request to see personnel staff. The trial court granted the defendants' motion for summary judgment. Affirming in part and reversing and remanding in part, this court held that the trial court improvidently granted summary judgment for the defendants, since issues of fact remained as to whether the defendants' conduct in discharging the plaintiff was extreme and outrageous and caused him to suffer serious emotional distress. Rejecting the defendants' argument that their conduct was privileged, the court held that there were fact issues as to whether the defendants, in discharging the plaintiff, had done no more than insist on their legal rights; even if the defendants' conduct was privileged, questions remained as to whether the conduct was in excess of privilege. Uebelacker v. Cincom Systems, Inc., 48 Ohio App.3d 268, 549 N.E.2d 1210, 1219-1221, appeal after remand 80 Ohio.App.3d 97, 608 N.E.2d 858 (1992).

Ohio App.1987. Subsec. (1) and com. (d) quot. in case quot. in disc. After an employer called an employee in the hospital on medical leave to inform her of a voluntary retirement program being initiated at work, the employee sued the employer for intentional and/or negligent infliction of serious emotional distress, inter alia. The trial court granted summary judgment for the defendant. Affirming, this court held that the defendant's telephone call to the plaintiff was conducted in a businesslike manner, that it was not of an antagonistic or harassing nature, and that it did not rise to the level of an atrocity. Lynn v. Allied Corp., 41 Ohio App.3d 392, 536 N.E.2d 25, 33.

Ohio App.1987. Subsec. (1) quot. in case quot. generally in sup., com. (d) quot. in case quot. in sup. A man who was stopped by police with their guns drawn because he met the description of an armed man in the area sued the police for civil rights violations and for intentional infliction of emotional distress. The trial court granted the defendants' motion for summary judgment. This court affirmed, holding that the officers were justified in conducting an investigatory stop of the plaintiff, given the facts and circumstances known to the officers at the time of the stop. The court also held that the defendants were entitled to summary judgment as to the plaintiff's claim for intentional infliction of emotional distress, reasoning that the officers' conduct did not rise to the requisite level of extreme and outrageous conduct. Wells v. City of Akron, 42 Ohio App.3d 148, 537 N.E.2d 229, 231, 232.

Ohio App.1986. Cit. in case quot. in disc., coms. (d) and (j) quot. in case quot. in disc. The sister and grandchildren of a decedent sued a cemetery association for damages on the theories of infliction of emotional distress and the mishandling of a dead body after the remains of their relative were disturbed. The trial court found for the plaintiffs. Affirming, this court held that the emotional injuries suffered by the plaintiffs as a result of the defendant's mishandling of the corpse were severe, reasonably foreseeable, and valid injuries under the tort of infliction of emotional distress. Carney v. Knollwood Cemetery Ass'n, 33 Ohio App.3d 31, 514 N.E.2d 430, 432, 435.

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Ohio App.1986. Subsec. (1) cit. in disc., com. (d) cit. in disc. and quot. in case quot. in sup., coms. (e) and (f) quot. in case quot. in sup., com. (g) quot. in sup. The administratrix of the estate of her deceased husband sued his former employer and supervisor, alleging wrongful discharge and intentional infliction of serious emotional distress that eventually caused or contributed to his premature death. The trial court granted summary judgment for the defendants on the claim of wrongful discharge and sustained the defendants' motion for directed verdict on the claim of intentional infliction of emotional distress. Affirming in part, reversing in part, and remanding, this court held that the trial court properly sustained the defendants' motion in limine barring all testimony referring to infliction of emotional distress by reason of the termination of the decedent's employment. The court stated that because the decedent had been an at-will employee, the defendants were entitled to terminate his employment, regardless of whether they knew or intended that the termination would add to his emotional distress. The court also held that the trial court erred in directing a verdict for the defendants on the plaintiff's tort claim for serious emotional distress, since this court could not find, as a matter of law, that the conduct of the supervisor was not extreme and outrageous. Foster v. McDevitt, 31 Ohio App.3d 237, 511 N.E.2d 403, 406, 407.

Ohio App.1985. Com. (d) quot. and cit. in case quot. and cit. in disc. The city refused to provide legal counsel to a police officer who had shot a drug suspect, because he had used unauthorized bullets. When he sued the city, he was awarded attorney's fees and damages for serious emotional distress, but the trial court refused to instruct the jury on punitive damages. This court eliminated the plaintiff's award for serious emotional distress on the grounds that the defendant's conduct was not extreme and outrageous and no serious emotional distress had resulted. However, the court affirmed the trial court's position on punitive damages, reasoning that, even if extreme and outrageous conduct were involved, punitive damages could not be assessed against a municipal corporation in the absence of statutory authorization. Koenig v. City of Dayton, 28 Ohio App.3d 70, 502 N.E.2d 233, 236-238.

Ohio App.1985. Com. (d) quot. in sup. Parents and brother of decedent sued a coroner who called decedent a “pusher,” the reporter who reported the coroner's statement, and the publisher who printed the statement. Plaintiffs did not seek to recover for the defamation of the decedent but for injuries allegedly suffered directly by them under the theories of defamation, intentional or negligent infliction of emotional distress, and invasion of privacy. The trial court entered summary judgment in favor of all defendants, and the court of appeals affirmed. The court held, inter alia, that the publication in the newspaper of the coroner's statement that decedent was a “pusher” did not constitute an actionable tort for either intentional or negligent infliction of emotional distress, reasoning that the publication did not meet the necessary level of extreme or outrageous conduct for these torts. Lambert v. Garlo, 19 Ohio App.3d 295, 484 N.E.2d 260, 264.

Ohio App.1984. Subsec. (1) quot. in case cit. in sup. The plaintiff sued for criminal conversation, alienation of affections, intentional infliction of emotional distress, and loss of consortium. The plaintiff alleged that the defendant had repeatedly phoned the plaintiff's wife with the intention of seducing her. Some of the calls were made when the defendant allegedly knew that the plaintiff was at home. Both the plaintiff and his wife told the defendant to desist but he refused and eventually

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forced the plaintiff's wife to have sexual relations. The trial court granted the defendant's motion to dismiss for failure to state a claim. Although noting that the state had abolished the causes of action for criminal conversation and alienation of affections, this court reversed and remanded. It held that the plaintiff had pleaded a valid cause of action for intentional infliction of emotional distress. Slusher v. Oeder, 16 OhioApp.3d 432, 476 N.E.2d 714, 718.

Ohio App.1983. Coms. (d) and (j) quot. in disc., coms. cit. generally in sup. A father appealed a trial court order denying his motion for change of custody, and the mother appealed an award of tort damages to the father for intentional infliction of emotional stress. The actions were consolidated on appeal. The court of appeals affirmed the order denying a change of custody, as there was insufficient evidence that the children's home situation had changed since the original custody award, and reversed the trial court's judgment for the father on the emotional stress claim. While a cause of action could be stated for intentional infliction of severe emotional distress without a contemporaneous physical injury, the father failed to establish the requisite intent, outrageous behavior, and emotional distress. The mother's behavior in obstructing the father's visitation and permitting a small child to give his father a gift that she knew the father could not use, while unpleasant, did not rise to the necessary level of outrageous conduct. Pyle v. Pyle, 11 Ohio App.3d 31, 463 N.E.2d 98, 103.

Ohio Com.Pl.

Ohio Com.Pl.2007. Subsec. (1) cit. in case quot. in sup., com. (d) quot. in case quot. in sup. Buyers of bulldog puppy sued seller, alleging that, after they ceased making payments for the puppy, seller repeatedly called and e-mailed them, using threatening and outrageous language, and posted websites and other messages on the Internet that defamed them, including a copy of one buyer's driver's license and a mock wanted poster. Denying seller's motions to dismiss and for summary judgment as to buyers' claim for intentional infliction of emotional distress, this court held that buyers sufficiently alleged that seller, by his outrageous conduct, knowingly, intentionally, and maliciously inflicted emotional distress on them, and that he continued his behavior even after being informed of its effect; defendant, in response, provided no evidence outside of the pleadings. Nicolazzo v. Yoingco, 149 Ohio Misc.2d 44, 58, 2007-Ohio-7269, 898 N.E.2d 94, 105.

Ohio Ct.Cl.

Ohio Ct.Cl.2001. Com. (d) quot. in case quot. in sup. Corrections officer who was injured while breaking up a fight between two juveniles at a juvenile correctional center, and who had his bruises photographed to document his injuries for an accident report, sued department of youth services for, inter alia, intentional infliction of emotional distress, arising from conduct of correctional center's security administrator in showing to other employees one of the photographs, which showed plaintiff's inner thigh and part of his penis, and in making remarks to plaintiff and teasing him. Entering judgment for defendant, this court held that security administrator's conduct was

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not sufficiently extreme or outrageous to support a claim for intentional infliction of emotional distress. Toth v. Ohio Dept. of Youth Serv., 113 Ohio Misc.2d 1, 8, 754 N.E.2d 305, 310.

Ohio Ct.Cl.1997. Subsec. (1) and com. (d) quot. in case quot. in disc. Woman who was denied permission to marry prison inmate pending verification of her gender sued Department of Rehabilitation and Correction for intentional infliction of emotional distress. Entering judgment for defendant, the court held that prison representatives did not act outrageously when they questioned plaintiff's gender, based on their observations of her mannerisms, build, and other physical characteristics. Saffell v. Dept. of Rehab. & Corr., 91 Ohio Misc.2d 30, 696 N.E.2d 1126, 1127.

Ohio Ct.Cl.1990. Subsec. (1) quot. in case quot. in appendix to op. Prisoner sued state department of rehabilitation and correction for physical and emotional injuries allegedly incurred in a confrontation with a corrections officer. Adopting the referee's report, this court rendered judgment for defendant, holding that where plaintiff received minor scrapes and bruises from being pushed along with a piece of wood and forced down onto a wooden bench after his failure to comply with the officer's order, there was no causal relationship between these injuries and the lower back pain he later complained of, and the officer's conduct was not so extreme and outrageous as to support a claim for intentional or negligent infliction of emotional distress. Mason v. Ohio Dept. of Rehab. and Corr., 62 Ohio Misc.2d 96, 593 N.E.2d 482, 486.

Ohio Ct.Cl.1988. Subsec. (1) cit. in case cit. in disc. An employee sued her employer for intentional infliction of emotional distress, inter alia, alleging that the defendant intentionally caused her to suffer emotional distress when it mailed directly to the plaintiff's husband's attorney in a domestic relations case a subpoenaed investigative report the defendant had compiled concerning conversations the plaintiff had had with other employees describing several incidents involving the plaintiff and her minor son that had sexual overtones. Entering judgment for the defendant, this court held that the defendant's actions were not extreme or outrageous, because the mailing of the subpoenaed report was an attempt to expedite the custody matter and not a deliberate act to cause emotional distress. Fisher v. Ohio Dept. of Rehab. & Corr., 61 Ohio Misc.2d 303, 578 N.E.2d 901, 903.

Okl.

Okl.2008. Cit. in case quot. in disc. Former parishioner sued his former priest, archbishop, and diocese, alleging that he was a victim of priest's predatory sexual misconduct, and that archbishop and diocese failed to take appropriate actions against priest. The trial court granted summary judgment for archbishop and diocese, and the court of civil appeals affirmed. Vacating the judgment of the appellate court, reversing in part the judgment of the trial court, and remanding, this court held that fact issues remained as to plaintiff's claim for intentional infliction of emotional distress. The court pointed to plaintiff's testimony that he sought funds from defendants to pay for past and continuing therapy for the sexual abuse, and to evidence of several priests' knowledge of

certain improper conduct by defendant priest, defendant's known reputation to one archbishop of not complying with directions from the archbishop, and the priests' duty to report conduct to the archbishop. Schovanec v. Archdiocese of Oklahoma City, 2008 OK 70, 188 P.3d 158, 175.

Okl.2002. Cit. in disc., subsec. (1) quot. in ftn. Former employer sued former employee for misappropriation of trade secrets, inter alia, and employee brought third-party claim against employer's owner for intentional infliction of emotional distress. Trial court entered judgment for employee on third-party claim; appellate court reversed in part, holding that owner's conduct was not sufficiently extreme and outrageous to submit emotional-distress claim to jury. Reversing in part, supreme court held that evidence warranted submission of emotional-distress claim to jury where, following employee's termination of consensual sexual relationship, owner continually harassed employee for two years with letters, cards, phone calls, and visits to her neighborhood and workplace. Computer Publications, Inc. v. Welton, 49 P.3d 732, 735.

Okl.1999. Subsec. (1), com. (d) quot. in disc. Landowners sued neighbors/loggers for trespass and intentional infliction of emotional distress in connection with defendants' actions in gaining access to a section line on plaintiffs' property. The trial court directed a verdict for plaintiffs on the trespass claim and entered judgment on a jury verdict in their favor on the claim for intentional infliction of emotional distress. The intermediate appellate court affirmed. Vacating the judgment of the court of appeals and affirming in part and reversing in part that of the trial court, this court held that defendants' conduct, which amounted to a trespass, could not be considered extreme and outrageous. Frank v. Mayberry, 1999 OK 63, 985 P.2d 773, 776.

Okl.1998. Cit. in headnotes, cit. in disc., subsec. (1), com. (d) quot. in ftn. Attorneys specializing in the representation of tort plaintiffs brought defamation action against newspaper publisher that printed stories about organization's efforts to bring about tort reform through the initiative process. Attorneys also asserted claims for intentional infliction of emotional distress and tortious interference with advantageous business relations. After the trial court denied publisher's motion to dismiss, publisher sought a writ of prohibition to prevent attorneys from prosecuting their action. Issuing the writ, this court held that the common-law fair-report and fair-comment privileges protected communications on matters of public interest, that the stories at issue constituted pure political speech that could not serve as the basis for a defamation action, that newspaper did not act outrageously, and that newspaper did nothing improper so as to afford attorneys relief under a theory of tortious interference with business relations. Gaylord Entertainment Co. v. Thompson, 1998 OK 30, 958 P.2d 128, 133, 134, 149.

Okl.1998. Cit. in headnotes and sup., cit. in case cit. in sup., subsec. (1) quot. in ftn., com. (d) cit. in ftn. and headnote and quot. in sup., com. (h) cit. in ftn., com. (j) cit. and quot. in ftn. A man sued his former wife and her parents for damages and equitable relief based on fraud, intentional infliction of emotional distress, and quantum meruit. Plaintiff alleged that, for the purpose of inducing him to marry his wife, defendants in 1980 knowingly misrepresented to him that she was pregnant with his child, and continued to perpetrate this fraud against him for the next 15 years. Trial court dismissed plaintiff's suit and the appellate court affirmed. This court affirmed in part, reversed

in part, and remanded, holding, inter alia, that there were fact issues as to whether defendants' conduct was extreme and outrageous. Miller v. Miller, 956 P.2d 887, 889, 890, 900, 901.

Okl.1997. Cit. in disc., subsec. (1) quot. in ftn., com. (d) quot. in ftn. Two lawyers sued an organization, its leaders, and several publishing companies, alleging that defendants disseminated false, deceptive, fraudulent, and defamatory statements, and that defendants' actions constituted intentional infliction of emotional distress. Plaintiffs contended that the organization's publicity campaign, allegedly for an initiative petition drive, was in fact a sham that sought to disguise its sole purpose of maligning the plaintiffs and undermining Oklahoma's democratic processes. This court granted defendants a writ of prohibition enjoining the trial court from proceeding in the suit. The court concluded, inter alia, that plaintiffs failed to state a viable claim for the tort of outrage, because defendants' activity was both protected and nondefamatory. Brock v. Thompson, 948 P.2d 279, 293-294.

Okl.1996. Cit. in headnote, cit. in ftn., subsec. (1) and com. (d) quot. in ftn., coms. cit. generally in ftn. In husband's action against a drunk driver who struck husband and his wife as they walked through a parking lot, husband sought, among other items of recovery, damages for emotional distress arising from seeing his wife dragged under the driver's truck for 60 feet and fatally injured. The trial court granted defendant's motion for partial summary judgment; the court of appeals affirmed. Vacating the court of appeals' opinion and reversing the trial court's entry of judgment, this court held, inter alia, that plaintiff stated a cause of action for intentional infliction of emotional distress, because he was directly physically involved in the incident, he was damaged from viewing the injury to his wife rather than from learning of the accident later, and he was the spouse of the party whose injury gave rise to his anguish; the court remanded for a jury determination on the issues of the outrageousness of defendant's conduct and the severity of plaintiff's emotional distress. Kraszewski v. Baptist Medical, 916 P.2d 241, 242, 244, 248, 249.

Okl.1994. Cit. in ftn. Plaintiff's name was mentioned by district attorney at news conference in connection with drug investigation; newspaper republished the material verbatim. Plaintiff sued newspaper for libel and intentional infliction of emotional distress, and the trial court dismissed; the intermediate appellate court affirmed. Also affirming, this court held that district attorney's news conference was official function of his office and represented occasion to which common-law fair-reporting privilege attached. Moreover, since fair and accurate media coverage of official public occasions was in public's best interests, defendant's conduct, the court said, could not be actionable as an intentional infliction of emotional distress. Wright v. Grove Sun Newspaper Co., Inc., 873 P.2d 983, 990.

Okl.1992. Cit. in spec. conc. op., quot. in ftn. to spec. conc. op. Injured worker sued insurer in tort for bad faith refusal to timely pay his workers' compensation award. Affirming the trial court's granting of summary judgment for defendant, this court held that the evidence did not support the cause of action since defendant's litigation of the claim, causing delay in payment, did not constitute bad faith; moreover, defendant made an effort to pay the award 18 days after it became due. A specially concurring opinion characterized plaintiff's claim as one for intentional infliction

of emotional distress and argued that plaintiff did not prove that he suffered severe emotional distress or that defendant's conduct was outrageous. Goodwin v. Old Republic Ins. Co., 828 P.2d 431, 437.

Okl.1992. Cit. and quot. in ftn. Two parishioners sued their former church, the lay leader of the congregation, and the leader's counselors for intentional or negligent infliction of emotional distress, inter alia, alleging that they were excommunicated from the church and suffered harm from the willful or grossly negligent delivery of the expulsion letters and from the communication of the letters' contents to the public. The trial court granted summary judgment for the defendants. Affirming in part and remanding, this court held, inter alia, that, even if a statement made by one of the defendant counselors established a fact issue as to whether the lay leader communicated the letters' contents outside the church, the lay leader's conduct was not so extreme and outrageous as to justify submission of the claim to the jury. The court noted that it was the trial court's responsibility initially to determine whether the defendant's conduct could reasonably have been regarded as sufficiently extreme and outrageous to meet the standards set forth in the Restatement (Second) of Torts § 46. Hadnot v. Shaw, 826 P.2d 978, 985.

Okl.1992. Cit. in case quot. in disc., subsec. (1) quot. in disc., com. (j) quot. in ftn. An at-will employee of the Farmers Cooperative Association (co-op), who was also the mayor of the town and a voting member of the town's board of trustees, was fired by the co-op's board of directors. The employee sued the co-op and its board of directors for wrongful discharge and intentional infliction of emotional distress, alleging that he was fired because the town board did not grant the co-op's zoning variance request. The trial court granted the defendants' motion for summary judgment. The intermediate appellate court reversed and remanded. Vacating the intermediate appellate court's opinion and affirming in part, reversing in part, and remanding the trial court, this court held, inter alia, that there was no evidence that the co-op had acted in such an extreme or outrageous manner toward the employee to impose liability under the tort theory of intentional infliction of emotional distress. Smith v. Farmers Co-Op. Ass'n of Butler, 825 P.2d 1323, 1327.

Okl.1992. Cit. in case quot. in disc., subsec. (1) quot. in sup. Husband sued his estranged wife's parents for damages for intentional infliction of emotional distress, inter alia, alleging that defendants aided his wife in concealing his children from him with the intent to cause him mental distress and emotional suffering. Reversing in part the trial court's dismissal of the action and remanding, this court held that, based on the allegations in plaintiff's petition, it appeared that plaintiff possibly could prove a set of facts that would entitle him to relief. Zaharias v. Gammill, 844 P.2d 137, 140, 141.

Okl.1991. Com. (d) quot. in case quot. in disc. After a husband left his wife for another woman, the former wife sued the woman for intentional infliction of emotional distress. The trial court sustained the defendant's motion to dismiss under a state statute repealing actions for alienation of affections and seduction. The intermediate appellate court reversed and reinstated the emotional distress action. Vacating the appellate court's opinion and affirming the trial court, this court held that it could not find the conduct of willfully taking away a spouse, which the legislative body had

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removed from those acts bearing civil liability in tort, so outrageous as to be regarded as atrocious and utterly intolerable in a civilized community. Wilson v. Still, 819 P.2d 714, 716.

Okl.1990. Subsec. (1) quot. in ftn. to diss. op., com. (k) cit. in ftn. to diss. op. A psychological assistant at the state penitentiary experienced major depression and posttraumatic stress disorder following a prison ordeal in which he was held hostage. The assistant sought workers' compensation for permanent partial disability. The workers' compensation court denied recovery upon finding no accidental injury. The intermediate appellate court reversed. Vacating the intermediate appellate court's opinion, this court held that the claimant's mental stress was not compensable where he suffered no accompanying physical injury. Two dissenting opinions argued that denial of recovery for purely psychological injuries was strictly a judicial limitation rather than a statutory one. Moreover, one dissent noted that, even in tort law, recovery for intentional infliction of emotional distress was not limited to cases where there had been bodily harm. Fenwick v. Oklahoma State Penitentiary, 792 P.2d 60, 65, 72.

Okl.1989. Cit. in case quot. in ftn., com. (d) cit. in case quot. in ftn. A former member of a church sued the church elders, alleging invasion of privacy and intentional infliction of emotional distress, to recover damages for the defendants' public denouncement of the plaintiff as a fornicator. The trial court entered judgment on a jury verdict in the plaintiff's favor. This court reversed and remanded for a new trial confined to the defendants' actionable conduct unprotected by the First Amendment, which followed the plaintiff's unilateral withdrawal from the congregation, holding, inter alia, that the defendants were not entitled to an absolute or a qualified privilege regarding the invasion of privacy claim after the plaintiff had withdrawn from church membership. Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 783.

Okl.1987. Cit. in ftn., com. (k) cit. in ftn. A man sued his brother-in-law and sister-in-law for assault, battery, extortion, trespass, damage to property, intentional infliction of emotional distress, and invasion of privacy after the defendants allegedly kicked in the front door of the plaintiff's home, committed assault and battery, and extorted from him a $32,000 check as payment of the amount claimed to be due them in a prior suit. The trial court held that the assault and battery claims were barred by the statute of limitations, but it subsequently entered judgment on a jury verdict for the plaintiff with respect to the remaining theories of recovery. The intermediate appellate court reversed and directed the trial court to enter judgment for the defendants on remand. Vacating the intermediate appellate court's opinion and affirming the trial court's judgment on the jury verdict subject to the plaintiff's remittitur of punitive damages, this court held that the jury verdict was not lacking in evidentiary support and, with the exception of the award for punitive damages, was not excessive. The court stated that the extreme and outrageous character of a defendant's conduct is in itself important evidence that the distress episodes occurred and that most jurors were capable of estimating the degree and character of distress that may be caused by a defendant's conduct. Chandler v. Denton, 741 P.2d 855, 867.

Okl.1986. Cit. and quot. in disc., com. (d) cit. in ftn. An employee sued a former employer for invasion of privacy and for the tort of outrage, alleging that the supervisor and the employer had

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harassed and subjected him to ridicule, ultimately causing him to quit his job. The trial court granted summary judgment for the employer, and the intermediate appellate court reversed and remanded for trial. On the employer's petition for certiorari, this court vacated the intermediate appellate court's opinion and affirmed the trial court's judgment. The court held that the tort of outrage did not extend to mere insults and that the employee's complaints of harassment, such as disclosure of psychiatric visits, did not meet the Restatement's standards of extreme and outrageous behavior. In addition, the court said, the employee's claim for invasion of privacy did not satisfy the publicity element of the tort; only a limited number of employees heard that the employee was undergoing psychiatric treatment, and this disclosure did not amount to publicity. Eddy v. Brown, 715 P.2d 74, 75-77.

Okl.1984. Cit. in disc., cit. in ftn.; coms. (b) and (d) cit. in disc., cit. in ftn. in diss. op.; subsec. (1) quot. in ftn. in diss. op.; com. (h) cit. in ftn. in diss. op.; coms. cit. gen. in ftn. in diss. op. An employee sued his employer for intentional infliction of emotional distress. The trial court granted the employer's motion for summary judgment. This court reversed, holding that, although the tort of intentional infliction of emotional distress is an extension of the tort of assault, the statute of limitations applicable to this action differed from that applicable to an assault action. The court stated that the alleged tort did not require proof of physical injury or invasion of other interests. The dissent noted that, on remand, the trial court would have to determine initially whether the employer's conduct was so extreme and outrageous and the employee's emotional distress so severe as to permit recovery and warrant the claim's submission to the jury. Williams v. Lee Way Motor Freight, 688 P.2d 1294, 1296, 1297, 1298, 1299.

Okl.1978. Subsec. (1) quot. in sup., com. (d) quot. in part in sup., illus. (4) cit. in ftn. in sup., com. (e) cit. in ftn. in sup., com. (h) cit., quot. in ftn. in sup., com. (j) cit., quot. in part in ftn. in sup., com. (b) cit. in ftn. in dictum. Plaintiff debtor sued defendant collection companies seeking to recover damages for, inter alia, mental anguish allegedly resulting from the harassing and threatening collecting tactics of the defendants. The lower court granted summary judgment in favor of defendants, and plaintiff appealed. This court affirmed, holding that where defendants mailed three letters to plaintiff at her home address and at her place of employment and made several attempts to contact plaintiff by telephone both at home and her place of employment, but had only one telephone conversation with her, in which she was called a God damned liar and a deadbeat, and all calls were made during reasonable hours, defendants' conduct was not so outrageous as to give rise to a cause of action for intentional infliction of emotional distress. The court also held that the standard against which a defendant's conduct must be measured to impose liability for this tort, without the presence of the elements necessary to any other torts, is that the conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. The court assumed that because the trial court sustained the summary judgment, it determined that outrageous or extreme conduct could not be found, and that reasonable men could not differ as to that conclusion. Breeden v. League Services Corp., 575 P.2d 1374, 1376, 1377, 1378.

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Okl.1978. Cit. in disc.; subsecs. (h) and (j) cit. in disc. A debtor brought an action against a creditor to recover actual and exemplary damages alleging that the creditor's harassment and coercive collection practices invaded her privacy and caused her great emotional and mental distress. The trial court sustained the creditor's motion for summary judgment and dismissed the debtor's complaint. On appeal, the court of appeals reversed and remanded, and the creditor appealed. The court noted that it adopted the standard advanced in Section 46 of the Restatement in actions based upon outrageous conduct causing emotional distress. The court held that where the creditor had a legitimate debt owed to it by the debtor, where the debtor was in possession of personal property securing the debt, and where the debtor avoided all contact with the creditor's agents and refused to contact them, the creditor's conduct, which consisted of leaving business cards at the debtor's apartment door and contacting her landlord after she moved, may not reasonably be regarded as so extreme and outrageous that an issue of fact was framed for submission to the jury on intentional infliction of mental distress. The court adopted the standard advanced in the Restatement Tentative Draft No. 22, Sec. 652, Chapter 28A, in actions based upon invasion of privacy. The court held that, considering the facts most favorable to the debtor, the record will not support a finding that the creditor's agents conducted themselves in a manner highly offensive to a reasonable person in their attempts to contact the debtor and thus did not tortiously invade the debtor's privacy. Therefore, the judgment of the court of appeals was vacated, and the trial court's judgment was affirmed. Munley v. ISC Financial House, Inc., 584 P.2d 1336, 1338, 1340.

Okl.1976. Com. (d) quot. in sup. Plaintiff brought this action against the state and the state's chief medical examiner, alleging that the plaintiff was deprived of her right to the timely possession of her father's body when the examiner refused to perform an autopsy on the body. This refusal led to a delay of two or three days in the performing of an autopsy, and plaintiff alleged that this delay, and the manner in which the autopsy was finally performed, resulted in her suffering mental and physical anguish for which she sought to recover damages. The lower court sustained the defendant's demurrer. On appeal, the court affirmed, saying that the plaintiff's petition did not state a cause of action, since the complaint did not state sufficient facts to constitute a willful wrong of such a character that mental suffering would be recognized as the ordinary, natural, and proximate result of such a wrong. Dean v. Chapman, 556 P.2d 257, 261.

Okl.App.

Okl.App.2016. Cit. in sup., quot. in ftn.; com. (d) quot. in sup.; com. (h) cit. in sup. Husband, individually and as guardian ad litem for wife, brought claims for, among other things, intentional infliction of emotional distress against owner of a retirement facility where wife resided, alleging that, after wife suffered a broken wrist while residing in facility's specialized, memory-care unit, owner failed to adequately investigate the incident, tried to place the blame on sitters hired by husband, and allowed the employee who was allegedly responsible for wife's injury to return to work on the same floor as wife. After a bench trial, the trial court determined that owner was liable for intentional infliction of emotional distress. This court reversed that portion of the decision and remanded, holding that the alleged behavior was not sufficiently outrageous to state such a claim

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under Restatement Second of Torts § 46. Hicks v. Central Oklahoma United Methodist Retirement Facility, Inc., 423 P.3d 684, 697, 698.

Okl.App.2011. Com. (h) quot. in sup. and adopted in case cit. in sup. High school teacher/basketball coach sued television network, alleging that he was defamed and his privacy was invaded by network's broadcast of a news story concerning parents' complaints about purported threats made by teacher. The trial court granted summary judgment for defendant. This court reversed as to plaintiff's claim for invasion of privacy by false light, determining, as a threshold matter of first impression for that tort, that whether the broadcast was capable of the meaning plaintiff alleged was initially a question of law. The court noted that this was the approach taken when the claim was based on the tort of outrage. Grogan v. KOKH, LLC, 2011 OK CIV APP 34, 256 P.3d 1021, 1029.

Okl.App.2006. Quot. in sup. After employer hired attorney and law firm to investigate an incident in which a worker's drink was contaminated, and attorney accused former employee of being the perpetrator and a liar, former employee sued attorney and law firm for, among other things, intentional infliction of emotional distress, alleging that attorney's actions caused him to suffer embarrassment, humiliation, physical pain, and the loss of his job. The trial court granted summary judgment for defendants. Affirming, this court held, inter alia, that plaintiff failed to establish a prima facie case of intentional infliction of emotional distress, since, in the context of a workplace investigation into the dangerous contamination of an employee's drink, attorney's alleged conduct was not outrageous, atrocious, or beyond all possible bounds of decency as a matter of law. Ishmael v. Andrew, 2006 OK CIV APP 82, 137 P.3d 1271, 1277.

Okl.App.2006. Com. (d) quot. in case quot. in sup. Parents of children who played on an eight-and-under baseball team sued national, nonprofit sports association for, among other things, intentional infliction of emotional distress, after state director of association forced the team to forfeit a tournament game based on an official complaint lodged against them by another team and, when parents tried to discuss the matter, allegedly became enraged, jumped out of his chair, charged directly at one parent, and screamed at her in a threatening and menacing manner. The trial court granted defendant's motion to dismiss the emotional-distress claim. This court affirmed, holding that director's conduct was not so extreme and outrageous as to meet the standard for the tort of intentional infliction of emotional distress. Warren v. United States Specialty Sports Ass'n, 2006 OK CIV APP 78, 138 P.3d 580, 585.

Okl.App.2003. Cit. in case quot. in disc., subsec. (1) and com. (d) quot. in case quot. in disc. Male former employees who alleged that they had been sexually harassed by a co-worker sued former employer for, in part, intentional infliction of emotional distress. Affirming in part the trial court's grant of summary judgment for defendant, this court held, inter alia, that defendant's alleged conduct in failing to remedy the harassment in a timely and reasonable manner was not sufficiently extreme and outrageous to support a claim for intentional infliction of emotional distress. Miner v. Mid-America Door Co., 68 P.3d 212, 223.

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Okl.App.2000. Cit. in case quot. in disc., cit. in disc., com. (d) quot. in sup. Former employee sued former employer for wrongful discharge, asserting various tort and contract theories of recovery. The trial court dismissed the complaint. Affirming in part, reversing in part, and remanding, this court held, among other things, that, even if plaintiff were able to establish a contractual right of employment, defendant could not be found liable for tortious interference with present and prospective business relations where it was a party to the alleged agreement, and that allegations that defendant had verbally and mentally abused plaintiff after plaintiff refused to commit a crime for business purposes were not sufficient to support recovery under a theory of intentional infliction of emotional distress. Gabler v. Holder and Smith, Inc., 11 P.3d 1269, 1280.

Okl.App.2000. Cit. and quot. in disc., com. (d) quot. in disc. Law student expelled for falsifying student loan application sued state university for negligent and intentional infliction of emotional distress after university refused student's readmission application. Affirming trial court's dismissal, this court held, inter alia, that student did not present evidence sufficient to establish "outrageous" conduct necessary to support claim for intentional infliction of emotional distress. Mason v. State ex rel. Bd. of Regents of University of Oklahoma, 23 P.3d 964, 969, 970, cert. denied 534 U.S. 853, 122 S.Ct. 124, 151 L.Ed.2d 79 (2001).

Okl.App.1999. Cit. in case cit. in disc. Landowners involved in a neighborhood property dispute brought a claim for, in part, intentional infliction of emotional distress against newspaper and its owner, which had published an editorial about the dispute. The trial court dismissed for failure to state a claim, and denied plaintiffs' motion to amend. Reversing and remanding, this court held, inter alia, that, although plaintiffs' petition failed to allege outrageous conduct necessary to state a claim for intentional infliction of emotional distress, plaintiffs were entitled to amend their petition to allege additional facts to support recovery under that theory. Sturgeon v. Retherford Publications, Inc., 1999 OK CIV APP 78, 987 P.2d 1218, 1227.

Okl.App.1998. Cit. in case quot. in disc. Former medical research foundation employee sued employer for intentional infliction of emotional distress, among other claims, alleging that the employer denied his request to transfer research grants, funding, and equipment, and denied access to research files. In addition, employer required plaintiff to turn in his keys and to publicly collect all keys from his employees, and his clinic was padlocked at nighttime and weekends. Trial court granted employer summary judgment. This court affirmed, holding, inter alia, that, although plaintiff was embarrassed and humiliated, defendant's conduct was not extreme and outrageous. Corder v. Oklahoma Medical Research Foundation, 980 P.2d 1122, 1127.

Okl.App.1998. Cit. in headnote, cit. in disc., com. (d) quot. in disc. Former employee sued former employer for, inter alia, intentional infliction of emotional distress. The trial court entered judgment for defendant. Affirming, this court held, in part, that the conduct complained of, which included telephoning plaintiff at home during early morning hours, calling his wife by his first wife's name, disciplining plaintiff in front of co-workers, and denying plaintiff's request for a day off following the birth of his son, was not so extreme and outrageous as to support a claim for intentional infliction of emotional distress. Mirzaie v. Smith Cogeneration, Inc., 962 P.2d 678, 678, 682.

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Okl.App.1996. Quot. in sup., com. (d) quot. in case quot. in sup., com. (e) quot. in sup., coms. (h) and (j) adopted in case quot. in sup. Former employee brought an action for, in part, intentional infliction of emotional distress against her former employer. Affirming the trial court's grant of summary judgment for defendant, this court held, inter alia, that the allegedly vulgar, insensitive, and annoying conduct of one of plaintiff's female supervisors was not sufficiently extreme and outrageous to support plaintiff's claim for intentional infliction of emotional distress. The court said that some of the crude conduct was not specifically directed at plaintiff, plaintiff did not complain to persons higher in the chain of command, and plaintiff admitted that she also used "cuss words" at times. Anderson v. Okl. Temporary Services, Inc., 925 P.2d 574, 576.

Okl.App.1996. Cit. in headnotes, com. (d) quot. in case quot. in disc., coms. (h) and (j) cit. in disc. Woman who contended that she was mistreated by city police officers sued city for intentional infliction of emotional distress. The trial court granted city's motion for summary judgment on the ground that at the time of the alleged acts in question, the officers were not acting within the scope of their employment. Affirming, this court held that governmental employees acted within the scope of their employment only when they acted in good faith, but that, by definition, an actor charged with outrageous conduct never acted in good faith, thus relieving his governmental employer of liability for his actions. McMullen v. City of Del City, 920 P.2d 528, 528, 531.

Okl.App.1990. Coms. (h) and (j) quot. in disc. Beneficiaries of a life insurance policy sued the insurer after it refused to pay benefits allegedly due them. After sustaining the defendant's demurrer to the plaintiffs' evidence of a bad-faith breach of contract, the trial court entered judgment on a jury verdict for the plaintiffs in a sum equal to the face value of the policy. Affirming and remanding, this court held that the trial court properly disposed of the plaintiffs' bad-faith claim. The court stated that, before the issue of the defendant insurer's bad faith could be submitted to the jury, the trial court must determine whether the defendant's conduct could reasonably be perceived as tortious, analogous to the inquiry involving a claim for intentional infliction of emotional distress. The court reasoned that, because the evidence adduced at trial revealed that the defendant's refusal to pay the claim was based on what the defendant believed to be material misrepresentations of fact by the insured on his application for insurance, constituting grounds for avoidance of liability, the trial court properly determined that the defendant's conduct was not tortious. City Nat. Bank v. Jackson Nat. Life Ins., 804 P.2d 463, 469.

Okl.App.1990. Cit. in disc., com. (d) quot. in disc. In the course of investigating possible diversion of medications from patients at a hospital, a director of nursing requested a urine sample from a nurse for drug screening. The nurse said she would comply if given a statement acknowledging her admission that she had recently taken prescription drugs. The director, after initially agreeing, told the nurse there would be a delay in getting the statement and invited her to resign if she was displeased. The nurse quit and then sued the director, the hospital, and several co-workers for, inter alia, intentional infliction of emotional distress. This court affirmed the trial court's award of summary judgment to the defendants on the ground that the director's investigative tactics were not sufficiently outrageous in character to support an emotional distress claim. The court said that

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while the director may have exercised poor judgment in initially agreeing to furnish the written statement without stating that there would be a delay, she used no physical action to coerce or intimidate the nurse. Haynes v. South Com. Hosp. Mgmt., Inc., 793 P.2d 303, 306, 307.

Okl.App.1989. Coms. (h), (i) and (j) cit. in sup. Employees of a community services company sued former employees and other parties for invasion of privacy and intentional infliction of emotional distress arising from alleged abuse of the discovery process in obtaining court-ordered document discovery of the company's personnel files in a prior suit. The trial court granted summary judgment on these claims to the former employees and other parties, and this court affirmed. As a threshold issue, the court determined that abuse of the discovery process by a party to litigation could support an independent tort action against the discovering party. However, it proceeded to hold that the copying of documents by the former employees and other parties pursuant to the court-ordered discovery did not constitute an unreasonable intrusion into the seclusion of another so as to support a cause of action for invasion of privacy. It also ruled that the trial court did not err in determining that the conduct of the former employees and other parties during the court-ordered discovery was not so outrageous and extreme so as to permit recovery. Big Five Community Services, Inc. v. Jack, 782 P.2d 412, 414.

Okl.App.1984. Cit. in case quot. in sup. The plaintiff and the defendant lived together in the defendant's house, for which the plaintiff supplied a portion of the downpayment. The plaintiff vacated the premises when their relationship soured and filed a joint venturer's lien. The defendant used nude photographs of the plaintiff to obtain a release of the lien to sell the house. In the plaintiff's suit for intentional infliction of emotional distress, the trial court found for the plaintiff. The defendant argued that the jury had been improperly instructed on the elements of intentional infliction of emotional distress. This court affirmed in part and reversed and remanded in part. The court held that a defendant's conduct must be extreme and outrageous, not merely unreasonable, to support the tort of intentional infliction of emotional distress. Floyd v. Dodson, 692 P.2d 77, 80.

Okl.App.1976. Cit. in sup. Plaintiff brought this action against a bank for mental anguish and severe emotional distress, claiming that a bank employee made threatening and abusive telephone calls in an attempt to collect a debt owed by the plaintiff's son. The lower court sustained the bank's demurrer. On appeal, the court held that a valid cause of action was alleged, and that intentional infliction of mental anguish is an independent cause of action where mental suffering is recognized as the ordinary, natural, and proximate result of a wrong. The court also held that in such an action, expert testimony to prove the existence of mental anguish is not needed. Bennett v. City National Bank and Trust Con., 549 P.2d 393, 397.

Okl.App.1973. Quot. and coms. (b), (h), (j) quot. in sup. This was a suit for replevin of a combination stereo record player and television set which had been sold and delivered to the defendants by the plaintiff's salesman. The defendants cross-petitioned for actual damages and punitive damages, and possession and ownership of the goods, claiming that payment had been made. Defendants also claimed that they had been maliciously harassed and threatened by the plaintiff and his employees. Judgment was rendered on a verdict for defendants. Plaintiff appealed

contending the court committed a fundamental error in submitting to the jury a question of damages for mental suffering unaccompanied by physical injury. The court affirmed judgment for the defendants, stating that intentional infliction of mental distress is a separate and distinct tort, and one may recover without showing physical injury. There is evidence which substantiates the view that injuries to the nervous system are physical and recovery may be had for such injuries, just as recovery is permitted for any other physical injuries. The plaintiff's conduct was extremely outrageous and totally unwarranted and the defendant wife's mental state caused by the plaintiff's actions could not be ignored. Reeves v. Melton, 518 P.2d 57, 62.

Or.

Or.2002. Cit. in case cit. in sup., com. (i) quot. generally in case quot. in sup. After several security guards arrested concert audience members for illegal drug possession, concert arena owner discharged the entire group of security officers, who then sued arena owner for, in part, intentional infliction of emotional distress. The trial court granted defendant's motion to dismiss, and the court of appeals affirmed in part and reversed in part. Affirming in part and reversing in part, this court held that plaintiffs' allegation that defendant acted with the purpose of causing plaintiffs severe emotional distress was sufficient to survive a motion to dismiss. Plaintiffs were not required to allege also that defendant acted with knowledge that severe emotional distress was substantially certain to result from its conduct. Babick v. Oregon Arena Corp., 333 Or. 401, 412, 40 P.3d 1059, 1064.

Or.1995. Adopted in case cit. in disc., cit. in case cit. in disc., cit. in sup., com. (e) cit. in case cit. in disc., com. (i) cit. in headnote and quot. in sup. and adopted. Former employee of a collection agency sued her former employer and supervisor for intentional infliction of severe emotional distress, inter alia, alleging that her supervisor engaged in conduct constituting a continuing pattern of sexual harassment against her. The trial court granted in part defendants' motion to dismiss, and the court of appeals reversed in part. Affirming in part, this court held, inter alia, that the trial court erred in dismissing the claim, since plaintiff's allegation that defendants acted volitionally with knowledge that the acts would cause severe emotional distress pleaded the requisite intent to state a claim for intentional infliction of severe emotional distress. McGanty v. Staudenraus, 321 Or. 532, 545, 550, 551, 901 P.2d 841, 843, 849, 850, 853.

Or.1991. Cit. in ftn., com. (e) cit. in ftn. Wife of a decedent sued, among others, the agency responsible for maintaining a 9-1-1 emergency telephone system for negligent infliction of severe emotional distress, inter alia, alleging that, after she called 9-1-1 to report that her husband had no pulse and was not breathing and a 9-1-1 operator told her that someone would be right over, no one arrived for 45 minutes and that the operator knew that she lived in an unincorporated area where proper services would never have been sent. The trial court granted summary judgment for the defendant, and the intermediate appellate court affirmed. Affirming, this court held that the plaintiff could not recover because she had sustained no physical injury and that it would not recognize the tort of negligent infliction of emotional distress without the impact rule. The court noted that it

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had never expressly adopted as state law the tort of intentional infliction of emotional distress as defined in s 46 of the Restatement (Second) of Torts. Hammond v. Central Lane Communications, 312 Or. 17, 816 P.2d 593, 597.

Or.1986. Cit. in conc. and diss. op. An employee was fired from his job by his supervisor after refusing the supervisor's demands to stop seeing a female coemployee socially. The former employee sued the supervisor, another supervisor, and the store for wrongful discharge and intentional infliction of emotional distress. The trial court granted the defendants' motion to dismiss for failure to state a claim, and the intermediate appellate court affirmed the dismissal of the wrongful discharge claim but reversed and remanded on the intentional infliction of emotional distress claim. This court affirmed the wrongful discharge decision, saying that the employee could be fired at will and reversed the intentional infliction of emotional distress decision, because the behavior complained of was not outrageous. A concurring and dissenting opinion agreed with the majority's dismissal of the wrongful discharge claim but stated that a claim might exist against the two supervisors for tortious interference with contract, since the supervisors may have used their positions for their own purposes rather than for the company's. Patton v. J.C. Penney Co., Inc., 301 Or. 117, 719 P.2d 854, 859.

Or.1981. Com. (g) quot. in ftn. in disc. and quot. in diss. op. The plaintiff, a former employee at the defendant's store, brought an action for damages for defamation and for intentional infliction of emotional distress allegedly suffered after she was questioned by the store security personnel about shortages in her cash register. The lower court granted the defendant's motion for judgment n.o.v. and the appellate court affirmed. The plaintiff appealed, and the state supreme court reversed the decision as to the verdict for compensatory damages. The court reasoned that considering the evidence most favorable to the plaintiff, the jury could find that the security officer's conduct was extreme and outrageous and that he intentionally inflicted emotional distress. The case was accordingly reversed and remanded. The dissenting opinion argued that the extreme conduct required for the intentional tort could not be found by the jury. Hall v. May Dept. Stores Co., 292 Or. 131, 637 P.2d 126, 133, 139.

Or.1981. Cit. in diss. op. The plaintiff contracted to buy cattle from a third person, but the defendant caused the third-person seller to breach the contract with the plaintiff by buying the same cattle at a higher price. The plaintiff brought an action to recover for the defendant's alleged interference with contractual relations. The trial court awarded damages for mental anguish only. The appellate court reversed, holding that damages for mental suffering could not be awarded for the tort of interference with contractual relations in the absence of physical injury. The plaintiff appealed, and this court reversed and reinstated the jury verdict. The court held that damages for emotional suffering could be recoverable in an intentional interference with contractual relations suit, depending upon what type of contractual relation was disrupted and whether the mental suffering was a predictable outcome of the interference. The dissent argued that before any mental distress damages were recoverable in such an action, the plaintiff should be required to prove that the defendant's conduct was either malicious or outrageous. In a special concurring opinion, one justice stressed that the majority, by focusing on the type of contract in question, was imposing a

new requirement which made the test unworkable and subjective. Mooney v. Johnson Cattle Co., Inc., 291 Or. 709, 634 P.2d 1333, 1341, 1342.

Or.1979. Cit. in disc. and Tentative Draft 1 cit. in disc. and coms. cit. in disc. Plaintiff, a tenant, brought suit against her landlords, originally asking for injunctive relief arising out of allegedly wrongful efforts by the defendants to evict her by force, and subsequently adding claims for damages. The trial court granted an involuntary nonsuit in favor of two of the defendants, directed a verdict in favor of two other defendants on an emotional distress count, and entered judgment on the verdict against those defendants on a battery count. The plaintiff appealed, and the defendants cross-appealed, and the court reversed and remanded. The court held that the tenant was not entitled to punitive damages for violation of a statutory provision and, though the plaintiff could not charge to her landlords her emotional or psychological distress over the nonculpable shortcomings of her rented quarters, she could recover for her actual psychological harm suffered from the defendants' deliberate, wilful and retaliatory acts. Brewer v. Erwin, 287 Or. 435, 600 P.2d 398, 410, 411.

Or.1978. Cit. in diss. op.; com. (i) quot. in diss. op. The buyer of a used automobile brought an action against the dealer for damages resulting from the failure of the dealer to provide title to the car. Subsequent to the purchase, the car was stolen, "stripped," and "totaled," and the buyer's insurance company refused to pay the claim for the loss because of the buyer's inability to produce a certificate of title to the car. The lower court awarded the buyer compensatory and punitive damages and attorney's fees, and the dealer appealed, contending that there was no evidence under any standard for the award of punitive damages. The court held, inter alia, that, even under a test which included "gross negligence" and "recklessness," the evidence was insufficient to create a jury question as to whether, in representing to the buyer that title would be forthcoming, the dealer's conduct was such as to justify an award of punitive damages. The lower court's judgment was affirmed, except for the award of punitive damages and attorney's fees. The dissent noted that the dealer had in its possession neither a "duly assigned certificate of title" nor a "bill of sale from the registered owner" of the car at the time of its sale to the plaintiff. The dissent believed that if the trier of fact were to find that this conduct on the part of the dealer amounted to recklessness, the trier of fact should be permitted in its sole discretion to award punitive damages. Chamberlain v. Jim Fisher Motors, Inc., 282 Or. 229, 578 P.2d 1225, 1232.

Or.1978. Cit. in ftn.; illus. and coms. generally cit. in ftn. The plaintiff brought an action against the defendant, an operator of a towing company, for trespass to her automobile when the defendant towed away the plaintiff's car by mistake after being called by the police department to tow away a different car. The court granted the defendant's motion for summary judgment, and the plaintiff appealed. The plaintiff contended that the trial court erred in granting the motion because, in every trespass case, the plaintiff is entitled to at least nominal damages and, where a basis of liability exists, recovery may be had for mental suffering. The court held that the owner of the car was not entitled to recover for mental suffering and anguish unaccompanied by physical injury or loss of property. The judgment of the lower court was affirmed. Melton v. Allen, 282 Or. 731, 580 P.2d 1019, 1022.

Or.1977. Coms. (d) and (e) quot. in part in cases quot. in sup. Plaintiff brought an action against a collection agency to recover damages for defendant's alleged outrageous conduct. The court affirmed a judgment for plaintiff, holding, inter alia, that evidence that plaintiff, a blind woman, despite her statements that she had made arrangements to pay her bill to an eye clinic in installments, was subjected to a number of phone calls over a nine-day period in which she was referred to as "scum" and "deadbeat," and was the subject of profanity and other abuses by an agent of defendant, and consequently suffered emotional distress and headaches which caused her to be hospitalized, was sufficient to support a verdict for plaintiff, and, therefore, the trial court did not err in denying defendant's motion for a directed verdict. Turman v. Central Billing Bureau Inc., 279 Or. 443, 568 P.2d 1382, 1384.

Or.1972. Com. (j) cit. in ftn. in sup. The plaintiff brought this action against the defendant telephone company for emotional distress resulting from defendant's erroneous listing, in an advertisement in the yellow pages, of plaintiff's residential phone number as an after hours telephone number for a floral shop. On defendant's appeal from a judgment for plaintiff, the court affirmed the judgment and held that evidence of numerous calls to plaintiff during the late evening hours, resulting in an unreasonable invasion of plaintiff's right to enjoy property without unreasonable interference, established a nuisance, warranting imposition of liability upon defendant for plaintiff's mental distress, even though unaccompanied by physical injuries. Macca v. General Telephone Co. of Northwest Inc., 262 Or. 414, 495 P.2d 1193, 1196.

Or.1971. Cit. but question not reached in maj. op.; cit. in sup. in con. op.; quot. in sup., com (d). quot. in sup. in diss. op. Plaintiff brought an action against the defendant for damages sustained as a result of an alleged scheme to defraud him. Although the case was argued on appeal on the theory of extreme and outrageous conduct, the court refused to decide the issue because it was not argued before the trial court. The concurrence would have decided the issue and would have held that conduct intended to defraud was not sufficiently outrageous to be a cause of action on this theory. The dissent would have also decided the issue, but would have held that the defendant's attempt to wrongfully force the plaintiff to pay him money was sufficiently outrageous to state a cause of action. Chaney v. Fields Chevrolet Co., 258 Or. 606, 484 P.2d 824, 827, 828, 834.

Or.1971. Quot. in sup.; coms. (j), (k), cit. in sup.; com. (d) quot. but dist. Plaintiff appealed a nonsuit entered for defendant physician in her action to recover for alleged severe emotional distress caused by defendant's alleged outrageous conduct. In reviewing plaintiff's evidence, the court found that there was sufficient support from the record to submit the issue of outrageous conduct to the jury, inasmuch as the plaintiff and her baby, automobile accident victims, were treated rudely by the defendant, improperly diagnosed, and forced to wait in sub-freezing weather outside of the defendant's office after he refused to properly examine them. Rockhill v. Pollard, 259 Or. 54, 485 P.2d 28, 29, 31, 32.

Or.1970. Cit. but not fol. Plaintiff recovered general and punitive damages for emotion distress incurred as a result of defendant's conversion of his truck. Defendant, or an employee, had altered the date of a note in order to foreclose a lien on plaintiff. The court affirmed, holding that in

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a case where both parties assumed that plaintiff was entitled to recover for mental anguish and humiliation, if liability was established and damages proven satisfactorily to a jury, in an action for conversion, testimony as to plaintiff's mental and physical condition at the time, as to personal and family problems, and as to subsequent psychiatric care was admissible on the issue of mental anguish. The court refused to reverse for failure to sustain objections to such testimony where the objections were of a general nature only. Mays v. Carner, 476 P.2d 794, 796.

Or.1969. Coms. (d) and (e) quot. in sup. and also disc. of hist. of dev.of s 46. The issue here is whether an involuntary nonsuit of plaintiff was proper. Plaintiff had been in a mental hospital in 1960. As a result to a dispute between plaintiff and certain police officer, plaintiff was recommitted to a mental hospital. Plaintiff brought on an action against the police officer for the insults to him, which resulted in the dispute causing him to be returned to the mental hospital, on the basis that one who by extreme and outrageous conduct intentionally and recklessly caused severe emotional distress to another is subject to liability for such emotional distress. The court here stated liability is only found when the conduct has been so outrageous as to be regarded as atrocious by the average member of the community. Although one who, without a privilege to do so, intentionally causes severe emotional distress to another is liable, the issue is, how severe the distress. The court held, even if there was some evidence here of conduct unbecoming a peace officer, it was not actionable as not sufficiently outrageous. Pakos v. Clark, 253 Or. 682, 453 P.2d 682, 687, 688, 691.

Or.App.

Or.App.2023. Com. (j) cit. and quot. in sup. Elected school board officials brought an action against parents of students under state anti-doxing statute, alleging that plaintiffs suffered severe emotional distress after defendants disclosed information regarding plaintiffs' employers in private social media groups. The trial court denied defendants' special motion to strike. This court reversed and remanded, holding that plaintiffs failed to make a prima-facie case that the severe emotional distress they suffered as a result of defendants' disclosures was reasonable under state anti-doxing statutes. Citing Restatement Second of Torts § 46, Comment *j*, the court could not find that a reasonable person under these circumstances would suffer severe emotional distress, given that plaintiffs had previously publicized where they worked. DeHart v. Tofte, 533 P.3d 829, 846.

Or.App.2023. Com. (d) cit. in case quot. in sup. Former patient brought, among other things, an intentional-infliction of emotional distress (IIED) claim against former physician, alleging that defendant terminated the parties' physician-patient relationship and mistakenly sent automated messages to plaintiff for scheduling appointments despite termination of the relationship. The trial court granted defendant's motion for summary judgment. This court affirmed in part, holding that defendant's conduct was not sufficiently extreme or outrageous to sustain an IIED claim. The court cited Restatement Second of Torts § 46, Comment *d*, in defining extreme and outrageous conduct and explained that defendant's failure to follow internal policies by failing to issue additional warnings before terminating the parties' relationship on the ground that plaintiff abused painkillers, as well as its failure to stop its automated messages from being sent to plaintiff after

the termination of the parties' relationship, were not extraordinary transgressions of the bounds of socially-tolerable conduct. Wecker v. Salem Clinic, P.C., 529 P.3d 991, 996.

Or.App.2015. Com. (*i*) quot. in case quot. in sup. Corrections officer brought claims for, among other things, intentional infliction of emotional distress against television station and reporter, alleging that defendants showed plaintiff in a television news report about gunshots fired in his neighborhood despite his telling reporter of his safety concerns about revealing his address due to his work and reporter's agreement not to use his image. The trial court denied defendants' special motion to strike plaintiff's tort claims under the state anti-SLAPP statute. This court reversed and remanded, holding that plaintiff failed to show a probability that he would prevail on his claim for intentional infliction of emotional distress, because there was no evidence that defendants desired or intended to cause him emotional distress. While Restatement Second of Torts § 46 provided that the element of intent could depend on whether a defendant knew that emotional distress was certain, or substantially certain, to result from his or her conduct, plaintiff had not presented evidence that the person or persons responsible for broadcasting the footage knew that depicting plaintiff would result in plaintiff's severe emotional distress. Mullen v. Meredith Corp., 353 P.3d 598, 607.

Or.App.2010. Cit. in ftn. Petitioner sought a permanent stalking protective order (SPO) pursuant to Oregon's civil-stalking statute, alleging that former co-worker had engaged in repeated unwanted contact with her that caused her reasonable apprehension regarding her safety. Affirming the trial court's entry of an SPO, this court held that co-worker was not constitutionally entitled to a jury trial. The court reasoned that a statutory claim for civil stalking was not "of like nature" to those causes of action, like the common-law torts of assault and battery, for which a jury trial was guaranteed at the time that the Oregon Constitution was adopted. While co-worker also referred to the tort of intentional infliction of emotional distress, the court declined to address that tort, since it was not recognized at common law at the time that the Oregon Constitution was adopted. Foster v. Miramontes, 236 Or.App. 381, 388, 236 P.3d 782, 787.

Or.App.2008. Com. (d) quot. in sup. and cit. in case quot. in sup., coms. (g) and (h) quot. in sup., com. (i) quot. and adopted in case cit. in conc. op. Individual who was excluded from university campus for stalking university employee sued employee, university, and others for intentional infliction of emotional distress. The trial court granted summary judgment for defendants. Affirming, this court held, inter alia, that, as a matter of law, employee's conduct in reporting the unwanted contacts to university was not extreme and outrageous as required by this tort, even though some portions of the complaint were false or incomplete; additionally, the conduct of university, which employed ordinary means to deal with the complaint, was also not extreme or outrageous. The concurring opinion maintained that, while a jury could find the filing of a false report of stalking to be an extraordinary transgression of socially tolerable conduct, there was no evidence here that defendants intended to cause plaintiff severe emotional distress. House v. Hicks, 218 Or.App. 348, 358, 359, 368, 179 P.3d 730, 736, 737, 742.

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Or.App.2008. Com. (d) quot. in case quot. in sup., com. (j) cit. and quot. in disc. Employee sued employer, asserting claims for workers' compensation discrimination and intentional infliction of severe emotional distress. The trial court entered judgment on a jury verdict for employee on the emotional-distress claim. Affirming, this court held that the trial court did not err in concluding that employee adduced sufficient evidence to send that claim to the jury; employee's co-worker's acts did not necessarily cross the line of outrageousness when taken individually, but given employee's injured condition, as well as the persistent and repetitive nature of the demeaning treatment by several co-workers and its duration over five months, a jury could find the conduct as a whole to be intolerable. Schoen v. Freightliner LLC, 224 Or.App. 613, 625, 627, 199 P.3d 332, 340, 341.

Or.App.2005. Com. (j) cit. in disc. Guardian for his disabled brother sued church congregation and church elder and his wife for, in part, intentional infliction of emotional distress, alleging that elder and wife, while acting under congregation's direction and control, coerced brother to bring guardianship action to have plaintiff removed as guardian by convincing him that plaintiff stole money from him, abused and neglected him, and was Satan's instrument. On remand, trial court granted defendants summary judgment. This court reversed in part and remanded, holding, inter alia, that fact issues existed as to whether plaintiff suffered severe emotional distress due to charges that he neglected his brother and the pursuit of guardianship action. Checkley v. Boyd, 198 Or.App. 110, 107 P.3d 651, 664.

Or.App.2002. Cit. in disc., quot. in ftn., subsecs. (1), (2), and (2)(a) cit. in disc., com. (i) quot. in case quot. in disc. Patient's former husband sued professional counselor and clinical psychologist for, in part, intentional infliction of emotional distress, alleging severe emotional distress as a collateral consequence of the counseling relationship between patient and defendants. The trial court granted defendants summary judgment. Affirming, this court held that the complaint did not plead sufficiently egregious conduct to state a claim for intentional infliction of emotional distress. The court declined to resolve the question of whether third-party claims for intentional infliction of emotional distress generally should be acknowledged in Oregon, or whether, if such a claim were acknowledged, Oregon should adopt a “presence” requirement. Delaney v. Clifton, 180 Or.App. 119, 125-127, 130, 132, 41 P.3d 1099, 1104-1106, 1108.

Or.App.2001. Cit. in disc. Husband sued wife's paramour for intentional infliction of emotional distress. Trial court granted paramour summary judgment. Affirming, this court held that paramour's conduct in entering extramarital relationship that resulted in a pregnancy did not constitute extraordinary transgression of bounds of socially tolerable conduct so as to support plaintiff's claim for intentional infliction of emotional distress. Rosenthal v. Erven, 172 Or.App. 20, 23, 17 P.3d 558, 560.

Or.App.2000. Quot. in disc., com. (j) cit. in disc. Guardian ad litem brought, inter alia, claim of intentional infliction of emotional distress and wrongful use of civil proceedings against religious congregation and its members, alleging that defendants coerced guardian's disabled brother into filing guardianship proceeding against him. Trial court dismissed guardian's claim. Reversing in part and remanding, this court held, inter alia, that guardian's complaint satisfied outrageousness

element of emotional-distress claim where defendants manipulated brother and falsely accused guardian of neglecting, abusing, and stealing from brother. Checkley v. Boyd, 170 Or.App. 721, 14 P.3d 81, 89, 95.

Or.App.1999. Com. (i) quot. in case quot. in disc. School bus driver sued parents of student passengers, alleging intentional infliction of emotional distress, among other claims, arising from the parents' false allegations to the school board that the driver had sexually molested students. Trial court entered judgment on jury verdict for plaintiff. This court affirmed, holding, inter alia, that defendants' conduct was so extraordinary that a reasonable jury could have found it to be beyond all bounds of socially tolerable conduct. Based on its duration and intensity, the jury could have inferred that plaintiff's distress was severe. Kraemer v. Harding, 159 Or.App. 90, 976 P.2d 1160, 1173.

Or.App.1999. Com. (i) quot. in case quot. in sup. Employee of group home for individuals with developmental disabilities sued home for intentional infliction of emotional distress, alleging that facility was liable for house manager's failure to come to employee's assistance after one of the residents attempted to strangle her. The trial court entered judgment on a jury verdict for plaintiff. Reversing the trial court's order of remittitur of punitive damages but otherwise affirming, this court held that the jury was entitled to infer from the circumstances surrounding manager's refusal to come to employee's aid that he acted with the deliberate intent of causing her emotional injury, that manager's behavior was such as to transcend all bounds of socially tolerable conduct, and that the preremittitur award of punitive damages was not excessive. MacCrone v. Edwards Center, Inc., 160 Or.App. 91, 980 P.2d 1156, 1160.

Or.App.1998. Cit. in headnote, quot. in disc. Physically disabled bus passenger sued metropolitan transportation district for intentional infliction of emotional distress after bus driver allegedly belittled, berated, and insulted her, questioned her right to bring an assistance dog on the bus, and suggested that she was just pretending to be disabled in order to pay a reduced fare. The trial court granted defendant's motion for judgment on the pleadings. Reversing and remanding, this court held that the complaint, which included allegations of a public servant's harassment of an individual based on that individual's status as a disabled person, stated a claim sufficient to survive a motion for judgment on the pleadings. Williams v. Tri-County Met. Transp. Dist., 153 Or.App. 686, 958 P.2d 202, 204.

Or.App.1995. Com. (e) cit. generally in headnotes and quot. in sup. Apartment resident brought an action for intention infliction of emotional distress, inter alia, against police officers and an employee of an investigations company, arising from employee's failed attempt to serve a summons and complaint and from police officers' ensuing actions in permitting employee to enter the apartment and verbally assault the residents. The trial court entered judgment on a jury verdict awarding plaintiff damages. Affirming in part, this court held, inter alia, that defendant officers' conduct in permitting the employee's unlawful entry, notwithstanding plaintiff's objections and the officers' knowledge of an earlier altercation, and in standing by and doing nothing while the

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employee verbally abused plaintiff and his family in their home was so extraordinary as to warrant tort liability. Mauri v. Smith, 135 Or.App. 662, 676, 901 P.2d 247, 249, 256.

Or.App.1994. Com. (d) quot. in part in sup. Plaintiff sued defendant for intentional infliction of emotional distress after defendant intentionally ordered several magazine subscriptions in plaintiff's name by forging plaintiff's signature on the order forms. This court affirmed the trial court's dismissal for failure to state a claim, holding that, even if defendant's conduct of signing his name on magazine subscription forms was a felony under state law, it was not the type of conduct that constituted an extraordinary transgression of the bounds of socially tolerable behavior. Shay v. Paulson, 131 Or.App. 270, 884 P.2d 870, 872.

Or.App.1993. Cit. and quot. in cases cit. in disc., quot. in ftn. Defendant who was convicted of first-degree rape and sodomy for engaging in sexual intercourse with a female child under the age of 12 appealed the trial court's order that he make restitution, as part of his sentence, to the child's mother for her counseling costs. Vacating the restitution order and remanding for resentencing, this court held that since the state presented no theory of civil liability under which the mother could recover her counseling costs from defendant, she was not a "victim" under the applicable statute and was not entitled to restitution. The court rejected the state's argument that the mother could recover those expenses in an action against defendant for intentional infliction of emotional distress, noting that the state supreme court had left undecided the issue of whether a plaintiff might recover damages for emotional distress from a defendant who engaged in conduct directed at a third person. State v. Carrillo, 125 Or.App. 52, 865 P.2d 379, 381.

Or.App.1984. Cit. generally in ftn. State appealed trial court's order sustaining defendant's demurrer to complaint alleging racial intimidation and harassment. This court affirmed, finding that harassment statute, which prohibited abusive or obscene language, violated free speech provision of state constitution. The court noted that state constitution did not preclude a civil action for abusive speech, such as an action for intentional infliction of emotional distress. State v. Harrington, 67 Or.App. 608, 680 P.2d 666, 670, review denied 297 Or. 547, 685 P.2d 998 (1984).

Or.App.1982. Com. (d) quot. in ftn. and cit. in disc. The plaintiff, a former member of a religious organization, brought this action against the religious corporation and others to recover for intentional infliction of emotional harm and for fraud. The plaintiff's cause of action for outrageous conduct alleged a scheme to gain control of her mind and to force her into a life of service to the defendants, and a course of retaliatory conduct after the plaintiff disassociated herself from the defendants. The plaintiff's fraud cause of action alleged 14 misrepresentations which induced her to pay some $3,000 to the defendants. The jury awarded the plaintiff compensatory and punitive damages on both causes of action. On appeal, the defendants argued, inter alia, that there was not sufficient evidence of outrageous conduct or resultant severe emotional distress to have permitted the case to go to the jury. This court reversed, holding that the defendants' motion for a directed verdict on the cause of action for outrageous conduct should have been granted, because there was nothing in the record which constituted conduct beyond the limits of social toleration. This court noted that there was no evidence that the plaintiff was threatened or forced to remain in

Scientology, that her recruitment and indoctrination were not so very different from methods used by any number of organizations, and that the drills the plaintiff was subjected to were not in themselves outrageous. The fraud cause of action was reversed as to two of the defendants and reversed and remanded for a new trial as to the third defendant. Christofferson v. Church of Scientology, Etc., 57 Or.App. 203, 644 P.2d 577, 584, review denied 293 Or. 483, 650 P.2d 928 (1982), certiorari denied 459 U.S. 1206, 103 S.Ct. 1196, 75 L.Ed.2d 439 (1983), certiorari denied 459 U.S. 1227, 103 S.Ct. 1234, 75 L.Ed.2d 468 (1983).

Or.App.1982. Com. (j) cit. in case quot. in disc. and cit. in case quot. in conc. and diss. op. The plaintiff brought suit against the defendant, seeking recovery for damages to his real property caused by a fire allegedly resulting from the defendant's negligence in installing insulation in direct contact with the fluepipe of a woodstove in the plaintiff's residence. The plaintiff also sought to recover damages for mental distress arising out of the defendant's alleged negligence. The trial court dismissed the action and the plaintiff appealed. On appeal, the plaintiff contended that the trial court erred in striking the plaintiff's allegation of mental distress from his complaint. This court stated that while a plaintiff need not plead more than he must prove, he must at least plead that which he must prove for a minimum to recover damages for emotional distress. The court found that the plaintiff pleaded only negligently caused damage to his property, and no facts from which it could be inferred that the defendant's conduct amounted to a private nuisance of the type allowing recovery for mental distress. Therefore, the court declined to extend the recovery of damages for mental distress to this particular case. The court affirmed in part and reversed and remanded in part, holding that the trial court should not have dismissed the plaintiff's remaining claim for damages. The concurring and dissenting justice argued that the plaintiff alleged more than damage to his property and concluded that the plaintiff should have had an opportunity to present evidence in support of his mental distress claim. Meyer v. 4-D Insulation Co., Inc., 60 Or.App. 70, 652 P.2d 852, 855, 861.

Or.App.1981. Com. (j) cit. in ftn. in sup. The plaintiff worked as a part-time checker at the defendant store. The defendant customer entered the plaintiff's lane and the plaintiff began to ring up the items. There was a dispute as to one item, so the customer left the check-out lane to locate the item and the plaintiff moved her merchandise and voided the receipt. The plaintiff had begun to check out other customers when the defendant customer returned and accused the plaintiff of stealing the twenty dollars she had left on her merchandise. The store manager questioned the plaintiff, counted the money in her register and eventually demanded that the plaintiff submit to a strip search. The defendant customer was irate throughout the incident and other persons in the store gathered and watched the plaintiff. It appeared ultimately that the defendant customer had been mistaken. The next day the store implemented a procedure which the plaintiff felt was being used to watch her, and she quit at the end of her shift. The plaintiff brought a tort action for outrageous conduct against the defendants. The lower court granted the defendants' motions for summary judgment. This court stated that the plaintiff would have to prove that she suffered severe emotional distress. The court stated that in this case it was not unreasonable to expect that a shy, modest, young woman who had been put in the plaintiff's position would suffer the effects that she claimed, and that her distress was more than that which a person might reasonably be

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expected to pay as the price for living among people. The lower court's decision was reversed and the case remanded for trial. Bodewig v. K-Mart, Inc., 54 Or.App. 480, 635 P.2d 657, 662.

Or.App.1981. Com. cit. generally in disc. Landlords brought an action for forcible entry and detainer and the tenants counterclaimed for landlords' alleged outrageous conduct in attempting to evict them. The lower court entered judgment on a verdict in favor of the tenants on their counterclaim and the landlords appealed. This court stated that in order to recover on the counterclaim for intentional infliction of mental distress, the tenants must show that the landlords' conduct was deliberately aimed at harassing and distressing the tenants and exceeded the level of offensive conduct which a person should be expected to endure under contemporary societal standards. The court held, inter alia, that the evidence was sufficient to sustain the findings that the landlords had attempted to harass the tenants into surrendering their leaseholds and that the landlords acted beyond the bounds of societally tolerable conduct in their attempt to evict the tenants. The judgment of the lower court was affirmed. Fitzpatrick v. Robbins, 51 Or.App. 597, 626 P.2d 910, 913.

Or.App.1979. Subsec. (1) quot. in sup. Owner of an automobile brought action against garage, from which automobile had been stolen and damaged, to recover for the cost of repairs, loss of use of the vehicle, and intentional infliction of emotional distress. The trial court entered judgment on the verdict in favor of the owner for the cost of repair, but struck the cause of action for emotional distress and refused to submit to the jury the issue of compensation for loss of use of the automobile, and the automobile owner appealed. The court held, inter alia, that the owner was entitled to recover for the loss of use of the vehicle during the time that it was being repaired, but not for the time during which she delayed authorizing repairs, and that the complaint failed to state a basis for recovery for emotional distress, since it did not allege facts that showed that defendant's conduct was outrageous in the extreme. Graf v. Don Rasmussen Co., 39 Or.App. 311, 592 P.2d 250, 256.

Pa.

Pa.2010. Cit. in sup. After an accident in which a hose from a fire engine struck two ten-year-old bystanders, killing one and injuring the other, bystanders' family members brought strict-products-liability claims against successors of the fire engine's manufacturer. The trial court entered judgment on a jury verdict awarding damages for bystanders' injuries and wrongful death and for emotional distress suffered by family members who witnessed the accident. The court of appeals affirmed. Affirming in part, this court held that the trial court did not err in its instruction to the jury concerning the product-line exception to the rule against successor liability. The court stated in dicta that, for purposes of a strict-products-liability claim, a plaintiff's recovery for emotional distress was limited to that which was proximately caused by contemporaneous physical impact. Schmidt v. Boardman Co., 608 Pa. 327, 11 A.3d 924, 951.

Pa.2000. Quot. in sup., cit. in conc. op., subsec. (1) cit. in ftn. to conc. op., subsec. (2) cit. in sup. and in conc. op., com. (l) quot. in sup. and cit. in conc. op. After a teenage girl died while

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being treated for pneumonia at a hospital, her parents sued the hospital and two doctors for, in part, intentional infliction of emotional distress. Trial court entered judgment on jury verdict awarding plaintiff mother damages for emotional distress. Appellate court vacated in part and remanded for new trial, but it upheld trial court's denial of one doctor's motion for judgment n.o.v. on the emotional-distress claim. This court reversed in part, holding that inasmuch as mother had no contemporaneous observation of the tort allegedly committed to her child, recovery on the theory of liability set forth in Restatement (Second) of Torts § 46(2) was barred. Concurring opinion agreed that presence was required to pursue the severe emotional distress tort, and it observed that mother could not ascertain from her position in the waiting room that a pediatrician, rather than a cardiologist, performed the catheterization. Taylor v. Albert Einstein Medical Center, 562 Pa. 176, 754 A.2d 650, 650-655.

Pa.1998. Cit. in headnotes, cit. in disc., cit. in ftn., subsec. (1) quot. in disc., quot. in conc. and diss. op., com. (d) quot. in disc., quot. in conc. and diss. op. Female employee sued former supervisor and employer for violations of the Pennsylvania Human Relations Act (Act). Plaintiff also asserted a claim for intentional infliction of emotional distress in connection with supervisor's sexually abusive behavior. The jury returned a verdict for plaintiff, but the trial court entered judgment n.o.v. The intermediate appellate court vacated the jury's award of punitive damages under the Act and reversed as to supervisor's liability for intentional infliction of emotional distress. Affirming and remanding, this court held that punitive damages were not available under the Act; that consideration of retaliatory conduct was but one factor to be used in assessing liability for intentional infliction of emotional distress; and that, in this case, supervisor's conduct was not extreme or outrageous. Concurring and dissenting opinion believed that supervisor's actions, which included using sexually explicit language and profanity and posting inappropriate photographs and other materials in the workplace, were utterly intolerable in civilized society. Hoy v. Angelone, 554 Pa. 134, 720 A.2d 745, 746, 753-755. See above case.

Pa.1987. Cit. but not fol., cit. in conc. op., subsec. (1) and com. (d) quot. in disc., coms. (h) and (j) quot. in conc. op. A husband and wife sued a cemetery for intentional infliction of emotional distress, alleging that the cemetery failed to care for the gravesites of their deceased children and that it demanded payments in addition to the purchase price of the plots. The trial court granted the defendant's motion for a compulsory nonsuit. Affirming, this court held that the plaintiffs could not recover because they had presented no medical evidence concerning their alleged emotional distress, reasoning that the requirement of some objective proof did not present an unsurmountable obstacle to recovery. One concurring justice rejected a per se rule requiring competent medical evidence to prove severe emotional distress in all cases. Another concurring justice expressly rejected the tort; a third concurring justice argued that the defendant's conduct was not sufficiently outrageous to support a claim for damages for intentional infliction of emotional distress. Kazatsky v. King David Memorial Park, 515 Pa. 183, 527 A.2d 988, 988, 991-993, 995-997.

Pa.1981. Subsec. (1) cit. and quot. in ftn. The plaintiff's insured motor boat and outboard motor were damaged by a severe storm. The plaintiff filed a complaint seeking, inter alia, damages for emotional distress and punitive damages for the defendant insurer's bad faith conduct in denying

the insured's claim. The lower court dismissed the count in trespass and the plaintiff appealed. This court held that the Unfair Insurance Practices Act served to deter bad faith conduct and applied not only to the plaintiff's attempt to recover punitive damages but also to his claim for emotional distress. The court therefore affirmed. D'Ambrosio v. Pa. Nat. Mut. Cas. Ins. Co., 494 Pa. 501, 431 A.2d 966, 971.

Pa.1970. Cit. in sup. The plaintiff parents filed a trespass action for mental anguish allegedly caused by defendant's intentional action of withholding and burying the body of their son after one of the defendants had hit the son with a car. The court held that plaintiffs stated a cause of action because the law now allows recovery for mental anguish alone. Papieves v. Lawrence, 437 Pa. 373, 263 A.2d 118, 121.

Pa.Super.

Pa.Super.2022. Com. (d) cit. in sup. After student-athlete's pro se medical-malpractice claims were dismissed with prejudice, plaintiff filed an amended complaint asserting, among other things, a claim for intentional infliction of emotional distress (IIED) against university and university officials, alleging that defendants failed to correctly diagnose an infection in plaintiff's knee caused by injuries sustained in university football activities. The trial court sustained defendants' preliminary objection, holding that plaintiff failed to allege a claim for IIED under Restatement Second of Torts § 46, Comment *d*, because defendants' conduct in declining to provide transportation for plaintiff but offering to reimburse his transportation costs did not amount to the level of extreme outrageousness necessary to sustain a claim for IIED. This court affirmed and adopted the trial court's opinion for purposes of appellate review. Jordan v. Pennsylvania State University, 276 A.3d 751, 775.

Pa.Super.2019. Com. (d) quot. in case quot. in sup.; coms. (f) and (h) cit. in case quot. in sup.; illus. 4 quot. in sup., quot. in case quot. in sup. Customer of a pizza restaurant sued restaurant and its employee, alleging, among other things, intentional infliction of emotional distress in connection with an incident in which employee repeatedly called customer, who was African American, a "nigger" after he asked for a refund for a burnt pizza. The trial court sustained restaurant and employee's preliminary objections. Affirming, this court held that the trial court did not err in finding that the use of a racial slur in an argument was not enough to establish extreme and outrageous conduct that gave rise to liability for intentional infliction of emotional distress under Restatement Second of Torts § 46, particularly given that this was not a case involving continuous malicious actions or a special relationship between the parties. John v. Philadelphia Pizza Team, Inc., 209 A.3d 380, 383-385.

Pa.Super.2012. Cit. in ftn., subsec. (2) quot. in sup. and cit. in ftn., com. (h) quot. in case quot. in ftn. Son of deceased patient sued hospital, among others, for intentional infliction of emotional distress (IIED), inter alia, alleging that, although hospital knew that he did not want any post-mortem operations performed on his father's body, hospital, without his knowledge or permission,

transferred the body to medical school, where he was unable to locate it for several days; plaintiff further averred that, when the body was located, he and his family suffered mental and emotional distress through viewing disfiguring scars to decedent's face, head, and torso, and evidence that the brain had been removed or operated on. The trial court dismissed. Affirming, this court held that, while factfinders could reasonably disagree as to whether hospital's conduct was "outrageous," plaintiff did not sufficiently plead a claim for IIED, because he was not present when the allegedly tortious conduct that caused his severe distress occurred. Weiley v. Albert Einstein Medical Center, 51 A.3d 202, 216, 217.

Pa.Super.2009. Cit. in ftn., quot. in case quot. in ftn. Parents of son who sustained injuries at birth sued hospital's insurer, insurer's attorney's and attorney's law firm for abuse of process, alleging that defendants improperly filed a petition for appointment of a guardian ad litem over son while the parties were negotiating a settlement of parents' underlying suit against hospital. The trial court granted summary judgment for defendants. Reversing and remanding, this court held that plaintiffs were not required to present medical documentation of distress-related symptoms or evidence of a physical impact in order to establish that they sustained emotional harm; while such evidence was necessary to establish emotional harm for emotional-distress claims—where the emotional harm itself constituted the cause of action—it was not necessary for abuse-of-process claims, which relied for their impetus on the filing of a docketed action, petition, or other legal modality. Cruz v. Princeton Ins. Co., 972 A.2d 14, 18.

Pa.Super.2008. Cit. in sup., cit. in case quot. in ftn., subsec. (1) cit. in case quot. in sup. Patient brought professional negligence action against physician and others, alleging that defendants failed to properly read pelvic ultrasound examinations performed during her pregnancy that should have revealed profound fetal anomalies, including limb deformities, suffered by her unborn son, which she only discovered, first hand, upon his birth. The trial court sustained defendants' preliminary objections. Affirming in part, this court held, inter alia, that plaintiff failed to state a claim for intentional infliction of emotional distress, because she did not supply any factual allegations to support a legal conclusion of recklessness or intentional acts by defendants. Toney v. Chester County Hosp., 961 A.2d 192, 201, 203.

Pa.Super.2007. Cit. in case quot. in ftn. (general cite), subsec. (1) cit. in ftn. and adopted, com. (d) quot. in case quot. in sup. After college determined that student had plagiarized a classmate's work, student sued college, professor, and classmates for, in part, intentional infliction of emotional distress. The trial court dismissed the case. Affirming, this court held that plaintiff's allegations that defendants intentionally and wrongly accused her of violations of the college's honor code, despite their knowledge of the falsity of the allegations, and that college and professor acted to deprive her of her rights to a fair and impartial hearing did not describe behavior rising to the requisite level of clearly desperate and ultra extreme conduct. While noting that the Pennsylvania Supreme Court had not formally adopted Restatement Second of Torts § 46, this court named § 46(1) as the appropriate legal standard to be applied in reviewing a claim for intentional infliction of emotional distress. Reardon v. Allegheny College, 926 A.2d 477, 487, 488.

Pa.Super.2005. Cit. in ftn., cit. in case cit. in disc., com. (d) quot. in case quot. in disc. Husband brought claims for intentional infliction of emotional distress and professional negligence against ex-wife's therapist, alleging that therapist, who was treating ex-wife before the marriage was consummated, had a duty to warn husband that ex-wife would not be able to commit to the relationship. Trial court dismissed complaint. Affirming, this court held, inter alia, that, as to plaintiff's intentional-infliction-of-emotional-distress claim, plaintiff failed to show that therapist's actions rose to the level of extreme and outrageous conduct that went beyond all possible bounds of decency and would be considered intolerable in a civilized society. Swisher v. Pitz, 2005 PA Super 56, 868 A.2d 1228, 1231.

Pa.Super.2001. Cit. in disc. and ftn., cit. in case cit. in disc. Husband sued wife's lover for interference with contractual relations and conspiracy. This court affirmed trial court's dismissal, holding that there was no basis for plaintiff's claims, as tort claims based upon enabling or consorting with an unfaithful spouse in derogation of duties of marital fidelity were not actionable. The court distinguished a prior case that asserted intentional interference with contractual rights, because that case relied on Restatement Second of Torts § 46. The court stated that the tort of intentional interference with performance of contract by third persons, as embodied by Restatement Second of Torts § 766, was intended to reach commercial and employment contracts, not domestic contracts. Atkinson v. Evans, 787 A.2d 1033, 1035.

Pa.Super.2000. Cit. in disc. After a mentally ill truck driver fatally shot a homeowner and injured a motorist who gave him a ride, the motorist and the homeowner's widow sued the driver's employer for negligence, vicarious liability, and negligent and intentional infliction of emotional distress. Trial court granted employer summary judgment. This court affirmed, holding, inter alia, that plaintiffs' claim for intentional infliction of emotional distress failed, because employer did not engage in any extreme or outrageous conduct. Brezenski v. World Truck Transfer, Inc., 755 A.2d 36, 45.

Pa.Super.2000. Cit. and quot. in disc., com. (e) quot. in ftn. Employees sued county sheriff for defamation after sheriff provided deputies to accompany employer when he terminated employees. The trial court granted defendant summary judgment. Affirming, this court noted that since the Pennsylvania Supreme Court had not adopted certain portions of the Restatement Second of Torts, this court was not authorized to adopt new tort standards. Therefore, the court held that the sheriff's action in providing deputies to accompany employer when he terminated employees did not constitute defamation. D'Errico v. DeFazio, 763 A.2d 424, 434.

Pa.Super.2000. Cit. generally in ftn., subsec. (1) and com. (d) quot. in case quot. in disc. After mother who had been estranged from her son and daughter for 20 years sought a reconciliation with them and signed a power of attorney in favor of her son, the son used the power of attorney to close out his mother's bank accounts and take control of the funds. After mother confronted her children about these matters and was ejected from her daughter's house, she sued the children for, in part, intentional infliction of emotional distress. The trial court entered judgment on a jury verdict awarding plaintiff damages on this claim. Reversing in part and vacating the award, this court held,

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inter alia, that plaintiff could not recover because she failed to present expert medical testimony that she suffered severe emotional distress. Paves v. Corson, 765 A.2d 1128, 1134, appeal granted in part 566 Pa. 213, 779 A.2d 1142 (2001).

Pa.Super.1999. Cit. in case cit. in disc. A political figure sued a newspaper and a publishing company, among others, for defamation and "false light" invasion of privacy. Trial court granted defendants summary judgment. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that expert medical testimony was necessary in order to show both the emotional distress itself and that the plaintiff's particular distress was the kind that normally resulted from the particular invasion of privacy. Wecht, M.D., J.D. v. PG Publishing Co., 725 A.2d 788, 791.

Pa.Super.1998. Cit. and quot. in disc., cit. in case quot. in disc., cit. in conc. and diss. op., subsec. (2) cit. in case cit. in sup. and cit. in conc. and diss. op., com. (l) quot. in ftn. to conc. and diss. op. Parents whose 16-year-old daughter died during a catheterization procedure in a hospital brought wrongful-death and survival actions against hospital, pediatrician, and cardiologist. Vacating the trial court's entry of judgment on a jury verdict against pediatrician and remanding, this court held, inter alia, that the trial court did not err in refusing to enter a judgment n.o.v. in pediatrician's favor as to the verdict based on intentional infliction of emotional distress, since whether mother suffered severe emotional distress as a result of pediatrician's outrageous conduct in disregarding her limitation of consent for performance of the procedure to cardiologist was for the jury to determine. The concurring and dissenting opinion argued that mother was not entitled to recover damages for emotional distress because she did not witness pediatrician's outrageous conduct in performing the procedure himself despite her lack of consent. Taylor v. Albert Einstein Medical Center, 723 A.2d 1027, 1038, 1040, 1041, reversed in part 562 Pa. 176, 754 A.2d 650 (Pa.2000). See above case.

Pa.Super.1997. Cit. in headnote, cit. but dist. Former supermarket employee sued former supervisor and supermarket for violations of the Pennsylvania Human Relations Act, alleging that supervisor created and subjected employee to a sexually hostile work environment. Employee also asserted a claim for intentional infliction of emotional distress. The trial court entered judgment on a jury verdict for employee. Affirming in part and reversing in part the judgment against supermarket, and reversing the judgment against supervisor, this court held, inter alia, that supervisor created a sexually hostile work environment by groping employee, making lewd and suggestive comments, and posting sexually explicit photographs in the work area, and that supermarket knew or should have known of the situation; however, supervisor's conduct was not sufficiently egregious to support a claim for intentional infliction of emotional distress. Hoy v. Angelone, 456 Pa.Super. 596, 691 A.2d 476, 478, 482, affirmed 554 Pa. 134, 720 A.2d 745 (1998).

Pa.Super.1996. Cit. in conc. op., subsec. (1) quot. in sup., com. (d) quot. in sup. and cit. in conc. op., com. (h) cit. in conc. op. A terminated safety director for a sanitation company sued the company and its owner for wrongful discharge and negligent and intentional infliction of emotional distress. Trial court granted defendants summary judgment. This court affirmed, holding, inter alia, that the fact that plaintiff was fired for embarrassing his employer and a customer was not shocking

or outrageous. Furthermore, plaintiff failed to substantiate that he actually suffered the claimed distress with expert medical confirmation. Concurring opinion agreed that plaintiff's allegations that defendants harassed plaintiff concerning plaintiff's actions with regard to his duties as a safety director and that defendants expressed resentment and ill feelings towards plaintiff were insufficient to establish outrageous conduct. Hunger v. Grand Cent. Sanitation, 447 Pa.Super. 575, 670 A.2d 173, 177, 181, 182.

Pa.Super.1996. Cit. in headnote, subsec. (1) quot. in disc., com. (d) quot. generally in case quot. in disc., com. (h) quot. in disc. A college football coach who was fired after several players complained about the coach to school officials sued the college, school administrators, and three of the complaining players for intentional infliction of emotional distress and intentional interference with contractual relations, among other claims. Trial court granted defendants summary judgment. This court affirmed, holding, inter alia, that plaintiff failed to state a cause of action for intentional infliction of emotional distress, because the conduct of the players, in expressing concerns about their coach to the college administration, was not extreme and outrageous conduct. Small v. Juniata College, 452 Pa.Super. 410, 682 A.2d 350, 351, 355.

Pa.Super.1995. Cit. in disc., subsec. (1) quot. but dist. Woman who confided to psychotherapist that she suffocated her four-month-old son sued psychotherapist, among others, for, inter alia, infliction of emotional distress, claiming that psychotherapist caused her severe emotional suffering by disclosing the information to the authorities. The trial court dismissed the complaint and this court affirmed. Since plaintiff did not specify whether she was alleging negligent or intentional infliction of emotional distress, the court analyzed the facts under both standards and held that, because there was no physical impact, plaintiff had not shown negligent infliction, and, because psychotherapist's actions were not extreme or outrageous, plaintiff had not proven intentional infliction either. Fewell v. Besner, 444 Pa.Super. 559, 664 A.2d 577, 581, 581-582.

Pa.Super.1995. Cit. in sup., subsec. (1) and com. (d) quot. in sup. Employee who was reprimanded and demoted for arriving late to work as a result of stopping to administer emergency medical treatment to an automobile-accident victim sued supervisors, among others, for intentional infliction of emotional distress. Affirming the trial court's grant of summary judgment for defendants, this court held, inter alia, that defendants' conduct in screaming at plaintiff for being late, telling him that he would have to choose between being an emergency medical technician and his employment, reprimanding him, and demoting him to an entry-level position did not rise to the level of outrageousness required to permit recovery for intentional infliction of emotional distress. Snyder v. Speciality Glass Products, Inc., 441 Pa.Super. 613, 658 A.2d 366, 374, 375.

Pa.Super.1994. Cit. in cases cit. in disc. Mobile-home-park owners brought an action for intentional infliction of emotional distress, inter alia, against neighbor who had filed suit in equity against planning commission to enjoin it from approving application of plaintiffs to expand their mobile-home park. Affirming in part and reversing in part the trial court's dismissal of the case, this court held, inter alia, that plaintiffs failed to state a claim for intentional infliction of emotional

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distress under Pennsylvania law, since they failed to allege physical injury. Hart v. O'Malley, 436 Pa.Super. 151, 647 A.2d 542, 553, 554.

Pa.Super.1994. Cit. in case cit. in ftn., com. (d) quot. in case quot. in disc. Doctor sued professional corporation that formerly employed him, alleging tortious interference with contract and intentional infliction of emotional distress. He asserted that he was underpaid and wrongfully discharged, and that the corporation and its officers had wrongfully excluded him from the activities and revenues of corporation and eventually from the practice of medicine as corporation's employee. Affirming in part the trial court's dismissal, this court held, inter alia, that none of the allegations contained in plaintiff's complaint described conduct approaching the type of behavior that might give rise to liability for intentional infliction of emotional distress, since this case involved a straightforward business and contractual dispute. Zikria v. Ass'n of T. & C. Surgeons, 432 Pa.Super. 248, 637 A.2d 1367, 1370.

Pa.Super.1993. Cit. but dist., cit. in case quot. in ftn., cit. in ftn. Wife sued hospital for negligent infliction of emotional distress after defendant erroneously informed her that her husband had been injured in a serious accident. Reversing the trial court's denial of defendant's motion for judgment n.o.v., this court held that, although plaintiff's allegation of loss of continence, depression, nightmares, and insomnia adequately alleged physical injury as required to support a negligent infliction of emotional distress claim, she was not a bystander entitled to recover, since she was not related to the actual victim of the accident and had no contemporaneous perception of the accident. Armstrong v. Paoli Memorial Hosp., 430 Pa.Super. 36, 43, 49, 633 A.2d 605, 608, 611.

Pa.Super.1993. Cit. in case quot. in sup., subsec. (1) quot. in sup. Student sued college he was attending and one of his teachers for intentional infliction of emotional distress, inter alia, alleging that teacher did everything in his power to sabotage plaintiff's reputation and academic career after plaintiff objected to an exercise in teacher's "Gender Stereotyping" course as being improper. Affirming the trial court's granting of defendants' preliminary objections to plaintiff's emotional distress claim, this court held that the facts were insufficient to support plaintiff's claim and that plaintiff's failure to allege that teacher's conduct caused him to seek medical treatment required dismissal of the claim. Britt v. Chestnut Hill College, 429 Pa.Super. 263, 272, 632 A.2d 557, 561.

Pa.Super.1993. Cit. and quot. in disc., cit. in case quot. in diss. op., com. (d) cit. in disc. and in diss. op., coms. (e) and (h) cit. in disc., com. (j) cit. and quot. in disc. Employee sued employer for intentional infliction of emotional distress, inter alia, alleging that employer sexually harassed her repeatedly. Jury found for employee on emotional distress claim, but trial court granted employer's motion for judgment n.o.v. on the ground that employee had not sustained her burden of proof as to damages because she failed to introduce expert medical testimony. Reversing and remanding, this court held that expert medical testimony was not required under the facts of this case. The court noted that certain cases of intentional infliction of emotional distress required expert testimony, but the suffering of fright, humiliation, embarrassment, and loss of self-esteem in this case was within the average juror's understanding. Dissent argued that expert testimony was required because mental anguish was not easily identified, and because the Pennsylvania Supreme Court previously

held that expert testimony was required. Hackney v. Woodring, 424 Pa.Super. 96, 622 A.2d 286, 288, 290-292, reversed ___ Pa. ___, 652 A.2d 291 (1994).

Pa.Super.1993. Cit. in disc., cit. in diss. op. (erron. cit. in diss. op. as § 646), subsec. (1) cit. in disc., subsec. (2) cit. in sup. and in ftn., com. (*l*) cit. and quot. in disc. and quot. in ftn. to diss. op., com. (d) quot. in disc., caveat to com. (l) cit. in diss. op. An altar boy and his parents sued a priest, their church, and their diocese for damages resulting from alleged sexual abuse of the boy by the priest. This court affirmed a dismissal of the parents' claims, holding, inter alia, that the parents, who were not present at the time of the abuse, could not recover for intentional infliction of emotional distress. A dissent argued that the priest's conduct was so outrageous as to obviate the requirement of presence for the parents' emotional distress claim. Johnson v. Caparelli, 425 Pa.Super. 404, 410-412, 415-417, 625 A.2d 668, 671-674.

Pa.Super.1993. Cit. in disc., cit. in case quot. in disc., subsec. (1) quot. in disc., subsecs. (2)(a) and (2)(b) cit. and quot. in disc., com. (d) quot. in case quot. in disc. Claiming that veterinarian viciously beat a dog to death because he was having difficulty getting dog out of recovery room, veterinary assistants and dog's owners picketed veterinary hospital, and veterinarian sued them for defamation. Dog owners counterclaimed for, among other things, intentional infliction of emotional distress. Trial court dismissed emotional distress counterclaim. Affirming, this court held that dog owners did not state cause of action for intentional infliction of emotional distress because veterinarian's principal misconduct was directed at dog, not at owners themselves. Furthermore, veterinarian's acts of calling owner stupid, trying to lure owner into a fight, calling the dog “fat and ugly,” and telling owners that he would soon own their truck and house were not sufficiently outrageous to justify emotional distress damages. Miller v. Peraino, 426 Pa.Super. 189, 626 A.2d 637, 640, 641.

Pa.Super.1992. Subsec. (1) quot. but not fol. and cit. generally in disc. The daughter of a woman who died in a nursing home sued the nursing home for intentional, reckless, or negligent infliction of emotional distress, inter alia. Plaintiff's claim was based on her presence in the room while her mother's dressings were removed, revealing a spreading gangrenous infection that caused plaintiff to become upset, nauseated, and ill at the scene. Affirming the trial court's dismissal of the complaint, this court held that plaintiff could not prevail because defendant's actions were rendered in the normal course of treatment and were not calculated to induce emotional distress to bystanding family members. The court also noted that plaintiff, who averred no injury other than momentary nausea, had voluntarily chosen to be present and observe her mother's treatment. Kelly v. Resource Housing of America, 419 Pa.Super. 393, 615 A.2d 423, 426.

Pa.Super.1991. Cit. in disc., subsec. (1) quot. in disc., com. (d) quot. in disc. A hospital patient left unattended while awaiting an x-ray heard loud noises and vulgar language in the hallway coming from a birthday celebration for a hospital employee. The patient sued the hospital alleging that its employees, by their conduct, had intentionally and negligently caused her emotional distress. The trial court sustained the hospital's demurrer. Affirming, this court held, inter alia, that the plaintiff's claim for intentional infliction of emotional distress failed due to the lack of any averment in her

complaint of physical harm, injury, or illness occurring as a result of the employees' conduct. The court stated that the plaintiff's allegations of outrageousness did not rise to the level of the extreme and outrageous conduct necessary to sustain a cause of action for the tort of intentional infliction of emotional distress. Abadie v. Riddle Memorial Hosp., 404 Pa.Super. 8, 589 A.2d 1143, 1145, 1146.

Pa.Super.1991. A woman's husband came to visit her in a hospital psychiatric unit and found her hanging by the neck from shoestrings behind a bathroom door adjacent to her hospital room in a failed suicide attempt. The husband sued the hospital, the psychiatric unit's manager, and a psychiatrist for negligent infliction of emotional distress, inter alia. This court affirmed the trial court's dismissal, holding that plaintiff had not sufficiently pleaded a cause of action for negligent infliction of emotional distress, in that he failed to allege that he had witnessed defendants' failure to adequately care for his wife but alleged only that he witnessed the aftermath of defendants' negligence. The court did not reach the issue of whether plaintiff sufficiently pleaded a cause of action for intentional infliction of emotional distress, because plaintiff alleged neither intentional misconduct by defendants nor outrageous behavior needed for that tort. Bloom v. Dubois Regional Medical Ctr., 409 Pa.Super. 83, 597 A.2d 671, 680.

Pa.Super.1991. Com. (d) quot. in diss. op. A motorist sued his insurer and a law firm for infliction of emotional distress, among other claims, alleging that he was forced to undergo unnecessary and embarrassing medical examinations for his claim following an automobile accident. After the trial judge had denied the defendant's preliminary objections and denied reconsideration, a different judge sitting on the same court entered an order, on reconsideration, granting the defendants' preliminary objections and dismissing the case. Reversing and remanding, this court held that it was impermissible for another judge of the same court simply to ignore the previous decision and, without explanation, enter his own inconsistent order. The dissent would affirm, arguing that no allegation proffered by the plaintiff in the complaint could cause the court to regard any of the conduct attributed to the defendants as outrageous. Golden v. Dion & Rosenau, 410 Pa.Super. 506, 600 A.2d 568, 575.

Pa.Super.1991. Cit. in disc., cit. in case quot. in disc., cit. in cases cit. in ftn., com. (d) quot. in ftn. A patient sued, among others, her treating doctor after her post-spontaneous miscarriage, alleging, in addition to medical malpractice claims, that defendant's comment, “if you lose [the baby], you lose it,” intentionally or negligently caused her emotional distress. The trial court entered summary judgment for defendant. Affirming, this court held that damages for negligent infliction of emotional distress could not be awarded without a physical manifestation of plaintiff's emotional distress, evidence of which plaintiff failed to offer. It also held that defendant's comment was not extreme and outrageous. Moreover, the court agreed with defendant that an intentional infliction of emotional distress claim was not cognizable where defendant's negligence formed the basis of the claim. Strain v. Ferroni, 405 Pa.Super. 349, 592 A.2d 698, 703, 704.

Pa.Super.1990. Cit. in disc., cit. in case cit. and quot. in disc., com. (d) quot. in disc. A decedent, who had contracted with a corporation to be placed in a mausoleum on his death, was temporarily interred underground, in accordance with a provision in the contract, because the mausoleum

was unfinished when he died; he was then transferred to the mausoleum on its completion. The decedent's widow sued the corporation, alleging that the defendant intentionally caused her severe emotional distress by the manner in which it provided for her husband's interment. The trial court granted the defendant's motion for a compulsory nonsuit. Affirming, this court held meritless the plaintiff's claim for intentional infliction of emotional distress, because she was not present during the defendant's treatment of the corpse, did not see the damage to the casket or the condition of the body, and failed to establish the extreme and outrageous conduct that Pennsylvania law required for a claim of intentional infliction of emotional distress. Baker v. Morjon, Inc., 393 Pa.Super. 409, 574 A.2d 676, 678, 679.

Pa.Super.1990. Cit. in disc., cit. in case cit. in disc., com. (d) quot. in case quot. in disc., com. (h) cit. in disc. During a bitter custody dispute, a man allegedly threatened to kill his wife's mother, resulting in the filing of criminal charges, all of which were later dropped or nolle prossed. As a result of the filing of the criminal charges, which the man contended were unfounded, he filed this action against his now former mother-in-law, inter alia, for intentional infliction of emotional distress and malicious prosecution. The trial court dismissed the intentional infliction of emotional distress count, finding that the allegations were not outrageous, but refused to dismiss the malicious prosecution count. This court held that the dismissal of the intentional infliction of emotional distress claim was interlocutory rather than final and could not be appealed. Explaining that the harm alleged in both counts was substantially the same, the court concluded that the plaintiff had proffered alternative theories for the recovery of a given loss as would often be the case, for instance, in a claim for strict liability or, alternatively, negligence. Motheral v. Burkhart, 400 Pa.Super. 408, 583 A.2d 1180, 1188.

Pa.Super.1989. Cit. and quot. in disc., com. (d) quot. in sup. An independent contractor sued an electric company for injuries resulting from an alleged intentional exposure to high levels of radiation and for lost wages due to alleged wrongful termination. The trial court dismissed the claims for intentional exposure to radiation, wrongful discharge, and intentional infliction of emotional distress, and it struck the demands for punitive damages. This court reversed and remanded, holding, inter alia, that punitive damages could be awarded if the allegations contained in the complaint were established at trial. The court determined that intentionally venting radioactive steam on a worker solely to keep its reactor operational, especially after being warned that the situation was dangerous, would demonstrate the company's outrageous conduct through reckless indifference to the worker's safety. The court also held that the false statements allegedly made to the worker, which tended to conceal the level of radiation to which he had been exposed, satisfied the requirements of outrageous conduct needed for intentional infliction of emotional distress. Field v. Philadelphia Elec. Co., 388 Pa.Super. 400, 565 A.2d 1170, 1183, 1183-1184.

Pa.Super.1988. Subsec. (1) quot. in disc., com. (b) cit. in sup., com. (d) quot. in sup. Husband and wife employees were discharged after the wife complained to the firm's president of sexual harassment by a management-level employee. The couple sued the employer, the president of the corporation, and the manager for wrongful discharge, breach of implied contract of employment, and intentional infliction of emotional distress. The trial court dismissed the complaint. Reversing

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the dismissal of the wrongful discharge claim, and affirming the dismissal of the other two claims, this court held, inter alia, that the allegations that the manager attempted to have sexually suggestive private conversations with the wife and that he had given the wife sexually explicit gifts did not reach the standard of extreme and outrageous conduct required to support a claim for intentional infliction of emotional distress. Clay v. Advanced Computer Applications, 370 Pa.Super. 497, 536 A.2d 1375, 1384.

Pa.Super.1988. Cit. in sup. and in disc., cit. in case quot. in disc. and in ftn., subsec. (1) and com. (d) quot. in disc., com. (h) cit. in disc. A family sued two veterinarians and an animal hospital after their pet dog died, alleging intentional infliction of emotional distress, loss of companionship and comfort, and breach of express and implied warranties. The trial court granted summary judgment to the defendants. This court affirmed in part, holding that the plaintiffs failed to set forth a cause of action for intentional infliction of emotional distress as a matter of law because the principal misconduct alleged was directed at their dog, and was not extreme and outrageous conduct directed at them; and that the plaintiffs could not recover for the dog's loss because the dog was not a unique chattel. The court also reversed in part, holding that the plaintiffs had a viable cause of action on the breach of express and implied warranties theory. Daughen v. Fox, 372 Pa.Super. 405, 539 A.2d 858, 860-864, appeal denied 520 Pa. 605, 553 A.2d 967 (1988).

Pa.Super.1988. Cit. in case quot. but not fol. The owners of a condominium unit sued the other residents of the complex for civil conspiracy and intentional infliction of emotional distress. The trial court sustained the defendant's preliminary objections and dismissed the plaintiff's amended complaint with prejudice. Affirming, this court held that not only was the tort of intentional infliction of emotional distress not recognized in Pennsylvania, but the plaintiffs failed to allege any outrageous conduct. Ford v. Isdaner, 374 Pa.Super. 40, 542 A.2d 137, 139, appeal denied 520 Pa. 617, 554 A.2d 509 (1988).

Pa.Super.1988. Com. (g) cit. in conc. and diss. op. During a medical malpractice suit between the plaintiff hysterectomy patient and a hospital, the plaintiff's treating physician discussed her medical condition with the hospital's counsel, permitted the counsel to copy portions of her confidential file, and testified for the hospital. The plaintiff sued the physician, the hospital's counsel, and the hospital's insurer that hired the counsel in tort for breach of the professional code of confidentiality and inducement of the breach. The trial court granted summary judgment for the defendants. Affirming, this court held that the plaintiff's right to privacy and confidentiality was not absolute, particularly since she had voluntarily put her medical history into dispute by filing a suit for personal injuries. The concurring and dissenting opinion argued that the physician had a fiduciary duty to the plaintiff and that breaching that duty by releasing confidential information without the plaintiff's knowledge should be actionable. Moses v. McWilliams, 379 Pa.Super. 150, 549 A.2d 950, 969, appeal denied 521 Pa. 630, 558 A.2d 532 (1989).

Pa.Super.1988. Cit. generally in disc., com. (d) quot. in case quot. in disc. A research scientist was discharged by a hospital for removing discarded equipment from the hospital. After the scientist sued the hospital for, inter alia, intentional infliction of emotional distress, the trial court

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granted a nonsuit on the claim. Affirming in part, reversing in part, and remanding, this court held that the defendant's termination of the plaintiff's employment after 10 years of service was not the outrageous conduct for which Pennsylvania courts have held defendants liable in tort for intentional infliction of emotional distress. Paul v. Lankenau Hosp., 375 Pa.Super. 1, 543 A.2d 1148, 1158, 1159, appeal granted 520 Pa. 607, 553 A.2d 969 (1988).

Pa.Super.1988. Com. (d) quot. in case cit. in sup. A community college president, who was working without a contract, was fired after he requested an audit that showed that certain individuals had embezzled college funds. When he sued the college for intentional infliction of emotional distress, the trial court granted the defendant a nonsuit. Affirming, this court held that the plaintiff had been fired because his employer was displeased with the manner in which he handled the situation. It concluded that the dismissal was not so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. Rinehimer v. Luzerne Cty. Com. College, 372 Pa.Super. 480, 539 A.2d 1298, 1305, appeal denied 521 Pa. 606, 555 A.2d 116 (1988).

Pa.Super.1988. Com. (d) quot. in case quot. disc. A shooting victim and his wife sued a newspaper for defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress when the paper reported his shooting and that there was an organized crime retaliation motive behind it. The trial court granted summary judgment in favor of the newspaper and the plaintiffs appealed. This court affirmed, holding that the trial court was correct in its findings that the article was not capable of defamatory meaning, was not sufficiently extreme or outrageous to support a claim for intentional infliction of emotional distress, and that its publication did not state a cause of action for negligent infliction of emotional distress. Salerno v. Philadelphia Newspapers, 377 Pa.Super. 83, 546 A.2d 1168, 1172.

Pa.Super.1987. Cit. in case quot. in ftn., subsec. (1) quot. but dist., com. (d) cit. in sup. Mortgagors sued a bank and one of its officers on theories including intentional interference with a contract and intentional infliction of emotional distress after the bank refused a mortgage to a potential buyer of mortgagors' property. The trial court dismissed the complaint. Affirming, this court held, inter alia, that the defendant did not act improperly to interfere with the sales contract of the plaintiffs, and that the defendant's conduct was not so outrageous as to impose liability. The court reasoned that Pennsylvania had not adopted the Restatement's doctrine of intentional infliction of emotional distress, and that even if it had, the evidence in this case was insufficient to support the claim. Buczek v. First Nat. Bank, 366 Pa.Super. 551, 531 A.2d 1122, 1125.

Pa.Super.1987. Cit. in case cit. in disc. A rape victim sued three construction companies, alleging that they undertook and negligently performed a duty to secure the building in which she was raped. The trial court sustained the defendants' demurrer and dismissed the plaintiff's complaint for failure to state a cause of action. Affirming, this court held, inter alia, that the defendants could not be held liable under a theory that imposed a duty to exercise reasonable care in preventing a risk from taking effect upon one who performed an act and subsequently realized or should have realized that it had created an unreasonable risk of causing physical harm to another. The court reasoned, inter alia, that the description of the prohibited conduct was too vague to permit principled use of

the theory. The court noted that a theory, involving outrageous conduct had similarly been rejected for providing a nebulous definition of the term outrageous. Glick v. Martin and Mohler, Inc., 369 Pa.Super. 428, 535 A.2d 626, 629, appeal denied 519 Pa. 665, 548 A.2d 255 (1988).

Pa.Super.1987. Quot. but dist. An employee and his wife sued his employer for intentional infliction of emotional distress resulting from the defendant's failure to clear the employee's name with his fellow employees after he was wrongly accused of making sexual advances to a customer's daughter. The trial court granted summary judgment to the employer. Affirming, this court held that the employer had no legal duty to clear the employee's name where the employee had not shown that the employer had any intention to harm him, or that the employer had any knowledge that his failure to act would cause the employee emotional distress. Jackson v. Sun Oil Co. of Pennsylvania, 361 Pa.Super. 54, 521 A.2d 469, 471.

Pa.Super.1986. Cit. in case quot. in sup., quot. and cit. in sup., coms. (d) and (i) quot. in ftn. in sup. A patient with a history of emotional problems known to her physicians sued them for the intentional infliction of severe emotional distress when they refused to give her copies of her medical records, which she was legally entitled to receive. The trial court awarded the plaintiff compensatory and punitive damages. Affirming, this court stated that intentional infliction of emotional distress was an actionable wrong and that reckless conduct rendered an actor as liable as if he had acted intentionally. The court reasoned that, although the physicians might not have actually intended to cause the patient severe emotional distress, their reckless conduct was extreme and outrageous enough to support an action for damages. Pierce v. Penman, 357 Pa.Super. 225, 515 A.2d 948, 951, 953, appeal denied 515 Pa. 608, 529 A.2d 1082 (1987).

Pa.Super.1986. Quot. in sup., com. (d) quot. in disc., com. (h) cit. in sup. An American student chose to attend medical school in the Caribbean, but she remained at the school for only 11 days. After her attempts to receive a refund of her fees and tuition failed, the former student sued the school for, inter alia, intentional and negligent infliction of emotional distress. The trial court granted the defendant's motion for a directed verdict. This court affirmed, holding that the conduct alleged in the complaint, such as other students banging on her dormitory room door and giving the plaintiff pornography, and class size being larger than the plaintiff expected, was not sufficiently extreme or outrageous to support a claim for intentional infliction of emotional distress. The court also held that the plaintiff did not sufficiently prove bodily injury as a result of any negligence by the defendants to support a claim for negligent infliction of emotional distress. Reimer v. Tien, 356 Pa.Super. 192, 514 A.2d 566, 569.

Pa.Super.1986. Cit. in disc. Two children sued the telephone company for loss of their mother's consortium after an operator placed their mother on hold during an emergency call and she was subsequently raped by an unknown assailant before she could get help. The trial court sustained the telephone company's demurrer. Affirming, this court held that there was no cause of action for parental loss of consortium. The court stated that emotional injury could be compensated through claims of intentional infliction of emotional distress or of negligent infliction of emotional distress

accompanied by direct sensory and contemporaneous observance of the injury. Steiner by Steiner v. Bell Telephone Co., 358 Pa.Super. 505, 517 A.2d 1348, 1352.

Pa.Super.1986. Quot. in sup., quot. in ftn. in sup., subsec. (2) cit. and quot. in sup. A motorist who drove over the corpse of a hit-and-run victim sued the hit-and-run driver for intentional infliction of emotional distress. The trial court dismissed the action. Affirming, this court held that the plaintiff could not recover because the plaintiff was neither a member of the victim's family nor present at the time of the injury. The court noted that the fact that the extreme and outrageous conduct was not directed at plaintiff would not have barred recovery had the two requirements been met. Stoddard v. Davidson, 355 Pa.Super. 262, 513 A.2d 419, 422, 423.

Pa.Super.1985. Cit. in diss. op., coms. (h) and (f) cit. in sup., com. (d) quot. in sup. and quot. in diss. op., illus. 4 quot. in sup. A woman who was called a “nigger” by a department store employee sued the store for intentional infliction of emotional distress. The trial court sustained the defendant's demurrer and the plaintiff appealed. The superior court affirmed, holding that the conduct complained of was not sufficiently extreme and outrageous, nor was there liability for mere insults. The court also denied the plaintiff's attempt to establish a cause of action on a theory of special liability of owners of public places, noting that special liability had not been extended to conduct affecting an ordinary business invitee. The dissent argued that other jurisdictions allowed emotional distress claims for racial slurs and gave special notice of blacks' susceptibility to the term “nigger” in particular. Dawson v. Zayre Dept. Stores, 346 Pa.Super. 357, 499 A.2d 648, 649-651.

Pa.Super.1985. Com. (d) quot. in sup. The plaintiff's employment contract as a pathologist in the defendant's hospital was not renewed, based on letters of no confidence from several department heads. The plaintiff alleged intentional infliction of emotional distress. The trial court dismissed the complaint. This court affirmed in part, reversed in part, and remanded. It held that the letters of no confidence were not an extreme and outrageous act that could be considered atrocious and utterly intolerable in a civilized society. Gordon v. Lancaster Osteopathic Hosp. Ass'n, 340 Pa.Super. 253, 489 A.2d 1364, 1371.

Pa.Super.1985. Quot. in sup., com. (d) quot. in sup. An employee sued his employer's insurer and the insurer's attorney for intentional infliction of emotional distress, resulting from a statement made at the employee's workers' compensation hearing when the insurer's attorney stated in the employee's presence that the employee would only receive workers' compensation benefits if he was not represented by his counsel. The employee claimed that he suffered nervousness, insomnia, and stomach disorders as a result of the statement. The trial court sustained the insurer's objections, based on a finding that the insurer was immune from suit and the employee's sole remedy was outside of the court's jurisdiction under the workers' compensation act. The superior court affirmed on different grounds, holding that the employee could bring the claim, but that the attorney's conduct was not sufficiently outrageous to support the emotional distress claim. Jones v. P.M.A. Ins. Co., 343 Pa.Super. 411, 495 A.2d 203, 205.

Pa.Super.1985. Com. (i) cit. in disc., com. (d) quot. in disc., coms. (f) and (g) cit. in sup., illus. 2 quot. in sup. A club member sued her club's board of directors for intentional and negligent infliction of emotional distress after she received a letter from the board reprimanding her for alleged misconduct and promising disciplinary action if her behavior continued. The trial court sustained the defendant's preliminary objections and the superior court affirmed. Defendants' conduct was not sufficiently extreme or outrageous to sustain a claim for intentional infliction of emotional distress, and plaintiff failed to aver the physical harm necessary to maintain a claim for negligent infliction of emotional distress. Lazor v. Milne, 346 Pa.Super. 177, 499 A.2d 369, 370, 371.

Pa.Super.1985. Com. (g) quot. in sup., illus. 14 quot. in sup. The family of a couple that had been successful in a trespass action brought a claim for intentional infliction of emotional distress against the attorney that had opposed the couple in the trespass action. The trial court granted a demurrer to the complaint. This court ruled that the attorney's remarks that he was going to appeal the decision in the trespass case and that the couple would never see the money awarded them in that case could not form the basis of a claim for intentional infliction, since the attorney was privileged to utter them. Thompson v. Sikov, 340 Pa.Super. 382, 490 A.2d 472-474.

Pa.Super.1984. Cit. and quot. in sup., com. (d) quot. in sup., com. (i) cit. in sup. A father alleged that his sister, her husband, and their daughter persuaded the father's son to stay away from home. The father sued for intentional infliction of emotional distress, alienation of his son's affections, and harboring a child. The defendants filed preliminary objections in the nature of a demurrer. This court affirmed the trial court's order insofar as it sustained the demurrer to the purported causes of action for alienation of affections and harboring, but held that the complaint stated sufficient facts to sustain a potential cause of action for the intentional infliction of emotional distress and reversed on that issue. The court observed that Pennsylvania does not recognize causes of action by a parent for alienation of a child's affections or for harboring a child, but that if the father's allegations were true, it appeared that the defendants had intentionally manipulated his son in a manner “peculiarly calculated” to cause the father serious emotional distress. Bartanus v. Lis, 332 Pa.Super. 48, 480 A.2d 1178, 1184, 1185.

Pa.Super.1984. Cit. in case quot. in disc. The plaintiff, as executrix of her husband's estate and in her own right, sought damages from a manufacturer for injuries suffered by her husband from 20 years of working with asbestos, and for her own emotional distress resulting from a fear of contracting asbestosis herself by exposure to asbestos dust brought home by her husband. The lower court awarded summary judgment for the defendant, holding that the plaintiff did not commence the action within the two-year statutory limit. This court upheld the summary judgment regarding the husband's claims and refused to consider the plaintiff's personal claim of emotional distress on the ground that it was not raised at the trial level. Berardi v. Johns-Manville Corp., 334 Pa.Super. 36, 482 A.2d 1067, 1072.

Pa.Super.1984. Cit. in disc., quot. in ftn., cit. in case quot. in sup. Diagnosed as suffering from asbestosis, a shipyard worker with his wife brought actions against various asbestos producers.

The trial court entered orders non-prossing the first action except as to five defendants and granting summary judgment in the second action to all but three defendants. On appeal, this court affirmed and remanded. The court noted that the defendants dismissed from the first action had not submitted to the jurisdiction of the court. Concerning the second action, the court held that the trial court had properly ruled that the statute of limitations had run as to those defendants which had been granted judgment. The court also affirmed the trial court's dismissal of the wife's claims for negligent infliction of emotional distress, finding that she failed to aver that she had suffered physical harm, but it refused to rule on a claim of intentional infliction of emotional distress because of an incomplete record. Cathcart v. Keene Indus. Insulation, 324 Pa.Super. 123, 471 A.2d 493, 508, 509.

Pa.Super.1984. Cit. and quot. in sup., com. (d) quot. in sup. (Erron. cit. as § 461.) The defendant was convicted of involuntary deviate sexual intercourse, indecent assault, and the corruption of minors. In addition to his prison sentence, the defendant was ordered to pay $7,500 in restitution for psychological treatment and counseling for the two children that he had victimized. The defendant appealed the restitution portion of his sentence, arguing that, while restitution was appropriate for actual bodily harm, it was not proper for emotional or mental disturbances. The defendant also contended that no evidence linked his alleged conduct to the children's psychological disturbances. This court held that “actual bodily harm” included actual emotional or mental disturbances for the purpose of imposing restitution and vacated and remanded the case to proportion the award of damages between the disturbance to the children caused by the defendant's conduct and other contributing factors. Commonwealth v. Balisteri, 329 Pa.Super. 148, 478 A.2d 5, 8.

Pa.Super.1984. Subsec. (1) quot. but dist., com. (d) quot. in case quot. in disc. Landlord sued tenant for accelerated rent when tenant vacated the apartment prematurely. Tenant counterclaimed, alleging that landlord's breach of an oral agreement to allow the tenant to find a replacement amounted to the intentional infliction of emotional distress. This court affirmed a demurrer to the tenant's counterclaim for damages, holding that a simple breach did not constitute outrageous conduct capable of causing emotional distress. The case was reversed and remanded on the tenant's claim regarding her security deposit. Rittenhouse Regency Affiliates v. Passen, 333 Pa.Super. 613, 482 A.2d 1042, 1043.

Pa.Super.1982. Subsec. (1) quot. in disc., com. (f) quot. in disc., com. (d) quot. in case quot. in sup. The plaintiffs, a woman and her attorneys, brought an action against a physician and his attorneys for libel and intentional infliction of emotional distress. The defendants had previously brought an action for malicious prosecution against the plaintiffs, but had later dropped that action. The plaintiffs in this suit alleged that the defendants had made defamatory statements about the plaintiffs in their complaint in the previous action, and that such statements had caused the plaintiffs severe emotional distress. The trial court sustained the defendants' demurrer and dismissed the plaintiffs' complaint. On appeal, the dismissal was affirmed, the court holding that the plaintiffs had failed to state a cause of action. The allegations in the defendants' previous complaint were privileged, and there was no showing of malicious motives. The conduct of the defendants in filing their complaint was not so extreme and outrageous as to support an action

for intentional infliction of emotional distress. Rose v. Wissinger, 294 Pa.Super. 265, 439 A.2d 1193, 1195, 1198, 1199.

Pa.Super.1981. Quot. in part. in sup., com. (d) quot. in part in sup., com. (i) cit. in case quot. in sup. The plaintiff, a man involved in an altercation with another man who subsequently suffered a fractured jaw, brought this action against the hospital, doctors and nurse who attended the injured man in order to recover damages for the mental distress which they allegedly caused him to suffer. In his complaint, the plaintiff stated that the injured man had died during his hospital stay due to the negligence of the named defendants, and not due to an act on the part of the plaintiff. He maintained that the defendants had prepared records indicating that the death was due solely to the injuries inflicted by the plaintiff; as a result of these records, he was charged with criminal acts. The plaintiff charged the defendants with both intentionally and negligently inflicting emotional distress upon him. The trial court sustained preliminary objections in the nature of a demurrer and dismissed the complaint. This court affirmed the order as to the negligence count but reversed the dismissal on the count alleging an intentional infliction of mental distress. The court held, inter alia, that the facts, if proven, would entitle the plaintiff to relief for the intentional infliction of mental distress because an intentional misstatement of the cause of death was intolerable professional conduct and extreme and outrageous. Banyas v. Lower Bucks Hospital, 293 Pa.Super. 122, 437 A.2d 1236, 1238, 1239.

Pa.Super.1981. Quot. in disc., com. (d) cit. in case quot. in disc. The plaintiff notified the defendant book publisher that portions of one of the defendant's books had been plagiarized by the authors of a later book on the same subject. The defendant pursued a copyright infringement claim against the authors, and the plaintiff demanded compensation for his services in volunteering the information concerning the infringement. The defendant denied that it had any contract with the plaintiff or that it was liable to him for compensation, but nevertheless offered an honorarium of $200. The plaintiff refused the money and filed suit to recover one-third of the recovery effected by the defendant in the infringement suit. The plaintiff also sued for intentional infliction of emotional distress based on the defendant's alleged threat of a counterclaim. The trial court held for the defendant. On appeal, this court affirmed. The court held that when a person requested another to perform services, it was ordinarily inferred that he intended to pay for them. However, when one's work was voluntarily given to another, there was no such inference. Volunteers could not be reimbursed for unjust enrichment. As to the emotional distress claim, liability had been found only where the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of human decency. Martin v. Little, Brown and Co., 304 Pa.Super. 424, 450 A.2d 984, 988.

Pa.Super.1980. Quot. in disc. Plaintiff brought an action in assumpsit and trespass, alleging that the defendant had agreed that if the plaintiff would leave her job and make herself available to travel with him and spend time with him, he would take care of her for the rest of her life, that the defendant had breached the agreement which resulted in the plaintiff's financial and emotional damage. The lower court sustained the defendant's preliminary objections and dismissed the complaint and the plaintiff appealed. The court held that the complaint was not barred by the fact that the defendant was a married man, because a sexual relationship between

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the parties was not mentioned and because the agreement was no more than collaterally conducive to divorce. However, the court found that the complaint failed to state a cause of action for the intentional infliction of emotional distress because the alleged actions of the defendant, although "inconsiderate and unkind," were not extreme and outrageous. Accordingly, the judgment of the lower court was reversed in part and the case was remanded. The concurring opinion stated that, in light of the increasing number of cases involving nonmarital contracts, it was important to clarify the standards which would be used to determine whether such a contract violated public policy and would be unenforceable. Mullen v. Suchko, 279 Pa.Super. 499, 421 A.2d 310, 313.

Pa.Super.1978. Quot. in sup. Tenants brought an action against their landlords alleging that the landlords had breached the implied warranty of habitability on each of the dwellings. The tenants cited, inter alia, rodent and insect infestation, structural defects, inadequate heating, defective plumbing, and exposed electrical wiring as the defects amounting to a breach. As damages, the tenants sought the difference between the amount of rent they paid and the actual fair rental value of the properties. The lower court sustained the landlords' demurrer to the counts of the complaint alleging breach of the implied warranty of habitability. On appeal, the court reversed the lower court's order and held that implied warranty of habitability is a proper basis for a complaint. The court noted that should the tenants prove that the landlords breached the implied warranty, standard contract remedies would be available to them. The court also noted that, in order to succeed on their complaint, the tenants must prove that they gave notice to the landlords of the defective conditions, that the landlords had a reasonable opportunity to correct the defects, and that they failed to do so. The tenants complaint also alleged a cause of action for the tort of "slumlordism." The landlords again demurred to the complaint, and the lower court sustained the demurrer. On appeal, the court noted that, while the reference to the tort as "slumlordism" is not adopted, the court does recognize that the theory upon which the count of the complaint is based is the tort of intentional infliction of emotional distress. The court stated that tenants have the right to allege and to prove that landlords, by breaching the warranty of habitability, have intentionally inflicted emotional distress upon the tenants. Accordingly, the court held that count of the complaint did state a valid cause of action, and that the landlords' demurrer to the count was improperly sustained. Beasley v. Freedman, 256 Pa.Super. 208, 389 A.2d 1087, 1088.

Pa.Super.1978. Quot. in disc., cit. in diss. op. in disc. Appeal by plaintiff from demurrer sustained in favor of defendant to a count in trespass in an action brought by plaintiff insured against insurer, alleging causes of action in assumpsit and trespass, on the theory that denial by defendant insurer of the insured's claim was outrageous, malicious, and oppressive and caused the insured to suffer mental distress. Plaintiff alleged that defendant denied plaintiff's claim, refused to pay the claim even after plaintiff had conducted its own investigation and had informed the defendant that it was in error, and insinuated that the plaintiff was submitting a fraudulent claim. Plaintiff further alleged that, as a result of defendant's actions, plaintiff suffered severe emotional distress and undue worry about his credit standing and professional reputation as a police officer, and had been subjected to repeated demands for payment from the party who repaired plaintiff's boat. The order of the lower court was affirmed by an equally divided court, holding that defendant's refusals to pay the claim did not give rise to a cause of action for intentional infliction of mental distress or any other

cause of action for mental distress. The dissent would have overruled the demurrer, holding that the plaintiff could proceed on the complaint on the theory of a breach of the insurer's duty of good faith dealing. The dissent noted that if the insured is able to prove that the conduct of the insurer was, as alleged, outrageous and intentional or reckless, he may recover for the tort of intentional infliction of emotional distress, and in doing so he would have already proved that the insurer breached its duty of good faith. If the insured could not prove that the insurer's conduct reached the level of outrageous, he could still recover for emotional distress resulting from the insured's breach of its duty of good faith dealing. D'Ambrosio v. Pennsylvania Nat. Mut. Cas. Ins. Co., 262 Pa.Super. 331, 396 A.2d 780, 781, 782, order affirmed 494 Pa. 501, 431 A.2d 966. See above case.

Pa.Super.1978. Subsec. (1) quot. in sup. and quot. in part in disc. in diss. op., com. (e) quot. in part in sup., comments cit., com. (d) quot. in part in disc., and com. (j) quot. in part in sup., all in diss. op. Tenants sought to recover against a landlord for breach of the implied warranty of habitability and intentional infliction of emotional distress. The trial court sustained defendant's demurrer, and this court reversed and remanded, holding that leases include an implied warranty of habitability, which could be used as the basis of a complaint. Furthermore, the court held that the warranty could not be waived, citing public policy grounds. Among the policy factors considered by the court were public health and safety, inequality of bargaining power between landlord and tenant, the adhesive nature of the lease agreement, and the unreasonable burden imposed by the lease upon tenants, who were required under its terms to maintain the property. Based on these factors, any attempted waiver of the warranty would be unconscionable and, therefore, ineffective. The court refused to hold that breach of the warranty of habitability constituted intentional infliction of emotional distress as a matter of law, but it did hold that plaintiff had the right to attempt to prove that the landlord, in breaching the warranty, intentionally inflicted emotional distress on the tenants. A dissent argued that the majority's decision to allow no waiver of the implied warranty of habitability was offensive to contract principles and not in the interest of public policy. The dissent argued that the Restatement required specific intent to establish intentional infliction of emotional distress, and that it was inconceivable on the facts of this case that the landlord had such intent. Fair v. Negley, 257 Pa.Super. 50, 390 A.2d 240, 245, 246, 248.

Pa.Super.1976. Quot. in part., quot. in diss. op., com. (d) quot. in disc. and diss. op., com. (e) cit. in disc., com. (g) quot. in ftn., com. (h) quot. in diss. op. This was an appeal by a debtor and the administratrix of an estate from an order sustaining demurrers to a complaint which sought to recover for the intentional infliction of mental distress. Holding that the order was appealable, the court found that defendant's conduct in informing a debtor by letter that his property would be sold at a sheriff's sale without further notice and informing him of such in the presence of others in an insulting manner did not amount to the extreme or outrageous type of conduct necessary for such a cause of action. This was the case even if defendant should have known that such an execution sale could not possibly be held or completed. Jones v. Nissenbaum, Rudolph & Seidner, 244 Pa.Super. 377, 368 A.2d 770, 772, 773, 774, 775.

Pa.Super.1974. Cit. in ftn. A woman received injuries and underwent an operation as a result of an automobile accident. She and her husband brought this action against the other driver. After

testimony by the plaintiff's doctor that he discharged the wife from treatment on March 16, 1970, the trial judge limited recovery for pain and suffering and loss of consortium to the time between the accident and March 16, 1970. Plaintiffs appealed from a denial of their motion for a new trial. The court reversed and remanded for a new trial on the grounds that the court below should have allowed the plaintiffs themselves to testify as to the loss of consortium and pain and suffering in order to prove causation and extent of injuries. Reist v. Manwiller, 332 A.2d 518, 520.

Pa.Cmwlth.

Pa.Cmwlth.2002. Cit. in disc., cit. in ftn. to diss. op. Child's adoptive parents brought state tort-law claims against county, county employees, and child's natural mother who allegedly physically abused him, contending that county acted with gross negligence and in willful disregard for child's safety. The trial court dismissed the complaint against all parties other than the natural mother. Affirming, this court held that plaintiffs did not state a claim that individual employees committed willful misconduct serving to vitiate their immunity, since plaintiffs failed to allege that any of the individual employees acted with the requisite specific intent to injure the child. The dissent argued that defendants' failure to protect the child was extreme and outrageous, and that plaintiffs set forth a viable cause of action for intentional infliction of emotional distress. Robbins v. Cumberland County Children and Youth Services, 802 A.2d 1239, 1252, 1256, 1257.

Pa.Cmwlth.1995. Cit. in disc., cit. in case cit. in ftn. A woman sued the state police and individual officers for intentional and negligent infliction of emotional distress, citing defendants' mishandling of her dead daughter's remains and failure to return those remains to plaintiff. Affirming the trial court's decision to sustain defendants' demurrers, this court held that plaintiff's intentional-infliction-of-emotional-distress claim was barred by sovereign immunity and the facts she pled in support of her remaining claim were insufficient. The court disagreed with plaintiff's contention that she could recover on her negligence claim despite the fact that she had not witnessed the harm defendants allegedly inflicted on her daughter's remains. Ray v. Pennsylvania State Police, 654 A.2d 140, 141.

Pa.Cmwlth.1992. Cit. in case quot. in disc. Adoptive parents and their adopted son, who manifested aggressive behavior against other children after the adoption was finalized, brought an action for intentional infliction of emotional distress, inter alia, against the agency, among others, responsible for the child's placement, alleging that defendant's failure to disclose that the child had been in 10 placements before being classified as eligible for adoption and had been physically and sexually abused by his biological parents was extreme and outrageous. Affirming the trial court's denial of defendant's motion to strike this allegation, this court held that whether defendant's failure to disclose vital negative information concerning the child and his natural parents constituted extreme and outrageous conduct, recklessly causing plaintiffs to sustain emotional distress, was an evidentiary question for the trier of fact. Gibbs v. Ernst, 150 Pa.Cmwlth. 154, 615 A.2d 851, 856.

Pa.Cmwlth.1991. Quot. in sup., cit. in ftn., subsec. (1) cit. in case cit. and quot. in disc., illus. 4 and 8 cit. in disc., illus. 13 cit. in disc. and quot. in ftn. Alleging that he was made a target of harassment and ridicule by his co-workers, a former city plant operator and his wife sued his former supervisors for intentional infliction of emotional distress, negligent supervision, and loss of consortium. The trial court entered summary judgment in favor of the supervisors. Affirming, this court held, inter alia, that the supervisors' failure to prevent the operator's co-workers from taunting was not outrageous enough to sustain a complaint of intentional infliction of emotional distress. The court reasoned that the supervisors had no knowledge of the taunting, that the outrageous conduct was principally that of the co-workers, and that taunts alone would not create liability for intentional infliction of emotional distress. McNeal v. City of Easton, 143 Pa.Cmwlth. 151, 598 A.2d 638, 640, 641.

Pa.Cmwlth.1990. Cit. in disc. The police arrested one of two roommates who were engaged in a dispute and charged him with aggravated and simple assault and terroristic threats. After the arrestee was acquitted of all charges, he sued the city, the police commissioner, and others for intentional infliction of emotional distress, inter alia. The trial court granted the defendants' motions for summary judgment. Affirming, this court held that the alleged statements and conduct of the police department were not so extreme or outrageous as to subject the city-related defendants to liability for intentional infliction of emotional distress. Carson v. City of Philadelphia, 133 Pa.Cmwlth. 74, 574 A.2d 1184, 1187.

R.I.

R.I.2004. Com. (d) cit. generally in sup. and quot. in case quot. in sup. Apartment tenants sued property manager for retaliation, intentional infliction of emotional distress, abuse of process, and malicious prosecution, alleging that manager had filed false and malicious allegations of criminal conduct by tenants with the police department. In the police complaint, manager alleged that tenants were making multiple, annoying phone calls to her and taping notes to her door. Trial court granted manager summary judgment. This court affirmed, holding, inter alia, that plaintiffs' intentional-infliction-of-emotional-distress claim failed, because plaintiffs did not allege specific facts that rose to the level of extreme and outrageous conduct, and they did not allege any physical manifestation of their alleged injuries. Hoffman v. Davenport-Metcalf, 851 A.2d 1083, 1089, 1090.

R.I.2003. Com. (d) cit. and quot. in sup. and quot. in case quot. in sup., com. (h) cit. in sup. After nursing home banned resident's son from visiting resident for six weeks allegedly because he had complained about home's nurses, son sued home and its administrator for intentional and negligent infliction of emotional distress and statutory retaliation. Jury found for defendants on retaliation claim, but for plaintiff on emotional-distress claims. Trial court granted defendants judgment as a matter of law on claim of intentional infliction of emotional distress. This court affirmed, holding that home's nonretaliatory banishment of plaintiff together with its monitoring conduct of having nurses follow plaintiff when he was on premises was not extreme and outrageous conduct. Home

did not prevent plaintiff from visiting resident off premises and did not prevent resident from relocating. Jalowy v. Friendly Home, Inc., 818 A.2d 698, 707-709.

R.I.1998. Cit. in disc. and in headnote, cit. in case cit. in disc., quot. in ftn., com. (d) quot. in sup. and cit. in headnote, com. (g) cit. in disc. and in headnote. Husband and wife sued a neighbor for intentional infliction of emotional distress, among other claims, alleging that defendant engaged in an ongoing surveillance of various business activities occurring outside their home. Trial court dismissed plaintiffs' claims. This court affirmed, holding, inter alia, that defendant's conduct was not extreme and outrageous, because his surveillance was a legitimate attempt to document an alleged zoning violation. Swerdlick v. Koch, 721 A.2d 849, 852, 861, 862-864.

R.I.1997. Cit. in disc., cit. in case quot. in disc., cit. in ftn. in diss. op., com. (d) quot. in case quot. in diss. op. A client sued her former attorney for, among other claims, intentional infliction of emotional distress. Plaintiff alleged that she was compelled to perform sexual acts with the attorney in part because of an alleged threat that the attorney had once made to her, stating that if he discontinued his representation of her, she would be deported and lose custody of her child. Trial court entered judgment on jury verdict for plaintiff. This court vacated and remanded, holding, inter alia, that plaintiff's emotional-distress claim failed because it was founded on the inadmissible testimony of a social worker psychotherapist, who should not have been allowed to give an expert medical opinion on, and a diagnosis of, post-traumatic stress disorder. Dissent argued that, by conditioning his legal services on plaintiff's granting him sexual favors, defendant was guilty of outrageous conduct. It asserted that plaintiff was competent to testify about her own physical condition and about whether, after her sexual encounters with him, she developed symptoms of extreme nervousness, sleeplessness, and nightmares. Vallinoto v. DiSandro, 688 A.2d 830, 841, 842, 850, 851.

R.I.1996. Cit. in headnotes, cit. in case cit. in disc., quot. in conc. and diss. op., cit. in ftn. in conc. and diss. op., com. (d) quot. in conc. and diss. op., com. (f) cit. in disc., com. (g) cit. in disc. and quot. in case quot. in disc., com. (h) cit. in disc. After her husband committed suicide, a wife sued the owner of a television station that recorded a telephone interview with the husband shortly before his death, alleging intentional infliction of emotional distress, among other claims. Trial court granted defendant summary judgment. This court affirmed in part, vacated in part, and remanded, holding, inter alia, that the unsupported conclusory assertions of physical ills contained in plaintiff's complaint were insufficient to state a viable claim for emotional distress. It also held that, while perhaps lacking in good taste, the reporter's conversation with the decedent did not rise to the level of an actionable intrusion into the decedent's family's seclusion. An opinion concurring in part and dissenting in part argued that proof of physical symptoms of emotional distress should not be a necessary element of this cause of action. Clift v. Narragansett Television L.P., 688 A.2d 805, 805, 812-816.

R.I.1988. Quot. in disc. and in diss. op., coms. (d) and (k) quot. in disc. Two parents made various claims against the United States, including claims for medical malpractice and negligent infliction of emotional distress, after their newborn daughter suffered severe brain damage resulting from

a negligent delivery performed at a naval hospital. The district court awarded damages for the daughter's injuries, but certified to this court questions regarding whether the parents, who had suffered psychic injury, need also manifest physical symptoms in order to recover damages for negligent infliction of emotional distress. This court held that, under state law, a plaintiff must suffer physical symptoms to recover damages for negligent infliction of emotional distress because emotional disturbance, without more, was too easily feigned, and that where a defendant has been merely negligent, without any intent to do harm, he should not be subject to potentially unlimited and undeserved liability for a purely mental disturbance. The dissent argued that spurious claims and excessive damages could be precluded by means other than requiring plaintiffs to show physical symptoms. Reilly v. U.S., 547 A.2d 894, 898, 902.

R.I.1984. Cit. and quot. in sup., cit. in ftn., coms. (f), (g), and (j) cit. in sup. A bank hired an attorney to collect on overdue notes allegedly signed by a husband and wife who had since filed for divorce. Informed that the wife's father had just died, the attorney telephoned to ask the wife to assign her father's estate to the bank. In the wife's suit for intentional infliction of emotional distress, she testified that she had already been upset because of a lack of money, overdue mortgage payments, and the death of her father, and that after the call she became nervous, ill, and unable to work. The jury found that the wife's signatures on the notes had been forged and awarded her compensatory and punitive damages. The bank appealed, contending that it should be liable only for extreme and outrageous conduct described under s 46 of the Restatement 2d of Torts. The wife contended that § 312 or § 313, which impose liability for intentionally caused emotional distress, should apply. This court reversed, holding that s 46 described the applicable standard in debt collection cases. Champlin v. Washington Trust Co., of Westerly, 478 A.2d 985, 987-990.

S.C.

S.C.2007. Cit. in case quot. in ftn.; coms. (d) and (i) quot. in case quot. in sup.; com. (j) quot. in sup., quot. in ftn., and quot. in case quot. in sup. Former employee sued employer and supervisor for intentional infliction of emotional distress (IIED), alleging that his co-workers and supervisor constantly derided him with callous and vulgar remarks and gestures related to homosexuality. The trial court granted summary judgment for defendants; the court of appeals reversed. Reversing, this court held that, assuming, without deciding, that defendants' conduct was sufficiently outrageous to come within the ambit of an IIED claim, plaintiff's allegations of fairly ordinary symptoms—lost sleep and teeth grinding—failed to make a prima facie showing that his resulting emotional distress was sufficiently severe to sustain this claim. Hansson v. Scalise Builders of South Carolina, 374 S.C. 352, 650 S.E.2d 68, 70-72.

S.C.1993. Quot. in case cit. in disc., subsec. (2) cit. and quot. in disc. After man died while driving home from gymnasium, a white, powdery substance was detected in man's nostrils during police examination of body. Newspaper published front page article and deceased man's picture under a banner headline exclaiming “Cocaine Suspected in Death.” The same day article was published, toxicology reports came back negative as to presence of cocaine and established that deceased

died of coronary atherosclerosis. Deceased's family members sued newspaper and reporter for intentional infliction of emotional distress. Trial court directed verdict for defendants on ground that article's statements were substantially true at time of publication. Affirming, this court held that plaintiffs possessed no viable cause of action for emotional distress against defendants because there was no evidence defendants directed their allegedly tortious conduct at plaintiffs or that defendants physically attacked deceased in plaintiffs' presence. Upchurch v. New York Times Co., 314 S.C. 531, 431 S.E.2d 558, 561, 562.

S.C.1991. Coms. (i) and (d) cit. in case quot. in sup. A murder victim's mother sued a newspaper for defamation and intentional infliction of emotional distress. The newspaper printed an article describing the victim as a drifter from a broken home who had no family support to encourage her to continue her education. The trial court granted the paper's motion for a directed verdict on both claims. Reversing in part, this court held that the issue of defamation should have been submitted to the jury. Affirming in part, the court held that the language of the article was not so extreme and outrageous as to exceed all possible bounds of decency. Holtzscheiter v. Thomson Newspapers, 306 S.C. 297, 411 S.E.2d 664, 666.

S.C.1991. Com. (h) cit. in disc. An employee who required bladder surgery was told by her employer that her surgery would have to be postponed and she would have to work and participate in daily group exercises or be fired. When the employee lost control of her bladder as a result of the employer's requirements, she sued the employer for intentional infliction of emotional distress. The trial court denied the employer's motion for summary judgment on the ground that the employee had alleged a cause of action for intentional infliction of emotional distress, which would remove the action from the exclusive jurisdiction of the workers' compensation commission. Affirming, this court held that the exclusivity provision of the workers' compensation laws did not bar a common-law action against an employer for intentional infliction of emotional distress. The court stated that the trial court properly determined as a matter of law that the conduct of the employer, in intentionally and repeatedly forcing an employee with bladder problems to participate in daily exercises, could reasonably be found to be an outrageous and intentional act outside the realm of an accidental injury. McSwain v. Shei, 304 S.C. 25, 402 S.E.2d 890, 892.

S.C.1981. Cit. and quot. in sup. and fol.; coms. (d), (i), (j) and (k) cit. in case quot. in sup. 1948 Supp. and Tentative Draft 1 cit. in case quot. in disc. Real estate agent brought an action against a home purchaser for intentional infliction of emotional distress arising out of arguments between the purchaser and the agent regarding the state of disrepair of the purchased premises. The lower court entered judgment on a jury verdict for the agent, and appeal was taken. The Supreme Court of South Carolina adopted the rule of liability stated in Section 46 of the Restatement (Second) of Torts relating to the intentional infliction of emotional distress which states that one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and, if bodily harm to the other results from it, for such bodily harm. The court found that the evidence was sufficient for the jury as to whether the purchaser's continuing pattern of highly questionable conduct over a period of almost two years was intentional, whether it was extreme or outrageous, and whether the real estate agent's

injuries were as severe, as is required for the agent to recover for intentional infliction of emotional distress. Accordingly, the judgment of the lower court was affirmed. Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776, 777-779.

S.C.1979. Cit. and com. (d) quot. in part. An employee of the defendant engraving company injured his back and received temporary total disability compensation. The employee later sustained a similar injury and sought both temporary and permanent compensation, which he received. However, because of the injury the employee was continuously absent from work and was eventually terminated from employment. The employee sued the defendant alleging mental distress based upon a belief that he was discharged in retaliation of his pursuing workmen's compensation benefits. The employer stated that the plaintiff was terminated because he had given no indication that he intended to return to work and because the position the plaintiff had no longer existed. The lower court granted summary judgment for the defendant. The appellate court affirmed and stated that in order to prevail in a tortious action based upon damages for mental distress, the plaintiff must show that the conduct of the defendant was extreme and outrageous. The court rejected the plaintiff's contention that the defendant's act of intentionally and maliciously discharging him in retaliation, by itself constituted extreme and outrageous conduct. Hudson v. Zenith Engraving Co., Inc., 273 S.C. 766, 259 S.E.2d 812, 814.

S.C.1968. Subsec. (1) cit. in conc. op. in sup. The plaintiff, who, with her husband, agreed to purchase aluminum siding for their house from an agent of the defendant, sued the defendant for permanent injuries received when, upon their attempt to rescind the contract after the agent subsequently admitted that the siding was of an inferior quality, the agent threatened and verbally abused the plaintiff, thereby allegedly causing damage to the plaintiff's nervous system. The court overruled the defendant's demurrer, holding that the plaintiff had stated a cause of action in mental distress. The concurring opinion emphasized that, as a physical injury to the plaintiff was alleged, it need not be decided whether such a cause would be stated without an allegation of bodily harm. Turner v. A B C Jalousie Co. of N. Am., 251 S.C. 92, 160 S.E.2d 528, 530.

S.C.App.

S.C.App.2000. Subsec. (1) adopted and quot. in case quot. in disc. Retired state trooper sued his former supervisor and the director of the Department of Public Safety for, in part, intentional infliction of emotional distress, after he was accused in a press release issued by the department of failing to pass on crucial details concerning a car accident involving other state troopers. Affirming in part the trial court's grant of summary judgment for defendants, this court held, inter alia, that defendants' conduct with respect to the press release was not so extreme and outrageous as to constitute intentional infliction of emotional distress. Fleming v. Rose, 338 S.C. 524, 526 S.E.2d 732, 739, decision reversed 350 S.C. 488, 567 S.E.2d 857 (2002).

S.C.App.1993. Cit. in case cit. in disc., com. (d) quot. generally in disc. The mother of a premature infant whose heart rate decreased brought an action for intentional infliction of emotional distress

against the doctor who told her that her child was dead when the child actually revived. Trial court granted doctor's motion for summary judgment, finding that the conduct was not extreme and outrageous and that the doctor's actions and statements were based on his good faith belief that the baby was incapable of sustaining life on his own. This court affirmed, stating that where evidence was undisputed that the defendant acted in good faith and in a reasonable manner, his conduct could not be characterized as so extreme as to exceed all possible bounds of decency. Hawkins v. Greene, ___ S.C.App. ___, 427 S.E.2d 692, 693, 694.

S.C.App.1987. Cit. in sup. A woman sued her former husband, her two children, and a psychiatrist for outrageous conduct after she was committed to a mental health hospital. The trial court granted the defendants' motions for summary judgment, and this court affirmed, stating that in order to recover for intentional infliction of mental distress, the alleged conduct must be so extreme and outrageous as to exceed all possible bounds of decency and be regarded as atrocious. The court concluded that the defendants acted in good faith and in a reasonable manner and were justified in committing the woman to the hospital. Manley v. Manley, 291 S.C. 325, 353 S.E.2d 312, 314.

S.C.App.1987. Com. (f) cit. in sup. and quot. in case cit. in disc. An employee sued his employer for outrageous conduct, inter alia, after the employer fired him for failing to keep psychiatrist's appointments pursuant to a job-related injury. The trial court dismissed the complaint with prejudice. Reversing and remanding in part, this court held that a material issue of fact existed as to whether there was outrageous conduct by the employer. The court said that conduct may be adjudged outrageous because a defendant acts with knowledge that a plaintiff is peculiarly susceptible to emotional distress, if major outrage is shown. Nash v. AT & T Nassau Metals, 294 S.C. 248, 363 S.E.2d 695, 700, decision reversed 298 S.C. 428, 381 S.E.2d 206 (1989).

S.C.App.1984. Com. (d) quot. in case quot. in sup. The plaintiffs sued their former employer for intentional infliction of emotional distress and invasion of privacy. The trial court overruled the defendant's demurrers. This court reversed and remanded, holding that alleged threats of retaliatory discharge for failing to withdraw workman's compensation claims did not amount to extreme, intolerable conduct necessary for the tort of outrage, and that allegations of threats of dismissal and the mailing of a letter informing the plaintiffs of their discharge failed to state a cause of action for invasion of privacy. Corder v. Champion Road Machinery Intern., 283 S.C. 520, 324 S.E.2d 79, 81, certiorari denied 286 S.C. 126, 332 S.E.2d 533 (1985).

S.C.App.1984. Com. (j) cit. in disc. A former employee sued her former employer for wrongful discharge after she was discharged for attending a government hearing pursuant to a subpoena during working hours. The lower court ordered a nonsuit and this court affirmed, holding that South Carolina courts did not recognize a “public policy” exception to the doctrine of employment at will. The court also noted that there was no cause of action for outrage or intentional infliction of emotional distress where the employee pleaded only that she was embarrassed and humiliated by the discharge. Ludwick v. This Minute of Carolina, Inc., 283 S.C. 149, 321 S.E.2d 618, 621.

S.C.App.1984. Cit. in disc., coms. (e), (f) and (h) cit. in disc., coms. (d), (i) and (j) cit. in case quot. in disc. After the plaintiff was fired from his job for refusing to take a lie detector test regarding allegations that he leaked information to a suspected arsonist, he brought this action against his former employer for breach of an employment contract and conduct causing severe emotional distress. This court reversed a judgment for the plaintiff, holding that defendant's acts could not be deemed sufficiently "outrageous" to support the tort action. Todd v. South Carolina Farm Mut. Ins., 283 S.C. 155, 321 S.E.2d 602, 609, 610.

S.D.

S.D.2018. Quot. in case quot. in sup.; com. (d) quot. case quot. in sup. Former personal-care assistant at a senior-care facility who was terminated for gross misconduct following coworkers' reports that she had slapped and secluded a resident filed a claim for intentional infliction of emotional distress (IIED) against facility's management and parent company, alleging that defendants conducted an inadequate and conclusory investigation in violation of health-department rules, and submitted the mandatory investigative report to the department of labor fourth months late, misrepresenting that residents had been interviewed. The trial court entered summary judgment for defendants. This court affirmed, holding, inter alia, that plaintiff did not demonstrate that defendants' conduct surrounding her termination was extreme and outrageous, despite her subsequent acquittal of felony elder-abuse charges in a criminal case. The court quoted Restatement Second of Torts § 46, Comment *d*, to define the extreme and outrageous behavior necessary for establishing liability for an IIED claim. Harvey v. Regional Health Network, Inc., 906 N.W.2d 382, 395.

S.D.2011. Com. (d) quot. in case quot. in sup. Possessor of house that owners had conveyed to bank in lieu of foreclosure brought claims for intentional infliction of emotional distress (IIED) and abuse of process against bank, after defendant sold the property to a third party and sought to remove plaintiff from the property. The trial court granted summary judgment for defendant on the IIED claim, and, following a jury trial on the abuse-of-process claim, the jury returned a verdict finding bank liable but awarding no damages. While reversing and remanding on the abuse-of-process claim, this court held that defendant's acts of selling and requiring plaintiff to vacate the house in direct contravention to a letter in which it allegedly promised her possession for life did not constitute extreme and outrageous conduct for purposes of her IIED claim. Fix v. First State Bank of Roscoe, 2011 S.D. 80, 807 N.W.2d 612, 618.

S.D.2002. Quot. and cit. but dist., com. (d) quot. in sup. Bus passenger injured in traffic accident sued bus company and driver for intentional infliction of emotional distress, alleging that defendants' failure to summon emergency medical care, transport him to bus terminal, and provide him with free transportation home was outrageous conduct. Affirming trial court's grant of summary judgment for defendants, supreme court held that defendants' conduct, while indifferent, was not sufficiently outrageous to support liability for intentional infliction of emotional distress,

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and passenger failed to plead lesser tort of gross insult applicable to common carriers. Harris v. Jefferson Partners, L.P., 2002 SD 132, 653 N.W.2d 496, 500, 501.

S.D.2001. Com. (d) quot. in sup. and quot. in ftn. in diss. and conc. op., com. (h) quot. in diss. and conc. op., com. (j) quot. in diss. and conc. op. Wife filed for dissolution of marriage from husband and asserted tort claims. The trial court granted dissolution, divided marital property, and assessed punitive damages against husband. Affirming in part, reversing in part, and remanding, this court held, inter alia, that wife proved elements of tort of intentional infliction of emotional distress where husband made public accusations of child abuse and caused wife to lose job. The dissent argued that wife did not present evidence of sufficiently outrageous conduct, or of sufficiently severe emotional distress, to state a claim for intentional infliction of emotional distress. Christians v. Christians, 637 N.W.2d 377, 382, 385, 389, 390.

S.D.2001. Com. (l) cit. in sup. One of several physicians who formed a closely held corporation that operated a medical clinic sued the clinic and the other shareholders, among others, for, in part, intentional infliction of emotional distress, after the others voted to terminate his services for the clinic. On remand, the trial court directed a verdict against plaintiff on the claim. Affirming, this court held, inter alia, that plaintiff's contention that defendants mistreated his patients and that this mistreatment caused him emotional distress could not support his claim. The court said that a plaintiff could not recover under an intentional-infliction-of-emotional-distress cause of action when the alleged conduct was directed at a third person, and the plaintiff was not present when the conduct occurred. Hayes v. Northern Hills General Hospital, 628 N.W.2d 739, 744.

S.D.2000. Subsec. (1) and com. (d) quot. in sup. Former wife brought suit for, in part, intentional infliction of emotional distress against former husband, alleging that he had harassed her, arranged to have her criminally prosecuted on a bogus theft charge, and sent her threatening letters. After the jury returned a verdict awarding plaintiff no compensatory damages and $50,000 in punitive damages, the trial court granted plaintiff's motion for a new trial. Affirming, this court held that a new trial was warranted because the jury had shown by its verdict that it believed that plaintiff had been the victim of outrageous conduct, but that it had palpably mistaken the rules of law by which damages were measured. Henry v. Henry, 2000 SD 4, 6, 604 N.W.2d 285, 288.

S.D.1999. Com. (g) quot. in disc. Physician and sole shareholder of medical corporation sued former partners, hospital, and others for, inter alia, breach of contract and intentional infliction of emotional distress after defendants unilaterally terminated plaintiff's services. The trial court entered summary judgment for defendants. Affirming in part, reversing in part, and remanding, this court held, among other things, that summary judgment on the contract claim was proper; that material factual issues existed as to whether defendants' conduct, which allegedly included placing plaintiff on 24-hour-a-day, seven-day-a-week emergency room call, mistreating his patients, and tampering with his charts, could be considered extreme and outrageous; and that defendants failed to establish that their actions were privileged. Hayes v. Northern Hills General Hosp., 1999 SD 28, 590 N.W.2d 243, 251, appeal after remand 628 N.W.2d 739 (S.D.2001).

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S.D.1995. Cit. generally in sup., com. (d) cit. in ftn., com. (g) cit. and quot. in ftn., com. (h) quot. in disc. Former employee sued former employer and its general manager for wrongful discharge and intentional infliction of emotional distress. After a series of anonymous letters accusing general manager of illegal and unethical behavior was sent to employer's board of directors, general manager, believing plaintiff to be the author of at least one, gave her the choice of resignation or termination. The trial court granted defendants' motion for summary judgment and this court affirmed, holding that plaintiff, an at-will employee who could be dismissed without cause, was not treated abominably or intolerably when general manager assembled her, her immediate supervisor, and his supervisor in a private, professionally conducted meeting to explain plaintiff's options. Richardson v. East River Elec. Power Co-op., 531 N.W.2d 23, 27, 28, 27-28.

S.D.1994. Cit. generally in case quot. in sup., com. (h) cit. in case cit. in sup., com. (i) cit. generally in case quot. in sup. and quot. in case quot. in spec. conc. op. Female employees sued their employer for invasion of privacy and intentional infliction of emotional distress after discovering that company president was spying on them in the women's restroom through a hole in the wall. The trial court granted defendant a directed verdict on the emotional-distress claim and entered judgment on a jury verdict for plaintiffs on the invasion-of-privacy claim. Affirming in part, reversing in part, and remanding, this court held, inter alia, that there was sufficient evidence produced so that reasonable minds could differ on whether defendant's actions amounted to extreme and outrageous conduct. The court stated that it was for the jury to determine if company president knew to a substantial certainty that his act would cause an invasion of the interest of his female employees. Special concurrence emphasized that it was also for jury to determine if president engaged in reckless conduct. Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419, 429, 431.

S.D.1994. Com. (d) quot. in sup. and in ftn. Juvenile female sued juvenile male who accompanied her to party for assault and intentional infliction of emotional distress, among other claims. The trial court granted defendant summary judgment. Reversing and remanding, this court held, inter alia, that nature and extent of intoxicated plaintiff's consent to sexual activity with second juvenile male was genuinely in dispute, and that defendant's conduct in placing plaintiff in bedroom with second juvenile male, who was known by defendant to have body lice, was extreme enough to permit claim of intentional infliction of emotional distress to go to jury as well. Reeves v. Reiman, 523 N.W.2d 78, 84, 85.

S.D.1993. Com. (d) cit. in case cit. in sup. The former manager of a corporation sued it and its directors, alleging various claims including one for intentional infliction of emotional distress arising from his discharge. Affirming in part and reversing in part the trial court's grant of summary judgment for the defendants and remanding, this court held, inter alia, that the defendants' conduct in discussing the manager's job performance after a motion was made at a public meeting to fire him and then firing him that same day did not rise to the outrageous level necessary to support an emotional distress claim. Nelson v. Web Water Development Ass'n, Inc., 507 N.W.2d 691, 699.

S.D.1992. Cit. generally in disc., subsec. (1) quot. in ftn., com. (i) cit. in case quot. in disc. Discharged employee sued hospital for intentional infliction of emotional distress. The trial court granted summary judgment for defendant, and this court reversed in part and remanded. On petition for rehearing, this court held that the tort of intentional infliction of emotional distress encompassed liability for reckless infliction of emotional distress. Petersen v. Sioux Valley Hosp. Ass'n, 491 N.W.2d 467, 468, 469.

S.D.1992. Subsec. (1) quot. in case quot. in disc.; com. (i) cit. in case quot. in disc., quot. in conc. and diss. op. Employee who was discharged for habitual absenteeism and inability to get along with her co-workers sued hospital for intentional infliction of emotional distress, inter alia. Reversing in part the trial court's granting of summary judgment for defendant and remanding, this court held that a genuine issue of material fact existed as to whether plaintiff's supervisor's conduct in calling plaintiff to a meeting with co-workers to discuss her problems without first informing her could be considered reckless, given the supervisor's knowledge of plaintiff's fear of confrontational group meetings. The concurring and dissenting opinion argued that there was no evidence of reckless conduct causing plaintiff severe emotional distress, since plaintiff's own testimony indicated that her supervisor was simply trying to help resolve the friction between plaintiff and her co-workers. Petersen v. Sioux Valley Hosp. Ass'n, 486 N.W.2d 516, 518, 522, on rehearing 491 N.W.2d 467 (S.D.1992). See case below.

S.D.1992. Subsec. (1) quot. in disc. and cit. in ftn., com. (d) cit. in disc., com. (h) quot. in ftn. A family horse trainer's membership in a horse club was terminated on the grounds of her unsportsmanlike behavior and disruptive conduct. Various comments and observations were made by horse club members regarding this behavior. The trainer sued the horse club officers and directors alleging tortious interference with business relations, slander resulting in injury to profession, trade or business, and intentional infliction of emotional distress. The trial court dismissed the emotional distress claim against all of the defendants. Affirming, this court held, inter alia, that the defendants' termination of the plaintiff's membership in the horse club together with the statements allegedly made by the defendants did not amount to extreme and outrageous conduct. The court set forth the following definitive delineation of the elements of the tort of intentional infliction of emotional distress: (1) an act by defendant amounting to extreme and outrageous conduct; (2) intent on the part of the defendant to cause plaintiff severe emotional distress; (3) the defendant's conduct was the cause in-fact of plaintiff's injuries; and (4) the plaintiff suffered an extreme disabling emotional response to defendant's conduct. Tibke v. McDougall, 479 N.W.2d 898, 906, 907.

S.D.1989. Com. (j) quot. in disc. After the plaintiff's farm equipment dealership was terminated by the manufacturer, whose spokesman allegedly stated in a newspaper article that the plaintiff's dealership was not a good business, the plaintiff sued the manufacturer for intentional infliction of emotional distress, inter alia. The trial court entered judgment on a jury verdict for the defendant on this claim. Affirming in part, this court held that the evidence was insufficient to make a jury issue of the claim and that the fact that the jury was erroneously instructed was not reversible error. Groseth Intern., Inc. v. Tenneco Inc., 440 N.W.2d 276, 280.

S.D.1988. Cit. in case quot. in disc.; subsec. (1) cit. in case quot. in conc. and diss. op.; com. (h) cit. in disc., cit. in conc. and diss. op., cit. in ftn. to conc. and diss. op.; com. (i) cit. in ftn. to conc. and diss. op. A recently hired hospital laboratory supervisor was discharged at the end of the probationary period of his employment allegedly for poor performance. He sued the hospital and its administrator, who had recommended him for the position, claiming, inter alia, intentional infliction of emotional distress, fraud, and deceit. The trial court granted summary judgment for the defendants on all counts except fraud. Affirming in part and reversing in part, this court held that a question of material fact existed concerning the plaintiff's allegation that the dissatisfaction that led to his dismissal was really due to his lack of academic credentials, which the administrator had fraudulently assured him were sufficient for the position. The court also stated that reasonable minds could differ as to whether the defendants' conduct was so outrageous as to cause severe emotional distress. A concurring and dissenting opinion argued that there was no evidence of actions by the hospital that could reasonably be regarded as so extreme as to permit recovery for intentional infliction of emotional distress. Another concurring and dissenting opinion argued that the trial court should not have denied the plaintiff's motion to add a claim for breach of the implied covenant of good faith and fair dealing, claiming that the adoption of this concept would not interfere with the principle of employment at will; the administrator's assurances gave the plaintiff a justified expectation of fair treatment. French v. Dell Rapids Community Hosp., 432 N.W.2d 285, 289, 291, 292.

S.D.1988. Subsec. (1) and com. (f) quot. in sup., com. (i) cit. in sup. An employee sued his employer and related individuals for intentional infliction of emotional distress resulting from the manner in which he was treated when it was discovered that he was suffering from depression and alcohol abuse. The trial court entered judgment on a jury verdict awarding the employee compensatory and punitive damages, but ordered a new trial on the issue of punitive damages unless the employee agreed to a reduction of the jury award. This court affirmed in part and reversed in part and held that the punitive damages award was not excessive; therefore a new trial was not warranted. The court concluded that evidence that the defendants had knowledge of the plaintiff's mental condition when they confronted him was adequate for a jury to determine that the defendants' conduct was sufficiently reckless, extreme, and outrageous to find them liable for intentional infliction of emotional distress. Wangen v. Knudson, 428 N.W.2d 242, 248.

S.D.1987. Subsec. (1) cit. in disc. The plaintiff sued a soft drink company for negligent infliction of emotional distress after he consumed a beverage from a bottle that allegedly contained a decomposed mouse. The trial court granted the defendant's motion for summary judgment. Reversing and remanding, this court held that it was for a jury to determine whether the plaintiff's injury was sufficiently serious or substantial to warrant recovery. The court reasoned that while the plaintiff's physical injuries seemed trivial, a jury might find the defendant liable for conduct exceeding all bounds usually tolerated by society, including liability for fright. Wright v. Coca Cola Bottling Co., 414 N.W.2d 608, 609.

S.D.1986. Coms. (e) cit. in disc., com. (f) quot. in disc. A tenant suffering from psychological problems sued her landlord for intentional infliction of emotional distress, alleging that the landlord made sexual advances toward her knowing that she was psychologically incapable of resisting those advances and that his actions constituted outrageous conduct. The tenant also alleged that the landlord continued to harass her with obscene remarks and phone calls following her complaint to the police. The trial court did not address the harassment action and granted the landlord's motion for summary judgment, concluding that there was no evidence that the landlord knew or should have known of the tenant's psychological problems. Reversing and remanding, this court stated that extreme and outrageous conduct might arise from the actor's knowledge that the other is particularly susceptible to emotional distress and found that a factual question was presented as to the landlord's knowledge. The court also found that a jury question existed concerning the reasonableness of the landlord's actions. Ruane v. Murray, 380 N.W.2d 362, 364.

S.D.1984. Subsec. (1) quot. in ftn. and in diss. op., com. (f) cit. in disc., com. (h) quot. in disc., quot. in ftn. The plaintiff brought an action for intentional infliction of emotional distress against the defendant, who had made a series of obscene phone calls to her home. After the plaintiff had the police trace one of the calls, the defendant pleaded guilty to a criminal charge. The plaintiff then brought this civil action. At the close of the plaintiff's case the court granted her motion for a directed verdict on the issue of liability. The jury awarded actual and punitive damages. On appeal, the defendant contended that the jury, rather than the court, should have determined whether all of the elements of the tort had been present and that the directed verdict had foreclosed him from presenting evidence of his motivation in making the obscene calls. This court affirmed, holding that the directed verdict was properly sustained by the evidence. The dissent argued that it was improper for the trial court to render a directed verdict against the defendant before he had had a chance to present any evidence. Ruple v. Brooks, 352 N.W.2d 652, 654, 655, 657, 658.

Tenn.

Tenn.2021. Com. (d) cit. and quot. in sup., quot. in case quot. in sup.; coms. (h) and (j) quot. in sup. Second-grade teacher who resigned from her tenured position at an elementary school filed claims for, among other things, intentional infliction of emotional distress against school district and others based on allegations that she was constructively discharged. After the trial court granted defendants' motion to dismiss, the court of appeals affirmed in part. This court affirmed as to the dismissal of plaintiff's claim for intentional infliction of emotional distress, holding that defendants' alleged actions—including falsely and inaccurately reviewing her work, accusing her of child abuse in the form of using physical conduct to discipline a student, and placing cameras and a retired teacher in her classroom to monitor her actions—did not rise to the level of outrageous conduct required to state such a claim under Restatement Second of Torts § 46. Lemon v. Williamson County Schools, 618 S.W.3d 1, 21, 22.

Tenn.2012. Quot. in sup.; cit. in case quot. in sup. (general cite). After crematorium operator pleaded guilty to multiple felonies in connection with his failure to cremate hundreds of bodies,

parents of deceased son sued operator for allegedly mishandling son's body. The trial court entered judgment on a jury verdict in favor of plaintiffs. The court of appeals affirmed. Affirming, this court rejected defendant's argument that plaintiffs were precluded from recovery because they failed to specifically allege reckless infliction of emotional distress in their complaint, holding that a claim for intentional infliction of emotional distress could be proven by showing that a defendant acted recklessly, and that plaintiffs had presented sufficient proof from which the jury could have concluded that defendant acted recklessly. Akers v. Prime Succession of Tennessee, Inc., 387 S.W.3d 495, 502, 503.

Tenn.2012. Quot. in sup., cit. in case cit. and quot. in sup., com. (j) quot. in part in sup. and quot. in part but dist. (erron. cit. as § 45 on p. 208). Mother of deceased son sued owner of cemetery where her son was buried, and owner's sole shareholder, alleging, inter alia, intentional infliction of emotional distress (IIED) and outrageous conduct arising from defendant's inadequate maintenance of the cemetery. The trial court entered judgment against defendants, and awarded plaintiff compensatory and punitive damages; the court of appeals reversed the damages awards and the judgment against sole shareholder personally. Affirming, this court held that plaintiff provided insufficient proof of serious mental injury to support a judgment for damages based on the tort of IIED; plaintiff offered no evidence, by her own testimony or of anyone else, that she suffered physiological or psychological symptoms, sought medical or professional treatment, or incurred any significant impairment in her daily functioning resulting from defendants' conduct. Rogers v. Louisville Land Co., 367 S.W.3d 196, 205-210.

Tenn.2008. Com. (j) cit. in ftn. Family members of a child who was seriously injured in an automobile accident brought a claim for negligent infliction of emotional distress against driver of the vehicle that struck the child and, because driver lacked adequate insurance, served a copy of their complaint on their own insurer, in accordance with Tennessee's uninsured motorist statutes; plaintiffs alleged that they sustained severe emotional injuries after they observed child lying on the pavement in a pool of blood. The trial court granted summary judgment for insurer; the court of appeals reversed and remanded. Affirming, this court held that persons who observed an injured family member shortly after an injury-producing accident could pursue a claim for negligent infliction of emotional distress. The court noted that recovery was limited to serious or severe emotional injuries and could not be predicated on hurt feelings, trivial upsets, or temporary discomfort. Eskin v. Bartee, 262 S.W.3d 727, 737.

Tenn.2005. Cit. in disc.; quot. in sup.; cit. generally in case cit. in disc.; subsecs. (1) and (2) cit. in sup., cit. in disc., and cit. in ftn.; com. (d) quot. in ftn. and quot. in case quot. in disc.; com. (i) cit. in disc. Victims of child molestation by former priest sued church for reckless infliction of emotional distress, alleging that church's inadequate response to prior allegations enabled priest to continue pattern of abuse and infliction of severe emotional harm. Trial court granted summary judgment for defendant, and the court of appeals affirmed. Vacating and remanding, this court held, inter alia, that because reckless-infliction-of-emotional-distress claim did not have to be based upon conduct directed specifically at plaintiffs, genuine issues of material fact existed concerning defendant's conduct and awareness that the priest presented a substantial and unjustifiable risk of

harm to young males. Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville, 154 S.W.3d 22, 31-37, 39, 40.

Tenn.2004. Com. (d) quot. generally in sup. and adopted in case quot. in sup. Children of decedent who had consented to organ donation and/or harvesting particular organs sued funeral-home employees, alleging intentional infliction of emotional distress following upsetting comments made by employees regarding condition of decedent's body after it was embalmed. Trial court granted employees' motion to dismiss. The court of appeals affirmed in part. Reversing in part and remanding, this court held, inter alia, that children sufficiently alleged claim for intentional infliction of emotional distress, and reasonable inferences could be drawn from complaint that defendants knew the falsity of their statements. Leach v. Taylor, 124 S.W.3d 87, 92.

Tenn.2004. Quot. and adopted in case quot. in sup., com. (d) quot. in case quot. in sup. Postal carrier who witnessed a man shoot his wife in the head and then shoot himself sued the man's estate for intentional and negligent infliction of emotional distress. Trial court dismissed suit, but court of appeals reversed. This court affirmed, holding that plaintiff stated a claim for intentional infliction of emotional distress, since plaintiff's allegations described outrageous conduct that was intentional and caused plaintiff serious mental injury; that conduct, which occurred in plaintiff's presence and involved her as a participant, was not simply a tragedy common to daily life. Lourcey v. Estate of Scarlett, 146 S.W.3d 48, 51.

Tenn.1999. Subsec. (1) quot. in case quot. in sup., com. (d) cit. in headnotes and sup. and quot. in case quot. in sup., com. (j) quot. in sup. and quot. in ftn. (Erron. cit. as § 45 com. (j) on p. 614.) Parents of a newborn sued a doctor and the hospital for intentional infliction of emotional distress, after the doctor diagnosed the baby as suffering from Drug Withdrawal Syndrome, spread rumors throughout the hospital that the infant was a “drug baby,” and reported his suspicions concerning the mother's alleged drug use to the county health department. Trial court granted defendants summary judgment because plaintiffs failed to present expert proof to corroborate their claims of having sustained serious mental injuries. Appellate court affirmed. This court reversed and remanded, holding that expert medical or scientific proof of a serious mental injury was generally not required to support a claim for intentional infliction of emotional distress. Miller v. Willbanks, M.D., 8 S.W.3d 607, 612, 614-616.

Tenn.1997. Cit. in headnotes, subsec. (1) quot. but dist., com. (d) quot. in disc., com. (h) quot. in case quot. in disc. Patient in drug and alcohol rehabilitation program sued program for, inter alia, intentional infliction of emotional distress after he discovered that his roommate was HIV-positive. The trial court denied defendant's motion for summary judgment, even though defendant's expert testified that the American Hospital Association recommended segregating HIV-positive patients from those not infected with the virus in only three situations, none of which was present here. The intermediate appellate court affirmed. Reversing, this court held that, as a matter of law, defendant's conduct was not outrageous where it complied with applicable health care standards. Bain v. Wells, 936 S.W.2d 618, 618, 619, 622, 623.

Tenn.1977. Com. (d) quot. in part in sup., illus. (1) and (3) cit. and illus. (4) quot. in part in disc. A state university professor was struck in the face with a pie during a class. The professor accused plaintiff student of the assault and ejected him from the building the following day when he attempted to enter the class, and he also accused the student of attempted blackmail. Plaintiff brought this action against the professor for outrageous conduct, alleging that defendant wrongfully accused him. Plaintiff appealed from a dismissal for failure to state a claim, but the court affirmed. It was held that the student's allegations failed to state cause of action where the student claimed innocence but did not allege that defendant knew, or should have known, that his accusations were false, and where defendant's accusation of blackmail, though excessive, was the product of an unprovoked and humiliating attack, and where the defendant, having no reason to believe he was acting against the wrong person, ejected the student from the building when he attempted to take his seat in class. Goldfarb v. Baker, 547 S.W.2d 567, 568-69.

Tenn.1977. Cit. in disc. and com. (e) cit. in disc. The defendant, a department store, erroneously charged the plaintiffs, charge account customers, for a purchase after they returned the goods and were informed that they would receive credit. After being repeatedly notified of the error, the defendant failed to correct it, continued to bill the plaintiffs for the amount, and continued to send letters and make telephone calls to the plaintiffs threatening them with a lawsuit if they did not make payment. The plaintiffs brought an action against the defendant for compensatory and punitive damages for the alleged infliction of severe emotional distress. The lower court dismissed the complaint on the ground that it failed to state a cause of action, and the plaintiffs appealed. The court held that the plaintiffs' allegations stated a cause of action for intentional or reckless infliction of severe emotional distress by means of extreme and outrageous conduct. The court noted that two factors must concur in order to outweigh the policy against allowing an action for the infliction of mental distress: (a) the conduct complained of must have been outrageous, not tolerated by civilized society, and (b) as a result of the outrageous conduct, there must be serious mental injury. The court found that a jury could reasonably conclude that the defendant's conduct, considered as a whole, was extreme and outrageous, and that the mental and emotional injury alleged to have resulted from the defendant's conduct was serious. Therefore, the lower court was reversed, and the cause remanded for further proceedings. Moorhead v. J.C. Penney Co., Inc., 555 S.W.2d 713, 717.

Tenn.1976. Cit. in sup. and com. (d) quot. in sup. and coms. cit. in sup. An employee filed this action against his employer and a detective agency charging that the defendants were guilty of “outrageous conduct” and “invasion of privacy” which caused him to suffer severe emotional harm. The lower court dismissed the action. On appeal, the court affirmed, holding that the complaint, which alleged that defendants investigated and harassed him for a period of approximately six months, did not allege actionable conduct with sufficient specificity so as to state a cause of action for the tort of “outrageous conduct” or “invasion of privacy.” Swallows v. Western Elec. Co., Inc., 543 S.W.2d 581, 582, 583.

Tenn.1966. Subsec. (1) and com. (d) quot. in sup. The plaintiffs seek to recover damages from the defendant, a loan company, for intentional interference with the plaintiffs' peace of mind caused

by the defendant's agents, who allegedly were insulting and abusive in the course of several phone conversations pertaining to disputed loan payments. The Supreme Court affirmed defendant's demurrer, because the plaintiffs had failed to allege and prove the substance and severity of the abuse, which supposedly aggravated a nervous condition by causing headaches. Medlin v. Allied Investment Company, 398 S.W.2d 270, 274.

Tenn.App.

Tenn.App.2022. Com. (d) quot. in sup. and quot. in case quot. in sup. School secretary brought, among other things, a claim for reckless infliction of emotional distress against employer of school bus driver, alleging that defendant failed to address repeated instances of bus driver's dangerous driving, resulting in driver causing a bus to flip over and kill elementary-school passengers. The trial court denied defendant's motion to dismiss. This court affirmed in part and remanded on other grounds, holding that plaintiff sufficiently alleged that defendant's conduct was outrageous and extreme. Citing Restatement Second of Torts § 46, Comment *d*, the court explained that, according to plaintiff's complaint, defendant repeatedly ignored warnings about driver's dangerous driving, knew that driver failed to attend mandatory safety meetings, and failed to address warnings by a third-party monitor about driver's tendency to violate speed limits. Bibbs v. Durham School Services, L.P., 666 S.W.3d 327, 334.

Tenn.App.2022. Com. (d) quot. in sup., quot. in case quot. in sup. School brought, among other things, a claim for reckless infliction of emotional distress against employer of school bus driver, alleging that defendant failed to address repeated instances of bus driver's dangerous driving, resulting in driver causing a bus to flip over and kill elementary-school passengers. The trial court denied defendant's motion to dismiss. This court affirmed in part and remanded on other grounds, holding that plaintiff sufficiently alleged that defendant's conduct was outrageous and extreme. Citing Restatement Second of Torts § 46, Comment *d*, the court explained that, according to plaintiff's complaint, defendant repeatedly ignored warnings about driver's dangerous driving, knew that driver failed to attend mandatory safety meetings, and failed to address warnings by a third-party monitor about driver's tendency to violate speed limits. Cothran v. Durham School Services, L.P., 666 S.W.3d 355, 379.

Tenn.App.2022. Com. (d) quot. in sup., quot. in case quot. in sup. School educational assistant brought, among other things, a claim for reckless infliction of emotional distress against employer of school bus driver, alleging that defendant failed to address repeated instances of bus driver's dangerous driving, resulting in driver causing a bus to flip over and kill elementary-school passengers. The trial court denied defendant's motion to dismiss. This court affirmed in part and remanded on other grounds, holding that plaintiff sufficiently alleged that defendant's conduct was outrageous and extreme. Citing Restatement Second of Torts § 46, Comment *d*, the court explained that, according to plaintiff's complaint, defendant repeatedly ignored warnings about driver's dangerous driving, knew that driver failed to attend mandatory safety meetings, and failed

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to address warnings by a third-party monitor about driver's tendency to violate speed limits. Franklin v. Durham School Services, L.P., 666 S.W.3d 340, 348.

Tenn.App.2022. Com. (d) quot. in sup., quot. in case quot. in sup. School teacher brought, among other things, a claim for reckless infliction of emotional distress against employer of school bus driver, alleging that defendant failed to address repeated instances of bus driver's dangerous driving, resulting in driver causing a bus to flip over and kill elementary-school passengers. The trial court denied defendant's motion to dismiss. This court affirmed in part and remanded on other grounds, holding that plaintiff sufficiently alleged that defendant's conduct was outrageous and extreme. Citing Restatement Second of Torts § 46, Comment *d*, the court explained that, according to plaintiff's complaint, defendant repeatedly ignored warnings about driver's dangerous driving, knew that driver failed to attend mandatory safety meetings, and failed to address warnings by a third-party monitor about driver's tendency to violate speed limits. Muhammed v. Durham School Services, L.P., 666 S.W.3d 355, 363.

Tenn.App.2022. Com. (d) quot. in sup., quot. in case quot. in sup. School teacher brought, among other things, a claim for reckless infliction of emotional distress against employer of school bus driver, alleging that defendant failed to address repeated instances of bus driver's dangerous driving, resulting in driver causing a bus to flip over and kill elementary-school passengers. The trial court denied defendant's motion to dismiss. This court affirmed in part and remanded on other grounds, holding that plaintiff sufficiently alleged that defendant's conduct was outrageous and extreme. Citing Restatement Second of Torts § 46, Comment *d*, the court explained that, according to plaintiff's complaint, defendant repeatedly ignored warnings about driver's dangerous driving, knew that driver failed to attend mandatory safety meetings, and failed to address warnings by a third-party monitor about driver's tendency to violate speed limits. Schrick v. Durham School Services, L.P., 667 S.W.3d 259, 266.

Tenn.App.2020. Com. (d) quot. in case quot. in sup. Ex-husband brought, among other things, claims of intentional infliction of emotional distress (IIED) against attorney and law firm that represented ex-wife in divorce proceedings, alleging that defendants, after being informed that plaintiff had forwarded to close friends several photographs of ex-wife engaging in sexual acts with another man while she and plaintiff were dating, advised ex-wife to file criminal charges of unlawful exposure against him in order to obtain leverage in the divorce proceedings. The trial court granted defendants' motion to dismiss. This court affirmed, holding that plaintiff failed to establish the elements of his IIED claim. The court explained that defendants' actions of providing ex-wife legal advice to file a truthful report with law enforcement and referring her to a criminal-defense attorney did not constitute sufficiently outrageous behavior as defined by Restatement Second of Torts § 46, Comment *d*, to sustain a claim for IIED. Pagliara v. Moses, 605 S.W.3d 619, 628.

Tenn.App.2016. Com. (d) quot. in sup. and cit. in case quot. in sup. Mother sued assistant district attorney general for, among other things, intentional infliction of emotional distress (IIED), alleging that, while she was engaged in a prolonged standoff with police officers related to a

custody dispute, she overheard defendant, who was on speakerphone, use derogatory language to refer to her. The trial court granted summary judgment for defendant. Affirming, this court held that plaintiff failed to state an IIED claim under Restatement Second of Torts § 46. While defendant's comments—that plaintiff was a "jerk," a "troublemaker," and a "bitch"—were derogatory and inappropriate, none of them rose to the high standard of outrageousness necessary to sustain such a claim. Odom v. Claiborne County, Tennessee, 498 S.W.3d 882, 887.

Tenn.App.2013. Cit. in treatise quot. in sup., com. (j) quot. in sup. Paternal grandparents of minor child filed a petition for visitation against child's biological mother and her new husband, who adopted child after child's biological father relinquished his parental rights. The trial court found that cessation of visitation between the child and grandparents was likely to cause substantial harm to the child and awarded visitation. This court reversed, holding that the evidence preponderated against a finding that the child would likely suffer substantial harm or severe emotional harm as a result of the loss of the relationship. The court pointed out that the evidence showed only that the child became excited at the mention of grandparents, not that he became inconsolable, or otherwise upset, due to the loss of connection with them, and feelings of excitement did not rise to the level of other emotions that were customarily associated with findings of severe emotional harm, such as grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, or nausea. McGarity v. Jerrolds, 429 S.W.3d 562, 578-580.

Tenn.App.2012. Cit. in case quot. in sup.; com. (d) quot. in case quot. in sup.; com. (h) quot. in sup.; com. (j) quot. in case quot. in sup. (erron. cit. as § 45). Customer brought, inter alia, claims for intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED) against gas station, alleging that a verbal exchange between him and defendant's employee —in which the employee accused him of trying to "do a money-switch" and threatened to call the police—caused him severe emotional distress. The trial court granted summary judgment for defendant. Affirming, this court held, among other things, that the employee's alleged conduct fell squarely within the realm of mere insults, indignities, threats, annoyances, petty oppression, or other trivialities and was insufficiently outrageous to permit recovery for an IIED claim; similarly, the alleged conduct was not so extreme and outrageous that it would have caused a reasonable person to suffer serious or severe emotional injury, as required to state a claim for NIED. Brown v. Mapco Exp., Inc., 393 S.W.3d 696, 704, 705.

Tenn.App.2010. Cit. in case quot. in sup., com. (d) quot. in case quot. in sup., com. (h) cit. in sup. Witness in a divorce action between husband and wife sued wife's attorney, alleging, among other things, outrageous conduct, after attorney deposed him, treated him as a hostile witness, filed suit against him for participating in defamation of wife, and then dismissed that suit against him with prejudice. The trial court dismissed plaintiff's action. Affirming, this court held, among other things, that plaintiff failed to state a claim for intentional infliction of emotional distress as a matter of law; while the taking of the deposition and the filing of the lawsuit might have caused plaintiff some level of emotional distress, such conduct was not atrocious, and thus did not rise to the level of the “outrageous conduct” required to state such a claim. Lane v. Becker, 334 S.W.3d 756, 763.

Tenn.App.2008. Quot. and adopted in case quot. in sup., com. (d) quot. in case quot. in sup. Limited liability company member brought a claim of outrageous conduct, inter alia, against fellow members, alleging, among other things, that defendants withheld information regarding the company from plaintiff, failed to assist plaintiff with company's day-to-day operations, verbally assaulted plaintiff with regard to the company, and did not notify plaintiff of certain meetings. This court affirmed the trial court's dismissal of plaintiff's claim, reasoning that defendants' actions of which plaintiff complained were the same types of acts that occurred in virtually every dispute that arose between members of a limited liability company and did not rise to the level of being "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." O'Dell v. O'Dell, 303 S.W.3d 694, 696-697.

Tenn.App.2007. Cit. in conc. and diss. op, com. (b) cit. in conc. and diss. op. Parents and siblings of decedent whose body was sent to funeral home for cremation sued funeral home and its owner, after the body was not cremated, and plaintiffs were never told and never found out what had happened to decedent's body. The trial court dismissed for lack of standing. This court affirmed, holding that, consistent with Restatement Second of Torts § 868, any tort claims for negligent, reckless, or intentional interference with a dead body and the like could be brought in Tennessee only by the person or persons who had the right to control disposition of the body, here, decedent's widow. The concurring and dissenting opinion argued that the causes of action asserted by plaintiffs were not premised upon § 868, but rather upon the concept of outrageous conduct found in § 46 and other sections of the Restatement Second of Torts, e.g., §§ 312, 313, 436, and 436A, and that plaintiffs stated a claim for intentional, reckless, and negligent infliction of mental distress. Crawford v. J. Avery Bryan Funeral Home, Inc., 253 S.W.3d 149, 163.

Tenn.App.2006. Com. (d) quot. and adopted in case quot. in sup. (general cite). Terminated employee brought various discrimination claims against her former employer, as well as claims for negligent and/or intentional infliction of emotional distress, alleging, among other things, that defendant's employees continually harassed and mocked her because of her physical and mental disabilities. The trial court granted summary judgment for defendant. This court affirmed, holding, inter alia, that, because plaintiff provided no evidence to create a genuine issue of material fact as to whether she suffered severe emotional injury, a necessary element of her emotional-distress claims, it was irrelevant whether the alleged conduct was severe enough to be deemed negligent or outrageous. Oates v. Chattanooga Pub. Co., 205 S.W.3d 418, 428.

Tenn.App.2004. Coms. (d) and (j) quot. in case quot. in disc. Owners of small parcel of rural land sued owners of large, surrounding parcel for, inter alia, outrageous conduct, after defendants, learning of plaintiffs' anonymous complaints to authorities over defendants' business use of their land, threatened and intimidated plaintiffs. The trial court dismissed the outrageous-conduct claim. This court affirmed in regard to defendant wife, but reversed and remanded in regard to defendant husband, holding that husband's malicious issuance of death threats and firing of gunshots near plaintiffs' home was atrocious behavior that was utterly intolerable in a civilized community, and

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that plaintiffs presented substantial, undisputed evidence that they had suffered serious mental injury as a result of husband's conduct. Levy v. Franks, 159 S.W.3d 66, 83, 85.

Tenn.App.2003. Cit. in sup., coms. (d) and (j) quot. in case quot. in sup. Ninety-two African-American residents sued pizza-delivery company that refused to deliver pizza to their neighborhood, alleging discrimination and intentional infliction of emotional distress. Trial court granted company summary judgment. Affirming in part, this court held, inter alia, that record was devoid of evidence of severe mental injury resulting from company's actions, and company's conduct did not rise to level of outrageousness necessary to support claim for intentional infliction of emotional distress. Arnett v. Domino's Pizza I, L.L.C., 124 S.W.3d 529, 539, 540.

Tenn.App.1995. Com. (d) quot. in case quot. in disc. Employee sued former employer, asserting that the employer's actions, in connection with the employee's demotion and subsequent termination, violated the Age Discrimination in Employment Act and constituted intentional infliction of emotional distress. Employee alleged that employer reported his actions in the competitive bidding process to the federal government without probable cause and before a thorough investigation. He further alleged that he was humiliated after his firing by being given a large garbage bag for his personal possessions and then being ushered to exit through a common area in front of his work peers. Trial court granted employer summary judgment. This court affirmed, holding, inter alia, that employer's actions did not rise to the requisite level of outrageousness to state a viable emotional distress cause of action. Newsom v. Textron Aerostructures, 924 S.W.2d 87, 98.

Tenn.App.1992. Subsec. (1) and com. (d) quot. in case quot. in disc. Trust beneficiaries sued trustee alleging, among other claims, failure to manage the trust prudently, by not converting the trust property into cash and investing in more productive securities, and infliction of emotional distress arising from the trustee's indifference to the beneficiaries' needs in managing the trust. The chancery court found the trustee liable to the trust estate for failure to convert the trust property and awarded beneficiaries damages for negligent infliction of emotional distress. Modifying in part the chancellor's decree, affirming in part, and remanding, this court held, inter alia, that the trustee was not negligent in failing to sell the trust property because the trust did not authorize him to sell the property in gross, and that his conduct was not intentional or so reckless as to constitute outrageous indifference to the beneficiaries' reasonable financial needs. Phillips v. Taylor, 833 S.W.2d 927, 934.

Tenn.App.1991. Com. (d) quot. in disc. A husband sued his former wife's lover for outrageous conduct, inter alia, alleging that the defendant's affair with his wife ended the plaintiff's marriage, causing him to file for divorce, and that the defendant perjured himself concerning these activities in the plaintiff's divorce proceedings. The trial court dismissed the claim. Affirming, this court held that, although the defendant's conduct was inappropriate and unacceptable, an average member of the community would not find it to be so atrocious that it went beyond the bounds of decency. Alexander v. Inman, 825 S.W.2d 102, 105.

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Tenn.App.1991. Cit. in cases quot. in disc., subsec. (1) quot. in sup., com. (d) quot. in sup. and quot. in case quot. in disc., com. (h) quot. generally in case quot. in disc. Film-developing company customer whose partially nude photograph was shown to others sued the company, among others, for outrageous conduct, inter alia. The trial court granted a directed verdict for defendant on the ground that no serious damage was proved. Reversing and remanding, this court held that there was evidence in the record to support a verdict that defendant's conduct was outrageous and that plaintiff suffered serious mental or emotional injury as a result. Dunn v. Moto Photo, Inc., 828 S.W.2d 747, 748, 751-753.

Tenn.App.1991. Com. (d) quot. in case quot. in disc. and quot. in case quot. in sup. A hospital patient and her husband brought an action for infliction of emotional distress against a nurse who allegedly committed sexual battery upon the plaintiff husband. The trial court entered summary judgment for the defendant. Affirming, this court held that the plaintiffs failed to cite any evidence as to the standards of civilized society within a hospital environment and therefore failed to prove that the defendant's alleged actions were sufficiently outrageous to merit the imposition of liability. Highfill v. Baptist Hosp., Inc., 819 S.W.2d 436, 440.

Tenn.App.1988. Com. (d) quot. in disc. A former employee sued his supervisor and his employer for assault, outrageous conduct, and breach of implied contract in connection with workplace altercations between the employee and his supervisor. The trial court granted the defendants summary judgment. This court affirmed in part and vacated in part, holding that the plaintiff had not substantiated his outrageous conduct claim. The court stated that the pushing, shoving, and swearing that allegedly occurred between the two was not the type of conduct that an average member of the community would consider outrageous. Moreover, the plaintiff conceded that he had suffered no physical or emotional effects from the altercations; he had therefore failed to establish both essential elements of the tort. Blair v. Allied Maintenance Corp., 756 S.W.2d 267, 273.

Tenn.App.1988. Subsec. (1) and com. (d) quot. in case quot. in disc., coms. cit. in case quot. in disc. Shortly after a child abuse and murder suspect was shot to death by the grandfather of the victim, the police announced that the suspect would have been charged with the child's murder. The suspect's parents sued the police chief and a police captain for intentional infliction of emotional distress by reckless and outrageous conduct, alleging that the defendants had no evidence to support their accusations against the plaintiffs' son. The trial court granted summary judgment for the defendants. Affirming and remanding, this court held that the defendants' conduct was not outrageous, because it was not intolerable in civilized society. The court held that the defendants were acting in good faith, with a reasonable belief that they were doing right, and that the plaintiffs had not carried their burden of proving that the defendants had acted with the intention of injuring the plaintiffs. Gann v. Key, 758 S.W.2d 538, 543, 544.

Tenn.App.1988. Coms. cit. in case quot. in disc. Examinees who failed the state bar examination sued the board of law examiners and the individual members of the board, among others, alleging, inter alia, that the defendants' publication of the names of those who passed the test was outrageous

conduct that caused the plaintiffs severe mental and emotional damage. The trial court granted the defendants' motion for summary judgment. Affirming, this court held that the plaintiffs' allegations were general and inconclusive and contained absolutely no allegation concerning the conduct of the individual defendants that caused the damages alleged by the plaintiffs. Hampton v. Tennessee Bd. of Law Examiners, 770 S.W.2d 755, 764, certiorari denied 493 U.S. 975, 110 S.Ct. 498, 107 L.Ed.2d 501 (1989).

Tenn.App.1987. Quot. in disc., com. (d) quot. in disc. A trucking company employee sued the company's health insurance providers for benefits due under the policy, outrageous conduct, fraud, and gross misconduct. The trial court denied the defendants' motion for a directed verdict, and held that the plaintiff could recover on all of the claims. Reversing, this court held that the trial court should have directed a verdict for the defendants on the issues of outrageous conduct, fraud, and deceit. The court stated that the plaintiff failed to show that the defendant intentionally or even recklessly acted in a manner that would naturally lead to the infliction of emotional distress; therefore there could be no recovery for outrageous conduct. Holt v. American Progressive Life Ins., 731 S.W.2d 923, 926-927.

Tenn.App.1986. Subsec. (1) quot. in sup. but dist., com. (h) cit. in case quot. in disc. (cit. as Comment, p. 77), com. (d) cit. and quot. but dist. A mortgagor sued a mortgagee for outrageous conduct resulting in mental and financial injury allegedly suffered when the mortgagee refused to endorse an insurance check. The jury returned a verdict for the mortgagor; the mortgagee appealed, contending that no material evidence existed to support the jury's verdict. This court reversed the trial court's judgment and dismissed the case, stating that in an action for outrageous conduct causing severe emotional distress, the conduct must be so outrageous or extreme as to go beyond all possible bounds of decency, and that the mortgagee's conduct did not rise to such an atrocious level. Bryan v. Campbell, 720 S.W.2d 62, 64-65.

Tenn.App.1986. Coms. cit. in case quot. in sup., com. (d) quot. in disc., coms. (h) and (j) cit. in sup. An insurance company terminated disability payments to a former employee of a policy holder. The former employee sued the insurer, claiming that the termination involved outrageous conduct. The defendant was granted summary judgment. Affirming, this court held that the plaintiff's complaint failed to state a cause of action, because no instances of abusive or outrageous conduct were alleged. The court stated that the plaintiff's allegations utilized conclusory words repeating the test for abusive conduct by claiming that the defendant's acts were not to be tolerated in a civilized society, but the complaint did not describe the substance and severity of the defendant's conduct that allegedly amounted to actionable behavior. Chandler v. Prudential Ins. Co., 715 S.W.2d 615, 622, 623.

Tenn.App.1986. Com. (h) quot. in case cit. in disc. A husband and wife sued a doctor and a hospital for damages suffered when the doctor failed to remove a drainage tube from the wife's surgical incision. A jury found for the plaintiffs, but the trial court remitted the judgment by 75%. All parties appealed. Plaintiffs contended, inter alia, that the trial court should have permitted them to amend their complaint to allege the tort of outrageous conduct against the hospital. The court of

appeals held that it was not error to deny the amendment because plaintiffs, in their motion, did not allege facts for the court to evaluate, but only legal conclusions. The court, however, reversed and remanded, holding that because the misconduct of plaintiff's counsel may have prejudiced the jury, the trial court should have granted a new trial rather than remittitur. Guess v. Maury, 726 S.W.2d 906, 921.

Tenn.App.1981. Cit. in sup., com. (e) cit. in ftn. and com. (f) quot. in ftn. in sup. (Erron. cit. as Torts.) The plaintiffs, husband and wife, brought an action against the county medical examiner to recover compensatory and punitive damages for alleged "severe emotional stress" suffered by the wife as a result of the defendant's alleged "outrageous conduct." The defendant had told the plaintiffs that the thought that their daughter had been suffocated after being sexually abused, even though the defendant did not have any concrete evidence to support his belief and was aware that the wife had experienced a mental breakdown. The lower court granted the defendant's motion to dismiss and the plaintiffs appealed. The appellate court reversed and remanded with respect to the issue of the intentional or reckless infliction of severe emotional distress by means of outrageous conduct, because reasonable minds could differ as to whether the defendant's conduct was outrageous. Dunbar v. Strimas, 632 S.W.2d 558, 561.

Tenn.App.1981. Coms. (h) and (j) cit. in disc., coms. (d) and (e) quot. in disc., illus. 7 cit. in disc. The debtors of the appellant credit company had brought an action against the credit company for outrageous conduct. The debtors had paid their bills; however, through error, the debtors' account was not credited properly and appeared to be one month in arrears. Because of the appearance of the account, the credit company repeatedly sent letters stating that the account was past due and demanding payment. On remand, the trial court entered judgment for the debtors and awarded damages. The credit company appealed and the higher court reversed and remanded for a dismissal of the case. The court found that merely seeking to collect a debt believed to be outstanding was not sufficiently outrageous to sustain recovery. Nelson v. Ford Motor Credit Co., 621 S.W.2d 573, 575, 576.

Tex.

Tex.2008. Com. (b) quot. in ftn. to diss. op. Former church member brought negligence and intentional-tort claims against church, senior pastor, youth minister, and others, alleging that, in two incidents when she collapsed during worship services, individual defendants physically restrained her against her will. After the trial court denied defendants' protective order, the court of appeals granted them mandamus relief barring the litigation of those claims involving church's religious practices; subsequently, the trial court entered judgment on a jury verdict awarding plaintiff damages on her false-imprisonment claim. The court of appeals affirmed on this claim. This court reversed and dismissed on First Amendment grounds. A dissent argued that the cases cited by the majority involved situations where no physical assault occurred, unlike the situation in this case, and noted that the tort of intentional infliction of emotional distress was developed

because it was thought that extreme and outrageous conduct should be actionable despite the lack of a physical invasion. Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 17.

Tex.2006. Com. (d) quot. in case quot. in sup. Shopper who was acquitted on misdemeanor theft charges arising from an alleged shoplifting incident sued grocery store and assistant store manager for, in part, intentional infliction of emotional distress, arguing that defendants intentionally subjected her to embarrassment and emotional distress knowing that she was innocent. The trial court entered judgment on a jury verdict for plaintiff; the court of appeals affirmed. Reversing and rendering judgment for defendants, this court held that plaintiff's evidence was legally insufficient to support a finding that defendants' conduct was extreme and outrageous. The court reasoned that plaintiff's claimed innocence was insufficient to find that defendants did not honestly and reasonably believe that plaintiff was guilty; further, plaintiff produced no evidence of prior bad relations, racial animus, or other ulterior motives. Kroger Texas Ltd. Partnership v. Suberu, 216 S.W.3d 788, 796.

Tex.2005. Com. (d) cit. in ftn., com. (g) quot. in ftn. Former employee sued employer and CEO for intentional infliction of emotional distress, alleging that defendants refused to give her a reference letter, did not take reference calls on her behalf, forbade employees to contact ex-employees, and ordered one employee to evict plaintiff, who had moved into employee's home after being fired. Trial court granted defendants summary judgment. Court of appeals affirmed as to defendants' pretermination conduct, but reversed as to posttermination conduct. This court reversed in part and rendered judgment that plaintiff take nothing, holding that, while defendants' conduct might have been callous, meddlesome, overbearing, and vindictive, it was not so extreme and outrageous as to constitute intentional infliction of emotional distress. Creditwatch, Inc. v. Jackson, 157 S.W.3d 814, 817, 818.

Tex.2003. Com. (d) quot. in sup. and quot. in case quot. in disc. Concrete contractor's widow sued project owner for intentional infliction of emotional distress based on defendant's conduct as a party to two commercial-construction contracts. After the jury returned a verdict for plaintiff, the trial court granted defendant's motion for judgment n.o.v. The court of appeals reversed and remanded. Reversing and remanding, this court held that defendant's course of conduct in making numerous rude and insensitive phone calls to plaintiff relating to the contracts and threatening to terminate the contracts if the construction site was closed for the entire day of contractor's funeral did not rise to the level of extreme and outrageous conduct necessary to support jury's verdict. Tiller v. McLure, 121 S.W.3d 709, 713, 715.

Tex.2003. Com. (d) quot. in case quot. in disc. Former employee brought suit for disability discrimination and intentional infliction of emotional distress against former employer. The trial court entered judgment on a jury verdict for plaintiff, and the court of appeals affirmed. Reversing, this court held, inter alia, that plaintiff's claim of intentional infliction of emotional distress failed because defendant's investigation into sexual-harassment charges made against plaintiff and the subsequent termination of plaintiff amounted to an ordinary business dispute, and did not constitute

the requisite extreme and outrageous conduct as a matter of law. Wal-Mart Stores, Inc. v. Canchola, 121 S.W.3d 735, 741.

Tex.2002. Com. (d) cit. in ftn. to diss. op. Homeowners brought class action against builder, seeking to enjoin it from asserting that implied warranties of habitability and good and workmanlike construction had been waived by provisions in the sales contracts. Trial court dismissed; court of appeals reversed and remanded. Affirming, this court held that implied warranty of good workmanship could be disclaimed when the parties' agreement provided for manner, performance, or quality of construction, but implied warranty of habitability could not be disclaimed generally. Dissent argued that the court's new, undisclaimable implied warranty of habitability would be alleged in virtually every case involving residential defects, just as its creation of a cause of action for intentional infliction of emotional distress resulted in allegations of the claim in hundreds of cases in every context imaginable. Centex Homes v. Buecher, 95 S.W.3d 266, 279.

Tex.2002. Com. (d) quot. in case quot. in sup., com. (h) cit. in cases quot. in sup. In suit by insurance agent who was terminated for allegedly participating in kickback scheme, former employer appealed jury verdict finding it liable for negligence and intentional infliction of emotional distress. Court of appeals affirmed in part. Reversing and rendering judgment that plaintiff take nothing, supreme court declined to recognize a cause of action against employers for negligent investigation of their at-will employees' alleged misconduct, and held that employer's actions in investigating plaintiff and reporting results of investigation to state and federal enforcement agencies did not rise to level of extreme and outrageous conduct necessary to support claim for intentional infliction of emotional distress. Texas Farm Bureau Mut. Ins. Companies v. Sears, 84 S.W.3d 604, 610.

Tex.2000. Com. (h) cit. in headnote and quot. in case quot. in disc. Current and former city police officers sued two other officers and the city, alleging intentional infliction of emotional distress, among other claims. Trial court granted defendants summary judgment; the appellate court affirmed in part, vacated in part, and reversed in part. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that the city's decision to reclassify positions formerly held by police officers as civilian positions did not rise to the level of extreme and outrageous conduct that was required to establish intentional infliction of emotional distress. City of Midland v. O'Bryant, 18 S.W.3d 209, 217.

Tex.2000. Cit. in disc., com. (d) quot. in case quot. in sup. Stranded motorist sued other driver for intentional infliction of emotional distress, alleging that defendant harassed her as she sat in her vehicle by the side of the road and followed her when she tried to escape him. The trial court entered summary judgment for defendant and the intermediate appellate court affirmed. Reversing and remanding, this court held that defendant intentionally engaged in threatening behavior, which caused plaintiff severe mental distress. Morgan v. Anthony, 27 S.W.3d 928, 929.

Tex.1999. Cit. in sup., subsec. (1) adopted in case cit. in ftn., com. (d) quot. in sup. and cit. in ftn., com. (h) cit. in ftn. and quot. in case quot. in sup. State university professor who was

terminated after receiving negative evaluation brought suit for, in part, intentional infliction of emotional distress against, among others, three administrators who had participated in evaluation process. The trial court granted defendants summary judgment; the court of appeals reversed in part and remanded. This court reversed in part and rendered judgment that plaintiff take nothing, holding, inter alia, that, even assuming that defendants had retaliatory motives, their conduct in, for example, making negative comments that were reflected in plaintiff's tenure file did not rise to level of extreme and outrageous conduct necessary to maintain action for intentional infliction of emotional distress. Brewerton v. Dalrymple, 997 S.W.2d 212, 215, 216.

Tex.1999. Com. (d) cit. in headnote and cit. and quot. in sup., cit. and quot. in conc. op. and quot. in case quot. in conc. op., com. (e) cit. in headnote and cit. and quot. in sup., com. (g) cit. in sup., com. (h) cit. in headnote and sup. and quot. in case quot. in sup., illus. 2 cit. in sup., illus. 4 cit. in conc. op. Employees sued employer for intentional infliction of emotional distress premised on the constant humiliating and abusive behavior of their supervisor. Trial court entered judgment on jury verdict for plaintiffs, and the appellate court affirmed. This court affirmed, holding, inter alia, that the severity and regularity of the supervisor's abusive and threatening conduct brought his behavior into the realm of extreme and outrageous conduct. Concurring opinion argued that the supervisor's cursing was not intentional infliction of emotional distress when that cursing was not directed at plaintiff and was not simultaneously accompanied by sexual harassment or physically threatening behavior. GTE Southwest, Incorporated v. Bruce, 998 S.W.2d 605, 611-612, 616, 617, 621, 622.

Tex.1998. Com. (d) cit. in case cit. in ftn. Former customer-service representatives for provider of mobile-telephone systems sued former employer for retaliatory discharge and intentional infliction of emotional distress. The trial court entered judgment on a jury verdict for plaintiffs. The intermediate appellate court affirmed in part and reversed in part. Affirming in part and reversing in part, this court held, inter alia, that termination for a wrongful purpose, even, as in this case, in retaliation for reporting sexual harassment, was not sufficiently extreme and outrageous as to give rise to a cause of action for intentional infliction of emotional distress. Southwestern Bell Mobile Systems v. Franco, 971 S.W.2d 52, 54.

Tex.1998. Cit. in headnotes, cit. and quot. in disc., subsec. (1) cit. in disc., com. (b) quot. in disc., com. (i) cit. in disc., illus. 1-22 cit. in ftn. March participant brought action for, inter alia, intentional infliction of emotional distress against tractor-trailer driver and his employer. Specifically, plaintiff alleged that defendants were liable for the injuries caused by driver's failure to be vigilant on a public roadway, which resulted in his driving into the rear of the procession, killing one and injuring others. The trial court entered summary judgment for defendants. The intermediate appellate court affirmed in part and reversed in part. Reversing, this court held that intentional infliction of emotional distress was not available as an independent cause of action unless the wrongdoer intended to cause such distress or such distress was the primary risk created by his reckless conduct. Standard Fruit and Vegetable Co., Inc. v. Johnson, 985 S.W.2d 62, 62, 65-68.

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Tex.1996. Com. (d) quot. in sup. and quot. in case quot. in sup. Mother of a child who was removed from her home by the state department of human services (DHS) and placed in foster care sued a DHS caseworker, among others, for intentional infliction of emotional distress, inter alia. After the jury returned a verdict for plaintiff, the trial court granted judgment n.o.v. in favor of defendant; the court of appeals reversed. Reversing in part and rendering, this court held, inter alia, that defendant's conduct in asking plaintiff to sign a plan of permanent placement for the child during the same telephone conversation in which she informed plaintiff that the child was missing from her foster home was not extreme and outrageous behavior, as required to state a claim for intentional infliction of emotional distress; it was appropriate behavior in the context of defendant's job as a DHS caseworker. Mattix-Hill v. Reck, 923 S.W.2d 596, 597, 598.

Tex.1995. Com. (d) quot. in case quot. in sup. After a store manager bought several items from the store, but did not pay for a Christmas wreath that she was holding, employer's security personnel questioned manager about possible theft. Manager sued store and security employees for intentional infliction of emotional distress, inter alia. Trial court granted defendants summary judgment. Appellate court reversed in part. Reversing the appellate court and rendering a judgment that plaintiff take nothing, this court held, in part, that, as a matter of law, defendants' conduct was not extreme and outrageous and did not constitute a willful detention of plaintiff. Noting that employers act within their legal rights in investigating reasonably credible allegations of dishonesty of their employees, the court stated that the store merely asked a management-level employee to explain a report of wrongdoing. Randall's Food Markets, Inc. v. Johnson, 891 S.W.2d 640, 644.

Tex.1994. Cit. in ftn. to diss. op. On a certified question from a United States court of appeals, this court held that Texas did not recognize the tort of false-light invasion of privacy because it largely duplicated other rights of recovery, particularly defamation, which was more narrowly tailored than false-light invasion of privacy to restrict free speech as little as possible. A dissent argued that false-light invasion of privacy should be recognized in Texas, despite reservations about possible infringement of free speech rights, since related torts were designed to protect different interests. Cain v. Hearst Corp., 878 S.W.2d 577, 586.

Tex.1994. Cit. in sup., com. (d) quot. in sup. and quot. in case quot. in sup., com. (h) quot. in case quot. in sup. Workers' compensation claimant sued adjusting firm and a claims adjuster for intentional infliction of emotional distress, inter alia, arising from defendants' handling of her claim. The intermediate appellate court remanded plaintiff's cause of action after the trial court had rendered a take-nothing summary judgment for defendants. After the intermediate appellate court's ruling, this court adopted in a separate case the elements of this section for proving intentional infliction of emotional distress. This court reversed the intermediate appellate court and rendered judgment that plaintiff take nothing, holding that, although plaintiff's allegations, taken as true, might constitute bad faith, they did not go beyond all possible bounds of decency. Natividad v. Alexsis, Inc., 875 S.W.2d 695, 696, 698, 699.

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Tex.1993. Cit. in disc. and in ftn., cit. generally in conc. op., cit. in diss. op., subsec. (1) cit. in diss. op. College student had his friends covertly videotape female student engaging in sexual intercourse with him. She sued student and his friends for invasion of privacy and negligent infliction of emotional distress arising from video and surrounding gossip. Trial court entered judgment on jury verdict for plaintiff on emotional distress claim and appeals court affirmed. This court reversed and remanded, holding that there was no general duty in Texas not to negligently inflict emotional distress, as a claimant could recover mental anguish damages only in connection with defendant's breach of some other legal duty. Concluding that grossly negligent infliction of emotional distress was not pled or preserved as separate cause of action, the court expressed no opinion whether this theory referred to same mental state as intentional infliction of emotional distress. Concurrence maintained that defendants' conduct was intentional, but that plaintiff intentionally gave up her rights to recover under theory of intentional infliction of emotional distress. Dissent contended that legal duty not to cause harm must be breached by reckless, extreme, or outrageous conduct, resulting in severe psychic harm, and argued that this standard was met through defendants' highly offensive conduct and conscious indifference to others' rights. Boyles v. Kerr, 855 S.W.2d 593, 600, 601, 603, 615.

Tex.1993. Com. (d) cit. in diss. op. In divorce proceeding, wife asserted intentional and negligent infliction of emotional distress claims against her husband. The trial court entered judgment on a jury verdict awarding wife damages on her emotional distress claims, and the intermediate appellate court affirmed. Denying application for writ of error, this court held that wife could recover for intentional, but not negligent, infliction of emotional distress. The dissent argued that jury members had no standard by which to measure the outrageousness of husband's conduct other than their own personal opinions and contended that this was not a workable legal standard. Massey v. Massey, 867 S.W.2d 766, 767.

Tex.1993. Cit. in sup. and adopted, cit. in ftn., cit. in conc. and diss. op. and in ftn. to conc. and diss. op., cit. in diss. op.; subsec. (1) cit. in sup. and in ftn. to conc. and diss. op.; com. (d) quot. in sup., cit. and quot. in conc. and diss. op.; com. (h) cit. in ftn., cit. and quot. in conc. and diss. op.; com. (i) quot. in diss. op. During divorce proceeding, wife asserted general claim for emotional harm from husband's bondage activities without specifying whether claim was based on negligent or intentional infliction of emotional distress. Trial court dissolved marriage and awarded wife emotional distress damages. Appeals court affirmed, holding that wife could recover for negligent infliction of emotional distress. This court reversed and remanded based on its recent decision that no cause of action for negligent infliction of emotional distress existed in Texas; however, the court expressly adopted the tort of intentional infliction of emotional distress, holding that such a claim could be brought in a divorce proceeding. Concurring and dissenting opinion argued that tort of intentional infliction of emotional distress should not be recognized or should at least be carefully restricted because nebulous standard of “outrageousness” was a subjective notion and resulted in erratic decisions with no unifying principle. Dissent argued that negligent infliction of emotional distress claim was viable and that the plurality decision should have acknowledged severe emotional distress often caused unintentionally. Twyman v. Twyman, 855 S.W.2d 619, 621, 622, 624, 625, 630-632, 636, 644, 645.

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Tex.1993. Cit. in sup., coms. (d) and (h) quot. in part in sup. A terminated employee sued her former employer, alleging, among other claims, intentional infliction of emotional distress. The intermediate appellate court reversed the trial court's grant of summary judgment for employer. This court reversed the intermediate appellate court and rendered judgment that plaintiff take nothing, holding that employer's conduct in having a security guard escort plaintiff from the employment premises after her termination was, as a matter of law, not sufficiently outrageous to support a claim for intentional infliction of emotional distress. Wornick Co. v. Casas, 856 S.W.2d 732, 734.

Tex.1992. Quot. in disc., com. (d) quot. in disc., cit. in ftn. to diss. op. Employee who was fired after admitting he stole company property sued former employer for "false light" invasion of privacy and intentional infliction of emotional distress after employer circulated information about his termination among fellow employees. Trial court entered judgment on jury verdict for plaintiff on both counts. The court of appeals affirmed the judgment under the "false light" theory but held that no evidence supported the jury's verdict as to intentional infliction of emotional distress. This court reversed and remanded for a new trial on the "false light" theory, but affirmed as to the emotional distress claim. The court declined to expressly recognize the tort of intentional infliction of emotional distress, but concluded as a matter of law that defendant's actions did not reach the requisite level of outrageousness. Dissent argued that defendant's actions of falsely and deliberately blackening the name of a worker to co-workers and other potential employers constituted sufficiently outrageous conduct. Diamond Shamrock Refining v. Mendez, 844 S.W.2d 198, 201, 202, 219.

Tex.1967. Subsec. (1) cit. but dist. The plaintiff, a mathematician invited to eat at a buffet luncheon given by a certain corporation, sued in assault and battery for damages from humiliation and exemplary damages when the manager of the defendant club where the luncheon was held, which was located in the defendant motel, snatched the plaintiff's plate from him and shouted that he could not be served because he was a Negro. Although the court recognized that recovery could be had when intentional or reckless conduct causes emotional distress, it did not invoke that tort here, finding that the damages for a battery embraced damages to the personal dignity of the victim. The court on those grounds affirmed a judgment for the plaintiff. Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 630.

Tex.App.

Tex.App.2023. Quot. in case quot. in sup. Development company sued lot owners for breach of contract after owners decided not to use developer's company to build on their lot; owners counterclaimed, asserting, among other things, a claim for intentional infliction of emotional distress (IIED) after developer threatened to ruin their lives and prevented them from developing their lot. The trial court, among other things, entered judgment on a jury verdict in favor of owners for their IIED claim. This court reversed, holding that developer's conduct was not so extreme or

outrageous as to support owners' IIED claim under Restatement Second of Torts § 46. The court explained that meritorious claims for IIED were rare because most human conduct, even verbal abuse and threats, could not be characterized as extreme and outrageous, and that developer's single five-minute confrontation in which he verbally abused, intimidated, and bullied owners was not sufficiently extreme and outrageous to warrant recovery. Bill Wyly Development, Inc. v. Smith, 680 S.W.3d 679, 684.

Tex.App.2018. Com. (d) cit. and quot. in cases cit. and quot. in conc. and diss. op. Dentist brought a lawsuit against employer and dental practice, alleging that defendants had, inter alia, intentionally inflicted emotional distress upon her when they reported plaintiff to police for allegedly stealing funds from practice. The trial court denied the parties' motions to dismiss. This court affirmed in part and entered judgment for defendants, holding that defendants' alleged conduct was not sufficiently extreme and outrageous to support a claim for intentional infliction of emotional distress. In agreeing with the majority that defendants' actions were not extreme enough, the concurring and dissenting opinion explained that reporting plaintiff's actions to the police under the belief that plaintiff had stolen money did not rise to the level of going beyond all possible bounds of decency, as set forth in Restatement Second of Torts § 46, Comment *d*. Robert B. James, DDS, Inc. v. Elkins, 553 S.W.3d 596, 627, 628.

Tex.App.2017. Subsec. (1) cit. in sup.; com. (d) quot. in cases cit. and quot. in sup.; coms. (e) and (f) and illus. 7 and 8 cit. in sup. Operator of a radio station sued advertising firms, seeking to recover amounts allegedly owed for advertising and other services that firms purchased from station on behalf of their clients; firms and their principal counterclaimed for, among other things, intentional infliction of emotional distress, alleging that station demanded payment based on false invoices and told other public-media outlets that firms and their principal were "deadbeats." The trial court denied station's motion to dismiss the emotional-distress counterclaim. This court reversed that portion of the decision and remanded, holding that station's alleged conduct in reporting a disputed debt as unpaid and in calling firms and their principal deadbeats was not sufficiently extreme and outrageous under Restatement Second of Torts § 46. MVS International Corporation v. International Advertising Solutions, LLC, 545 S.W.3d 180, 203, 204.

Tex.App.2015. Com. (d) quot. in case quot. in sup. Former employee who left employment with church after making sexual-harassment allegations against a church elder filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against church, alleging that defendant caused her new employer to terminate her by prompting the new employer to check plaintiff's references and by church employees having conversations with the new employer regarding her reasons for leaving church's employment. The trial court granted summary judgment for defendant; this court affirmed in part. Citing Restatement Second of Torts § 46, Comment *d*, the court held that defendant's conduct of instigating a conversation with plaintiff's new employer about plaintiff's termination and providing an unfavorable reference was not "so outrageous in character, and so extreme in degree," as required to support an IIED claim. Shannon v. Memorial Drive Presbyterian Church U.S., 476 S.W.3d 612, 630.

Tex.App.2014. Com. (d) quot. in case quot. in sup. Former college track coach brought claims for intentional infliction of emotional distress (IIED), inter alia, against college, college president, and college's athletic director, alleging that president intentionally lied to the track team by telling them that certain of plaintiff's actions made them ineligible to compete in the 2010 championships, when in fact it was because athletic director failed to submit required paperwork. The trial court granted summary judgment for defendants. Affirming in part, this court held that, even accepting all of plaintiff's evidence as true, it was not sufficient to show that defendants' conduct was so extreme and outrageous as to permit recovery for IIED. Porter v. Southwestern Christian College, 428 S.W.3d 377, 384.

Tex.App.2010. Com. (d) quot. in case quot. in conc. op. Plaintiffs brought action for defamation and intentional infliction of emotional distress against website publisher in connection with several derogatory statements about them that were posted by anonymous users to a portion of the website titled "Guest Book." The trial court granted summary judgment for defendant. This court affirmed, holding, among other things, that there was no summary judgment evidence that proved defendant's failure to remove the anonymous posts constituted extreme and outrageous conduct under the circumstances. The concurring opinion argued that the availability in Texas of a tort claim like that described in Restatement Second of Torts § 577, which imposed liability on a property owner for an intentional and unreasonable failure to remove material that might be easily removed and that was known to be defamatory, might preclude the exceptional "gap-filler" type remedy of intentional infliction of emotional distress that plaintiffs asserted here. Milo v. Martin, 311 S.W.3d 210, 222.

Tex.App.2008. Adopted in case cit. in conc. op., com. (g) quot. in ftn. High-school vice-principal sued students for intentional infliction of emotional distress (IIED), inter alia, alleging that they created a website that would look as if it had been created by her, and that contained lewd, false, and obscene comments and pictures that implied that she was a lesbian. The trial court granted summary judgment for defendants. Affirming, this court held that plaintiff's IIED claim failed because the gravamen of her complaint was defamation, and she failed to allege facts independent of her defamation claim, which also failed. The court rejected plaintiff's allegations that opposing counsel threatened to sue her co-worker and drafted correspondence that severely distressed her during the litigation, explaining that a person could not be liable for asserting his legal rights even though he was aware that, in doing so, he was sure to cause emotional distress. The concurrence expressed frustration with the fact that an injured target of outrageous Internet conduct such as plaintiff could find no civil remedy under Texas law, since the tort of IIED was no more than a "gap-filler" tort that was virtually impossible to establish. Draker v. Schreiber, 271 S.W.3d 318, 324, 326.

Tex.App.2008. Cit. in sup., com. (d) quot. in case quot. in sup. Co-owners of a 40-acre property that they purchased at sheriff's sale brought a claim for intentional infliction of emotional distress (IIED), along with their claim for "cloud on title," against former owner and his wife, alleging that defendants interfered with plaintiffs' use of the property and harassed them. While the trial court found for plaintiffs on the title issues, it awarded them zero damages on their IIED claim. This

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court affirmed, holding that the trial court did not err in concluding that plaintiffs failed to prove that defendants' conduct was extreme and outrageous, an essential element of their IIED claim. Smith v. Hennington, 249 S.W.3d 600, 605.

Tex.App.2006. Coms. (d) and (e) cit. in sup., com. (f) cit. in sup. and in ftn. Judgment creditor sued for a declaratory judgment that judgment debtor's wife's business properties were community property and thus subject to execution to satisfy the debt, and obtained a temporary restraining order and an ex parte receivership to prevent dissipation of business assets; wife counterclaimed for, in part, intentional infliction of emotional distress. The trial court entered judgment on a jury verdict awarding wife actual and punitive damages on the counterclaims. Reversing and rendering judgment that wife take nothing, this court held, inter alia, that creditor's act of securing the appointment of a receiver, who had the authority to monitor sales and purchases, but who was never rude, insolent, or interfering, and whose presence was court-sanctioned, did not constitute the extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress. Montemayor v. Ortiz, 208 S.W.3d 627, 655, 656.

Tex.App.2005. Com. (d) quot. generally in case quot. in disc. and cit. in ftn. Former employee sued her employer for, in part, intentional infliction of emotional distress, contending that she was forced to resign after refusing to follow her supervisor's instructions, which she believed violated federal law. The trial court entered judgment on the jury's take-nothing verdict on the emotional-distress claim. Affirming in part, this court held, inter alia, that, although plaintiff's testimony about her termination and the reasons for it was relevant evidence of whether supervisor engaged in extreme and outrageous conduct, and the trial court abused its discretion by refusing to permit plaintiff's counsel to discuss that evidence in closing argument, the trial court's error did not result in the rendition of an improper judgment, because plaintiff failed as a matter of law to establish her claim for intentional infliction of emotional distress. Bryant v. Lucent Technologies, Inc., 175 S.W.3d 845, 849.

Tex.App.2005. Com. (d) quot. in case quot. in sup. Former city employee brought age-discrimination claims against city and intentional-infliction-of-emotional-distress claim against former supervisor. The trial court entered judgment for plaintiff against both the city and supervisor on all claims. This court modified the judgment against the city and reversed on plaintiff's claim against supervisor, holding, inter alia, that evidence that supervisor, among other things, insulted plaintiff daily over a period of eight months, calling her “stupid, senile, and incompetent,” was legally insufficient to support a finding that supervisor engaged in the extreme and outrageous conduct required to sustain an intentional-infliction-of-emotional-distress claim. City of Houston v. Fletcher, 166 S.W.3d 479, 492.

Tex.App.2005. Cit. in disc. Stepfather sued his stepdaughter for defamation after she told her mother and others that he had repeatedly sexually abused her. The stepdaughter counterclaimed for assault and intentional infliction of emotional distress, and the trial court entered judgment on a jury verdict awarding her $300,000 in damages against stepfather. This court affirmed, holding, inter alia, that sufficient evidence supported the damages award for stepdaughter's emotional-distress

claim, particularly in light of the emotional harm she suffered from learning that her stepfather had made videotapes of their sexual encounters and threatened to show them to others. Separate and apart from the actual sexual assaults, stepfather's actions were extreme and outrageous as a matter of law, and thus the emotional-distress damages were recoverable in addition to damages for assault. Conley v. Driver, 175 S.W.3d 882, 886, 888.

Tex.App.2004. Com. (d) quot. in case quot. in sup. Former employee sued employer and its officers for, in part, intentional infliction of emotional distress, alleging that he was discriminated against and fired for filing workers' compensation claim. Trial court granted defendants summary judgment. This court affirmed, holding that plaintiff did not provide evidence as to job assignments that raised fact issue as to whether defendants' conduct in assigning work to plaintiff was extreme or outrageous. Furthermore, plaintiff's allegations that defendants verbally attacked and threatened him and told him to engage in illegal activities such as ignoring safety regulations did not show that defendants' conduct constituted more than ordinary employment disputes in management of the business, which did not constitute extreme and outrageous conduct. Benners v. Blanks Color Imaging, Inc., 133 S.W.3d 364, 373.

Tex.App.2003. Com. (h) cit. in disc. Contractor on a project to build a house for homeowners brought suit for, in part, malicious prosecution and intentional infliction of emotional distress against homeowners and lender, after criminal charges against contractor for misapplication of funds from a construction loan were dropped. The trial court entered judgment for plaintiff. Reversing in part and rendering judgment that plaintiff take nothing on his emotional-distress claim, this court held, inter alia, that homeowners' filing of a criminal complaint against plaintiff was not sufficiently outrageous to permit recovery for intentional infliction of emotional distress. San Antonio Credit Union v. O'Connor, 115 S.W.3d 82, 101.

Tex.App.2002. Subsec. (1) cit. in sup., com. (d) quot. in sup. and quot. in case cit. in disc. Author of internet commentary that called high-school prom a “huge gang fight” filed a countersuit for, in part, intentional infliction of emotional distress against school district that had sued him for defamation. After the trial court severed the countersuit from the district's original suit, it granted summary judgment for district. Affirming, this court held, inter alia, that although the district's defamation lawsuit had no legal merit, neither the suit nor public comments of the district's trustees constituted extreme and outrageous conduct sufficient to support a cause of action for intentional infliction of emotional distress. Klein & Associates Political Relations v. Port Arthur Independent School, 92 S.W.3d 889, 898.

Tex.App.2002. Com. (h) quot. in case quot. in disc. Neighbors of warehouse in which oil company stored chemicals sued company for intentional infliction of emotional distress, inter alia, in relation to chemical spill and statements made by company employees. One employee had threatened countersuit if plaintiffs brought suit over spill, and another employee criticized plaintiffs in discussions with fellow church parishioners and suggested that illness of plaintiff's relatives was a punishment from God. Jury awarded plaintiffs damages. This court reversed and rendered

judgment for company, holding, inter alia, that employees' statements did not constitute extreme and outrageous conduct. Quaker Petroleum Chemicals Co. v. Waldrop, 75 S.W.3d 549, 554.

Tex.App.2001. Com. (d) quot. in sup. Father of girl who was being hidden by mother after father was awarded custody brought action against television station and reporter who interviewed mother with daughter for, among other things, intentional infliction of emotional distress for failing to disclose daughter's location and for interfering with his possessory right in his daughter. The trial court denied defendants summary judgment. Reversing and remanding, this court held, inter alia, that defendants' conduct was not so extreme or outrageous as to support claim of intentional infliction of emotional distress. A.H. Belo Corp. v. Corcoran, 52 S.W.3d 375, 383.

Tex.App.2001. Com. (d) cit. in case cit. in sup. Hospital patient sued hospital for, in part, intentional infliction of emotional distress, alleging that defendant withheld from plaintiff for 18 months four pathology slides that plaintiff had requested to enable her to obtain a second opinion on her Crohn's disease diagnosis. Reversing in part the trial court's grant of summary judgment for defendant and remanding, this court held, inter alia, that defendant's failure to provide the pathology slides, apparently without any explanation or excuse, for an extended period of time during which it had reason to know that plaintiff was suffering and delaying further treatment constituted sufficiently extreme and outrageous conduct to allow a jury to assess liability. Elliott v. Methodist Hosp., 54 S.W.3d 789, 797.

Tex.App.2001. Com. (d) quot. in disc. After attorney sued client for past-due legal fees, client counterclaimed for fraud and misrepresentation and also sued for emotional distress. Jury found that attorney defrauded client and intentionally inflicted emotional distress upon her. This court affirmed the sanctions against the attorney, but reversed the damages award to client, holding, inter alia, that client's emotional-distress claim failed. Even though attorney did not behave in a socially appropriate manner when he had a sexual relationship with client during her divorce proceeding, and sent her a bill for legal fees that client thought attorney would do for free after he ended their relationship, attorney's actions were not extreme and outrageous conduct. Gaspard v. Beadle, 36 S.W.3d 229, 238.

Tex.App.2001. Com. (d) cit. in sup. Wife of a city employee who was fired for unauthorized use of a city-owned camera to take provocative photographs of wife sued law firm and its partner who enlarged one of the photos to poster size for use at public hearing, alleging intentional infliction of emotional distress. Trial court entered judgment on jury verdict for plaintiff. This court reversed and rendered judgment for defendants, holding that partner's actions in displaying and commenting on photos, while rude and unprofessional, did not rise to requisite level of extreme and outrageous conduct. Haynes & Boone, L.L.P. v. Chason, 81 S.W.3d 307, 309-310, 314.

Tex.App.2001. Subsec. (1) cit. in case cit. in disc., com. (d) quot. in disc. After university fired employee because of accusations that he sexually harassed a female student who worked as a parttime employee in the same office, employee sued the student for libel and intentional infliction of emotional distress, among other claims. Trial court entered judgment on jury

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verdict for employee on the emotional-distress claim. This court reversed and rendered a take-nothing judgment, holding, inter alia, that student's complaint about employee, her coworker, to a supervisor and her signing of a statement based upon her complaint did not constitute extreme and outrageous conduct. Henderson v. Wellmann, 43 S.W.3d 591, 596.

Tex.App.2001. Cit. generally in case quot. in sup., com. (d) quot. generally in sup. and cit. in case cit. in ftn. Widow of contractor who contracted to build storage units sued customer for intentional infliction of emotional distress, after customer made repeated rude and demanding phone calls during course of contractor's illness and after his death. Jury awarded widow damages, but trial court granted customer's motion for judgment n.o.v. This court reversed and remanded, holding, inter alia, that evidence supported jury's findings that customer acted intentionally or recklessly and that his conduct was extreme and outrageous. The court rejected customer's assertion that his actions were privileged because he was insisting on his legal rights in enforcing contract. Although customer knew widow was susceptible to emotional distress due to husband's fatal illness, he continued to engage in harassing and intimidating conduct. McLure v. Tiller, 63 S.W.3d 72, 82, judgment reversed 121 S.W.3d 709 (Tex.2003). See above case.

Tex.App.2001. Cit. in sup., com. (d) quot. in case quot. in sup. and cit. in conc. and diss. op. Former employee sued employer for wrongful termination and intentional infliction of emotional distress, inter alia. Trial court entered judgment on jury verdict for plaintiff. This court reversed in part, holding that plaintiff's emotional-distress claim failed because defendant's threat to "blackball" plaintiff in the industry and defendant's alleged firing of plaintiff for failing to perform illegal acts, while deplorable, did not constitute extreme and outrageous conduct. Concurring and dissenting opinion argued that defendant's conduct was extreme and outrageous, and that the issue of whether severe emotional distress existed was question of fact for jury. Rescar, Inc. v. Ward, 60 S.W.3d 169, 180, 187.

Tex.App.2001. Cit. in sup, subsec. (1) adopted in case cit. in disc., com. (d) quot. in sup. and in diss. op. and cit. and quot. in cases quot. in disc., com. (j) cit. in sup. Insurance agent sued insurance company for intentional infliction of emotional distress, alleging that defendant terminated his employment after falsely implicating him in a kickback scheme. The trial court entered judgment on a jury verdict for plaintiff. Affirming in part, this court held that defendant's conduct in pursuing a damaging course of action against plaintiff, even after plaintiff was fired, by involving several federal agencies, such as the IRS, with punitive powers and by attempting to have plaintiff's insurance license revoked was sufficiently extreme and outrageous to result in liability. The dissent argued that defendant's acts did not constitute outrageous conduct, and thus did not support plaintiff's claim. Texas Farm Bureau Ins. Companies v. Sears, 54 S.W.3d 361, 373-375, 379, judgment reversed 84 S.W.3d 604 (Tex.2002). See above case.

Tex.App.2001. Coms. (d), (h) and (j) quot. in sup. Wife countersued husband for divorce and filed tort claim for, among other things, intentional infliction of emotional distress. Trial court bifurcated the actions and entered judgment n.o.v. for husband on tort claims. Reversing in part and remanding, this court held, inter alia, that evidence of physical and mental abuse was sufficient

to support finding that husband caused wife severe emotional distress and that husband's behavior was extreme and outrageous. Toles v. Toles, 45 S.W.3d 252, 261, 262, 263.

Tex.App.2001. Com. (d) quot. in case quot. in sup. Store employee sued former employer for disability discrimination and intentional infliction of emotional distress, after he was fired for violating the company's policy on sexual harassment. Trial court entered judgment on jury verdict for plaintiff. This court affirmed, holding, inter alia, that there was sufficient evidence that employer's conduct was extreme and outrageous. There was evidence that employer's investigation of the charges against plaintiff was incomplete and biased, that employer failed to uniformly implement its policy regarding sexual harassment by demoting one person accused of harassment, yet firing plaintiff, and that the store's director instructed a witness to falsify her statement implicating plaintiff. Wal-Mart Stores, Inc. v. Canchola, 64 S.W.3d 524, 540, judgment reversed 121 S.W.3d 735 (Tex.2003). See above case.

Tex.App.2000. Cit. in case cit. in sup., com. (d) quot. in sup. and cit. in case quot. in sup., coms. (e), (f), (h), and (j) cit. and quot. in sup., illus. 7 quot. in sup., illus. 11 and 13 cit. in sup. Former employee of a local union sued the union and a union trustee for sexual harassment and retaliation and intentional infliction of emotional distress, among other claims. Trial court granted defendants summary judgment. This court affirmed in part and reversed in part, holding, inter alia, that the trustee's conduct, viewed in light of trustee's harassment directed toward plaintiff, his position of authority over her, and his manipulation of plaintiff's peculiar susceptibilities to emotional distress, could be regarded as extreme and outrageous conduct. Plaintiff claimed that her suffering was severe, pervasive, and involved her job, and that she felt threatened, intimidated, and humiliated when trustee implied that her job was conditioned on acquiescing to his advances. Fields v. Teamsters Local Union No. 988, 23 S.W.3d 517, 530-533.

Tex.App.1999. Subsec. (1) cit. in headnote and cit. in case cit. in sup., com. (d) cit. in headnote, cit. and quot. in sup., and quot. in conc. op., coms. (e) and (h) cit. in headnote and sup., com. (j) cit. in headnote and quot. in sup. A female job seeker sued a car dealership and its employee for intentional infliction of emotional distress, among other claims, alleging that the employee made sexual advances toward her while ostensibly assisting her in obtaining a job at the dealership. Trial court entered judgment on jury verdict for plaintiff. This court affirmed in part and reversed in part, holding, inter alia, that it was reasonable for the jury to conclude that defendant's conduct constituted extreme and outrageous conduct, but the evidence was insufficient to establish severe emotional distress. Concurrence argued that defendant's conduct was not extreme and outrageous. Gonzales v. Willis, 995 S.W.2d 729, 735, 736, 740.

Tex.App.1999. Cit. in headnote, cit. in case cit. in disc. An employee was fired after testing positive for cocaine in a company drug test. He sued the company for intentional infliction of emotional distress, among other claims. Trial court entered judgment on jury verdict for plaintiff. This court reversed and rendered a take-nothing judgment, holding, inter alia, that plaintiff failed to prove that defendant acted intentionally or recklessly. There was no evidence that the urine sample collectors conspired with the plaintiff's supervisor and the company's assistant district manager to taint or

switch plaintiff's samples with those of another employee. Halliburton Company v. Sanchez, 996 S.W.2d 216, 218.

Tex.App.1999. Quot. in case cit. in ftn. County department employee was fired for assisting a co-worker in writing a letter criticizing the department; employee sued the department director for libel, slander, and intentional infliction of emotional distress, alleging that defendant made false, misleading, and untrue statements about her, directed other employees to assist in his scheme to cast plaintiff in a false light, and violated the department's confidentiality provisions. Trial court granted defendant summary judgment. This court affirmed, holding, inter alia, that defendant's conduct was not outrageous, because plaintiff was unexpectedly terminated in a private meeting with defendant after he had investigated the situation and discussed it with other managers. Leatherman v. Rangel, 986 S.W.2d 759, 764.

Tex.App.1998. Com. (d) quot. in disc. School district employee sued television station for defamation and intentional infliction of emotional distress after station reported that employee, assistant superintendent for business services for school district, engaged in bid-rigging and racketeering. The trial court entered summary judgment for station. Affirming, this court held that employee was a public official, that employee failed to establish that station acted with actual malice when reporting the allegations against him, and that reporting employee's involvement in criminal activity was not extreme, outrageous, or beyond all bounds of decency in a civilized society. Beck v. Lone Star Broadcasting Co., 970 S.W.2d 610, 619.

Tex.App.1998. Com. (d) cit. in case cit. in disc. Discharged television-station manager sued the station for breach of contract and intentional infliction of emotional distress, among other claims. Trial court granted defendant summary judgment. This court affirmed, holding, inter alia, that neither plaintiff's termination nor the manner in which it was done constituted outrageous behavior, because there was no harassment and the behavior did not continue for an extended period of time. Gilmartin v. KVTV—Channel 13, 985 S.W.2d 553, 557.

Tex.App.1998. Com. (d) quot. in case cit. in disc. Debtor brought tort action against creditor in connection with defendant's collection attempts. The trial court entered judgment on a jury verdict for plaintiff. Affirming in part, reversing in part, and rendering in part, this court held, among other things, that defendant's persistent, vulgar, and abusive telephone calls to plaintiff at both her home and office constituted intentional infliction of emotional distress, as well as an actionable invasion of privacy. Household Credit Services, Inc. v. Driscol, 989 S.W.2d 72, 81.

Tex.App.1998. Coms. (d) and (h) cit. generally in headnote and cit. in sup. Former employee brought an action for, in part, intentional infliction of emotional distress against former employer and supervisor. The trial court entered judgment for defendants. Affirming in part, this court held, inter alia, that, although supervisor's conduct in swearing at plaintiff about work-related matters, giving out bad references, and beeping him at night 20 to 30 times for no reason was, if true, insensitive or rude, it did not, as a matter of law, constitute extreme and outrageous behavior and

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thus did not support a claim for intentional infliction of emotional distress. Saucedo v. Rheem Mfg. Co., 974 S.W.2d 117, 118, 123.

Tex.App.1998. Com. (d) cit. generally in headnote and cit. in disc. Twenty-two plaintiffs brought suit against pipeline companies for damages resulting from an explosion at an underground salt-dome storage facility and pipeline pumping station. The trial court entered judgment awarding plaintiffs damages. Vacating in part, this court held, inter alia, that, because plaintiffs presented no evidence to suggest that defendants' actions were motivated by animus, hostility, malevolence, or ill will, the presence of gross negligence alone was not sufficient to support an award for mental anguish arising solely from damage to property. Seminole Pipeline v. Broad Leaf Partners, 979 S.W.2d 730, 754.

Tex.App.1998. Com. (h) cit. in disc. Former employees sued former employer for assault and intentional infliction of emotional distress, alleging that defendant subjected them to unwanted touching and made sexually suggestive remarks. The trial court entered judgment on a jury verdict awarding plaintiffs actual and punitive damages, but ordered a remittitur. Affirming in part, this court held, inter alia, that the evidence was both legally and factually sufficient to support the jury's finding of intentional infliction of emotional distress, showing that defendant acted intentionally or recklessly, that his conduct was extreme and outrageous and caused plaintiffs emotional distress, and that the emotional distress was severe. Additionally, the evidence showed that defendant's conduct went beyond all possible bounds of decency, and was utterly intolerable in a civilized society. Stokes v. Puckett, 972 S.W.2d 921, 924.

Tex.App.1997. Com. (d) quot. in case quot. in disc. Parents sued a hospital and a doctor for, among other claims, intentional infliction of emotional distress arising from defendants' failure to dispose of the mother's stillborn fetus in a respectful way. The trial court granted the hospital's motion for a directed verdict on the claim of intentional infliction of emotional distress. This court affirmed in part and reversed in part, holding, inter alia, that defendants' actions of preserving the fetus in a sealed container and storing it in the hospital's morgue did not constitute extreme and outrageous conduct. Although defendants' conduct was nonchalant and insensitive, they did not abuse the fetus. Angeles v. Brownsville Valley Reg. Med., 960 S.W.2d 854, 860.

Tex.App.1997. Subsec. (1) cit. in headnote, cit. in case cit. in sup., and quot. in sup. After a 15-year-old rape victim was refused treatment in a hospital emergency room, her mother sued the hospital, its director of emergency services, and an emergency room nurse for intentional infliction of emotional distress, inter alia, alleging that the nurse refused to examine the victim, implied that the victim had not been raped, and violated the victim's privacy by interviewing her in the public waiting room. The trial court granted a take-nothing summary judgment in favor of defendants. This court affirmed in part and reversed in part, holding, inter alia, that, although the nurse was rude, insensitive, and uncaring, her conduct did not rise to the level necessary for intentional infliction of emotional distress. C.M. v. Tomball Regional Hosp., 961 S.W.2d 236, 238, 244.

Tex.App.1997. Com. (d) quot. but dist. Owner of company that contracted with airline to provide mail and baggage handling services sued airline for, inter alia, defamation and intentional infliction of emotional distress after airline terminated the parties' contract because company's employees had engaged in theft while on the job. The trial court denied airline's motion for summary judgment. Affirming in part, reversing in part, and remanding, this court held that statements on the part of airline representatives that company did not meet airline's standards under the contractual agreement were either not defamatory or were substantially true, and that representatives' actions in making the statements did not constitute conduct that was extreme, outrageous, or utterly intolerable in a civilized society. Delta Air Lines, Inc. v. Norris, 949 S.W.2d 422, 428.

Tex.App.1997. Cit. in headnote, com. (g) cit. in case cit. in disc. A newspaper ran an article reporting on the various arrests made by the city police department at local parks in conjunction with an undercover operation targeting sex offenders. A man who was arrested for indecent exposure committed suicide shortly after publication of the article. The man's estate sued the newspaper publisher and the reporter who wrote the article, alleging invasion of privacy and intentional infliction of emotional distress, in that the defendants printed private facts about the man that essentially "outed" him as a homosexual against his wishes. Trial court granted defendants summary judgment. This court affirmed, holding, inter alia, that plaintiff failed to state an emotional-distress claim, because defendants' conduct in publishing information contained in public records, as a matter of law, was not outrageous. Although the court expressed no opinion concerning whether a newspaper should exercise its right to publish the names of persons arrested for lewd conduct, it could not conclude that a newspaper's otherwise lawful conduct was beyond all possible bounds of decency. Hogan v. Hearst Corp., 945 S.W.2d 246, 247, 251.

Tex.App.1997. Cit. in headnotes, cit. in disc., quot. in diss. op., subsecs. (1) and (2) cit. in disc. and cit. in diss. op., subsecs. (2)(a) and (b) cit. in diss. op., coms. (d)-(l) and illus. 1-22 cit. in diss. op. March participant brought action for negligent and intentional infliction of emotional distress against tractor-trailer driver and his employer. Specifically, plaintiff alleged that defendants were liable for the injuries caused by driver's failure to be vigilant on a public roadway, which resulted in his driving into the rear of the procession, killing one and injuring others. The trial court entered summary judgment for defendants. Affirming in part, reversing in part, and remanding, this court held that plaintiff had not stated a viable claim for negligent infliction of emotional distress; however, material factual issues existed as to whether driver's actions in possibly falling asleep at the wheel and jeopardizing the lives of those around him constituted extreme or outrageous conduct. Dissent believed that, in order to prevail, plaintiff was required to show that the tortious conduct was directed specifically at him. Johnson v. Standard Fruit and Vegetable Co., Inc., 984 S.W.2d 633, 633, 639-641, 643, reversed 985 S.W.2d 62 (Tex. 1998). See above case.

Tex.App.1997. Cit. in case quot. in disc., subsec. (1) cit. in disc. Husband and wife were arrested and charged with criminal trespass after a visit to the home of husband's elderly mother; they sued complainant, husband's brother, among others, for, inter alia, intentional infliction of emotional distress. Mother, who had previously informed complainant that husband and wife had been harassing and disturbing her, gave complainant her power of attorney authorizing him to

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file complaints against trespassers. The trial court granted complainant's motion for summary judgment. Affirming in part, reversing in part, and remanding, this court held, among other things, that complainant's decision to file a criminal complaint against husband and wife did not constitute outrageous conduct where he was doing no more than what he was entitled to do under the circumstances. Lang v. City of Nacogdoches, 942 S.W.2d 752, 759.

Tex.App.1997. Com. (d) quot. in case cit. in sup. Female employee of gas company sued employer for, inter alia, intentional infliction of emotional distress, alleging that she was the victim of a co-worker's continuing offensive and abusive conduct and remarks. The trial court granted employer's motion for summary judgment. Reversing and remanding, this court held, in part, that co-worker's conduct, which included touching employee at the site of her breast cancer surgery, ridiculing her surgery, and referring to her as "lopsided," was sufficiently extreme and outrageous to support a cause of action for intentional infliction of emotional distress, and that material factual issues existed as to employer's liability for co-worker's behavior. Soto v. El Paso Natural Gas Co., 942 S.W.2d 671, 681.

Tex.App.1997. Cit. in headnote, cit. in case cit. in disc., com. (h) quot. in case cit. in diss. op. Employees who were discharged in retaliation for having complained to the Texas Commission for Human Rights of sexual harassment in the workplace sued employer for, inter alia, intentional infliction of emotional distress. The trial court entered judgment on a jury verdict for plaintiffs. Affirming in part, reversing in part, and remanding in part, this court held, among other things, that the termination of plaintiffs in retaliation for protesting the illegal act of workplace sexual harassment constituted extreme and outrageous conduct. Dissent believed that the law required the manner of termination to be extreme and outrageous, and that the mere act of firing an at-will employee, even for an illegal reason, was not sufficiently outrageous to support an action for the intentional infliction of emotional distress. S.W. Bell Mobile Systems v. Franco, 951 S.W.2d 218, 218, 221, 231, affirmed in part, reversed in part 971 S.W.2d 52 (Tex.1998). See above case.

Tex.App.1997. Cit. in headnote, com. (d) quot. in case quot. in disc., com. (j) cit. in disc. and cit. in case cit. in disc. Individual sued former life partner for breach of contract and breach of oral or implied partnership agreement, seeking recovery for services rendered in consideration of the parties' nonmarital, conjugal relationship. Plaintiff also asserted a claim for intentional infliction of emotional distress, alleging that defendant exposed him to the human immunodeficiency virus. The trial court dismissed the complaint. Affirming in part, reversing in part, and remanding, this court held that, to the extent plaintiff sought recovery for services rendered in consideration of his relationship with defendant, his claim was one for palimony and, as such, was barred by the Statute of Frauds, and that the pleadings failed to allege intentional or outrageous conduct on the part of defendant, or that plaintiff sustained severe mental distress; however, plaintiff was entitled to amend the pleadings to cure any defects related to his claim for intentional infliction of emotional distress. Zaremba v. Cliburn, 949 S.W.2d 822, 823, 828.

Tex.App.1996. Com. (g) cit. in case quot. in disc. Hospital patient sued hospital for, inter alia, intentional infliction of emotional distress when she discovered, postsurgery, that hospital had

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assigned her a semiprivate room, not the private room she requested prior to admission. After complaining, however, patient was placed in a private room. Affirming the trial court's entry of summary judgment for hospital, this court held, in part, that hospital's insistence that patient pay for the private room did not subject it to liability for intentional infliction of emotional distress. Delgado v. Methodist Hosp., 936 S.W.2d 479, 486.

Tex.App.1996. Cit. in headnote, adopted in case cit. in disc., com. (d) quot. but dist. Individual who was prosecuted in connection with his roommate's scheme to embezzle funds and launder money through individual's checking account sued bank for, inter alia, malicious prosecution, negligence, and intentional infliction of emotional distress. The trial court directed a verdict for bank on the malicious prosecution claim, and entered judgment on a jury verdict awarding individual approximately $3 million in damages on the remaining claims. Reversing and rendering a take-nothing judgment, this court held that bank, which merely provided the authorities with the relevant facts but did not initiate the criminal proceedings, could not be found liable for malicious prosecution; that bank owed individual no duty of care and thus could not be adjudged negligent; and that bank's conduct in reporting information to the district attorney was not outrageous. ITT Consumer Financial Corp. v. Tovar, 932 S.W.2d 147, 148, 158.

Tex.App.1996. Cit. in headnote, subsec. (1) cit. in disc. Fast-food restaurant employee who claimed to have been sexually harassed by two managers sued employer and managers for, inter alia, intentional infliction of emotional distress. The trial court granted employer's motion for summary judgment and severed employee's action against it from the remainder of the case. Affirming in part, reversing in part, and remanding, this court held that, even if the exclusive remedy provision of Texas's Workers' Compensation Act did not bar employee's claim, she could not recover absent proof that employer intentionally or recklessly committed the acts causing the alleged mental distress. Mackey v. U.P. Enterprises, Inc., 935 S.W.2d 446, 447, 454.

Tex.App.1996. Cit. in sup., subsec. (1) adopted in case quot. in disc. Woman sued employees of the department of human services for, inter alia, intentional infliction of emotional distress, claiming that they acted outrageously while investigating allegations that woman's daughter had been sexually molested by her stepfather. After the jury returned a verdict finding some employees liable and exonerating others, the trial court entered judgment n.o.v. for all employees. Affirming in part and reversing in part, this court held that, while most of the acts complained of did not constitute extreme conduct, the jury could have found outrageous behavior on the part of the employee who attempted to get mother to agree to give up custody while mother was hysterical over her daughter's disappearance from a foster home. Reck v. Londow, 926 S.W.2d 589, 593, judgment reversed in part 923 S.W.2d 596. See above case.

Tex.App.1995. Coms. (d) and (h) cit. in headnotes, quot. in case quot. and cit. in disc. Former employees of thread distributor sued one of distributor's principal customers for tortious interference with contract and intentional infliction of emotional distress after distributor, believing that customer would not enter into a lucrative new contract with it unless plaintiffs were dismissed, terminated them. The trial court granted defendant's motion for summary judgment and this court

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affirmed, holding that defendant, which, from experience, had reason to doubt plaintiffs' business abilities, was legally justified in interfering with their employment contracts in order to protect its own contractual rights. Given that defendant's conduct was justified, the court refused to find that it acted atrociously or in a manner considered intolerable in civilized society. Lee v. Levi Strauss & Co., 897 S.W.2d 501, 502, 506.

Tex.App.1995. Subsec. (1) cit. in headnote and disc. Employee sued former employer for, among other claims, intentional infliction of emotional distress, alleging that employer forced him to do on-site engineering work and desert driving even though it knew that employee had suffered a back injury. Trial court forced plaintiff to elect between pursuing a workers' compensation claim and a claim for intentional infliction of emotional distress, and it directed a verdict for defendant at the conclusion of the trial. This court affirmed, holding, inter alia, that plaintiff failed to state an emotional-distress cause of action because defendant's conduct was not outrageous. While company did not provide him with an independent medical examination to determine whether or not his disability prevented him from driving, it provided him with medical care, paid his salary, and afforded him hearings through various levels. Nayef v. Arabian American Oil Co., 895 S.W.2d 825, 826, 828.

Tex.App.1995. Com. (g) quot. in sup. Certified public accountant who was reported to the Board of Public Accountancy for alleged misconduct sued attorney who reported him for, inter alia, intentional infliction of emotional distress. The trial court granted attorney's motion for summary judgment and this court affirmed, holding that the letter he sent detailing accountant's supposed improprieties was protected by an absolute privilege, as it constituted a communication published during proceedings of a quasi-judicial board. Rose v. First American Title Ins. Co. of Texas, 907 S.W.2d 639, 643.

Tex.App.1995. Com. (g) cit. in disc. and headnotes. Tenant sued landlord for wrongful eviction and intentional infliction of emotional distress. Trial court granted landlord summary judgment. This court affirmed, holding, inter alia, that, although an eviction is an unpleasant legal proceeding for both landlord and tenant, action taken pursuant to a lease contract does not rise to the level of outrageous conduct necessary to satisfy this element of intentional infliction of emotional distress. It stated that landlord was entitled to terminate the lease as a matter of law. Straus v. Kirby Court Corp., 909 S.W.2d 105, 106, 109.

Tex.App.1995. Subsec. (1) cit. in disc. Two transportation company employees reported that a security officer employed by the company had stolen an electronic bug zapper from transportation company's terminal. Based on the employees' report, the terminal manager contacted the police department and made a complaint. Following an investigation, the officer was arrested and charged with a misdemeanor of theft of property. After being acquitted of all charges, the officer sued the transportation company and the two employees for malicious prosecution, intentional infliction of emotional distress, and civil conspiracy. Trial court entered a take-nothing judgment after jury returned verdict for defendants. This court affirmed, holding, inter alia, that trial court did not err in refusing to define the term “recklessly” in the court's instructions on the emotional distress issue.

The court stated that the term "reckless" had a commonly understood meaning that did not require any special legal or technical knowledge. Turner v. Roadway Express, Inc., 911 S.W.2d 224, 227.

Tex.App.1995. Cit. in headnote, com. (j) cit. in case cit. in disc., com. (l) cit. in disc. After a divorce, the wife sought modification of the support, visitation, and domicile provisions of the divorce decree. Husband counterclaimed for modification and asserted claims for slander and intentional infliction of emotional distress, alleging that wife had denied access to his children, placed over 100 harassing phone calls to his home, and told his new wife that he had affairs with other women that placed the new wife at risk of contracting AIDS. Trial court awarded husband damages on the emotional-distress claim. This court affirmed in part and reversed in part, holding, inter alia, that husband failed to prove the requisite elements of the emotional-distress claim, because he offered no evidence of the severity of his pain, nor did he demonstrate how the duress was unendurable. Husband did not experience nausea, loss of appetite, sleeplessness, depression, fear, or rage, and he did not consult professional help or suffer a pecuniary loss as a result of wife's actions. Villasenor v. Villasenor, 911 S.W.2d 411, 412, 417.

Tex.App.1994. Coms. (d), (h), and (j) cit. in sup. and cit. generally in headnotes. During a divorce proceeding, husband sued wife for intentional infliction of emotional distress. He specifically alleged that his wife threatened to get a hit man to kill him, that she burst into the bedroom at 1:30 a.m. and pointed a gun at him, and that she falsely accused him of adultery and hired private investigators to trail him. The trial court awarded the husband damages. Affirming, this court held that the evidence supported the trial court's findings that wife intentionally and recklessly engaged in extreme and outrageous conduct that caused husband severe emotional distress. Husband suffered sufficiently severe emotional distress in that, as a result of wife's threats and actions, husband was in fear of his life every day, all the time, and had lost weight, appeared nervous, and cried frequently. Behringer v. Behringer, 884 S.W.2d 839, 840, 841, 844.

Tex.App.1994. Com. (d) quot. in case cit. in disc., com. (h) quot. in case cit. in disc. A horse rancher charged with cruelty to animals on the basis of a humane society investigator's complaint sued the investigator and others for, inter alia, intentional infliction of emotional distress after the charges were dismissed. Plaintiff, whose horses appeared malnourished because they ingested contaminated water and who had contacted authorities about it, contended that defendant's act of filing his complaint constituted outrageous conduct. Affirming the trial court's grant of summary judgment for defendant, this court held that, although he had misunderstood the situation, he did so in good faith, and societal interests in preventing animal cruelty militated against holding him liable for any harm suffered by plaintiff as a result of these misperceptions. Furthermore, defendant's honest mistake was neither atrocious nor intolerable. Carr v. Mobile Video Tapes, Inc., 893 S.W.2d 613, 620, 621.

Tex.App.1994. Com. (d) quot. in part in sup. Former employee sued her former employer, alleging sexual harassment and retaliatory discharge and seeking to recover damages for, among other claims, intentional infliction of emotional distress for employees' retaliatory conduct after plaintiff's supervisor was dismissed in connection with plaintiff's sexual-harassment claim.

Affirming the trial court's granting of summary judgment for employer, this court held, inter alia, that plaintiff, who had returned to work after termination of the supervisor who had sexually harassed her, failed to state an emotional-distress claim, since the hostility of coemployees upon her return in their circulating of a petition suggesting that plaintiff had lied about the sexual harassment was not conduct so extreme or outrageous that employer's actions in not separating plaintiff from them could be said to be beyond all possible bounds of decency. Ewald v. Wornick Family Foods Corp., 878 S.W.2d 653, 660.

Tex.App.1994. Com. (h) cit. in sup. Deaf-mute customer sued car dealership and its employees, bringing various claims, including one for intentional infliction of emotional distress during negotiations for sale of a vehicle. Affirming the trial court's entry of judgment awarding plaintiff damages but not attorney fees, this court held, inter alia, that there was sufficient evidence to support plaintiff's emotional-distress claim in that plaintiff's requests for return of his check and that he be allowed to go home became more and more frequent and, although the salesman did not think plaintiff was lying when he stated that they were making him crazy and that he was becoming sick and confused and needed rest, the decision was made to subject plaintiff to takeover of the negotiations by another salesman. George Grubbs Ent., Inc. v. Bien, 881 S.W.2d 843, 853.

Tex.App.1994. Cit. in sup. and in diss. op., subsec. (1) cit. in diss. op., com. (j) quot. in part in sup. Motorist sued another driver who had used vulgar language to her during and after a traffic altercation, seeking to recover damages for intentional infliction of emotional distress. Reversing the trial court's entry of judgment for plaintiff motorist and rendering, this court held that the evidence was legally insufficient to support a finding of severe emotional distress, particularly when plaintiff did not seek professional help for her alleged depression, offered no evidence of the severity of her depression or humiliation, did not demonstrate how her distress was unendurable, offered no evidence of pecuniary loss, and it appeared that her primary purpose in bringing suit was to punish the other driver. Dissent argued that other driver's conduct was sufficiently egregious to support an emotional-distress claim. Regan v. Lee, 879 S.W.2d 133, 136, 137.

Tex.App.1994. Com. (d) quot. in part in sup. and cit. in case cit. in sup., com. (h) cit. in sup. Former employee sued former employer for intentional infliction of emotional distress, among other claims, alleging that defendant fired her because of her jury service. This court affirmed the trial court's granting of defendant's motion for summary judgment, holding that supervisor's yelling at plaintiff for not getting out of jury duty, employer's policy not to pay employees serving on jury duty, and employer's termination of plaintiff were not extreme and outrageous. The court noted that even illegal conduct was not necessarily extreme and outrageous. Sebesta v. Kent Electronics Corp., 886 S.W.2d 459, 462.

Tex.App.1994. Coms. (d) and (h) cit. in sup. Former employee sued former employer, alleging wrongful discharge and seeking damages for negligent and intentional infliction of emotional distress and false-light invasion of privacy. Affirming in part and reversing in part the trial court's granting of summary judgment for defendant and remanding, this court held, inter alia, that, since plaintiff did not allege that the manner of his discharge was outrageous, but, rather, that the

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employer's motivation may have been outrageous and, since the meeting where the discharge took place was conducted privately and in a businesslike manner, plaintiff had not made out a prima facie case of intentional infliction of emotional distress. Shaheen v. Motion Industries, Inc., 880 S.W.2d 88, 92.

Tex.App.1994. Cit. in disc., subsec. (1) cit. in disc., com. (d) quot. in part in case quot. in sup. A third party named in a counterpetition for interference with the familial relationship of a husband and wife filed by the wife's attorney in a divorce action moved for sanctions against the wife's attorney. This court, affirming the trial court's imposition of sanctions, held that, at the time the counterpetition was filed, there was no viable cause of action for interference with familial relationships and, because the pleadings filed were not seeking extension of existing law in good faith, as the pleadings never asserted that plaintiff's conduct was extreme or outrageous, the sanctions were warranted for filing of a groundless suit. Stites v. Gillum, 872 S.W.2d 786, 792, 793.

Tex.App.1994. Cit. in disc., com. (d) cit. in case cit. in disc., com. (j) cit. in disc. Widow of diabetic having unsound mind who died after surgery to which plaintiff had refused consent brought suit for intentional infliction of emotional distress, among other claims, against nurse who had ripped out patient's I.V., saying that if patient was not going to have surgery, he would not need I.V.; medical center where this took place; and clinic and associated physician who had ordered plaintiff to sign consent forms permitting surgery, telling her that if she did not sign that Medicare would not pay bills, then exceeding $100,000. This court reversed and remanded for further proceedings the trial court's granting of summary judgment for defendants, holding that their conduct could reasonably be considered intentional or reckless, extreme, and outrageous, and a cause of plaintiff's severe emotional distress. Washington v. Knight, 887 S.W.2d 211, 216.

Tex.App.1994. Cit. in sup. and in case cit. in sup., com. (g) cit. in sup., com. (j) quot. in case cit. in sup. Mortgagors sued mortgage company for intentional infliction of emotional distress, among other claims, after mortgage company provided plaintiffs with several contradictory figures for total amount that they owed and ultimately foreclosed on their house. This court affirmed the trial court's granting of summary judgment for defendant, holding that there was no evidence that plaintiffs' embarrassment and anger went beyond plaintiffs' expected endurance. Moreover, it said that, even if defendant's conduct were extreme or outrageous, defendant could not commit the tort when it did no more than insist on its legal rights through foreclosure in compliance with loan terms. Wieler v. United Sav. Ass'n of Tex., FSB, 887 S.W.2d 155, 159.

Tex.App.1994. Com. (d) cit. in case quot. in sup. A woman sued grocery store corporation for negligence and intentional infliction of emotional distress after she and her daughter witnessed an act of indecent exposure at one of the stores. She alleged that defendant took grossly inadequate measures both to bar the perpetrator from the store and to protect its customers before and after the arrest. She also asserted that store personnel failed to call the police until she insisted they do so, and that they let her stand face-to-face with the perpetrator while he berated her verbally. Trial court granted defendant summary judgment. This court affirmed, holding, inter alia, that

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defendant's conduct did not amount to intentional infliction of emotional distress because there was no showing of extreme and outrageous conduct. Wyatt v. Kroger Co., 891 S.W.2d 749, 753.

Tex.App.1993. Com. (d) cit. and quot. in disc. and quot. in case cit. in disc. A waitress was fired, allegedly on the basis of two job-related incidents: she went "over the head" of her manager to seek an investigation by the restaurant chain's corporate headquarters, and she advised a co-worker who was pregnant with the manager's child not to have an abortion, despite manager's pressures to contrary. Waitress sued manager and corporation for wrongful termination on the basis of, inter alia, intentional infliction of emotional distress. Trial court dismissed plaintiff's claims. Affirming, this court held, in part, that trial court did not abuse its discretion in finding that plaintiff failed to state a cause of action for intentional infliction of emotional distress, as the manager's retaliatory actions based on animosity did not constitute extreme and outrageous conduct. Amador v. Tan, 855 S.W.2d 131, 135.

Tex.App.1993. Com. (d) quot. in part in case quot. in sup. Former employee sued her former employer and corporate manager for intentional infliction of emotional distress based on manager's alleged sexual harassment. Affirming the trial court's granting of summary judgment for defendants, this court held, inter alia, that manager's conduct in allegedly observing employee from top to bottom, making her feel as if she were being undressed, asking employee if she did her best work in the dark, and telling her about his wife's magazine discussing sizes and shapes of men and conduct "in the sack" was not so extreme and outrageous as to support an emotional distress claim. Garcia v. Andrews, 867 S.W.2d 409, 412.

Tex.App.1993. Com. (d) quot. in part in conc. and diss. op. Former grocery store manager sued store owner, among others, asserting various claims arising from her discharge, including one for intentional infliction of emotional distress. Affirming in part and reversing in part the trial court's granting of summary judgment for defendant and remanding, this court held, inter alia, that the fact that plaintiff was crying during part of her interrogation by supervisors regarding her alleged theft from the market was some evidence of emotional distress precluding summary dismissal of her emotional distress claim. A concurring and dissenting opinion argued that, since plaintiff had admitted to taking store property without paying for it, it was permissible for defendant to respond by asking questions regarding the alleged theft and placing plaintiff's job in jeopardy. Johnson v. Randall's Food Markets, Inc., 869 S.W.2d 390, 402, judgment reversed 891 S.W.2d 640 (Tex.1995).

Tex.App.1993. Cit. in disc. After a mall distributed fliers and pictures to mall merchants accusing two shoppers of passing counterfeit money, the shoppers sued the mall, alleging, among other claims, defamation and intentional infliction of emotional distress. This court affirmed in part and reversed in part the trial court's entry of a take-nothing summary judgment, holding, inter alia, that whether the humiliation and damage to reputation plaintiffs suffered was the type of mental or emotional injury required to support the emotional distress claim presented a fact question precluding summary judgment. The court also determined that the mall did not negate

the emotional distress claim's element of intent, which required that the defendant's conduct be either intentional or reckless. Mitre v. La Plaza Mall, 857 S.W.2d 752, 755.

Tex.App.1993. Cit. in case cit. in sup., cit. and quot. in ftn., subsec. (2) cit. in ftn., com. (d) cit. in sup., quot. in case quot. in sup., and quot. in ftn., coms. (f), (g), and (h) quot. in sup., com. (j) cit. and quot. in sup. Seller of a business who had been retained by buyer as a consultant sued buyer and others, alleging intentional infliction of emotional distress and other claims, after buyer caused the deductible on a health insurance policy covering seller, who was suffering from terminal cancer, to be raised from $300 to $50,000 in order to save on premium costs. Affirming a trial court judgment on a jury verdict for seller, this court held, inter alia, that seller's conduct of agreeing to provide seller the same health insurance as other employees, but then allowing seller to continue to accumulate medical bills and learn of increase in deductible only when his doctors complained of claims not being paid by insurer, was sufficiently extreme and outrageous to support emotional distress claim. Plaintiff's emotional distress was deemed sufficiently severe given testimony that he was seriously contemplating suicide, or giving up the fight against the disease, as a result of effectively losing his insurance coverage. Motsenbocker v. Potts, 863 S.W.2d 126, 131-133, 135.

Tex.App.1993. Cit. in sup., coms. (d) and (j) cit. and quot. in part in sup. An employer sued its former employees, asserting various claims, and defendants counterclaimed against the employer supervisors for intentional infliction of emotional distress, after the employees had resigned and formed their own competing business and the supervisors and other employees of the employer allegedly engaged in threatening and harassing behavior. Affirming a trial court judgment for defendants on their counterclaim, this court held, inter alia, that evidence, though disputed in many respects, of threats, surveillance, hang-up phone calls at all hours, and delivery of a black floral arrangement to each of the former employees was sufficient to support the emotional distress counterclaim. Qualicare of East Texas, Inc. v. Runnels, 863 S.W.2d 220, 222.

Tex.App.1993. Cit. in sup., com. (d) quot. in sup., com. (g) cit. in sup. Applicant denied a job because he tested positive for alcohol in employer's screening test sued for intentional infliction of emotional distress, inter alia. Affirming the trial court's granting of employer's motion for judgment n.o.v., this court held, inter alia, that employer's conduct in following its established policy and denying the job to applicant on the basis of the test result was not extreme and outrageous conduct necessary to support an emotional distress claim. Reeves v. Western Co. of North America, 867 S.W.2d 385, 391, 392.

Tex.App.1993. Com. (d) quot. generally in sup. Hospital nurse sued hospital and her supervisor for, among other claims, intentional infliction of emotional distress allegedly arising out of an employment performance appraisal. Affirming the trial court's grant of summary judgment for the hospital, this court held, inter alia, that the hospital's conduct was not so outrageous as to support an emotional distress claim, as it consisted merely of reviewing the nurse's job performance and recording observations according to policy. The nurse was neither demoted nor reduced in pay, and the appraisal was provided only to the nurse's immediate supervisor and was neither shared

nor discussed with co-workers or physicians. Schauer v. Memorial Care Systems, 856 S.W.2d 437, 451.

Tex.App.1993. Cit. in headnote, cit. in sup., com. (d) cit. in headnote and quot. in part in sup. Professor brought a claim for intentional infliction of emotional distress, inter alia, against state university and its president and vice president, alleging that he was denied tenure because he spoke out against president's proposal to sell a ranch belonging to university. Reversing the trial court's entry of judgment on a jury verdict for plaintiff and rendering judgment that plaintiff take nothing, this court held, inter alia, that president's conduct in refusing to recommend tenure was not so outrageous as to support an emotional distress claim. Tarleton State University v. Rosiere, 867 S.W.2d 948, 949, 951.

Tex.App.1992. Com. (j) cit. in disc. Female insurance agent who had been yelled at by her supervisor and was eventually fired sued insurance company, her supervisor, and district sales manager, alleging sexual harassment, retaliatory discharge, and intentional infliction of emotional distress. Trial court granted defendants' motion for summary judgment. This court affirmed, holding, inter alia, that plaintiff failed to state a claim for intentional infliction of emotional distress because she offered no evidence that directly showed the severity of her distress. Noting that plaintiff had not consulted mental health professionals and that she gave a tangential response to the inquiry as to whether she could work out the stress and anguish by herself, the court stated that whatever stress she suffered did not rise to the level that a reasonable person could not be expected to endure. Benavides v. Moore, 848 S.W.2d 190, 195.

Tex.App.1992. Com. (d) quot. in sup., com. (h) cit. in sup. Employee sued her employer for intentional infliction of emotional distress after a co-worker insulted her on several occasions and threw a paper wad at her. The trial court granted summary judgment for employer, and this court affirmed, holding that employee failed to prove the element of outrageous conduct. The court said that co-worker's actions were mere indignities and insults, which did not rise to the level of outrageous conduct. Horton v. Montgomery Ward & Co., Inc., 827 S.W.2d 361, 369.

Tex.App.1992. Cit. in sup. A man and a woman sued various shopping mall stores for intentional infliction of emotional distress and invasion of privacy, inter alia, after stores posted pictures of plaintiffs, given to them by mall security, that falsely accused plaintiffs of passing counterfeit money. The trial court granted defendants summary judgment. This court affirmed on the issue of privacy but reversed and remanded the issue of emotional distress. It held, in part, that a jury could find that the stores posted the signs in reckless disregard of their truthfulness and that plaintiffs' humiliation in their community, as well as the outrageousness of defendants' actions, could satisfy the elements of such a tort. Mitre v. Brooks Fashion Stores, Inc., 840 S.W.2d 612, 621.

Tex.App.1992. Cit. in disc. Employee who had sustained work-related injuries sued insurance adjusting company hired to handle workers' compensation claims, alleging, inter alia, breach of duty of good faith and fair dealing and extreme and outrageous conduct causing severe emotional distress arising from delay in compensation payments. The trial court granted summary judgment

for adjuster, finding that defendant had no duty to employee. Reversing and remanding, this court held, inter alia, that defendant did have a duty to employee and that an affidavit of the adjuster handling employee's claim stating that he had not intended to cause employee emotional distress was insufficient to support summary judgment, since the adjuster had a vital interest in the suit's outcome and the issue of intent was generally a question for the factfinder. Natividad v. Alexsis, Inc., 833 S.W.2d 545, 547, judgment reversed 875 S.W.2d 695 (Tex.1994).

Tex.App.1991. Cit. in disc., subsec. (1) quot. in disc. and cit. in case cit. in disc., com. (j) cit. in disc. A hospital administrator left his job to accept a position as executive administrator at another hospital, but the offer was removed because of opposition in the hospital staff. The prospective executive administrator sued the hospital, its parent corporation, the parent's vice president, the hospital's assistant administrator, and individual physicians for tortious interference with business relationships, fraud, and intentional infliction of emotional distress. The trial court entered judgment on a jury verdict for the plaintiff. Affirming in part, reversing in part, and remanding, this court held, inter alia, that there was sufficient evidence to support the jury's finding that the defendants intentionally inflicted severe emotional distress on the plaintiff through outrageous conduct, as part of a conspiracy. The court cited evidence that the assistant administrator spread rumors that once the plaintiff became executive administrator he would fire all department heads and supervisors, that several doctors organized to berate him at a party held in his honor, and that the plaintiff became severely depressed and frustrated as a result of what happened. American Medical Intern. v. Giurintano, 821 S.W.2d 331, 340, 343.

Tex.App.1991. Cit. in case cit. in disc., coms. (d) and (e) quot. in diss. op., com. (h) cit. in diss. op. illus. 5, 6, and 7 cit. generally in ftn. to diss. op. An at-will employee was terminated from her position when she refused to misrepresent facts to government auditors. Upon termination, she allegedly was told to leave the premises in five minutes and a security guard was called to escort her off the premises in the presence of her co-workers. The employee sued her former employer and its parent company for, inter alia, intentional infliction of emotional distress. The trial court granted summary judgment in favor of the defendants. Reversing the trial court's entry of summary judgment on the intentional infliction of emotional distress count of the complaint, this court held that the evidence suggested there was action independent of the discharge of the employee that might meet the criteria for intentional infliction of emotional distress, and that fact issues were raised both as to the outrageousness of the conduct and to the severity of the injury which resulted. The dissent argued that the plaintiff had not alleged any facts amounting to extreme or outrageous conduct by the defendants, and that there was no evidence of vituperative language or vindictive conduct. Casas v. Wornick Co., 818 S.W.2d 466, 471-473, reversed 856 S.W.2d 732 (Tex.1993). See above case.

Tex.App.1991. Cit. in sup., coms. (i) and (g) quot. in sup. An employee was terminated from his job for allegedly stealing a handful of nails. The employee sued his employer for false light publicity and intentional infliction of emotional distress. The trial court entered judgment for plaintiff. Affirming, this court held, inter alia, that, although the evidence did not establish the employer's liability for intentional infliction of emotional distress when the employer did not act

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intentionally or recklessly in firing the employee for stealing, this error did not require reversal when the trial court did not distinguish between the independent causes of action or make separate awards. Diamond Shamrock Refining v. Mendez, 809 S.W.2d 514, 522, affirmed in part, reversed in part 844 S.W.2d 198 (1992). See above case.

Tex.App.1991. Cit. in sup., com. (j) quot. in sup. In this divorce action, a jury awarded the couple's child, who had been conceived by artificial insemination, damages against the husband for intentional infliction of emotional distress, inter alia. The husband was not the child's biological father, and the wife had alleged that the husband's tortious acts included threats to publicize the artificial insemination as well as actual publication. This court reversed the child's damages for intentional infliction of emotional distress, holding that there was no evidence that the husband ever told the child about the artificial insemination or publicized the matter except in his pleading, and no evidence that the child ever suffered any distress, severe or otherwise. Because the law protected statements made in judicial pleadings, and because the law did not allow recovery for damages from a future, threatened publication, the court held that the damage award was improper. K.B. v. N.B., 811 S.W.2d 634, 640, certiorari denied ___ U.S. ___, 112 S.Ct. 1963, 118 L.Ed.2d 564 (1992).

Tex.App.1990. Cit. in disc. A mother and children sued a father and the father's mother under the state family code and numerous common law theories after the children were allegedly kidnapped by their father. The trial court entered judgment on a jury verdict for the plaintiffs. Reversing in part as to the father's mother, this court held, inter alia, that no cause of action existed for negligent interference with a family relationship in Texas in the context of a child abduction case. While noting that a common law cause of action for child abduction exists in Texas, and under such a cause of action, damages for emotional distress to the parent are recoverable, the court also held that Texas did not recognize an independent cause of action for negligent infliction of emotional distress in the context of a child abduction case. It determined that the infliction of emotional distress must be intentional and that the father's mother had merely acted negligently. Weirich v. Weirich, 796 S.W.2d 513, 516, judgment reversed 833 S.W.2d 942 (Tex.1992).

Tex.App.1986. Cit. in disc. A woman filed a lawsuit claiming that she had sustained mental and emotional injuries while attending group awareness training sessions conducted by the defendants. The trial court granted summary judgment to the defendants on the ground that the plaintiff's complaint was barred by the statute of limitations. Affirming, this court held that the plaintiff's argument that the limitations period was suspended because of her unsound mind could not be considered on appeal because it had not been raised during the trial. The court reasoned that issues not expressly presented to the trial court could not be considered as grounds for reversal. Smith v. Erhard, 715 S.W.2d 707, 708.

Tex.App.1985. Cit. in sup. A widower sued an automobile club for intentional infliction of emotional distress, alleging that the club had denied a life insurance claim on the erroneous ground that the insured, the plaintiff's deceased wife, had been intoxicated. The trial court entered judgment for the plaintiff. Affirming, this court recognized the tort of intentional infliction of

emotional distress and held that the evidence, including the daughter's testimony that the club's assertion had distressed her father to the point of his seeking medical help, supported the finding that the plaintiff had suffered severe emotional distress. Tidelands Auto. Club v. Walters, 699 S.W.2d 939, 942.

Utah,

Utah, 2018. Com. (j) cit. in ftn. Father brought a claim for negligent infliction of emotional distress against therapist and medical center that mother hired without his knowledge to treat their 4-year-old daughter, alleging that therapist's use of inappropriate treatment methods resulted in father being falsely accused of sexually abusing daughter. The trial court granted defendants' motion to dismiss, ruling that a therapist did not owe a duty to a potential sexual abuser when treating an alleged victim. Reversing and remanding, this court held that a therapist owed a duty to a minor patient's parent to refrain from affirmative acts that recklessly violated the standard of care in a manner that gave rise to false memories or false allegations of sexual abuse by the parent, and that a therapist who breached that duty was liable for damages, including damages for severe emotional distress, resulting from that breach. The court cited Restatement Second of Torts § 46 in stressing that the duty created under its analysis was limited to a duty to refrain from causing severe emotional distress. Mower v. Baird, 422 P.3d 837, 854.

Utah, 2014. Cit. in cases cit. in ftn., com. (j) quot. in ftn. Son who had a seizure disorder and suffered from mental disabilities sought a temporary civil-stalking injunction against mother, alleging that mother's near daily phone calls to him after he enrolled in a program to assist with his transition to independent living and moved out of her home were causing him emotional distress within the meaning of the state's stalking statute. The trial court granted the injunction. Vacating the injunction and remanding for further proceedings, this court held that the trial court erred in applying a subjective rather than an objective standard to the statute's emotional-distress element. The court rejected mother's argument, based on a prior state appellate court case that relied on Restatement Second of Torts § 46 to define "emotional distress," that the statute's definition of that term included an "outrageous and intolerable" conduct requirement, explaining that the appropriate standard to determine whether son was entitled to an injunction on remand was whether mother's conduct would have caused emotional distress to a reasonable person in son's circumstances. Baird v. Baird, 2014 UT 08, 322 P.3d 728, 738.

Utah

Utah, 2010. Com. (h) quot. in case quot. in sup. Employee of city's power company sued supervisor and company's director for intentional infliction of emotional distress, alleging that supervisor and director engaged in a pattern of harassment, intimidation, and abuse at his workplace. The trial court granted summary judgment for defendants. This court affirmed as to employee's claim against director, holding that employee failed to demonstrate that director's conduct was directed toward employee with the intent to inflict emotional distress; while employee argued that director

failed to curb supervisor's outrageous conduct, there was no Utah support for the position that the failure to prevent another from inflicting emotional anguish gave rise to a valid claim for intentional infliction of emotional distress, and the court declined to expand the rule here. Cabaness v. Thomas, 2010 UT 23, 232 P.3d 486, 499.

Utah, 2008. Com. (h) quot. in case quot. in sup. Terminated employee brought claim for intentional infliction of emotional distress, inter alia, against school district. The trial court granted summary judgment for district. Noting that district followed the procedures of both the contract and the Utah Orderly School Termination Procedures Act when it terminated employee for cause, this court affirmed, holding, as a matter of law, that no reasonable person could conclude that firing an employee under the terms of an employment contract and according to procedures provided by law was so extreme and outrageous as to permit recovery for intentional infliction of emotional distress. Oman v. Davis School Dist., 2008 UT 70, 194 P.3d 956, 969.

Utah, 2006. Subsec. (2) cit. in disc.; com. (b) quot. in disc. (erron. cit. as § 46(2)). Applicant that was denied a position at state park sued park manager for assault, and park manager counterclaimed for, in part, intentional infliction of emotional distress, based on applicant's conduct toward manager's wife. The trial court, inter alia, entered judgment on a jury verdict for manager on his emotional-distress claim. The court of appeals remanded the claim for a new trial. This court affirmed the remand, holding, inter alia, that it could not answer the court of appeals' certified question on an incomplete record as to whether applicant's behavior directed at wife outside of manager's presence qualified as an exception to the "presence" rule. While the court emphasized that only the most egregious case could carve out an exception to the rule, it noted that wife was truly a noncombatant in the men's long-running feud, and stated that the facts of this case could well satisfy the exception. Hatch v. Davis, 2006 UT 44, 147 P.3d 383, 386, 388.

Utah, 2003. Com. (d) quot. in sup. Corporation's minority shareholder sued law firms and several of firms' partners for, in part, intentional infliction of emotional distress. Trial court granted defendants' motion to dismiss the emotional-distress claim. This court affirmed, holding, inter alia, that plaintiff's emotional-distress claim failed regarding defendants' alleged conduct associated with defendants' initiation of bar-order litigation and use of legal process to enforce the bar order, because defendants' conduct was not outrageous. Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, 70 P.3d 17, 32.

Utah, 2001. Subsec. (1) cit. in case quot. in sup. Following an automobile accident, insureds sued automobile-liability insurer for bad-faith refusal to settle within policy limits, fraud, and intentional infliction of emotional distress. On remand, the trial court entered judgment on a jury verdict awarding plaintiffs damages. Affirming in part, this court rejected defendant's challenge of the jury's finding of intentional infliction of emotional distress, holding, inter alia, that plaintiffs were required only to show that they subjectively experienced severe emotional distress regarding the situation they found themselves in, not that an ordinary reasonable person would have experienced it that way. Campbell v. State Farm Mutual Automobile Ins. Co., 65 P.3d 1134, 1165.

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Utah, 2001. Com. (d) cit. in disc. Teenager and her parents sued church, bishop, and church official for injuries suffered when they counseled teenager to "forgive and forget" past sexual abuse and referred her to unlicensed therapist. Trial court dismissed, and this court affirmed, holding, inter alia, that defendants' referral of plaintiff to an unlicensed counselor was not intentional and outrageous conduct sufficient to support a claim for intentional infliction of emotional distress, because there was no evidence that defendants knew that counselor was unlicensed when they made the referral or that their conduct in referring plaintiff to the counselor might cause emotional distress. Franco v. The Church of Jesus Christ of Latter-Day Saints, 21 P.3d 198, 207.

Utah, 2001. Adopted in case quot. in disc., coms. (h) and (j) quot. in disc. Former patient sued psychotherapist for intentional infliction of emotional distress, among other things, based on broken promises of marriage made by defendant during sexual relationship with plaintiff. Trial court granted defendant summary judgment. Affirming, this court held, inter alia, that distress plaintiff suffered as a result of defendant's actions was not so severe that a reasonable person could not be expected to endure it. Schuurman v. Shingleton, 26 P.3d 227, 233.

Utah, 1992. Subsec. (1) cit. in sup.; com. (d) cit. in disc., cit. generally, and quot. in ftn.; illus. 1 cit. in disc. Former employee who alleged retaliation by co-workers after complaining of co-workers' sexual harassment sued co-workers for intentional infliction of emotional distress, and sued employer for negligent employment. The trial court granted summary judgment for all defendants. Reversing summary judgment as to employee's claims against co-workers and her claims of negligent employment against employer, this court held that, since employee alleged a pattern of retaliatory harassment, it was such behavior in its aggregate that constituted extreme and outrageous conduct, and the statute of limitations applicable to her claims did not begin to run until she had suffered severe emotional distress, which, measured subjectively, occurred when plaintiff took sick leave for psychiatric attention. In addition, since co-workers could be liable for an independent tort, employer could be liable for negligent employment premised on its negligence in hiring and supervising the co-workers. Retherford v. AT & T Communications, 844 P.2d 949, 975-978.

Utah, 1985. Cit. in sup. The plaintiff sued her apartment manager for forcibly evicting her and her two children without court process and retaining her furniture and belongings. The plaintiff's complaint was verified. The defendant filed a verified answer and moved for summary judgment, supporting his motion with an affidavit that he was an agent for the owners of the apartment and that the plaintiff had failed to pay rent or security. The belongings had been kept as security. The motion was granted, and the plaintiff appealed. This court reversed, holding that the plaintiff's verified pleading met the requirements for a summary judgment motion. Further, the pleadings, taken together, alleged several different tort claims against the apartment manager including conversion, forcible entry, and intentional infliction of emotional distress. Pentecost v. Harward, 699 P.2d 696, 700.

Utah, 1972. Com. (h) cit. and quot. in sup. Plaintiff alleged that defendant intentionally and unreasonably subjected the decedent to extreme emotional distress that precipitated his suicidal act.

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In affirming summary judgment for defendant, the court held that where the 37-year-old defendant refused to marry the 27-year-old decedent and instead terminated their9-month relationship, the record did not support the assertion of plaintiff that reasonable men could differ as to whether the conduct of defendant was so outrageous and extreme that it offended the generally accepted standards ofdecency and morality. Gygi v. Storch, 28 Utah 2d 399, 503 P.2d 449, 450.

Utah App.

Utah App.2013. Com. (g) quot. in sup. Borrower who obtained a construction loan from credit union to build a new home sued credit union for, inter alia, negligent infliction of emotional distress, alleging that he suffered severe emotional distress because credit union refused to allow a potential buyer to assume the loan, delayed in approving a short sale, and then foreclosed on his home. The trial court granted credit union's motion to dismiss. Affirming, this court held that borrower's allegations did not support his claim, concluding that nothing in borrower's promissory note required credit union to approve an assumption of the loan or a short sale of the home, and that, therefore, credit union's actions were consistent with the parties' contractual agreements. Further, borrower failed to allege facts that would cause a reasonable person to suffer severe injury rendering him unable to cope in his daily life, noting that credit union was merely pursuing the collateral that borrower agreed to pledge as security for repayment of the loan proceeds. Snow v. Chartway Federal Credit Union, 2013 UT App 175, 306 P.3d 868, 873.

Utah App.2007. Com. (j) quot. in case quot. in sup. Church member/custodial parent of two minor children who were kidnapped by their noncustodial parent and taken to Japan, where they received religious ordination against custodial parent's wishes from the church, brought various claims against church. The trial court dismissed the complaint. This court reversed as to plaintiff's claim of intentional infliction of emotional distress, the only claim that the court concluded did not necessarily implicate church doctrines and raise First Amendment entanglement issues; whether defendant's conduct in allegedly instructing its leaders in Japan to conceal the location of the children from plaintiff was sufficiently outrageous and whether plaintiff's resulting distress was sufficiently severe to support plaintiff's distress claim were questions of fact requiring further factual development. Gulbraa v. Corporation of the President of the Church of Jesus Christ of Latter-day Saints, 2007 UT App 126, 159 P.3d 392, 396.

Utah App.2006. Com. (f) cit. and quot. in sup. In response to female college student's petition, the trial court entered an ex parte civil stalking injunction against male college student. Following an evidentiary hearing, the trial court granted male student's motion to dismiss and revoked the injunction. Reversing and remanding, this court held that the trial court erred in its interpretation and application of the statutory provisions governing civil stalking injunctions, since it failed to apply the definition of emotional distress as the product of the accused stalker's extreme and outrageous conduct from the perspective of a reasonable person under all the circumstances of the case, which circumstances here included male student's knowledge of his previous vicious sexual assault of petitioner and her subsequent reactions to his presence; thus, the trial court

inappropriately limited its analysis in a way that negated the cumulative effect of the alleged course of conduct. Ellison v. Stam, 2006 UT App 150, 136 P.3d 1242, 1249.

Utah App.2003. Coms. (d) and (j) quot. in case quot. in sup. After she terminated sexual relationship with her attorney, former client sued attorney for breach of fiduciary duty, fraud, intentional infliction of emotional distress, and reckless misconduct, inter alia. Trial court granted summary judgment for attorney. Reversing in part and remanding, court of appeals held that plaintiff sufficiently stated claim for intentional infliction of emotional distress by alleging that attorney used position of trust, information gained in representing client in divorce action, and misrepresentations about his marital status and her legal affairs to lure client into sexual relationship, and by alleging emotional distress resulting in physical and emotional pain, medical bills, loss of employment, and need for counseling and therapy. Walter v. Stewart, 2003 UT App 86, 67 P.3d 1042, 1048, 1049.

Utah App.2002. Com. (j) cit. in case quot. in sup. Former husband brought suit for, in part, intentional infliction of emotional distress against church trust and religious leaders who counseled his former wife after she decided to divorce him. Affirming the trial court's grant of summary judgment for defendants, this court held, inter alia, that plaintiff's alleged injuries were no different than the type normally suffered when a relationship failed, and thus were not sufficiently severe to support a claim for intentional infliction of emotional distress. Williams v. Jeffs, 57 P.3d 232, 237.

Utah.App.

Utah.App.1989. Coms. (h) and (j) quot. in disc., com. (b) quot. in ftn. A testator's survivors sued the children and son-in-law of the deceased's former wife seeking to invalidate a family settlement agreement (FSA) that was contrary to the will and to recover for intentional infliction of emotional distress. The survivors argued that the testator's intent in forming a trust was to dispose of the estate and that the agreement was not formally approved in probate court. The trial court ruled in favor of the defendants. Affirming in part, reversing in part and remanding, this court held that the FSA was enforceable without formal approval, even if it destroyed the testator's intent, since mutual promises of family harmony constituted consideration for the FSA. The court also held that a jury trial should have been granted for the emotional distress claim. It noted allegations that the defendants had continually pressured, threatened, and harassed the surviving wife, demanding that she have the deceased execute a new will during his final illness. Matter of Estate of Grimm, 784 P.2d 1238, 1246, certiorari denied 795 P.2d 1138 (1990).

Vt.

Vt.2013. Com. (d) quot. in case quot. in sup. Former employee of city's parks-and-recreation department sued city for, among other things, intentional infliction of emotional distress (IIED), alleging that defendant, motivated by politics, sparked a criminal investigation against him that tarnished his reputation and caused him distress. The trial court granted summary judgment for

defendant. Affirming, this court held that plaintiff failed to present evidence creating a genuine issue of fact as to whether defendant engaged in conduct that was so outrageous as to surpass all possible bounds of decency, as required to state an IIED claim. The court reasoned that defendant's reaction in referring the matter to police was not unreasonable given the undisputed fact that, immediately after plaintiff was notified that he was being placed on administrative leave, he contacted two subordinates and requested that they hide a laptop and remove cash from a safe. Cate v. City of Burlington, 2013 VT 64, 79 A.3d 854, 864.

Vt.2004. Com. (d) cit. in disc. and quot. in case quot. in disc., com. (h) cit. in case cit. in disc. Corrections officer sued employer and employer's superintendent for intentional infliction of emotional distress. The trial court granted summary judgment for defendants. Affirming, this court held, inter alia, that plaintiff failed to show outrageous conduct that met the threshold standard for a claim of intentional infliction of emotional distress. The court said that plaintiff was trying to combine a series of workplace indignities without showing a significant outrageous act. Fromson v. State, 176 Vt. 395, 848 A.2d 344, 347, 349.

Vt.2002. Com. (d) quot. in sup. Parents sued social services center and employee for, in part, intentional infliction of emotional distress in connection with defendants' role in taking and retaining custody of their runaway son. Affirming the trial court's grant of judgment as a matter of law for defendants, this court held, inter alia, that defendants' alleged violation of the Juvenile Proceedings Act by failing to return child to plaintiffs within a specified period of time, and their refusal to tell father the child's location did not meet the standard for outrageous conduct for purposes of an intentional-infliction-of-emotional-distress claim. Dalmer v. State, 174 Vt. 157, 811 A.2d 1214, 1227, cert. denied 537 U.S. 1110, 123 S.Ct. 891, 154 L.Ed.2d 782 (2003).

Vt.2002. Com. (h) cit. in case cit. in sup. Terminated nurse appealed trial court's grant of summary judgment for hospital on her claims of breach of contract, wrongful discharge, and intentional infliction of emotional distress. Affirming, supreme court held, inter alia, that nurse failed to state claim for emotional distress because hospital's actions in investigating patient complaints, conducting disciplinary proceedings, and discharging nurse for failure to conform to hospital's policy on narcotic administration were not extreme and outrageous. Dulude v. Fletcher Allen Health Care, Inc., 174 Vt. 74, 807 A.2d 390, 398.

Vt.1999. Com. (d) quot. in case quot. in disc. Shareholder sued other shareholders for breach of contract and deceit. Defendants filed a counterclaim and a third-party complaint against plaintiff's former employer, a food wholesaler, and employer's law firm, alleging that third-party defendants conspired with plaintiff to destroy defendants' recently created food wholesaling entity. The trial court dismissed the third-party complaint for lack of personal jurisdiction. Affirming, this court held that even if it recognized the conspiracy theory of in personam jurisdiction, defendants had failed to establish the existence of a conspiracy, and that, with the possible exception of the allegations of intentional infliction of emotional distress against law firm, none of the acts attributed to firm's members was sufficient to support the imposition of tort liability upon firm. Schwartz v. Frankenhoff, 169 Vt. 287, 733 A.2d 74, 84.

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Vt.1995. Com. (d) quot. in case quot. in sup. and cit. in headnote. Two car-accident victims sued the other driver's insurer, alleging that defendants' failure to settle plaintiffs' claims in an expeditious manner constituted a breach of defendants' duty to deal with plaintiffs in good faith as well as intentional infliction of emotional distress. Trial court granted defendants summary judgment. Affirming, this court held, inter alia, that defendants' delay in settling plaintiffs' claims was not so outrageous and extreme so as to constitute intentional infliction of emotional distress. Larocque v. State Farm Ins. Co., 163 Vt. 617, 660 A.2d 286, 287, 288.

Vt.1995. Cit. in headnotes, Caveat cit. in disc., subsec. (2) quot. and cit. but dist., com. (l) quot. in disc. Family of woman who was abducted and murdered by her ex-boyfriend brought survival claims and action for, inter alia, intentional infliction of emotional distress against psychologist who was treating boyfriend and who was aware of his obsession with victim. The trial court granted psychologist's motion for summary judgment insofar as it concerned the claim for emotional distress but otherwise denied. Affirming, this court held that family could not recover for intentional infliction of emotional distress where the allegedly outrageous conduct was directed at a third person, the victim, and family members were not present. As for the survival claims, however, psychologist could not take advantage of a valid release executed by family and ex-boyfriend, since there was no indication that the document was intended to discharge from liability any tortfeasors other than the actual murderer. Leo v. Hillman, 164 Vt. 94, 665 A.2d 572, 573, 578.

Vt.1994. Com. (d) cit. in case cit. in sup. Residential facility attendant sued his former employer after being discharged, asserting various claims, including one for intentional infliction of emotional distress. Affirming the trial court's grant of summary judgment for defendant on the emotional-distress claim, this court held, inter alia, that, even though plaintiff had been dismissed after filing complaints for unpaid compensation and sexual harassment, defendant's conduct was not outrageous and could not support an intentional-infliction-of-emotional-distress claim, considering that plaintiff had previously been suspended for trying to buy drugs on the premises and had refused to meet with defendant to discuss the terms of that suspension. Baldwin v. Upper Valley Services, Inc., 162 Vt. 51, 644 A.2d 316, 319.

Vt.1994. Com. (d) cit. in headnotes, quot. in sup., and quot. in diss. op; com. (e) quot. in sup., com. (f) quot. in sup. and quot. in diss. op., com. (h) cit. in diss. op. Employee and his family sued former employer and supervisor for intentional infliction of emotional distress and invasion of privacy, inter alia,, alleging that supervisor embarked on an insulting, demeaning, and vindictive course of conduct toward employee that included ridicule, invasions of privacy, intentional interference with ability to car pool, and an unreasonable workload. Trial court granted defendants summary judgment. This court affirmed, holding, in part, that supervisor's conduct did not reach the requisite level of extreme outrage because the record did not support a reasonable inference that supervisor knew plaintiff was susceptible to emotional distress. Dissent argued that jury should have been allowed to decide whether supervisor's conduct was extreme and outrageous, stating that supervisor used his supervisory position to intrude upon plaintiff and his family in their

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private, nonworking life, and exploited plaintiff's known weaknesses. Denton v. Chittenden Bank, 163 Vt. 62, 655 A.2d 703, 703, 704, 706, 707, 709-711.

Vt.1994. Com. (d) quot. in case quot. in sup. and cit. in headnotes. A firefighter who was denied promotions on several occasions due to his known reading problem sued the city and the fire chief for civil rights violations and intentional infliction of emotional distress, among other claims. Trial court granted defendants summary judgment. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that plaintiff failed to state an emotional-distress claim, because certain disciplinary reprimand letters were not outrageous, and the "detail" chores to which plaintiff was assigned after he filed a fair-employment-practices claim were routine firehouse duties, though they were normally assigned to rookie or junior firefighters. Gallipo v. City of Rutland, 163 Vt. 83, 656 A.2d 635, 637, 643.

Vt.1992. Com. (d) cit. in case quot. in sup., com. (h) cit. in disc. Mother sued state and medical examiner for emotional distress resulting from the removal of her deceased son's brain in connection with an autopsy authorized by statute. Affirming the superior court's grant of summary judgment for defendants, the supreme court held that defendants' removal of the brain and its retention after the cause of death had been established were not actionable; defendants breached no duty to plaintiff where the medical examiner was authorized to conduct an autopsy and to take and preserve portions of the body that might require further study. Plaintiff could not recover for intentional infliction of emotional distress because there was no evidence that defendants intended to cause plaintiff emotional distress, and defendants' conduct was not extreme or outrageous in the context of an authorized autopsy. Jobin v. McQuillen, 158 Vt. 322, 609 A.2d 990, 993.

Vt.1990. Com. (h) cit. in sup. The administratrix of her daughter's estate sued a police chief for intentional infliction of emotional distress, inter alia, alleging that the defendant's failure to respond to the report of the abduction of the plaintiff's daughter resulted in her daughter's rape and death and caused the plaintiff great emotional distress. The trial court dismissed the claim on the ground that there was no allegation that the plaintiff was in the zone of danger or that physical impact had occurred. Reversing and remanding in part, this court held that the trial court's application of the presence requirement to the plaintiff's claim was error, since the requirement applied not to a claim for intentional infliction of emotional distress but to one for negligently caused emotional distress. Applying the correct standard, the court stated that it could not be said as a matter of law that the acts here alleged did not rise to the level of extreme and outrageous conduct that would allow recovery for intentional infliction of emotional distress. Thayer v. Herdt, 155 Vt. 448, 586 A.2d 1122, 1126.

Vt.1986. Cit. in disc., com. (d) quot. in disc. A widow sued her late husband's employer and the employer's workers' compensation insurer for death benefits and for the intentional infliction of emotional distress. The trial court dismissed the complaint for lack of subject matter jurisdiction. Reversing in part, this court held that the conduct constituting the tort of intentional infliction of emotional distress was not within the scope of the Workers' Compensation Act and therefore the trial court was the proper forum with original jurisdiction when a carrier's conduct went beyond

simple failure to pay and constituted intent to cause severe emotional distress. Demag v. American Ins. Companies, 146 Vt. 608, 508 A.2d 697, 699.

Vt.1978. Cit. in sup. and fol. and quot. in ftn. An action was brought to recover on the theory that the defendant had intentionally inflicted mental distress on the plaintiff by rendering it impossible for any personal contact or communication to take place between the plaintiff and her daughter for a period of time. The lower court dismissed the complaint for failure to state a cause of action on which relief could be granted, and the plaintiff appealed. The defendant argued that Vermont should not recognize a cause of action for intentional infliction of mental distress but that, should the court recognize the tort, the complaint was legally insufficient on its face because it did not allege the elements necessary to establish a prima facie case. The court held that a cause of action can be maintained for the recovery of damages for intentional infliction of mental distress. The court noted that the tort of intentional infliction of mental distress, as described by Section 46 of the Restatement, has gained sufficient acceptance to be characterized as the general rule, and the court believed that it was appropriate to recognize it in Vermont. The court also held that the complaint adequately alleged the elements necessary to establish a prima facie case, i.e., outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct. Accordingly, the judgment of the lower court was reversed, and the case was remanded. Sheltra v. Smith, 136 Vt. 472, 392 A.2d 431, 432.

Va.

Va.2021. Com. (d) quot. in case quot. in sup. Member of a church sued church and others, alleging that a former pastor of the church, who had retired but remained active as a minister in the church, sexually molested her when she was a minor. The trial court granted demurrers filed by defendants. This court affirmed in part, holding that the trial court properly dismissed plaintiff's claim for intentional infliction of emotional distress, because plaintiff's allegations did not clear the high bar necessary to state such a claim under Restatement Second of Torts § 46. The court noted that, while plaintiff made broad and nonspecific allegations about the pastor's inappropriate conduct as well as specific allegations of his disturbing conduct toward women over the course of his decades serving as pastor for the church, defendants' alleged failure to take measures stronger than ordering him to attend counseling did not rise to the level of being outrageous and intolerable. Doe by and Through Doe v. Baker, 857 S.E.2d 573, 589.

Va.2007. Com. (j) quot. in ftn. to conc. and diss. op. Plaintiff filed a motion for judgment against, among others, individuals who accused her of sending them anonymous, handwritten letters making accusations of marital infidelity. The trial court sustained defendants' demurrers, and dismissed the action with prejudice. Reversing in part and remanding, this court held, inter alia, that plaintiff could proceed against defendants on her claim for intentional infliction of emotional distress. The concurring and dissenting opinion argued that plaintiff failed to allege facts showing emotional distress so severe that no reasonable person could be expected to endure it; it noted that

because the parties had not argued whether plaintiff's alleged emotional distress was exaggerated and unreasonable under the circumstances, it declined to express an opinion on that issue. Almy v. Grisham, 273 Va. 68, 639 S.E.2d 182, 190.

Va.1991. Cit. in disc. and in sup., com. (d) quot. in sup., com. (h) cit. in sup., com. (j) cit. and quot. in sup. and quot. in ftn. to diss. op. The plaintiff sought recovery in damages for alleged intentional infliction of emotional distress, independent of any physical injury and unaccompanied by any physical impact, claiming that the defendant made repeated hang-up calls to the plaintiff. The trial court sustained the defendant's demurrer. Affirming, this court held that, since the plaintiff did not claim, for example, that she had any objective physical injury caused by the stress, that she sought medical attention, that she was confined at home or in a hospital, or that she lost income, the alleged effect on the plaintiff's sensitivities was not the type of extreme emotional distress that was so severe that no reasonable person could be expected to endure it. The dissent argued that the plaintiff alleged sufficient facts to indicate the requisite extreme emotional distress, and noted that this was a new requirement created by the majority and that it had not heretofore been articulated by this court. Russo v. White, 241 Va. 23, 400 S.E.2d 160, 162-164.

Va.1974. Quot. in part, com. (i) cit., and com. (h) quot. in sup. This plaintiff sought to recover compensatory and punitive damages for mental shock and distress allegedly caused by the willful, wanton, malicious, fraudulent, and deceitful conduct of an investigator who was employed by a man charged with child molesting to take a picture of the plaintiff in his home, under the pretense of publishing an article about the plaintiff's employment as a skating coach. Actually, the photo was used to ask the child molesting victims in court whether the plaintiff was the one who had molested them, although there was never any question that the plaintiff was innocent of the charges. This court reversed the judgment below, thus reinstating the jury verdict in favor of the plaintiff and holding that a cause of the action will lie for severe emotional distress, unaccompanied by physical injury, provided that the wrongdoer's conduct was intentional or reckless, that there was a casual connection with the wrongdoer's conduct, and that the conduct was intolerable and offended against the generally set standards of decency. Here there were questions for the jury regarding both the last of these elements and whether the emotional distress was severe. Womack v. Eldridge, 215 Va. 388, 210 S.E.2d 145, 147, 148.

Va.App.

Va.App.1994. Com. (j) quot. in case quot. in disc. Former husband was convicted of stalking his ex-wife. Affirming, this court held, inter alia, that evidence that defendant had followed his ex-wife for several months, watched her in her home, followed her boyfriend, and threatened to kill her and her boyfriend was sufficient to support the conviction, particularly in light of the ex-wife's testimony that defendant's threat and conduct terrified her and that she believed defendant wanted to shoot or otherwise kill her. The court stated that the statutory phrase “intent to cause emotional distress” was not unconstitutionally vague; “emotional distress” was a common and well-recognized legal term that had been discussed by the state supreme court in the context of

civil tort actions for intentional infliction of emotional distress. Woolfolk v. Commonwealth, 18 Va.App. 840, 848, 447 S.E.2d 530, 534.

Wash.

Wash.2021. Cit. in diss op. Brother of decedent filed an action for tortious interference with a deceased body against city in federal court, after he learned that employees of city's fire department had repeatedly intubated decedent's body as part of a training exercise without permission from decedent's family. Answering a question certified by the federal court, this court held that brother had standing to bring a claim for tortious interference with decedent's body even though decedent's surviving spouse was the legal custodian of decedent's remains, because he was in the class of foreseeable plaintiffs, namely"close relatives" who had significant and substantial contacts with the decedent during their lives. The dissent argued in favor of adhering to a traditional limited-standing approach, like the one applied to the tort of intentional infliction of emotional distress described in Restatement Second of Torts § 46, in order to avoid potentially unlimited liability. Fox v. City of Bellingham, 482 P.3d 897, 905.

Wash.2018. Com. (d) quot. in case quot. in sup.; com. (e) cit. in sup.; com. (g) quot. in sup. Wife of patient who died of liver damage due to undiagnosed liver disease while being treated for tuberculosis brought a claim for, among other things, the tort of outrage against medical providers in connection with allegations that defendants threatened to incarcerate patient if he did not comply with his tuberculosis treatment regimen. The trial court granted summary judgment for defendants. The court of appeals affirmed. Affirming, this court held that the alleged conduct was not outrageous as a matter of law. The court pointed out that, under Restatement Second of Torts § 46, conduct that would be extreme and outrageous but for a legal privilege to do it immunized conduct from a claim for intentional infliction of emotional distress, and, here, defendants had the power to execute the complained-of conduct under state law, which provided that noncompliance with a tuberculosis treatment regimen was a misdemeanor, and granted local health officers the power to issue a quarantine order for persons who were diagnosed with tuberculosis and were under medical orders for treatment or follow-up examinations. Reyes v. Yakima Health District, 419 P.3d 819, 825.

Wash.2014. Com. (d) cit. in sup. Borrower who executed a deed of trust on her primary residence sued trustee under the deed of trust, alleging, among other things, a claim for intentional infliction of emotional distress (IIED) in connection with its conduct during a foreclosure that was initiated by an entity that no longer had any beneficial interest in the loan. The trial court granted summary judgment for defendant. This court affirmed as to plaintiff's IIED claim, holding that, although conduct during foreclosure could support an IIED claim, that conduct had to satisfy the high burden applicable to such claims under Restatement Second of Torts § 46, and the alleged conduct—that defendant failed to confirm the proper beneficiary and failed to suspend the trustee's sale when plaintiff contacted it—was not so outrageous as to shock the conscience or go beyond all bounds of decency. Lyons v. U.S. Bank Nat. Ass'n, 336 P.3d 1142, 1151.

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Wash.2003. Adopted in case cit. in disc., com. (d) quot. in case quot. in disc., coms. (j) and (k) quot. in sup. Defendant appealed trial court judgment finding him liable for intentional infliction of emotional distress upon plaintiff, his female former roommate. Court of appeals affirmed. Affirming, supreme court held that, where plaintiff's evidence showed that defendant's conduct of harassing, threatening, and stalking plaintiff over a three-year period was extreme and outrageous, disrupting her life and preventing her from forming relationships, she was not required to prove by objective symptomatology that defendant's actions caused her severe emotional distress. Kloepfel v. Bokor, 149 Wash.2d 192, 196, 198, 202-203, 66 P.3d 630, 632, 633, 635-636.

Wash.2002. Quot. in sup. Employee sued former employer in connection with treatment by co-workers and supervisors after employee filed workers' compensation claim, alleging disability discrimination, retaliation, negligent and intentional infliction of emotional distress, and defamation. Trial court entered judgment for employee. Appellate court reversed and remanded. Reversing in part, this court held, inter alia, that evidence supported finding that employees' conduct was sufficiently outrageous to find former employer vicariously liable for intentional infliction of emotional distress. Robel v. Roundup Corp., 148 Wash.2d 35, 51, 59 P.3d 611, 619.

Wash.2001. Com. (d) quot. in case quot. in diss. op. Former employee sued employer for constructive discharge and outrage, inter alia, alleging that her supervisor used threats of physical force against her and mocked her in front of others. Trial court granted company summary judgment, and appellate court affirmed. This court affirmed, holding, in part, that company was not liable for intentional torts committed by supervisor acting outside scope of employment. Dissent argued that summary judgment on plaintiff's claim for intentional infliction of emotional distress should be reversed, because this case was not merely about incivility, but rather involved threats, intimidation, and assault of an employee by a supervisor. Reasonable minds could differ as to whether supervisor's conduct was sufficiently extreme as to constitute outrage. Snyder v. Medical Service Corp. of Eastern Washington, 145 Wash.2d 233, 249, 35 P.3d 1158, 1167.

Wash.1998. Cit. in headnotes, cit. generally in disc., coms. (e)-(g), (j), and (l) quot. in case quot. in disc. Survivors of deceased public officials and others sued county for intentional and negligent infliction of emotional distress and invasion of privacy, arguing that members of medical examiner's office misappropriated autopsy photographs of decedents and displayed them for personal gain. The trial court entered judgment for defendant. Affirming in part and reversing in part, this court held that plaintiffs, who were not present when the allegedly outrageous conduct occurred, could not maintain an action for intentional infliction of emotional distress, and that the claim for negligent infliction of emotional distress failed as well; however, a common law cause of action for invasion of privacy existed in Washington, and plaintiffs had a protectible privacy interest in autopsy records that were statutorily required to be kept confidential and released only to those with a genuine interest in them. Reid v. Pierce County, 136 Wash.2d 195, 961 P.2d 333, 334, 337, 338.

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Wash.1997. Cit. in headnote, cit. in case quot. in disc. Between 1974 and 1980, patient received counseling for, among other things, marital problems; in 1992, patient brought malpractice action against his psychologist after he discovered that psychologist had been romantically involved with his wife from 1976 until 1981. Patient also asserted a claim for the tort of outrage. The trial court dismissed the complaint on the ground that the claims were time-barred, but the intermediate appellate court reversed. Affirming and remanding, this court held that, if it was shown that psychologist intentionally concealed his relationship with patient's wife, the statute of limitations governing malpractice claims would be indefinitely tolled, and that material factual issues existed as to whether a two- or three-year statute of limitations applied to the claim for outrage. Doe v. Finch, 133 Wash.2d 96, 942 P.2d 359, 359, 361.

Wash.1995. Cit. in case quot. in sup., cit. in ftn., subsec. (1) cit. and quot. in sup., subsecs. (2) and (2)(a) cit. in sup., com. (d) cit. in case quot. in sup. Airplane parts manufacturer's employees who were exposed to toxic chemicals at the workplace sued employer for, among other claims, the tort of outrage in the context of the industrial insurance act. Federal district court dismissed plaintiffs' claims. In response to the questions of the Ninth Circuit, this court held that plaintiffs stated a claim for the tort of outrage to the extent that they alleged that defendant's deliberate intention to injure was outrageous conduct. Plaintiffs stated a claim of outrage because they alleged a variety of work-related medical symptoms, oppressive behavior by employer's supervisors, human experimentation, prevention of workers from transferring even after the workers had been given medical restrictions from working with phenolic resin, and cleaning and ventilating the workplace immediately before testing by governmental agencies to skew the test results. Birklid v. Boeing Co., 127 Wash.2d 853, 904 P.2d 278, 286, 287.

Wash.1991. Quot. in ftn. Partners in real estate development projects sued another partner for fraud and breach of fiduciary duty. The trial court entered judgment on a jury verdict awarding the plaintiffs economic and emotional distress damages. The intermediate appellate court reversed the award of emotional distress damages, holding that the plaintiffs had not shown severe emotional distress. Reversing, this court held that there was no requirement that a plaintiff must always show severe emotional distress before emotional distress damages, as a component of compensable damages resulting from a harm, may be awarded upon proof of an intentional tort. The court noted that the requirement of severity of emotional distress must be shown to establish the elements of the independent tort of outrage. Nord v. Shoreline Sav. Ass'n, 116 Wash.2d 477, 805 P.2d 800, 804.

Wash.1991. Cit. in disc. Several ex-employees sued their employer for wrongful discharge and the tort of outrage, seeking a declaratory judgment as to whether a cause of action for the tort of outrage, inter alia, could be maintained in light of the workers' compensation statute. The case was removed to federal court, which certified questions to this court. In another suit involving the same issue, the trial court granted summary judgment for the employer, and the intermediate appellate court affirmed. The two cases were consolidated on appeal. This court answered the questions and reversed and remanded the appellate court's decision, holding that the injured employee was not precluded from bringing an action for the tort of outrage by a provision in the

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workers' compensation act providing a cause of action for retaliatory discharge for filing a workers' compensation claim. Wilmot v. Kaiser Alum. & Chem. Corp., 118 Wash.2d 46, 821 P.2d 18, 33.

Wash.1989. Cit. in disc., com. (d) cit. in disc. An executive secretary to two medical boards who was discharged after she disclosed that the boards' budget did not include the expenditure of surplus funds accumulated in the medical disciplinary account brought a wrongful discharge action against the state, alleging, inter alia, that the discharge constituted outrageous conduct by the defendant. The trial court dismissed the plaintiff's claims. Affirming, this court held that the plaintiff failed to set forth facts showing that there was a genuine issue of material fact. The court stated that the defendant's method of discharge, which involved a private termination letter to the plaintiff and a brief response to media inquiries, could not be considered atrocious and intolerable in a civilized society; moreover, the plaintiff's assertion that the defendant embarrassed and humiliated her would not support the imposition of liability on a claim of outrage. The court noted that, at worst, the plaintiff's allegations amounted to a showing of bad faith. Dicomes v. State, 113 Wash.2d 612, 782 P.2d 1002, 1012, 1013.

Wash.1987. Cit. in sup., com. (b) quot. in sup. A janitor sued defendants who firebombed the tavern where he worked for assault, outrage, and RICO violations. The trial court found for the janitor, but the intermediate appellate court certified the case for resolution of the RICO issue. Reversing the trial court, this court held that the janitor could not recover for both assault and outrage, or intentional infliction of emotional distress, for the same act. The court stated that recovery for outrage should be permitted only in the absence of any other tort remedy. Rice v. Janovich, 109 Wash.2d 48, 742 P.2d 1230, 1238.

Wash.1984. Cit. in case quot. in sup. The plaintiff brought an action against the state, the state patrol, and an individual trooper, alleging assault, outrage, false arrest, and false imprisonment. The claims were based on the plaintiff's being searched by the trooper, who was informed that a warrant was outstanding for someone with the same physical characteristics and a similar name. This court held that the trooper's actions did not support a claim of outrage, and that the trooper had a qualified immunity from actions for assault, false imprisonment, and false arrest, even where the statute the trooper relied upon to conduct the searched was found unconstitutional. Guffey v. State, 103 Wash.2d 144, 690 P.2d 1163, 1164.

Wash.1984. Quot. in disc., subsec. (2)(a) cit. in sup. A husband brought an action against a church and its pastor alleging that the pastor's sexual relationship with his wife constituted outrageous conduct and impairment of consortium. The trial court granted summary judgment to the defendants, and on appeal this court affirmed. The court ruled that the husband had not established the elements necessary for recovery on the outrageous conduct claim because he failed to allege that he was present at the time of that conduct. The court also ruled that while an impairment of consortium claim was generally a separable claim actionable by the deprived spouse independently, the claim in the case at hand was actually a claim for alienation of affection barred by earlier state decisions abolishing such actions. Lund v. Caple, 100 Wash.2d 739, 675 P.2d 226, 228, 229.

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Wash.1980. Cit. in disc. The plaintiff's back was severely injured when his truck left the road and rolled over. The plaintiff and his wife subsequently brought this negligence action against the defendant automobile garage, alleging that it negligently repaired the truck braking system and it was the resultant brake failure that caused the accident. As a result of the plaintiff's spinal injury, he and his wife's social life was altered. They could no longer go bowling or dancing. He was also unable to perform his usual household tasks. The main issue in this case is whether Washington permits a wife to claim damages for loss of consortium when her husband is injured due to the negligence of a third party. The trial court awarded the plaintiff wife $25,000 for loss of consortium. The appellate court affirmed. The majority of American jurisdictions have recognized the wife's right to damages for loss of consortium due to the negligent acts of a third party. While a wife had no right to such damages at common law, it is not necessary for courts to leave abrogation of this rule to the legislature. On the contrary, Washington courts have repeatedly discharged their duty to reassess the common law and alter it where justice requires. There is no rational basis for distinguishing between husbands and wives where a claim of damages for loss of consortium is made. Lundgren v. Whitney's, Inc., 94 Wash.2d 91, 614 P.2d 1272, 1275.

Wash.1979. Subsecs. (1), (2) and (2)(a) cit. and fol. in case cit. Husband sued for alienation of wife's affections. The trial court entered judgment for the plaintiff, but the Court of Appeals reversed and ordered the action dismissed with prejudice based upon the conclusion that the action for alienation of affections should be abolished; discretionary review was granted. The Supreme Court, citing its adoption of the strict products liability theory of the Restatement, and the Restatement view regarding the tort of outrage as indicative of its trend toward expanding tort liability and adopting new remedies, held, nevertheless, that the action for alienation of a spouse's affections should not be reversed by judicial abolition, and the reversal of the judgment for the plaintiff based upon judicial abolition of the action for alienation of affections would be reversed. Wyman v. Wallace, 91 Wash.2d 317, 588 P.2d 1133, 1134, 1135, opinion vacated 94 Wash.2d 99, 615 P.2d 452 (1980).

Wash.1977. Sec. (1) cit., quot., and fol., secs. (1), (2) and subsec. (2)(a) cit. and fol. in case quot. in sup., and coms. (d, e, f, g, j,) and (1) cit. in cases quot. in sup. Sec. (1), coms. (d, e, and f) cit. and com. (h) cit. in sup. in conc. op. The plaintiffs, a Mexican-American employee and his wife, sued his former employer alleging conspiracy under the Civil Rights Act and a claim for damages for the tort of outrage. Plaintiff husband asserted he had been subjected to repeated racial slurs, comments, and conduct which caused him severe emotion distress by intimidation, humiliation, and public exposure to scorn and ridicule. The plaintiffs appealed dismissal of the tort claim. The court held that plaintiff had alleged a cause of action for the tort of outrage and reversed. The concurring opinion urged that the alleged conduct not be equated with the tort of outrage. The actions, if proved, could be deemed by a jury to be tortious but that determination should be left to the jury. Contreras v. Crown Zellerbach Corp., 88 Wash. 735, 565 P.2d 1173, 1174, 1175, 1176, 1177, 1178.

Wash.1975. Subsecs. (1), (2), and (2)(a) and coms. (d), (e), (f), (g), (j)and (l) fol. Subsec. (2)(b) cit. but not ruled on. Section and subsecs. (1), (2)(a), (b) & illus. cit. but dist. in diss. op. A husband brought this action against a hospital and a physician on "tort of outrage" to recover for damages arising from his wife's death. Plaintiff alleged that the physician had negligently, recklessly, wantonly, and outrageously breached the patient-doctor relationship with plaintiff's wife by abandoning her and failing to provide medical care and that, as a result, plaintiff, forced to watch his wife die, suffered physical and emotional injury. The trial court dismissed plaintiff's complaint for failure to state a cause of action. On appeal, reversed and remanded. The court rejected the doctrine providing for liability for emotional injury suffered by a third party because of the negligent injury of another.However, the court held that while a defendant might not be accountable for mere negligent actions which cause emotional stress, one, who by extreme and outrageous conduct, intentionally or recklessly, directed at a third person, causes severed emotional distress to a member of such person's immediate family, is liable if the person so affected is present at the time. The dissent would apply this doctrine only in cases of "active" vis à vis "passive" conduct by the defendant. Grimsby v. Samson, 85 Wash.2d 52, 530 P.2d 291, 294, 296.

Wash.App.

Wash.App.2021. Com. (g) quot. in case quot. in sup. Former wife filed claims for abuse of process and intentional infliction of emotional distress against former husband and his attorney, alleging that husband and attorney pursued parenting-plan-modification proceedings against her in order to place her in intractable circumstances with regard to both her immigration status and finances. The trial court granted husband's and attorney's motions to dismiss. This court reversed and remanded, holding, among other things, that the litigation privilege did not preclude wife's claim for intentional infliction of emotional distress against either husband or attorney. The court cited Restatement Second of Torts § 46 in noting that, while conduct that was extreme and outrageous could be privileged, a claim for intentional infliction of emotional distress would not be precluded where the manner of invoking a legal power intentionally inflicted emotional distress. Mason v. Mason, 497 P.3d 431, 453.

Wash.App.2021. Cit. in case quot. in sup.; com. (j) quot. in case quot. in sup. City resident who was arrested for refusing to stop making a video recording of a city council meeting filed a claim for intentional infliction of emotional distress against city and its mayor, among others, after the criminal charges against her were dismissed. The trial court granted summary judgment for defendants on resident's emotional-distress claim. This court affirmed, holding that resident failed to produce sufficient evidence to show that she severe emotional distress, as required to state a claim for intentional infliction of emotional distress under Restatement Second of Torts § 46. The court noted that, while resident claimed to have suffered a panic attack after her arrest, there was no evidence showing that her distress was ongoing or that it led her to seek professional help. Zink v. City of Mesa, 487 P.3d 902, 908.

Wash.App.2019. Cit. in ftn., quot. in diss. op., cit. in ftn. to diss. op.; subsec. (2)(b) cit. in diss. op.; coms. (d), (g), and (h) quot. in cases quot. in diss. op.; com. (*i*) cit. in ftn. to diss. op.; com. (*l*) cit. in case cit. in sup. Piano teacher who gave private lessons to children in her home brought claims for, among other things, intentional infliction of emotional distress against neighbor who lived across the street, alleging that, over the course of four months, neighbor parked his diesel pickup truck along the sidewalk next to teacher's home, and regularly and repeatedly remote-started his truck, revved its engine, and activated its alarm in order to scare teacher's students as they walked past the truck on their way to their lessons. After a bench trial, the trial court found that, although neighbor did not cause any loss of business to teacher, his conduct was sufficiently outrageous to constitute intentional infliction of emotional distress under Restatement Second of Torts § 46. The dissent argued that, while neighbor's behavior was childish and annoying, it was not outrageous. Spicer v. Patnode, 443 P.3d 801, 806, 808, 810.

Wash.App.2017. Cit. in case cit. in ftn. Estate of shipyard machinist who died of mesothelioma after exposure to asbestos dust from products manufactured by bankrupt subsidiary brought a wrongful-death action against parent corporation, seeking to impose liability under Restatement Second of Torts § 400 on defendant as an apparent manufacturer. The trial court granted summary judgment for defendant. This court affirmed, holding that plaintiff failed to create a genuine issue of material fact sufficient to satisfy any test for liability under § 400. The court predicted that Washington would adopt § 400, noting that it had previously applied Restatement Second of Torts § 46. Rublee v. Carrier Corporation, 398 P.3d 1247, 1251.

Wash.App.2015. Com. (d) quot. in case cit. in sup. Patient filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against doctor, alleging that defendant yelled at plaintiff in his office and attempted to avoid liability for the cauda equina syndrome plaintiff developed, after defendant performed laminectomies on her lower back, by denying that she experienced the syndrome and referring her to numerous specialists, including a neurologist that did not study the critical area of her spine. The trial court granted defendant's motion for summary judgment. This court affirmed in part, holding that plaintiff failed to present sufficient evidence to overcome defendant's motion on the IIED claim. Citing Restatement Second of Torts § 46, Comment *d*, the court concluded that defendant's alleged conduct was not sufficiently outrageous to support her claim, because, among other things, referring a patient to specialists did not suggest that defendant was seeking to avoid liability, and there was no evidence that defendant and the neurologist conspired to hide information from plaintiff. Christian v. Tohmeh, 191 Wash.App. 709, 736, 366 P.3d 16, 30.

Wash.App.2014. Com. (j) cit. and quot. in sup. and quot. in case quot. in sup. Grandmother, on behalf of first-grade student, brought claims for assault, battery, and outrage against school district and teacher in connection with an incident in which teacher allegedly berated student in a loud voice while towering over her and physically bumping her until she was pinned against a wall. The trial court granted summary judgment for district and teacher. Affirming in part, this court held that grandmother failed to come forward with evidence that student suffered severe emotional distress as a result of teacher's conduct, as required to state a claim for outrage. The court noted

that, because outrage was an intentional tort, grandmother was not required to show bodily harm or objective symptomatology; however, she did not provide evidence that student suffered any significant emotional distress that was more than transient or trivial. Sutton v. Tacoma School Dist. No. 10, 324 P.3d 763, 769.

Wash.App.2011. Com. (d) quot. in case quot. in sup., coms. (g) and (h) cit. in sup. Owners of residential and commercial properties sued utility, its manager, and its elected commissioners, alleging improper termination of electrical service. The trial court granted summary judgment for defendants. Affirming, this court held, among other things, that plaintiffs failed to state a claim for the tort of outrage. The court reasoned that defendants' alleged actions and omissions—in failing to make accommodations for plaintiffs' nonpayment and in terminating plaintiffs' service without notice—were not in violation of utility's service contract and were privileged, and, in any event, could not reasonably be regarded as so extreme and outrageous as to permit recovery. Steinbock v. Ferry County Public Utility Dist. No. 1, 165 Wash.App. 479, 269 P.3d 275, 282.

Wash.App.2008. Com. (d) quot. in case quot. in sup., com. (j) cit. in sup. Patient sued doctor, alleging sexual abuse, and doctor counterclaimed for, among other things, intentional infliction of emotional distress (IIED). The trial court granted doctor's motion to dismiss and, after a bench trial, ruled in favor of doctor on his counterclaims. Reversing in part and remanding, this court held, inter alia, that patient's decision to sue doctor did not rise to the level of outrageous conduct required to state a claim for IIED; filing a suit alleging sexual abuse by a physician, even with malicious intent, was not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be utterly intolerable in a civilized community. Saldivar v. Momah, 145 Wash.App. 365, 186 P.3d 1117, 1130, 1131.

Wash.App.2008. Adopted in case cit. in sup., com. (d) quot. in sup. Former employee of school district sued former supervisor, alleging, among other things, that he verbally abused her daily by screaming at her and criticizing her work in an unprofessional manner, pointedly telling “blonde jokes,” and ridiculing her with remarks about her personal life. The trial court granted summary judgment for defendant. Affirming in part, this court held, inter alia, that plaintiff failed to state a claim for intentional infliction of emotional distress. The court rejected plaintiff's argument that the totality of defendant's misconduct over two years was enough to establish this claim, concluding that, at worst, plaintiff's allegations fell within the category of insults, indignities, threats, annoyances, petty oppressions, or other trivial harms that were not encompassed by the tort. Strong v. Terrell, 147 Wash.App. 376, 195 P.3d 977, 981, 982.

Wash.App.2007. Com. (h) cit. in case quot. in sup. Sisters sued their stepfather and church for, in part, intentional infliction of emotional distress (IIED), alleging that they had reported stepfather's sexual abuse to church bishops who had failed to contact state authorities. The trial court entered judgment on a jury verdict against defendants. Affirming as to the IIED claim, this court held that the trial court correctly allowed the question of whether church's conduct could reasonably be regarded as extreme and outrageous to go to the jury. The court pointed to evidence that a church bishop not only did not report the abuse but also effectively silenced the older sister by advising

her that, if the abuse were reported, she would be the cause of her family's breakup and would be at the center of church gossip. Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 141 Wash.App. 407, 167 P.3d 1193, 1204.

Wash.App.2006. Adopted in case cit. in disc., subsec. (1) quot. in disc., com. (d) quot. in sup. and quot. and adopted in case quot. in sup., com. (g) cit. in sup., com. (h) quot. in sup., com. (*l*) cit. in disc., illus. 14 quot. in sup. Bank teller's husband and her estate sued bank for intentional infliction of emotional distress and other claims, alleging that bank caused teller to commit suicide by accusing her of theft and placing her on administrative leave during an investigation over missing funds. The trial court granted summary judgment for bank. Affirming, this court held that there was no evidence that bank falsely accused teller, willfully withheld exonerating information, or did anything more than it was legally entitled to do; thus plaintiffs' allegations were not sufficient to show that bank engaged in extreme and outrageous conduct. Cook v. Shoshone First Bank, 2006 WY 13, 126 P.3d 886, 891, 892, 895.

Wash.App.2006. Com. (j) quot. in case quot. in sup. Pet owner brought suit against minors and their parents to recover damages for the death of her cat, which the minors set on fire using gasoline. The trial court entered a default judgment against defendants, awarding plaintiff a $5,000 general damages award for emotional distress, but dismissed plaintiff's claim for the tort of outrage. Affirming, this court held, inter alia, that the trial court did not err in dismissing the outrage claim, since plaintiff failed to establish that she suffered severe emotional distress or that defendants intended to cause, rather than negligently brought about, that distress. Womack v. Von Rardon, 133 Wash.App. 254, 135 P.3d 542, 545.

Wash.App.2006. Com. (d) quot. in case quot. in sup. School-district employees sued their supervisor, among others, asserting, in part, various tort claims stemming from supervisor's alleged bullying and harassment. The trial court dismissed plaintiffs' claims with prejudice. Affirming, this court held, inter alia, that because defendant's conduct, which, at worst, fell within the category of nonactionable insults, indignities, and petty oppressions, occurred within the scope of his employment so that the school district was required to defend him, plaintiffs' failure to give the district any notice of their complaint barred their case. The court further held that none of the allegations rose to the level of the intentional tort of outrage. Wright v. Terrell, 135 Wash.App. 722, 145 P.3d 1230, 1239.

Wash.App.2004. Cit. in disc. Guardian ad litem for child who was struck by a car settled negligence suit against insured city regarding curb extensions, but insurer missed deadline for payment of funds under settlement agreement. Guardian sued insurer for fraudulent misrepresentation and intentional infliction of emotional distress, inter alia. Trial court dismissed suit. This court reversed in part and remanded, holding that plaintiffs' intentional-tort claims of fraudulent misrepresentation and infliction of emotional distress were not barred, since intentional-tort claims did not require preexisting duty. Thus, third-party claimants could bring tort claims against insurer despite lack of duty, as this would not interfere with insurer's good-faith duties to

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insured and would not place conflicting duties upon insurer. Dussault ex rel. Walker-Van Buren v. American Intern. Group, Inc., 123 Wash.App. 863, 99 P.3d 1256, 1260.

Wash.App.2004. Cit. in case cit. in disc. A gay woman sued her former domestic partner, the biological mother of a minor child, seeking to establish plaintiff's co-parentage of child, who was conceived by artificial insemination during their 12-year relationship. Trial court ruled that no common-law claim for de facto parentage existed in Washington, since common-law actions available in the parent-child area were very limited. This court affirmed in part, reversed in part, and remanded, holding that a common-law claim of de facto or psychological parentage existed in Washington such that plaintiff could petition for shared parentage or visitation with the child. The court noted that common law was creation of the courts rather than of legislatures, and it listed Washington's adoption of the tort of outrage as an example. In re Parentage of L.B., 121 Wash.App. 460, 89 P.3d 271, 279.

Wash.App.2002. Com. (d) quot. in case quot. in disc. After protestors occupied top two floors of a building for a week and police ordered utility services to building terminated, a business tenant on first floor suffered irreparable losses and ultimately closed. Tenant sued city, former mayor, former police chief, and utility companies for tort of outrage, inter alia. Trial court granted defendants summary judgment. This court affirmed, holding, inter alia, that utilities behaved properly in following police order to terminate utilities, and police decision to follow standard procedures in dealing with building takeover situations by shutting off utilities and waiting protestors out, rather than forcibly evicting them in the face of a high risk of danger to life and property, was not outrageous. Citoli v. City of Seattle, 115 Wash.App. 459, 494, 61 P.3d 1165, 1184.

Wash.App.2001. Cit. in case quot. in disc. Employee sued former employer for sexual harassment and intentional infliction of emotional distress, among other claims, alleging that employer stared at plaintiff, fondled her, and made inappropriate sexual comments. Trial court granted employer summary judgment. This court affirmed in part, holding, inter alia, that although employer's actions were outrageous and inappropriate, plaintiff failed to establish that her emotional distress was manifested by objective symptoms. Although plaintiff claimed that she suffered from nightmares, sleep disorders, intrusive memories, and fear and anger, there was no objective evidence regarding the severity of the distress and the causal link between employer's actions and plaintiff's emotional reactions. Haubry v. Snow, 106 Wash.App. 666, 680, 31 P.3d 1186, 1194.

Wash.App.2001. Com. (d) quot. in case quot. in disc. and in sup., coms. (e)-(g) cit. in case quot. in disc. Following the dismissal of murder charges against physician, physician sued state and county for, in part, the tort of outrage. The trial court granted state's motion for summary judgment. Affirming, this court held, inter alia, that state's conduct in failing to retain the results of inconclusive drug tests in the murder investigation, failing to initially control for another drug during the testing, and secretly testing the victim's blood was not sufficiently extreme to support a claim for outrage. Stansfield v. Douglas County, 27 P.3d 205, 214, 107 Wash.App. 1, 15, 16.

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Wash.App.2000. Com. (d) quot. in case quot. in sup. Estate and survivors of suspect who was fatally shot by police during a domestic-violence incident sued city and two individual police officers, asserting, in part, a claim for the tort of outrage. Affirming the trial court's summary dismissal of the outrage claim, this court held, inter alia, that the officers' use of deadly force against the suspect, who pointed a shotgun at one officer's chest and refused to put it down, did not constitute outrageous conduct against the suspect's family members, who were victims of the felony that the officers were investigating. Estate of Lee ex rel. Lee v. Spokane, 101 Wash.App. 158, 2 P.3d 979, 990.

Wash.App.2000. Com. (d) quot. in case quot. in disc. Supermarket worker who claimed that she was retaliated against and subjected to a hostile work environment when she complained about unsanitary food-handling procedures sued supermarket for, inter alia, intentional infliction of emotional distress and defamation. The trial court entered judgment for plaintiff. Reversing and remanding, this court held, in part, that name-calling and other acts of rudeness by plaintiff's co-workers did not allow for recovery under an intentional-infliction-of-emotional-distress theory, since such behavior could not be considered outrageous, and that, to the extent that vulgarities used by co-workers to describe plaintiff were capable of defamatory meaning, plaintiff had failed to establish damages. Robel v. Roundup Corp., 103 Wash.App. 75, 10 P.3d 1104, 1112, affirmed in part, reversed in part 148 Wash.2d 35, 59 P.3d 611 (2000). See above case.

Wash.App.1999. Com. (d) quot. in case quot. in sup. County resident who was injured in attack by neighbors' dogs sued county for, in part, tort of outrage. Affirming in part the trial court's grant of summary judgment for county, this court held, inter alia, that although issue existed as to whether county was under a statutory duty to confiscate surviving dog as a "dangerous dog," its failure to do so was not extreme and outrageous conduct necessary to state a claim for tort of outrage. King v. Hutson, 97 Wash.App. 590, 987 P.2d 655, 659.

Wash.App.1999. Cit. in disc., quot. in case quot. in disc. Former employee sued former employer for, inter alia, intentional infliction of emotional distress, alleging that she was compelled to resign because of her supervisor's abusive treatment. The trial court entered summary judgment for defendant. Affirming, this court held, in part, that supervisor's insults, threats, and rude behavior did not rise to the level of outrageous conduct sufficient to support recovery for the intentional infliction of emotional distress. Snyder v. Medical Service Corp. of Eastern Wash., 98 Wash.App. 315, 988 P.2d 1023, 1027, affirmed 145 Wash.2d 233, 35 P.3d 1158 (2001). See above case.

Wash.App.1998. Cit. in ftn. Individual who was terminated shortly after informing her employer that she had been diagnosed with cancer brought disability discrimination action against former employer. Plaintiff also asserted claims for both negligent and intentional infliction of emotional distress. The trial court entered summary judgment for defendant. Reversing and remanding for plaintiff to proceed with her disability discrimination claim, this court held that the "small employer" exception to the Washington Law Against Discrimination was inapplicable, that defendant's conduct was not negligent, and that, because the claim for intentional infliction of emotional distress duplicated the claim for discrimination, and therefore plaintiff would have the

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chance to raise her claim of emotional distress in her discrimination case, there was no need for the court to make the initial determination as to whether defendant's behavior was so extreme as to support recovery under the theory of outrage. Anaya v. Graham, 89 Wash.App. 588, 950 P.2d 16, 20.

Wash.App.1997. Com. (b) quot. in sup. and cit. in ftn., com. (j) quot. in disc. and in sup. and cit. in ftn., com. (k) quot. in ftn. A community activist who had accused a company of erecting dozens of illegal billboards sued individuals who allegedly made anonymous threatening telephone calls to him at his home. The trial court granted summary judgment to defendants. Affirming in part and reversing in part, this court held, inter alia, that plaintiff's claim for negligent infliction of emotional distress was properly dismissed because plaintiff failed to show that his distress was manifested by objective symptomatology, i.e., physical symptoms evidencing and resulting from the emotional distress. A question of material fact as to the severity of the emotional distress suffered by plaintiff, however, precluded summary judgment on plaintiff's claim for the tort of outrage or intentional infliction of emotional distress. Brower v. Ackerley, 88 Wash.App. 87, 96-98, 100, 102, 943 P.2d 1141, 1146-1148.

Wash.App.1996. Cit. in headnote, cit. but dist. Insureds whose home was destroyed by fire sued insurer for, inter alia, intentional infliction of emotional distress in connection with the parties' protracted dispute over the nature and extent of insureds' coverage. The trial court granted insurer's motion for summary judgment. Affirming, this court held that insurer's behavior throughout the dispute was not extreme and outrageous. Dombrosky v. Farmers Ins. Co. of Wash., 84 Wash.App. 245, 928 P.2d 1127, 1130, 1137.

Wash.App.1995. Cit. in case quot. in sup. Plaintiff sued county and law enforcement officials for, inter alia, outrage, arising from the investigation of a fatal shooting for which plaintiff was first convicted and then acquitted on retrial. Reversing the trial court's dismissal of the claim and remanding, this court held that, under Washington law, plaintiff's claim for outrage could not be dismissed on the ground that plaintiff's conviction established probable cause for defendants' actions in arresting and prosecuting plaintiff, since lack of probable cause was not an element of plaintiff's claim, nor did probable cause establish a complete defense. Fondren v. Klickitat County, 79 Wash.App. 850, 861, 905 P.2d 928, 934.

Wash.App.1994. Com. (d) quot. generally in case quot. in sup., coms. quot. in case quot. in sup. Widower with posttraumatic stress disorder linked to police interrogation after his wife's murder sued city and interrogating officer for outrage and negligent infliction of emotional distress, claiming that defendants failed to investigate properly resulting in their premature and overly aggressive interrogation of him. Opposing defendants' summary judgment motion, plaintiff introduced former police chief's affidavit, which said that defendants' investigation and treatment of plaintiff were so lacking in expected professional standard of care as to be callously outrageous. The trial court granted defendants' motion. Affirming, this court held that plaintiff's interrogation was insulting to plaintiff and unbecoming to officer but did not rise to the level of outrage, since officer was investigating serious crime and plaintiff was possible suspect. It also held

that defendants owed plaintiff no duty to use reasonable care to avoid inadvertent infliction of emotional distress. Keates v. City of Vancouver, 73 Wash.App. 257, 869 P.2d 88, 91, 93.

Wash.App.1992. Com. (d) quot. in case cit. in disc. A father sued a state and several caseworkers for, inter alia, outrage and negligent infliction of emotional distress, alleging that, after his former wife made false accusations that he was sexually abusing their children, the defendants denied him visitation rights and the caseworkers failed to properly investigate the charges. The trial court granted summary judgment for the defendants. Affirming in part, this court held that the claim of outrage was properly dismissed because, even if it were shown that the caseworkers were grossly negligent in choosing to believe the wife's allegations and in deciding not to thoroughly investigate the plaintiff's claims, their conduct could not be characterized as going beyond all possible bounds of decency. The court stated that the caseworkers' conduct could not be said to have been outrageous, particularly since the caseworkers were supported in part by the expert opinions of therapists. Waller v. State, 64 Wash.2d 318, 824 P.2d 1225, 1235.

Wash.App.1990. Quot. in disc. The sister of a shoplifter sued a department store for malicious prosecution, inter alia, arising from an incident in which the plaintiff was falsely charged with shoplifting done by her sister. The trial court granted summary judgment to the defendant. This court reversed and remanded, holding that factual issues remained, including whether the defendant had a duty to inform the prosecutor when it realized that the plaintiff was falsely charged by misidentification, and whether the defendant had lost control of the case once the prosecution had been initiated. It stated that not only affirmative conduct would sustain a malicious prosecution action, since tortious conduct can arise from a failure to act when there is a duty to act affirmatively. The court also determined that the failure to call the prosecutor before trial was insufficient to support a claim for the tort of outrage. The dissent argued that active participation was needed to find malicious prosecution, and additionally that there was no showing of malice on the part of the department store. Banks v. Nordstrom, Inc., 57 Wash.App. 251, 787 P.2d 953, 960, review denied 115 Wash.2d 1008, 797 P.2d 511 (1990).

Wash.App.1990. Com. (d) quot. in case quot. in sup. and cit. in ftn. A supervisor who was demoted to a nonsupervisory position following his company's investigation of complaints of sexual harassment sued the company, the employees who accused him of harassment, and the employees who investigated the complaints, for outrage, inter alia. The trial court granted the defendants summary judgment. This court affirmed, holding that the defendants' conduct was not so outrageous in character or extreme in degree as to be utterly intolerable in a civilized community. The court stated that the plaintiff had also failed to allege facts to satisfy the element of severe or extreme emotional distress, noting that the symptoms alleged by the plaintiff: depression; loss of appetite, libido, and energy; sleeplessness; and increased headaches were not signs of distress above that level that was a fact of life. Lawson v. Boeing Co., 58 Wash.App. 261, 792 P.2d 545, 551.

Wash.App.1990. Quot. in ftn. Partners in a real estate company sued their copartner for fraud and breach of fiduciary duty arising from the copartner's creation of a second deed of trust on a property owned by the partnership. The trial court entered judgment on a jury verdict for the partners

providing awards for economic damages and emotional distress. This court affirmed in part, but reversed as to the emotional distress damages awarded below. The court, inter alia, rejected the parties' contention that emotional distress damages are recoverable for any intentional tort, ruling that a plaintiff must show severe emotional distress in order to recover. It noted that the language of a prior supreme court case stating that a plaintiff could recover damages for emotional distress upon a showing of actual anguish or emotional distress was not instructive as to the quantum of evidence required to show emotional distress. The court concluded that the partners' statements that they were "distressed and very hurt" and "upset and incensed" did not rise to the requisite level of severe emotional distress. Nord v. Shoreline Sav. Ass'n, 57 Wash.App. 151, 787 P.2d 66, 72, decision reversed 116 Wash.2d 477, 805 P.2d 800 (1991). See above case.

Wash.App.1989. Com. (d) quot. in case cit. in disc. After a public official sued for defamation and outrage a publisher and the newspaper columnist who wrote a satirical article, using disreputable fictional characters, about the official's involvement in a controversy over hiring private detectives to follow one of his assistants, the court granted the defendants' motion for summary judgment. The court stated that, although humorous and satirical statements that implied defamatory facts could be actionable, the article's unique format, humorous tone, and narrative style readily distinguished it from more general news articles and indicated that the column did not concern actual events. The court also held that the plaintiff did not make an evidentiary showing sufficient to maintain his outrage claim. Hoppe v. Hearst Corp., 53 Wash.App. 668, 770 P.2d 203, 209.

Wash.App.1987. Quot. in sup., com. (l) quot. in sup. Two men who formerly lived with a hospital patient demanded that he be reconnected to a respirator that had been removed without his consent. The respirator was reconnected and the patient recovered. The men later sued the hospital for outrage, and the trial court granted the defendant's motion for summary judgment on the ground that the plaintiffs lacked standing to assert a claim for emotional distress because their mother's marriage to the patient had been invalidated, and they had not lived with him for many years. Affirming, this court held, inter alia, that the defendant could be held liable for intentionally or recklessly causing severe emotional distress only to a member of the patient's immediate family, and that the class of immediate family members consisted of those who would be permitted to bring wrongful death actions, which in this state would be spouses, children, stepchildren, parents, and siblings, but not close associates. Strickland v. Deaconess Hosp., 47 Wash.App. 262, 735 P.2d 74, 77.

Wash.App.1985. Com. (d) quot. in case quot. in sup. After being fired for allegedly harassing female co-workers, the plaintiff brought an action for the tort of outrage. The trial court granted the defendant summary judgment. Affirming, this court held that the defendant's conduct was not so extreme and outrageous to be considered intolerable in a civilized community. Hurst v. Farmer, 40 Wash.App. 116, 697 P.2d 280, 282.

Wash.App.1984. Com. (d) quot. in case cit. in sup. Mental health patient who was involuntarily committed sued the county, a mental health professional, and a police officer, alleging, inter alia, trespass, assault, battery, false imprisonment, and outrage. Plaintiff appealed the trial court's grant

of partial summary judgment for defendants. This court affirmed as to the individual defendants, but reversed and remanded as to the county. The court found that under state law the individuals were personally immune from liability. It noted that although in general the master could not be liable if the servant was not liable, this rule did not apply if the nonliability of the servant was based upon personal immunity. It concluded that plaintiff was entitled to assert his state law tort claims against the county. Regarding the cause of action for outrage, the court upheld summary judgment for defendants, holding that even if the mental health professional was negligent in performing his statutory duties, reasonable minds could not conclude that his conduct was extreme and outrageous. Spencer v. King County, 39 Wash.App. 201, 692 P.2d 874, 880.

Wash.App.1982. Quot. in part in sup., com. (d) quot. in case quot. in sup., coms. (e), (f) and (g) cit. in case quot. in sup. The plaintiff brought an action against his former employer, the owner of a supermarket, alleging that the defendant had requested him to find purchasers for the company's stock. After he had begun negotiations with several prospective buyers, the defendant abruptly terminated the plaintiff and announced that the company and its stock were not for sale. The plaintiff brought this action claiming, inter alia, intentional infliction of emotional distress. The trial court dismissed the complaint and this court affirmed, holding that the plaintiff's allegations were insufficient to support his claim. Springer v. Rosauer, 31 Wash.App. 418, 641 P.2d 1216, 1220.

Wash.App.1982. Cit. in sup., cit. in headnotes, coms. (b), (d), (g), and (j) cit. in sup. and cit. in headnotes. The plaintiff attempted to gain entrance into his son's apartment through the landlady, one of the defendants, after receiving a call from his son complaining that he had fallen, wrenched his back, and needed assistance. Although the plaintiff told the landlady that he had a heart condition and should not get excited, she denied entry to the plaintiff because the son had previously expressly instructed her that she was not to enter his apartment without his written consent. The plaintiff allegedly suffered an anxiety attack, mental and emotional distress, and was forced to retire from his job. He sought recovery under the tort of outrage. The jury was instructed that the plaintiff had the burden of proving emotional distress so extreme or so severe that no reasonable man could be expected to endure it. A verdict was returned in favor of the defendants. On appeal, the plaintiff claimed that the instruction was an erroneous statement of the law. Affirming the verdict, the court found that the instruction was in accord with the Restatement (Second) of Torts and the Comments to section 46 thereof, which defined severe emotional distress. Further, it was not error to instruct the jury that the conduct at issue had to go beyond all possible bounds of decency. Woodward v. Steele, 32 Wash.App. 152, 646 P.2d 167, 167-170.

Wash.App.1981. Cit. and quot. in sup. and fol.; coms. (e), (f), (g) and (h) cit. in disc. Purchasers of a home brought an action against the vendors who retained possession of the home past the date provided for in a rental agreement with the purchasers. The purchasers sought damages for the intentional infliction of emotional distress and outrage. The trial court entered judgment for outrageous conduct against the vendors and the vendors appealed. The court held that the purchasers' action was not barred by res judicata following the denial of an unlawful detainer action by the purchasers, since the purchasers' separate cause of action did not specifically relate

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to possession or related damages, but was much broader and included issues relating to breach of contract, business interruption, and intentional infliction of emotional distress. The court also held that the evidence that the purchasers were entitled to possession of the home no later than the date set forth under the rental agreement with the vendors, under which the vendors were allowed to remain in possession from the date of closing to that date, that the vendors knew that the purchasers had rented their other residence and that their intentional delay in allowing the purchasers to take possession of the home would result in the purchasers being unable to move, and that as a result the purchasers were unable to enjoy their new home for the holiday season, supported the finding that the vendors' conduct was outrageous beyond the bounds of decency and that their actions resulted in damage to the purchasers. Accordingly, the court found that the purchasers were entitled to recover for intentional infliction of emotional distress by outrageous conduct. Phillips v. Hardwick, 29 Wash.App. 382, 628 P.2d 506, 510.

Wash.App.1980. Com. (k) quot. in sup. The plaintiff brought this action against her former husband and his second wife individually and as a marital community, seeking damages for allegedly outrageous conduct and intentional and negligent infliction of mental distress. The plaintiff alleged that the defendant wife had made over 1000 harassing telephone calls which caused the plaintiff to become nervous and lose weight. The trial court dismissed the complaint against the former husband and the marital community but awarded damages against the defendant wife. The plaintiff appealed from the dismissals and the second wife cross-appealed from the damage award. This court held that the husband could not be held personally liable because there was no evidence that he and his wife had acted as joint tortfeasors nor that he was aware that his wife was making the calls. The court held that the marital community could not be held liable because the wife had acted for her own benefit and not for the benefit of the community. The court held that substantial evidence existed to support the award of damages. The nervousness and weight loss were valid indicators from which the jury could conclude that the plaintiff had suffered an extreme emotional disturbance. The lower court's decisions were affirmed. Farman v. Farman, 25 Wash.App. 896, 611 P.2d 1314, 1319.

Wash.App.1979. Subsecs. (1) and (2) and coms. (d), (f), (g), (h), (i), and (j) cit. in sup.; com. (e) illus. 7 quot. in sup. Plaintiff debtor brought action against defendant creditor, alleging that the creditor's attempted repossession of his automobile constituted the tort of outrage. The lower court entered judgment for the debtor, and the creditor appealed denial of his motion to dismiss. This court held that the creditor's conduct was to be viewed in light of a proper exercise of a right to repossession, and that in view of such lawful repossession, the measures used by the creditor were not clearly had obviously excessive. In addition, the court held that defendant's notice of plaintiff's diabetic condition was not sufficient awareness to render defendant's conduct outrageous because of the other party's known susceptibility to emotional distress; thus defendant's conduct could not be viewed as outrageous because it inflicted severe emotional distress on the plaintiff recklessly or intentionally. Accordingly, the court reversed and ruled that the lower court had erred in denying defendant's motion to dismiss. Jackson v. Peoples Federal Credit Union, 25 Wash.App. 81, 604 P.2d 1025, 1027-1030.

Wash.App.1979. Cit. in sup. and coms. cit. in sup. Parents brought action against insurer seeking, inter alia, damages for intentional and outrageous conduct in cancelling a policy covering losses due to injury or sickness incurred by the plaintiffs' daughter. The trial court denied a motion to dismiss as to the claimed tort of outrage, and the parties appealed. The court affirmed the denial of the motion, holding, inter alia, that the trial judge was correct in his conclusion that, in this case, the question of whether the defendants' conduct could reasonably be regarded as so extreme and outrageous as to permit recovery should have been resolved after the presentation of the plaintiffs' case at trial, since the nature of an outrage claim is such that the trial judge should have the opportunity to hear testimony in open court before resolving the issue as a matter of law. Rounds v. Union Bankers Ins. Co., 22 Wash.App. 613, 590 P.2d 1286, 1288.

Wash.App.1977. Com. (h) cit. in disc. The plaintiff was injured when the car in which she was a passenger was struck by a vehicle driven by the defendant driver. The injuries sustained by the plaintiff were sufficient to temporarily prevent her from working. She depended upon her employment to support herself and her parents. The defendant driver's insurance company offered the plaintiff wages for the period of unemployment. The plaintiff sought an additional amount and did not accept the amount that the insurance company sent her in advance. The company replied and stated that they would not longer make advance payments for loss of wages, but that they would be willing to discuss the final settlement. Thereafter, the company refused to advance her any monies for lost wages. The plaintiff brought an action against the defendant driver for damages for personal injuries and mental distress suffered as a result of the collision, against the insurance company for mental distress and outrage caused by its failure to advance payment for lost wages, and against the insurance company for an unfair and deceptive act or practice in attempting to deduct taxes and other deductions from her wage compensation and in attempting to force her into an early settlement. The trial court granted the insurance company's motion to dismiss the plaintiff's claims against it on the basis that they did not state a claim. On appeal, the court found that as the insurance company had no contractual obligation to the plaintiff, it was under no duty to the plaintiff and had not breached any duty when, following the plaintiff's rejection of the company's offer of payment for lost wages, the company responded that it would not renew its offer, but would negotiate for full and final settlement when the plaintiff's condition had stabilized. The court held that the alleged acts of the company did not constitute aggravated conduct necessary for an action for outrage, and thus any emotional stress or anguish resulting from the company's acts was not compensable under an outrage theory. The court also held that an action for an unfair and deceptive act or practice must involve a consumer transaction in which there is an actual sale of goods or services involving a buyer and a seller and that the plaintiff's dealings with the insurance company was not such a transaction. Therefore, the decision of the lower court was affirmed. Bowe v. Eaton, 17 Wash.App. 840, 565 P.2d 826, 830.

Wash.App.1976. Cit. in ftn. in disc. Suit was brought against a corporation alleging that pollutants from the defendant's factory had caused damage to the plaintiff's farm and to plaintiffs, themselves. After the corporation had admitted liability, the court entered judgment awarding damages to the plaintiffs. On appeal from the damages awarded, the court affirmed, holding the plaintiffs' testimony regarding irritation, annoyance, and anguish which they suffered from the invasion of

chloride from the defendant's factory onto their property was sufficient to support an award of damages for these types of suffering. Furthermore, while these damages would not have been proper, absent an actual invasion of the plaintiff's person or property, the court's affirmance of the plaintiffs' award for the loss of use of their property acted to support the award for the intangible injuries listed above. Freeman v. Intalico Aluminum Corporation, 15 Wash.App. 677, 552 P.2d 214, 218.

Wash.App.1971. Cit. in sup. In November, 1963, the plaintiff advised the defendant finance company that she was not agreeable to her husband's mortgaging any personalty as security for his loans; nonetheless, the defendant'h assistant manager notarized both her husband's and the plaintiff's signatures on a subsequent chattel mortgage without the plaintiff's knowledge. After the plaintiff's divorce in December, 1964, and after default, the defendant sought to foreclose the chattel mortgage by notice and sale. The court held that where the plaintiff served the defendant with a court order restraining it from removing any of the personalty from the plaintiff's home, where the defendant disregarded that order, and where there was substantial evidence in the record to support the trial court's conclusion of emotional distress caused by the defendant's conduct in the foreclosure, the plaintiff could recover for the resulting humiliation and embarrassment. Theis v. Federal Finance Co., 4 Wash.App. 146, 480 P.2d 244, 247.

W.Va.

W.Va.2020. Com. (d) quot. in case quot. in sup. After a jury found customer not guilty on charges of criminal harassment related to incidents in which he admittedly used inappropriate and aggressive language toward manager of a restaurant, customer filed claims sounding in outrage and intentional infliction of emotional distress against manager and restaurant. The trial court granted defendants' motion for summary judgment on customer's claims for outrage and intentional infliction of emotional distress. Affirming, this court held that customer's allegations fell far short of the required showing that a plaintiff had to make in order to state a claim for intentional or reckless infliction of emotional distress under Restatement Second of Torts § 46. The court reasoned that seeking the assistance of law enforcement and the criminal-justice system was not extreme and outrageous conduct as a matter of law. Zsigray v. Langman, 842 S.E.2d 716, 727.

W.Va.2015. Subsec. (1) cit. in sup., cit. in cases cit. and quot. in sup.; com. (d) cit. and quot. in sup., cit. and quot. in cases cit. in sup.; com. (j) quot. in case cit. in sup. Landowner filed a claim for, inter alia, outrageous conduct against contractor, alleging that despite the remediation work completed by replacement workers that she had hired, the home was still not safe to live in because of the defects caused by defendant. The trial court entered judgment on a jury verdict for plaintiff on her negligence claim. This court affirmed, holding that the trial court did not err in including dicta in the jury instruction for plaintiff's outrageous-conduct claim. The court explained that the instruction, which was based on Restatement Second of Torts § 46, Comment *d*, was a correct recitation of the law and was warranted, even if it was not limited to a bare recitation of the elements of the claim. Sneberger v. Morrison, 235 W.Va. 654, 672, 673, 776 S.E.2d 156, 174, 175.

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W.Va.2007. Com. (d) cit. in case quot. in diss. op. Hotel employee who allegedly was constructively discharged after disobeying hotel management's instruction to have a union organizer arrested, and another employee who allegedly was fired because management became convinced that she assisted unionizing activities sued hotel and management members for wrongful discharge. The trial court dismissed. Affirming, this court held that plaintiffs' claim was preempted by the National Labor Relations Act. The dissent argued that federal preemption was not implicated because plaintiffs had legal remedies under West Virginia law, including a claim for the tort of outrage, since the allegation that management conspired to have a person wrongfully arrested and then retaliated against an employee for refusing to be a part of that conspiracy certainly qualified for the tort of outrage. Lontz v. Tharp, 220 W.Va. 282, 647 S.E.2d 718, 725.

W.Va.2003. Com. (d) quot. in case quot. in sup. Customer who had brought underlying slip-and-fall case against store filed this separate action against individual who had testified as a witness for the defense in the underlying case, alleging that defendant had lied on the stand and, in so doing, had committed, inter alia, the tort of outrage. Affirming the trial court's dismissal of the complaint, this court held, in part, that plaintiff failed to state a claim for the tort of outrage because defendant's conduct was not so outrageous as to exceed the bounds of decency. Williamson v. Harden, 214 W.Va. 77, 585 S.E.2d 369, 373.

W.Va.2001. Subsec. (1) quot. in case quot. in sup. Former employee sued employer for retaliatory constructive discharge and intentional infliction of emotional distress, alleging that, after she filed wage suit against employer, she was transferred to another department where she had to wear safety equipment, and other employees would not associate with her. Trial court granted employer judgment as a matter of law on emotional-distress claim. This court affirmed, holding, in part, that, while plaintiff may have endured certain amount of emotional discomfort due to job transfer, her symptoms were not severe, and she did not prove that employer's conduct was extreme and outrageous where she continued to receive salary increases and was praised for community service work. Love v. Georgia-Pacific Corp., 209 W.Va. 515, 550 S.E.2d 51, 61.

W.Va.2000. Com. (i) quot. in case quot. in conc. op. Trial court entered declaratory judgment order, determining that exclusions contained in construction company's commercial general liability insurance policies precluded coverage for a contract claim asserted against construction company by homeowners, but that such exclusions did not bar recovery for homeowners' tort claim for intentional infliction of emotional distress. This court denied construction company's request for a writ of prohibition to prevent trial court from enforcing the declaratory judgment order, concluding that trial court had jurisdiction and did not exceed its powers by rendering its declaratory judgment. Concurring opinion asserted that the issue of whether there was coverage for homeowners' emotional-distress claim should be a fact question for a jury, because if the contractor acted recklessly in inflicting the emotional distress, then the "intentional acts" exclusion would not apply. State ex rel. Davidson v. Hoke, 207 W.Va. 332, 532 S.E.2d 50, 59.

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W.Va.1999. Com. (d) cit. in headnote and quot. in case quot. in disc. A doctor sued attorneys who represented a patient in a medical-malpractice action against the doctor, alleging malicious prosecution and the tort of outrage. In the underlying suit, a jury found for the doctor and the judgment was affirmed on appeal. Answering certified questions from the trial court, this court held, inter alia, that both of plaintiff's claims were barred by the statute of limitations. The court determined that any outrageous conduct occurred prior to or on the date of the ultimate termination in the trial court. The attorneys' act of appealing the adverse trial court judgment on behalf of their clients after that date did not constitute the kind of extreme and outrageous conduct contemplated in a tort-of-outrage claim. McCammon, M.D., Facog v. Oldaker, 205 W.Va. 24, 516 S.E.2d 38, 46.

W.Va.1998. Cit. in headnotes; subsec. (1) cit. in headnote, quot. in case quot. in disc., and cit. in sup.; com. (d) quot. in case quot. in sup.; com. (e) cit. in sup.; coms. (f), (h), and (i) quot. in sup. Former employee who alleged that he was constructively discharged sued his former employer in federal court, claiming that the termination was caused by the intentional or reckless infliction of emotional distress by plaintiff's supervisor. On certification of questions from the federal district court, this court held, inter alia, that, for plaintiff to prevail on a claim for intentional or reckless infliction of emotional distress, plaintiff must show that defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; that defendant acted with the intent to inflict emotional distress or acted recklessly when it was certain or substantially certain that emotional distress would result from his conduct; that defendant's actions caused plaintiff to suffer emotional distress; and that the emotional distress suffered by plaintiff was so severe that no reasonable person could be expected to endure it. Travis v. Alcon Laboratories, Inc., 202 W.Va. 369, 504 S.E.2d 419, 419, 420, 425-430.

W.Va.1997. Com.(d) quot. in case quot. in sup., com. (g) quot. in disc. Employee sued for defamation/libel, invasion of privacy, and intentional infliction of emotional distress arising from his employer's response to union complaints on sick pay. The union had grieved the policy as it related to part-time workers. The employer responded in a letter, posted conspicuously in the business premises, complaining that certain employees, including plaintiff, were “habitual” users of sick pay and would be investigated and possibly disciplined. The trial court ruled that the claims were preempted by the Labor Management Relations Act of 1947. This court reversed, finding nothing in the elements of the wrongs claimed that required interpretation of a collective-bargaining agreement. The offenses were purely matters of state law. Greenfield v. Schmidt Baking Co., Inc., 199 W.Va. 447, 485 S.E.2d 391, 405.

W.Va.1997. Cit. in ftn., quot. in case quot. in disc. A discharged coal-mine foreman sued his former employer, the employer's vice president, and the mine superintendent, alleging that his firing constituted unlawful discrimination against a handicapped person, and that the manner of discharge constituted the tort of outrage. Plaintiff argued that it was outrageous for the employer to include a 16-year employee who was going blind and was on a salary continuance plan in a reduction in force. The trial court granted defendants summary judgment. This court affirmed, holding, inter alia, that plaintiff had not identified any facts suggesting that the employer's conduct was outrageous. The court concluded that plaintiff was essentially asserting a wrongful-discharge

claim rather than a claim for the tort of outrage. When he was fired, plaintiff was not singled out, embarrassed, threatened, verbally abused, ridiculed, or humiliated. Hosaflook v. Consolidation Coal Co., 201 W.Va. 325, 497 S.E.2d 174, 184.

W.Va.1997. Cit. in headnote, cit. in disc., com. (d) quot. in sup. and quot. in ftn., com. (j) quot. in disc. and quot. in cases quot. in disc. Four-year-old child who was shopping with her mother when mother was accused of and detained for shoplifting sued department store in which the incident took place for, inter alia, negligent infliction of emotional distress. The trial court granted store's motion for directed verdict. Affirming, this court held that child could not recover damages for the emotional distress she allegedly sustained as a result of witnessing store's employees verbally abuse her mother, because employees' behavior, while rude, was not sufficiently extreme or outrageous to serve as a basis for recovery. Johnson v. Hills Dept. Stores, Inc., 200 W.Va. 196, 488 S.E.2d 471, 472, 474-476.

W.Va.1997. Coms. (d) and (j) quot. in case quot. in disc. After two people were killed when a tanker truck crashed into their home and exploded, eleven family members who were at the scene of the fire sued the owner of the truck for negligent infliction of emotional distress. The trial court granted defendant summary judgment, holding that the contemporaneous-observation requirement was not met. However, it determined that plaintiffs could have recovered punitive damages because the claims for negligent infliction of emotional distress were not duplicative of the claims asserted in separate wrongful-death suits. This court reversed and remanded, holding, inter alia, that upon appropriate proof, both compensatory and punitive damages may be awarded to a plaintiff in an action for negligent infliction of emotional distress. The court stated that in a claim for negligent infliction of emotional distress, the focus is on the seriousness of the emotional distress suffered by the plaintiff. Stump v. Ashland, Inc., 201 W.Va. 541, 499 S.E.2d 41, 52.

W.Va.1995. Cit. in sup.; subsec. (1) cit. in headnotes and cit. and quot. in sup.; com. (d) quot. in sup.; com. (j) quot. in ftn., quot. in sup., and quot. in cases cit. and quot. in disc. and in sup.; com. (k) quot. in ftn. Customers who were detained as suspected shoplifters by store sued the store, alleging, inter alia, the tort of outrage. The trial court entered judgment on a jury verdict awarding plaintiffs compensatory and punitive damages. Affirming, this court held that direct or supplementary testimony by an expert witness on behalf of plaintiffs to prove causation or severity of emotional distress was not required, since the emotions and the manifestations that plaintiffs experienced as a result were well within the common understanding of the average juror and were properly submitted to the panel; the jury accepted evidence that plaintiffs were publicly accused of criminal wrongdoing, endured a public search, were labeled as thieves, and were ridiculed by onlooking customers. Tanner v. Rite Aid of West Virginia, Inc., 194 W.Va. 643, 461 S.E.2d 149, 150, 156, 157, 159-161.

W.Va.1994. Cit. in headnote and in sup., quot. in case quot. in sup., quot. in case cit. generally in sup., com. (g) quot. in sup. and cit. generally in headnote. Management employee sued his former employer for the tort of outrage and intentional infliction of emotional distress, inter alia, after he was fired due to accusations that he had taken kickbacks, approved payment for employees that

performed no work, and improperly accepted gratuities from a contractor. The trial court entered judgment on jury verdict for plaintiff. Reversing, this court held that the trial court erred in finding that defendant's conduct during its investigation of plaintiff's alleged improprieties rose to the level required for the tort of outrage. The manner by which defendant effected plaintiff's discharge was not outrageous and defendant's motivations for the discharge were proper. Furthermore, a qualified privilege attached to communications made during the investigation and these communications did not proceed beyond the privilege's scope. Dzinglski v. Weirton Steel Corp., 191 W.Va. 278, 445 S.E.2d 219, 220, 224-227.

W.Va.1994. Cit. in headnotes, cit. generally in disc., quot. in conc. op., com. (d) quot. in case quot. in disc., com. (j) quot. in case cit. in disc., coms. (e) and (f) cit. in ftn. to conc. op. Department store fired employees who, in an attempt to prove that price scanner malfunctioned, purchased tricycles ticketed at $20 for the clearly misscanned price of $3. Store also had employees charged with obtaining goods under false pretenses. After the charges were dismissed, employees sued store for, inter alia, intentional infliction of emotional distress. The trial court entered judgment on a jury verdict for plaintiffs but this court reversed, holding that defendant's conduct, while harsh and arguably overzealous, was not so disgusting as to be intolerable in civilized society. The concurrence, leery of overturning a jury verdict, nevertheless agreed with the majority that plaintiffs had not shown defendant's behavior to be abusive or targeted at a group of people known to be particularly prone to emotional distress. Hines v. Hills Dep't Stores, Inc., 193 W.Va. 91, 454 S.E.2d 385, 386, 389, 390, 392.

W.Va.1993. Quot. in ftn., com. (j) cit. in case cit. in disc. and quot. in ftn. Former wife sued ex-husband for intentional infliction of emotional distress, inter alia, as a result of having witnessed defendant battering their son. The trial court granted defendant's motion for summary judgment on the ground that the cause of action was time barred by a one-year statute of limitations. Reversing and remanding, this court held, inter alia, that the claim for emotional distress damages as a result of assault and battery was part of the overall assault and battery claim and was, therefore, subject to the two-year statute of limitations applicable to such claims. Courtney v. Courtney, 190 W.Va. 126, 437 S.E.2d 436, 440.

W.Va.1991. Cit. in sup., subsec. (1) quot. in ftn. and in disc., subsec. (2) cit. in sup. and quot. in ftn., subsec. (2)(b) cit. in ftn., com. (d) quot. in case quot. in sup. and quot. in ftn., com. (j) quot. in case quot. in sup. and cit. in ftn. A woman sued her ex-husband and his mother to recover for injuries she and her minor son suffered as a result of alleged attacks on them by her ex-husband, alleging: that he intentionally assaulted and battered them; that his mother supplied him with drugs and alcohol, knowing that it would make him abusive; and that he intentionally inflicted emotional distress on the child by assaulting the woman in the child's presence. The trial court dismissed the claims against the mother and the claim against the ex-husband of intentional infliction of emotional distress upon the son. Reversing and remanding, this court held, inter alia, that the allegations that the son suffered severe emotional distress because of witnessing his father's attacks on his mother were sufficient to state a cause of action for intentional infliction of emotional distress. The court stated that the son became emotionally disabled in his ability to communicate and socialize with

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his mother and had to seek psychiatric care. Courtney v. Courtney, 186 W.Va. 597, 413 S.E.2d 418, 421-424, appeal after remand 190 W.Va. 126, 437 N.E.2d 436 (1993). See case below.

W.Va.1990. Cit. in sup., com. (d) quot. in case quot. in sup. A decedent's son sued the decedent's mother, the decedent's brother, and the brother's wife for intentional infliction of emotional distress, inter alia, after the defendants did not permit the plaintiff any say in his father's funeral arrangements, despite his appointment as administrator. He also alleged that the defendants conspired to shunt him into an inconspicuous, uncomfortable seat at his father's funeral, his name was not mentioned in the newspaper obituary or at the funeral, he was not allowed to ride with the family at the funeral, and he was not permitted to erect the gravestone he had chosen. After the funeral, he was hindered by the defendants in collecting the estate property. The trial court awarded compensatory damages and punitive damages for willful misconduct. This court reversed and entered final judgment for the defendants, holding that there was no ground for the trial court's finding of emotional distress and explaining that, although this case constituted a serious breach of etiquette and hurt feelings following a death within the family, resort to legal process would do more to aggravate the original slight than to redress it. Keyes v. Keyes, 182 W.Va. 802, 392 S.E.2d 693, 696.

W.Va.1989. Cit. in disc., cit. generally in disc., com. (j) quot. in disc. An employer sued an employee for the return of overpayments made to the employee under the employer's sick leave plan. The employee counterclaimed, alleging intentional infliction of emotional distress by the employer in attempting to recover the overpayments. The trial court entered judgment for the employer. Affirming, this court held, inter alia, that the employer's statements to the employee that the employer was "going to get the overpayments," and that they "could discuss the alternatives" to the employee's refusal to return the overpayments did not constitute intentional infliction of emotional distress. The court said the employer's deduction of collateral source monies, in the form of workers' compensation benefits received by the employee, was in accordance with the company's sick leave plan, and that restitution was a proper remedy. Moreover, the court said the company had used no express or implied threats or other impermissible vehicles of coercion. Kanawha Valley Power Co. v. Justice, 181 W.Va. 509, 383 S.E.2d 313, 317.

W.Va.1989. Cit. in ftn. A wife whose husband was undergoing marriage counseling sued the counselor, inter alia, for malpractice and intentional interference with the marital relationship, alleging that her husband and the defendant had engaged in sexual relations, which led to the dissolution of the marriage. After the suit was removed to federal district court, which dismissed the case, the federal appeals court certified to this court the question whether the plaintiff's suit could be maintained. This court stated that the malpractice theory was unavailable since this claim asserted by the plaintiff, who was not counseled by the defendant, did not rest on any professional relationship with the defendant. The court stated, further, that the plaintiff's claim for intentional interference with the marital relationship was substantially the same as one for alienation of affections, which was barred by a state statute. Weaver v. Union Carbide Corp., 180 W.Va. 556, 378 S.E.2d 105, 108, answer to certified question conformed 873 F.2d 78 (4th Cir.1989).

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W.Va.1986. Com. (d) quot. and cit. in sup. An employee sued her former employer and various others for intentional, reckless, and malicious infliction of emotional distress, among other things, arising from her termination from employment. The trial court granted the employer's motion for directed verdict on all but one count, and the plaintiff appealed. This court affirmed in part, reversed in part, and remanded, holding, inter alia, that the plaintiff's evidence in support of her claim for outrageous conduct was not sufficient to pass the Restatement's litmus test for this tort that the conduct be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. Cook v. Heck's Inc., 176 W.Va. 368, 342 S.E.2d 453, 461.

W.Va.1985. Com. (j) quot. in ftn. The plaintiff sued her insurer in federal district court for intentional infliction of severe emotional distress, defamation, insulting words, improper handling of an insurance claim, and breach of fiduciary relationship when it came to her attention that the insurer's records contained a reference to her supposed Mafia ties. The plaintiff was permitted to go to the jury only on the issue of a violation of the Unfair Trade Practices Act. On appeal, the Court of Appeals certified questions to this court concerning West Virginia law. This court held that the memorandum in the insurer's file that alleged the Mafia connection was not privileged because it was written with such willful, wanton, and reckless disregard of its truth or falsity. There is, of course, no privilege known to the common law of defamation, said the court, that protects the intentional publication of false material. Mustafis v. Erie Ins. Exchange, 174 W.Va. 660, 328 S.E.2d 675, 690.

W.Va.1982. Quot. but dist., com. (d) quot. in ftn. and in disc. but dist., com. (j) quot. in ftn. but dist. The plaintiff, a former bank employee, brought suit against his immediate supervisor and his employer for retaliatory discharge, outrageous conduct, and blackballing and blacklisting; he sought compensatory and punitive damages. The lower court submitted special interrogatories to the jury and it returned verdicts in favor of the plaintiff on all counts. On the defendants' motion for a new trial, the lower court struck the damages for blackballing and blacklisting as not supported by the evidence, struck the compensatory and punitive damages against the supervisor on the retaliatory discharge theory because he did not directly discharge the plaintiff, and also struck the compensatory and punitive damages against the bank of the outrageous conduct claim as not supported by the evidence. All parties appealed. This court affirmed that the evidence did not support the claim of blackballing and blacklisting. The court held that the tort of outrageous conduct was duplicitous of a claim for retaliatory discharge because the damages were essentially the same. The court also held that a claim for punitive damages did not automatically exist in a retaliatory discharge claim because there was a certain openendedness to the damages available under the latter. The court also held that the facts of the instant case did not warrant punitive damages because the defendants' behavior was not sufficiently wanton, willful, or malicious. The court also held that the supervisor was erroneously removed from the retaliatory discharge claim because it was not necessary for him to directly discharge the plaintiff to be liable. The court remanded the case on the issue of damages only, because it recognized that its drastic reduction of the jury verdict on damages substantially affected the plaintiff's right of recovery. Harless v. First Nat. Bank in Fairmont, _ W.Va. ___, 289 S.E.2d 692, 703-705.

W.Va.1978. Cit. in ftn. An action was brought against a bank and its officers by an at-will employee who alleged that he was fired because he attempted to require his employer to operate in accordance with state and federal consumer credit protection laws by reporting apparent violations thereof to a member of the bank's board of directors. The trial court dismissed the complaint and certified its ruling, which this court reversed. The complaint stated a cause of action on the ground: that the dismissal was retaliation for the employee's efforts to require his employer to conform to statutes, and was thus contrary to public policy; and also on the ground that the employer's action surrounding and leading up to the dismissal amounted to intentional, malicious, and outrageous conduct which caused plaintiff severe emotional distress. In a footnote, the court, citing the Restatement, stated that it did not address the question of whether emotional distress arising solely from outrageous conduct, which conduct was not in itself a tort, could be actionable. Harless v. First Nat. Bank in Fairmont, 162 W.Va. 116, 246 S.E.2d 270, 276.

W.Va.App.

W.Va.App.2016. Com. (d) quot. in case quot. in sup. and cit. in ftn. Registered nurse filed, inter alia, a claim for intentional infliction of emotional distress (IIED) against hospital, alleging that hospital wrongfully terminated her for falsely completing documentation in patient files and filed a false complaint about her with the state nursing board. The trial court entered judgment on a jury verdict finding hospital liable for IIED. Reversing and remanding, this court held that the trial court erred in refusing to grant hospital's motion for judgment as a matter of law on nurse's IIED claim. The court reasoned that, even if hospital's discharge of nurse might not have been warranted and might have been a grievous mistake, it could not be said that hospital's actions were so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, as required to state an IIED claim under Restatement Second of Torts § 46. Herbert J. Thomas Memorial Hospital Association v. Nutter, 795 S.E.2d 530, 544.

Wis.

Wis.1994. Com. (j) quot. in ftn. A boy was killed when his bicycle was struck by a car. The boy's estate sued the driver's insurer for the boy's trauma preceding the collision, and the boy's mother sued for negligent infliction of emotional distress arising from her viewing the immediate aftermath of her son's fatal injury. The trial court dismissed both claims and the intermediate appellate court affirmed. This court affirmed the dismissal of the estate's claim, but reversed the dismissal of the mother's claim. The court abandoned the "zone of danger" rule and held, inter alia, that a bystander's claim for negligent infliction of emotional distress was governed by the traditional rules applicable to negligence actions. The court stated that it was borrowing the requirement of severe emotional distress from the tort of intentional infliction of emotional distress, and that, in this case, the mother's severe emotional distress was neither too remote nor too extraordinary. Bowen v. Lumbermens Mut. Cas. Co., 183 Wis.2d 627, 517 N.W.2d 432, 442-443.

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Wis.1991. Cit. in ftn. to diss. op. A husband brought an action for intentional infliction of emotional distress against the biological father of a child born to the husband's wife, alleging that the defendant concealed his paternity until the husband developed a bond with the child. The trial court dismissed the claim, and the intermediate appellate court certified the appeal to this court. Affirming, this court held that the complaint in essence stated a claim for criminal conversation and was barred by a state statute abolishing claims for criminal conversation and alienation of affections. The dissent argued that the plaintiff's claim for intentional infliction of emotional distress was distinct from the claims of alienation of affections and criminal conversation and should not be barred; it said that the three causes of action focused on different concepts, noting that alienation of affections and criminal conversation focused on harm to the marriage, while emotional distress claims focused on harm to the plaintiff's well-being. Koestler v. Pollard, 162 Wis.2d 797, 471 N.W.2d 7, 13, 15.

Wis.1980. Cit. in ftn. in sup. The plaintiff brought an action charging wrongful performance of an autopsy on their deceased child. The defendants, Milwaukee County and individuals employed by the County, moved to dismiss the complaint, contending that it failed to state a claim upon which relief could be granted because an autopsy performed by a medical examiner is a quasi judicial function and immunity therefore applies. The trial court denied the motion to dismiss, declaring that the immunity was not so broad as to encompass the negligence which occurred in this case. This court stated that a family has a legal right to entomb deceased family members with integrity and without mutilation. Therefore, a next of kin has an actionable claim against one who mutilates a corpse. The action does not revolve around the physical mutilation, but rather encompasses the degree of emotional suffering endured by the living kin. The plaintiff claimed that the defendant's conduct was negligent, or in the alternative, intentional. Given the standards of emotional distress, the court found the bare allegations of the plaintiff sufficient to survive the initial hurdle of the motion to dismiss. The medical examiner's authority to perform autopsies is discretionary, but is limited by statute in order to protect the emotional well being of the next of kin. The court found that the defendants' duties were quasi judicial, and blanket immunity did not apply. The court found that the discretion was medical, not governmental, and therefore public policy would not be served by allowing wholesale decisions to perform autopsies. The claim for misconduct was not barred by immunity. The defendants did not act in excess of their jurisdiction but instead acted wholly outside their jurisdiction. The court held that the complaint did state a claim upon which relief could be granted, and affirmed the order of the trial court. Scarpaci v. Milwaukee County, 96 Wis.2d 663, 292 N.W.2d 816, 822.

Wis.App.

Wis.App.1987. Com. (d) quot. in diss. op. A funeral director who failed to prepare a corpse properly for shipment to Mexico for viewing and burial was found guilty of gross negligence and outrageous conduct by the state licensing board, which revoked his license. The trial court reversed the revocation and remanded, and this court reversed the trial court, holding that the evidence was sufficient to support the board's decision. The dissenting opinion argued that the board was entitled to find the funeral director negligent, but there was insufficient evidence that he acted in

reckless and willful disregard of the family's wishes. Doersching v. State Funeral Directors Bd., 138 Wis.2d 312, 405 N.W.2d 781, 791.

Wis.App.1983. Cit. in ftn. The plaintiff sued the defendant after failing to collect a debt on a consumer loan. The plaintiff had contacted the defendant several times a month and had contacted the defendant's employer to determine that the defendant had been paid. The defendant denied that he had defaulted, and counterclaimed for alleged violations of debt collection practices. The trial court granted judgment of foreclosure on a summary judgment motion and denied the counterclaim after a trial. This court affirmed the denial of the counterclaim, but reversed an award of damages to the plaintiff, holding that the defense asserted by the defendant was not frivolous. The court conducted its inquiry under a state statute which eliminated the need to rely on the tort of intentional infliction of emotional harm. Associates Financial Services Co. v. Hornik, 114 Wis.2d 163, 336 N.W.2d 395, 397.

Wyo.

Wyo.2017. Cit. in case cit. in sup. (general cite). Computer renters filed claims for invasion of privacy against rent-to-own franchise, alleging that defendant installed software on leased computers that allowed defendant to track the location of the computer, capture screen shots and key strokes, and activate the webcam. The trial court granted summary judgment for defendant. The court of appeals affirmed. This court reversed, holding that Wyoming recognized a common-law cause of action for intrusion upon seclusion as set forth in Restatement Second of Torts § 652B, with damages as defined by § 652H. The court agreed with plaintiffs that the Restatement version of the tort of intrusion upon seclusion was the approach best suited to Wyoming common law, noting its prior reliance on Restatement Second of Torts § 46 to define the tort of intentional infliction of emotional distress. Howard v. Aspen Way Enterprises, Inc., 406 P.3d 1271, 1278.

Wyo.2005. Subsec. (1) quot. in sup., com. (d) cit. in sup., com. (h) quot. in case quot. in sup. Former employee sued employer for breach of contract and intentional infliction of emotional distress, inter alia, alleging that defendant unlawfully terminated her as an act of retaliation for reporting co-worker's sexual harassment. Trial court granted defendant summary judgment. This court affirmed, holding that plaintiff's lawful termination by defendant could not support her claim of intentional infliction of emotional distress. Plaintiff was an at-will employee, and there was evidence that plaintiff was fired because she could not balance her cash drawer over a period of time and because of insubordinate actions when questioned about her last submitted cash drawer statement accounting. Hoflund v. Airport Golf Club, 2005 WY 17, 105 P.3d 1079, 1089-1090.

Wyo.2003. Cit. in disc., cit. in case quot. in sup., subsec. (1) and com. (d) quot. in case quot. in disc., com. (j) quot. in case quot. in disc. and quot. in diss. op. Mother and daughter who were separated for 43 years because a hospital switched two newborn babies at birth sued hospital for negligence, seeking damages for great emotional pain, humiliation, anxiety, grief, and expenses for psychological counseling. The federal district court certified to this court the question of whether

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Wyoming allowed recovery of purely emotional damages. Answering the question, this court held that plaintiffs could maintain a negligence action in which the only alleged damages were emotional. The court required that the emotional distress inflicted be severe. The dissent argued that the court system would be overburdened by the requirement of a case-by-case determination of emotional severity. Larsen v. Banner Health System, 2003 WY 167, 81 P.3d 196, 205-207.

Wyo.2002. Cit. in sup., subsecs. (2) and (2)(a) cit. and quot. in sup., coms. (d), (i), and (j) and illus. 1 and 11 quot. in sup., com. (h) cit. and quot. in sup., and com. (l) and caveat cit. in ftn. Minors brought suit for intentional infliction of emotional distress against attorney who attacked their mother. Reversing in part the trial court's grant of summary judgment for defendant and remanding, this court held, inter alia, that the trial court erred in requiring plaintiffs to show a continuing course of abuse, and genuine issues of material fact existed as to whether defendant's alleged conduct in beating, kicking, and punching plaintiffs' mother, while screaming that he wanted to kill her, was sufficiently outrageous for liability, and as to whether plaintiffs sustained severe emotional distress as a result of the conduct. Bevan v. Fix, 2002 WY 43, 42 P.3d 1013, 1019-1021, 1023-1025.

Wyo.2002. Quot. in case quot. in sup., coms. (g), (h), and (j) quot. in case quot. in sup. Parents sued grandparents and others for various conspiracy and individual claims, including tortious interference with the parent-child relationship and intentional infliction of emotional distress, arising from daughter's failure to return home after staying with grandparents during pendency of abuse charges against father. Trial court dismissed tortious-interference claim against grandparents for lack of jurisdiction and dismissed remaining claims by summary judgment. Supreme court affirmed, holding, inter alia, that there was no supporting evidence that defendants' conduct caused parents “severe emotional distress.” Hoblyn v. Johnson, 55 P.3d 1219, 1231-1232.

Wyo.2002. Subsec. (1) quot. in case quot. in sup. Employee who was fired sued former employer for intentional infliction of emotional distress, inter alia, alleging that termination of her employment solely on the basis of her coemployees' anonymous and unsubstantiated comments during a time in which she was grieving over the recent death of her mother caused her severe emotional distress. Trial court granted defendant summary judgment. This court affirmed, holding, inter alia, that employee's emotional-distress claim failed. In light of the court's holding that plaintiff's employment was at will, the court found that employer did nothing more than act within its legal rights when it terminated plaintiff's employment. Trabing v. Kinko's, Inc., 2002 WY 171, 57 P.3d 1248, 1256.

Wyo.2001. Coms. (d) and (e) quot. in sup., com. (h) quot. in case quot. in sup. Former employee sued employer and employer's owner for wrongful discharge and intentional infliction of emotional distress, inter alia, alleging that defendants fired him despite knowing that his mother was terminally ill. Trial court granted defendants summary judgment, concluding that plaintiff's allegations were not so extreme and outrageous as to permit jury to consider emotional-distress claim. This court reversed and remanded, holding, in part, that since defendants did not submit evidence in support of summary judgment motion controverting plaintiff's complaint that he suffered intentional infliction of emotional distress, plaintiff could rest on allegations of his

complaint. While plaintiff presented no evidence supporting his claim, he had no burden to do so. Loya v. Wyoming Partners of Jackson Hole, Inc., 2001 WY 124, 35 P.3d 1246, 1252-1253.

Wyo.2001. Adopted in case cit. in disc., quot. in disc., cit. generally in law review article quot. in disc., coms. (d) and (h) quot. in sup. Wife sued for divorce and brought various tort claims, including one for intentional infliction of emotional distress, against husband. The trial court held, in part, that wife failed to state a claim for intentional infliction of emotional distress. Reversing in part and remanding, this court held, inter alia, that extreme and outrageous conduct by one spouse that resulted in severe emotional distress to the other spouse should not be ignored by virtue of the marriage of the victim to the aggressor, and that such behavior could create an independent cause of action for intentional infliction of emotional distress. McCulloh v. Drake, 24 P.3d 1162, 1169, 1170.

Wyo.2000. Cit. in disc., subsec. (1) quot. in case quot. in disc., com. (d) quot. in disc., coms. (h) and (j) cit. and quot. in disc. Survivors of worker killed in mine collapse brought wrongful-death action against mining company. Plaintiffs also asserted a claim for intentional infliction of emotional distress in connection with the conduct of defendant's on-site representatives. The trial court dismissed the complaint. Affirming, this court held that the Workers' Compensation Act provided the exclusive remedy for the wrongful-death claim, that the claim for intentional infliction of emotional distress was derivative of the statutory claim, and that, in any event, defendant's representatives did nothing extreme or outrageous when they informed plaintiffs that a rescue crew had reached worker, who was supposedly talking and laughing with crew, but who was pronounced dead two hours later. Anderson v. Solvay Minerals, Inc., 3 P.3d 236, 239, 241.

Wyo.2000. Subsec. (1) and coms. (d), (e), (h), and (j) quot. in sup. Terminated employee sued former employer under theories including promissory estoppel and intentional infliction of emotional distress. The trial court entered summary judgment for defendant. Affirming in part and reversing in part, this court held, inter alia, that material factual issues existed as to whether plaintiff had detrimentally relied on defendant's assurances of job security, whether defendant's actions were outrageous under the circumstances, and whether plaintiff's claimed mental distress was severe. Worley v. Wyoming Bottling Co., Inc., 1 P.3d 615, 627-630.

Wyo.1997. Cit. in headnotes, adopted in case cit. in disc., com. (d) quot. but dist., coms. (h) and (j) cit. and quot. in disc. Insureds whose house was destroyed by fire sued insurer for, inter alia, intentional infliction of emotional distress in connection with insurer's claims investigation practices. On remand from this court, the trial court directed a verdict for insurer. Affirming, this court held, in part, that insureds presented insufficient evidence from which a jury could conclude that insurer had acted outrageously or caused insureds to suffer severe mental distress. Hatch v. State Farm Fire and Cas. Co., 930 P.2d 382, 384, 385, 395-397.

Wyo.1997. Subsec. (1) cit. in headnote and quot. in case quot. in sup., coms. (d), (e), (h), and (j) cit. in headnotes and quot. in sup., com. (h) quot. in spec. conc. op. A former dispatcher with the city police department sued another officer for intentional infliction of emotional distress. Trial

court granted defendant summary judgment. This court reversed, holding that a fact issue existed as to whether defendant's conduct was extreme and outrageous. Plaintiff alleged repeated incidents over a period of several weeks in which defendant stared at her, followed her, and subjected her to sexually motivated advances and physically intimidating behavior, each escalating in intensity and severity. She also alleged unwelcome, non-negligible physical contact wherein defendant touched and hugged her even after she repeatedly rebuffed his advances, and ultimately confined her in a closet and rubbed his crotch against her leg. The court also determined that plaintiff presented sufficient evidence to create a jury issue on the severity of her emotional distress, as she received therapy for post-traumatic stress disorder, anxiety, and depression. Specially concurring opinion argued that the majority opinion did not establish an arbitrary rule that in every case involving sexual misconduct reasonable men could differ as to whether the conduct is so extreme and outrageous as to justify recovery. Kanzler v. Renner, 937 P.2d 1337, 1337, 1338, 1341, 1343, 1345.

Wyo.1997. Com. (g) cit. in case cit. in disc. and cit. generally in headnote. An employee sued his former employer, the employer's vice president, and the employer's production supervisor for breach of contract and intentional infliction of emotional distress, among other claims. Plaintiff based his emotional-distress claim on the fact that he was fired at a time when the defendants knew he was extremely vulnerable due to the death of a longtime friend. The trial court granted defendants summary judgment. This court affirmed, holding, inter alia, that defendants' conduct was not sufficiently extreme and outrageous to support an emotional-distress claim, because plaintiff's employment was at will and his contract permitted discharge for any reason or for no reason. The employer did no more than act on its legal rights in a permissible way when it terminated his employment and subsequently filled his position. Terry v. Pioneer Press, Inc., 947 P.2d 273, 274, 278.

Wyo.1997. Cit. in headnote, quot. in case quot. in sup. Former employee sued employer, alleging breach of contract and intentional infliction of emotional distress, among other claims. The jury awarded plaintiff emotional-distress damages, but trial court struck jury's award of damages for loss of business reputation. This court affirmed in part, holding, inter alia, that plaintiff could not recover damages for loss of business reputation as part of his emotional-distress claim. Plaintiff did not present any evidence to the jury that the injury to his business reputation was caused by emotional distress. Wilder v. Cody Country Chamber of Commerce, 933 P.2d 1098, 1098, 1105.

Wyo.1996. Cit. in headnotes, adopted in case quot. in disc., cit. in spec. conc. op., com. (d) cit. in case quot. in disc., com. (d) quot. in spec. conc. op., com. (j) cit. in case quot. in disc., com. (h) quot. in disc. and quot. in spec. conc. op. In action brought under 42 U.S.C. § 1983, woman who was kidnapped by her boyfriend, held against her will, and repeatedly raped charged responding police officer with intentional infliction of emotional distress, alleging that he conducted a substandard and inadequate investigation of her complaint. Officer moved for summary judgment on the ground that he was entitled to invoke the doctrine of qualified immunity. The trial court denied the motion, but the intermediate appellate court reversed. Affirming, this court held that, while officer was rude, insensitive, and offensive, his conduct was not so extreme or outrageous as to be considered utterly intolerable in civilized society. Specially concurring opinion believed that behavior coming

within the protection of the qualified immunity doctrine could not be termed outrageous. Garcia v. Lawson, 928 P.2d 1164, 1165, 1166-1168.

Wyo.1994. Cit. in headnote, cit. in case cit. in sup., subsec. (1) quot. in sup., coms. (d) and (j) quot. in sup. and cit. generally in headnote. Alleging that his former wife removed his daughter from Oregon and hid her from him for nine years, assisted by the maternal grandmother and the woman's second husband, a husband brought suit for interference with parental rights and intentional infliction of emotional distress, among other claims. The trial court dismissed. Affirming, this court held, inter alia, that plaintiff failed to state an emotional-distress claim because there were no facts alleged in the complaint supporting the intentional concealment of the child or any prevention of plaintiff from visiting with her, and there was no factual allegation in the complaint that would demonstrate the lack of notice to plaintiff of the filing of guardianship proceedings was due to defendants' intentional or reckless acts that would overstep all bounds of decency. Cosner v. Ridinger, 882 P.2d 1243, 1243, 1248, 1249.

Wyo.1994. Cit. in case cit. and quot. in sup., subsec. (1) cit. in case cit. in sup., subsec. (2) cit. in headnotes, cit. and quot. in sup. and adopted, com. (l) quot. in sup. A woman whose stepfather had sexually abused her throughout her life developed psychiatric difficulties and eventually committed suicide by ingesting an overdose of a prescription drug. Although stepfather had been aware of the woman's previous suicide attempt, he contacted a doctor and asked him to write a prescription for the woman. The woman's husband and her child sued stepfather for wrongful death and infliction of emotional distress. The trial court dismissed. Reversing and remanding, this court held, inter alia, that plaintiffs sufficiently pleaded a third-party cause of action for intentional infliction of emotional distress because they were present in the immediate aftermath of the tragic results of stepfather's outrageous conduct, and the suicide was the final result of a continuing course of conduct instigated by stepfather. R.D. v. W.H., 875 P.2d 26, 27, 32, 33.

Wyo.1994. Subsec. (1) quot. in disc., coms. (d), (h), and (j) quot. in case quot. in sup. Former executive director sued nonprofit corporation for intentional infliction of emotional distress, inter alia, after he was terminated by board of directors dissatisfied with his financial oversight. The trial court granted defendant summary judgment. This court reversed and remanded, holding that sufficient evidence existed of outrageous conduct by defendant, both before and after plaintiff's termination, when corporation officials placed plaintiff on probation, reduced his compensation, possibly altered his employment status, and required him to publicly address community group to accept responsibility for defendant's financial problems, despite fact that defendant had not completed any formal investigation and despite plaintiff's denial of any prior knowledge of the problems; defendant also aggressively sought to prevent plaintiff from getting a job after termination. It noted that shame and humiliation that plaintiff alleged extended for two years and was enough to create a jury question on issue of liability. Wilder v. Cody Country Ch. of Commerce, 868 P.2d 211, 223, 224.

Wyo.1990. Quot. in case quot. in disc., coms. (d), (h), and (j) quot. in case quot. in disc. Several ranchers sued an oil company, alleging that the company's failure to properly plug and abandon

an oil test well allowed salty seepage water to escape and damage their lands. The ranchers asserted, inter alia, a claim for intentional infliction of emotional distress based on the company's misrepresentations in telling them that the well was adequately plugged. One of the ranchers allegedly became chronically depressed and had to have part of his stomach removed because of the failure of his crops due to the salt on his ranch. The trial court granted the defendant a directed verdict on the emotional distress claim. Affirming, this court held that the plaintiffs failed to establish the element of causation necessary to support the claim. The court said that a reasonable jury could only conclude that the emotional distress suffered by the rancher resulted not from any statement made to him concerning the well but rather from the condition of his land. Davis v. Consolidated Oil & Gas, Inc., 802 P.2d 840, 849.

Wyo.1989. Cit. in case quot. in sup. A university student filed an action for damages against her professor for assault, battery, intentional infliction of emotional harm, and duress and undue influence, after he ran at her during class, yelling and shaking his fists, and pounded his fists on her belongings on the table in front of her, creating in the plaintiff fear and apprehension of imminent bodily contact. The trial court granted the defendant's motion for summary judgment. Reversing and remanding in part, this court held that the trial court erred in granting summary judgment for the defendant because the elements of civil assault, civil battery, and intentional infliction of emotional distress, as found in the Restatement, were stated in the plaintiff's complaint. Affirming in part, this court held that the plaintiff's allegations of duress and undue influence in that the defendant had forced her to submit her final class paper, thus depriving her of free exercise of her will and her constitutional rights, did not state a cognizable claim. Jung-Leonczynska v. Steup, 782 P.2d 578, 583, appeal after remand 803 P.2d 1358 (1990).

Wyo.1989. Com. (g) quot. in case quot. in sup. The plaintiff sued the defendants for intentional infliction of emotional distress, inter alia, on the ground that the defendants purchased an outstanding judgment against the plaintiff and caused execution to be levied against the plaintiff and his stock in a malicious, improper, and unlawful fashion. The trial court dismissed the complaint for failure to state a claim for which relief could be granted. Affirming, this court held that the plaintiff did not sufficiently allege the tort of intentional infliction of emotional distress, since there was nothing in the complaint that alleged that the defendants did anything that they were not entitled to do under the law. Mummery v. Polk, 770 P.2d 241, 243.

Wyo.1986. Quot. and cit. in conc. and diss. op. The family of a child struck by an automobile who observed the child's severe injury after the impact sued the driver for negligent infliction of emotional distress. The trial court dismissed the complaint for failure to state claims on which relief could be granted. Reversing in part, this court held that the class of plaintiffs who could bring an action for negligent infliction of emotional distress must either witness the accident or soon come to the scene while the victim was still there. The dissenting and concurring opinion argued that a proper plaintiff status should be allowed only if the party was present at the location of the incident when it occurred. Gates v. Richardson, 719 P.2d 193, 205.

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Wyo.1986. Cit. in sup. and adopted, quot. and cit. in disc., coms. (d), (g), and (h) quot. in disc., com. (j) quot. in sup. and in disc. An employee sued his former employer for intentional infliction of emotional distress after he was discharged from his job because he was suspected of leaking confidential information to competitors. The trial court awarded the employer summary judgment. Affirming in part, this court held that the employee's allegations of distress were insufficient to create a jury question on the severity issue. The court stated that, as a matter of law, the employee's distress was not severe enough to be compensable. Leithead v. American Colloid Co., 721 P.2d 1059, 1065, 1066-1067.

Wyo.1986. Quot. in case cit. in disc. A bank filed a complaint for replevin against a rancher, alleging that the rancher was preparing to sell cattle in which the bank had a secured interest. The trial court issued an order of attachment against the rancher's property and later granted summary judgment to the bank, finding that the rancher's affirmative defenses and counterclaim were meritless. This court affirmed, holding, inter alia, that there was no evidence to support the rancher's counterclaim that the bank intentionally inflicted emotional distress upon her by forcing her to negotiate loans when she was grief-stricken following her husband's death. Sturman v. First Nat. Bank, 729 P.2d 667, 680.

Wyo.1985. Quot. in sup., coms. (d), (g), (h) quot. in sup., subsec. (1) quot. in diss. op., com. (g) cit. in diss. op. A former high school principal brought action for intentional interference with contractual relations and intentional infliction of mental distress against parents, teachers, and students who had addressed complaints about him to the school board. The trial court entered summary judgment for the defendants, holding that as a matter of law the information furnished was not the cause of the principal's termination. The claim for intentional infliction of mental distress also failed because it was adjunct to the claim for interference with contract. This court affirmed, holding that the essential element of outrageous conduct by the defendants was not present. The court declined to use this case to explicitly recognize and define the torts of intentional and negligent infliction of emotional distress. A dissent argued that the defendants' conduct was sufficiently extreme and outrageous for the claim of intentional infliction of emotional distress to have gone to a jury. Spurlock v. Ely, 707 P.2d 188, 192, 193, 194.

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CASE NO. 12

2024 WL 1216562
Only the Westlaw citation
is currently available.
United States Court of Appeals, Fifth Circuit.

Selva KUMAR, Plaintiff—Appellant,
v.
PANERA BREAD COMPANY,
Defendant—Appellee.

No.
23
-
20178
|
FILED March 21, 2024

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:21-CV-3779

Attorneys and Law Firms

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Cassie J. Dallas, David A. McFarland, Ryan Owen, Thompson, Coe, Cousins & Irons, L.L.P., Dallas, TX, for Defendant—Appellee.

Before Wiener, Haynes, and Higginson, Circuit Judges.

Opinion

Per Curiam: [*]

***1** Plaintiff-Appellant and steadfast vegetarian Selva Kumar, proceeding pro se, alleges that Defendant-Appellee Panera Bread Company misrepresented that its broccoli-cheddar soup was free of meat byproducts. The district court granted Panera's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, we AFFIRM in part, and VACATE and REMAND in part.

I. Facts and Procedural History

Kumar is a "staunch and unfaltering follower of the Hinduism religion." [1] Central to his faith is a commitment to vegetarianism. As such, when he eats out at restaurants, Kumar asks whether the food that he orders is vegetarian, including whether it is cooked in the same oil used for animal products. He notes that "[a]ccidentally consuming meat for a vegetarian is upsetting on many levels."

Kumar alleges that (1) on January 23, 2021, Kumar dined "as usual" at a Panera location in Houston, Texas; (2) every time that he ordered the broccoli-cheddar soup at Panera, he inquired whether it was made with chicken broth; (3) "each time," the answer was no; (4) those representations were false; and (5) he was "fraudulently induced into purchasing [Panera's] products."

Kumar brought this suit in Texas state court, alleging negligence, gross negligence, intentional infliction of emotional distress, and violation of the Texas Deceptive Trade Practices Act (DTPA). Panera removed the case to federal court on the basis of diversity jurisdiction, then sought dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court allowed Kumar to amend his complaint, which is now the operative pleading. Panera then filed a second motion

to dismiss, which the court granted. Kumar appeals.

II. Standard of Review

On appeal, a district court's grant of a motion to dismiss is reviewed de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs." *Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018) (quoting *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008)). A complaint survives a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) only if it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2008). Pro se complaints are "held to less stringent standards than formal pleadings drafted by lawyers." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (internal quotation marks and citation omitted). Nevertheless, they must "set forth facts giving rise to a claim on which relief may be granted." *Johnson v. Atkins*, 999 F.2d 99 (5th Cir. 1993).

III. Discussion

***2** Kumar challenges the merits, but before we address his arguments, we examine the basis for our jurisdiction, as we are obligated to do. *See In re Yazoo Pipeline Co., L.P.*, 746 F.3d 211, 214 (5th Cir. 2014).

A. Subject-Matter Jurisdiction

It is axiomatic that federal courts are courts of limited jurisdiction. *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 821 (5th Cir. 2022). As such, this court has an independent responsibility to address questions of subject-matter jurisdiction, even when parties "overlook or elect not to press" the issue. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011); *see also Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("Subject-matter jurisdiction can never be waived or forfeited."). Although Kumar did not raise the subject, on review of the pleadings we sua sponte observed that Panera's amended notice of removal does not properly allege diversity jurisdiction.

For a federal court to exercise diversity jurisdiction, there must be complete diversity between the parties. *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 920 (5th Cir. 2001) (citing 28 U.S.C. § 1332). Panera's amended notice of removal alleges that Kumar is a citizen of Texas, a fact which neither party disputes. The notice then states that Panera is a "limited liability company with its principal place of business in Missouri." However, the citizenship of an LLC is not determined by its principal place of business, but instead by the citizenship of each of its members. *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008). Without correct information as to Panera's citizenship, the district court could not properly exercise diversity jurisdiction. *See Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 805 (5th Cir. 1991).

This overlooked issue is not fatal to the instant appeal, however, because 28 U.S.C. § 1653 provides a mechanism for amending the pleadings to properly assert jurisdiction. *Id.* at 805–06. Parties may "cure technical defects or failure to specifically allege the citizenship of a party in the appellate courts, but only when the amendment would do nothing more than state an alternative jurisdictional basis for recovery upon the facts previously alleged." *Howery*, 243 F.3d at 919 (internal quotation marks and alteration omitted) (quoting *Whitmire v. Victus Ltd.*, 212 F.3d 885, 888 (5th Cir. 2000)).

The court requested that the parties file a letter addressing this apparent failure to properly assert diversity jurisdiction. Panera admits that it wrongly pleaded that it is an LLC rather than a corporation. It has attached public records from Missouri and Delaware which establish that it is a corporation with citizenship in each of these states. This court may take judicial notice of "online state agency records" to resolve a jurisdictional defect via amendment on appeal. *See Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 518–19 (5th Cir. 2015) (taking judicial notice of jurisdictional facts from public agency filings as they are "not subject to reasonable dispute"); *MidCap Media Fin., L.L.C. v. Pathway Data, Inc.*, 929 F.3d 310, 315 (5th Cir. 2019). Kumar opposes this amendment, claiming that Panera is indeed an LLC, but cites no evidence for his assertions.

***3** Title 28 U.S.C. § 1653 is to be "broadly construed to avoid dismissals of actions on purely 'technical' or 'formal' grounds." *Whitmire*, 212 F.3d at 887. The purpose of the statute is to correct "formal mistakes," which is how we would characterize the error made by Panera in its amended notice of removal. *See Midcap Media*, 929 F.3d at 316. We thus elect to take judicial notice of the state agency records attached to Panera's letter and to treat the letter as a motion to amend its notice of removal. We hereby grant that motion. With this amendment, we are satisfied that federal diversity jurisdiction existed at the time of removal and at the time of judgment. *See Howery*, 243 F.3d at 921.

B. Waiver

In its responsive briefing, Panera argues that Kumar has waived every issue on appeal because he did not adequately brief his arguments. Briefs must "contain appellant's contentions and the reasons for them." Fed. R. App. P. 28(a). As Panera points out, several of the **cases** that Kumar cites are nonexistent, and those cited **cases** that do exist are largely irrelevant to his claims. Further, Kumar fails to identify any error in the district court's analysis of at least one of his claims, simply re-urging the same points that he urged below. *See Shaw v. Norman*, 389 F. App'x 408, 409 (5th Cir. 2010) (per curiam) ("When an appellant does not identify error in the district court's analysis, it is the same as if the appellant had not appealed the judgment."). While we recognize the evident shortcomings in his briefing, Kumar's pro se status and impressive effort at self-representation leads us to consider his appellate arguments on their merits. *Cf. Goins v. Dir., Office of Worker's Comp. Programs*, 436 F. App'x 366, 369 (5th Cir. 2011) (per curiam) (describing the adequate briefing standard as a "low hurdle," but finding arguments waived when plaintiff's

brief had *zero* citations to the record or legal authority).

C. Tort Claims

Kumar appeals the district court's dismissal of his claims for negligence, gross negligence, and intentional infliction of emotional distress. We review each in turn.

"To sustain a negligence action, the plaintiff must produce evidence of a legal duty owed by the defendant to the plaintiff, a breach of that duty, and damages proximately caused by that breach." *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782 (Tex. 2001).[2] In dismissing Kumar's negligence claim, the district court held that his complaint failed to allege any facts supporting the elements of duty, breach, and damages.

We agree with the district court that Kumar has failed to identify a breach of duty owed to him by Panera. On appeal, Kumar discusses the "reasonable expectations" test, suggesting that Panera acted negligently by failing to warn him of the chicken broth despite knowing about his vegetarianism. However, this test applies to premises liability claims, not negligence claims. *See Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 215–16 (Tex. 2015) (distinguishing between negligent-activity and premises-defect claims). Although negligence and premises liability are related, Kumar's amended complaint alleges only that Panera breached a duty owed to him to "act reasonably and perform their responsibilities in such a way as to protect their patrons from injury." This "action-focused" claim sounds in negligence, not premises liability, which instead concerns injuries resulting from a "condition on the premises." *See Austin v. Kroger Tex., L.P.*, 746 F.3d 191, 198 (5th Cir. 2014). Accordingly, we conclude that the district court did not err in dismissing Kumar's claims for simple and gross negligence.

***4** Kumar's complaint also brings a claim for intentional infliction of emotional distress. However, in his briefing before this court, Kumar expressly abandons this claim, stating that he "agrees with the trial court [that] Appellee did not cause Intentional Infliction of [E]motional Distress." He admits that Panera's actions were not intentional, "but [were] still reckless." Although Kumar does not raise this argument, intentional infliction of emotional distress can be established through merely reckless conduct. *See Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993) (citing RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965)). But, given Kumar's decision to agree specifically with the district court's holding, we deem this claim abandoned. And, while Kumar may seek to pursue other types of "emotional distress" claims, such as negligent infliction of emotional distress, we are a "court of errors" and may not consider claims that were not before the district court. *See Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 701 (5th Cir. 2004).

As the district court properly dismissed each of Kumar's tort claims, we turn now to the DTPA.

D. The DTPA

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The DTPA protects consumers from "[f]alse, misleading, or deceptive acts or practices." TEX. BUS. & COM. CODE § 17.46(a). To state a claim under the DTPA, a plaintiff must establish that (1) he or she was a consumer within the meaning of the Act, (2) the defendant violated a specific provision of the Act, and (3) the violation caused the plaintiff's injury. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996) (citing TEX. BUS. & COM. CODE § 17.50(a)). Kumar alleges that Panera fraudulently misled him "regarding the meal ingredients," causing him pain and suffering.

In federal court, a complaint alleging violations of the DTPA is subject to the requirements of Federal Rule of Civil Procedure 9(b), which requires that fraud be pleaded "with particularity." *See Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001) ("Rule 9(b) applies by its plain language to all averments of fraud, whether they are part of a claim of fraud or not."); *see also Berry v. Indianapolis Life Ins. Co.*, 608 F. Supp. 2d 785, 800 (N.D. Tex. 2009) (noting that it is well settled that claims alleging violations of the DTPA are subject to Rule 9(b)'s particularity requirement). A pleading satisfies "particularity" when it alleges the "time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Wallace v. Tesoro Corp.*, 796 F.3d 468, 480 (5th Cir. 2015) (citation omitted). However, Rule "9(b)'s ultimate meaning is context-specific." *IAS Servs. Grp., L.L.C. v. Jim Buckley & Assocs., Inc.*, 900 F.3d 640, 647 (5th Cir. 2018). Likewise, "we are mindful that Rule 9(b) does not supplant Rule 8(a)'s notice pleading, which requires only enough facts to state a claim to relief that is plausible on its face." *Id.* (internal quotation marks and citations omitted).

Here, the district court dismissed Kumar's DTPA claim because his complaint failed to allege the identity of the person who made the false representations about the soup. However, given that he is a pro se litigant and has represented in his brief that he is able to submit that name, we conclude that the **case** should not have been dismissed solely on that basis. *Cf. Erickson v. Pardus*, 551 U.S. 89, 94–95 (2007) (per curiam) (relying, in part, on later filings by a pro se plaintiff to conclude the complaint plausibly alleged harm and explaining "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers" (citation omitted)). Importantly, his first attorney failed to file anything, so he was pro se. By the time that he found another attorney, he was not given the necessary time to have that attorney represent him. Moreover, while his complaint was not very clear on the issue of his alleged injury, liberally construing it, he does plead the third element of a DTPA claim: that Panera's actions caused his alleged injury. *See Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830, 834 (Tex. 2009) (defining causation under the DTPA as a "substantial factor in bringing about the injury, without which the injury would not have occurred"); *Amstadt*, 919 S.W.2d at 650 ("[T]he defendant's deceptive trade act or practice is not actionable under the DTPA unless it was committed *in connection with* the plaintiff's transaction in goods or services."). Thus, upon remand, he should be permitted to have his new attorney come in and amend his DTPA claim.

***5** Accordingly, we AFFIRM in part, and VACATE and REMAND in part.

All Citations

Not Reported in Fed. Rptr., 2024 WL 1216562

Footnotes

* This opinion is not designated for publication. See 5th Cir. R. 47.5.

1 Because this **case** comes to this court on review of a motion to dismiss, all facts in the operative complaint are assumed to be true. *See* *Lampton v. Diaz*, 639 F.3d 223, 225 (5th Cir. 2011) (quoting *Kalina v. Fletcher*, 522 U.S. 118, 122 (1997)).

2 As a federal court sitting in diversity, we apply the law of the forum state. *James v. Woods*, 899 F.3d 404, 408 (5th Cir. 2018) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

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CASE NO. 13

2024 WL 4183301
Only the Westlaw citation
is currently available.
United States District Court,
E.D. Texas, Tyler Division.

7X CATTLE CO. LLC, Plaintiff,
v.
Daniel BRANDSTADT, 3C Farms, LLC, and Pinehurst Partners I, LLC, Defendants.

CASE NO . 6 : 22 - CV - 00396 - JDK - KNM

Signed July 22, **2024**

Attorneys and Law Firms

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Eric Charles Wood, Brown Fox, PLLC, Frisco, TX, C. Alan Carrillo, Brown Fox PLLC, Dallas, TX, for Defendant Pinehurst Partners I, LLC.

Daniel Brandstadt, Big Timber, MT, Pro Se.

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

K. NICOLE MITCHELL, UNITED STATES MAGISTRATE JUDGE

***1** Before the Court is Plaintiff/Counter-Defendant 7X Cattle Company, LLC's motion to dismiss Defendant/Counter-Plaintiff Daniel Brandstadt's counterclaims (Doc. 109). Defendant/Counter-Plaintiff Brandstadt has filed a response (Doc. 133) and a sur-reply (Doc. 140). 7X has filed a reply (Doc. 136). Having considered the parties' pleadings and the relevant law, the Court **RECOMMENDS** 7X's motion to dismiss (Doc. 109) be **GRANTED in part and DENIED in part**.

BACKGROUND

Brandstadt is 7X Cattle Company's former employee.[1] 7X alleges that during Brandstadt's last year of employment, co-defendant Pinehurst Partners paid Brandstadt to concurrently manage Pinehurst's ranch.[2] 7X states that this caused Brandstadt to neglect his job duties at 7X and that 7X's ranch operations materially suffered as a result.[3] Pinehurst allegedly paid Brandstadt through Brandstadt's LLC, 3C Farms.[4]

7X brings claims against Brandstadt, Pinehurst, and 3C Farms for breach of fiduciary

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duty, knowing participation in the breach of fiduciary duty, conversion, violations of the Texas Theft Liability Act, and interference with contract and employment relations.[5] Brandstadt (proceeding *pro se*) brings various counterclaims against 7X, which 7X now moves to dismiss.[6]

STANDARD OF REVIEW

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading stating a claim for relief, which includes a counterclaim, contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A party's counterclaims must set forth plausible, not merely possible, claims. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

Under Rule 12(b)(6), a party can move for the dismissal of asserted claims for "failure to state a claim upon which relief can be granted." In considering a Rule 12(b)(6) motion to dismiss, "[t]he court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (citation omitted). But the court will "not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts." *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

***2** Courts must construe the pleadings of *pro se* litigants liberally. *Andrade v. Gonzales*, 459 F.3d 538, 543 (5th Cir. 2006). However, "such a liberal construction does not require that the Court or a defendant create causes of action where there are none." *Smith v. CVS Caremark Corp.*, 2013 WL 2291886, at *8 (N.D. Tex. May 23, 2013). Even with *pro se* litigants, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) (quoting *S. Christian Leadership Conference v. Supreme Court of State of La.*, 252 F.3d 781, 786 (5th Cir. 2001)).

DISCUSSION

Brandstadt brings counterclaims against 7X that are labeled as follows: (1) defamation of character; (2) tortious interference; (3) hostile work environment/wrongful termination; and (4) emotional distress.[7] Texas law governs here. *Wisznia Co. v. Gen. Star Indem. Co.*, 759 F.3d 446, 448 (5th Cir. 2014) ("A federal court sitting in diversity applies the substantive law of the forum state ....")

I. Defamation

To establish a prima facie case of defamation under Texas law, a plaintiff must demonstrate the following: "(1) the defendant published a false statement; (2) that defamed the plaintiff; (3) with the requisite degree of fault regarding the truth of the statement (negligence if the

plaintiff is a private individual); and (4) damages." *Bedford v. Spassoff*, 520 S.W.3d 901, 904 (Tex. 2017) (citations omitted); *see also Fiber Sys. Int'l, Inc. v. Roehrs*, 470 F.3d 1150, 1161 (5th Cir. 2006) (stating that defamation is "a false statement about a person, published to a third party, without legal excuse, which damages the person's reputation" under Texas law). "[S]tatements that are not verifiable as false cannot form the basis of a defamation claim." *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 639 (Tex. 2018) (citation omitted). In addition, even if false, a statement is not actionable if "the entire context in which it was made discloses that it is merely an opinion masquerading as fact." *Id.* (citation omitted).

"While a claim for defamation is not subject to the heightened pleading requirements of Rule 9(b), the pleadings for a defamation claim must be sufficiently detailed to the extent necessary to enable the defendant to respond." *Encompass Off. Sols., Inc. v. Ingenix, Inc.*, 775 F. Supp. 2d 938, 958 (E.D. Tex. 2011). Specifically, "[t]o recover on such a claim, the plaintiff must identify the alleged defamatory statement and the speaker." *Ameen v. Merck & Co.*, 226 F. App'x 363, 370 (5th Cir. 2007). Additionally, "[a] plaintiff generally must specify when and where the statement was published. Otherwise, the claim may be too vague to give adequate notice to the defendant of the claim he must contest." *Mandawala v. Ne. Baptist Hosp.*, 16 F.4th 1144, 1153 (5th Cir. 2021). Texas defamation claims are subject to a one-year statute of limitations. *Ameen*, 226 F. App'x at 370.

Brandstadt generally alleges that 7X made knowingly false statements that "impugn[ed] Defendant Brandstadt's honesty, integrity and professional abilities."[8] Brandstadt also states that "7X achieved such defamation of character through Gilbert Pepin, Fred Bennett, their private investigator John McSwain, and others seeking to find information other than the truth that they had already have [sic] been informed of and knew in great detail."[9]

***3** 7X argues that Brandstadt's defamation claim as written is too vague to give adequate notice to 7X of the claim it must contest. The Court agrees. Brandstadt does not quote or paraphrase any particular statement. He does not delineate which speaker made any particular statement. Additionally, as noted by the Fifth Circuit, a plaintiff generally must specify when and where the alleged defamatory statement was published to give adequate notice to the defendant of the claim he must contest; Brandstadt has not done so here. *See Mandawala*, 16 F.4th at 1153 (5th Cir. 2021).

Construing the complaint liberally, Brandstadt has not pleaded factual allegations that raise the right to relief above the speculative level. *See Stukes v. Nehls*, 614 F. App'x 792, 794 (5th Cir. 2015) (affirming dismissal of defamation claim that "fail[ed] to identify any specific defamatory statements" and "fail[ed] to squarely identify the speaker of the alleged defamatory statement").

Brandstadt's Response raises new factual allegations regarding a YouTube video that are not pleaded in his second amended counterclaims.[10] Generally, claims and allegations that are not raised in the complaint,

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but raised for the first time in a response to a motion to dismiss are not properly before the court. *Middaugh v. InterBank*, 528 F. Supp. 3d 509, 535 (N.D. Tex. 2021). However, the Fifth Circuit has held that where a plaintiff raises new claims in opposition to a dispositive motion, courts may construe the opposition as a motion for leave to amend the complaint to assert the new claims. *Cash v. Jefferson Assocs., Inc.*, 978 F.2d 217, 218 (5th Cir. 1992) (deciding that a response to a motion to dismiss in which plaintiff first alleged that she had been willfully discriminated against should be treated as a motion to amend).

The Court will not construe Brandstadt's response as a motion for leave to amend at this juncture. The deadline to amend pleadings without leave of Court in this case passed on March 29, **2024**.[11] The Report and Recommendation issued on June 13, **2024**, clearly stated that to the extent Brandstadt wishes to add allegations regarding a YouTube video to his Second Amended Counterclaims, he should file a motion seeking leave of court to do so.[12] Brandstadt has not filed such a motion.

II. Tortious Interference

Brandstadt's second counterclaim alleges that 7X tortiously interfered with "business relationships and expectancies."[13]

To state a claim for tortious interference with prospective business relations, Brandstadt must allege:

> (1) there was a reasonable probability that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result.

Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 923 (Tex. 2013).

To the extent that Brandstadt instead intends to bring a claim for tortious interference with existing contractual relationships, that claim would require: (1) an existing contract subject to interference; (2) a willful and intentional act of interference with the contract; (3) that proximately caused the plaintiff's injury; and (4) caused actual damages or loss. *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000).

***4** 7X argues that Brandstadt's interference claim should be dismissed because he has not pleaded facts to support any of the required elements for either claim.[14] Under the paragraph labeled "Tortious Interference," Brandstadt states that his "purpose and

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concern outside of supporting his family was providing a place for underprivileged youth to experience a wholesome and healthy lifestyle" and that "7X actively, viciously, and hatefully attacked and destroyed this positive environment and place for underprivileged youth."[15] Specifically, Brandstadt states that 7X "made obscene and hateful gestures and statements directed to the youth of color" and that 7X prevented Brandstadt from accessing "the property that [he] lived, worked and recreated on."[16]

Any claim that Brandstadt brings for tortious interference with existing and prospective business relationships should be dismissed because Brandstadt does not allege the existence of a specific contractual relationship that ended due to 7X's interference or a prospective business relationship that failed to develop due to 7X's interference. *See Priority Design & Serv., Inc. v. Plaza*, No. SA-19-CV-00058, 2019 WL 2124677, at *4 (W.D. Tex. May 15, 2019) (dismissing tortious interference claims because Plaintiff did not identify any prospective contracts or existing business relationships with third parties that had been jeopardized by Defendant's actions). Brandstadt does not allege that any contractual relationship existed between himself and the "underprivileged youth," nor does not allege that there was a reasonable probability he would have entered into a contractual relationship with said youth.

As 7X points out in its motion to dismiss, to the extent Brandstadt is alleging that 7X interfered with its own employment relationship with Brandstadt or with 7X's own lease for the property Brandstadt was living on, this claim fails as a matter of law because "a party cannot tortiously interfere with its own contract." *Holloway v. Skinner*, 898 S.W.2d 793, 796 (Tex. 1995). Brandstadt's tortious interference claims should be dismissed.

III. Hostile Work Environment/Wrongful Termination

Brandstadt's third counterclaim is labeled "Hostile Work Environment, Wrongful Termination."[17] Under this heading, Brandstadt alleges that "[7X] forced [Brandstadt] to quit by using undue pressure and lack of good cause to improperly motivate [Brandstadt] to resign."[18] Brandstadt's general assertion is that he was forced to resign so that 7X would have a "straw man" to blame their failures on.[19]

Under Texas law, the employment-at-will doctrine governs unless there is an employment contract to the contrary. *County of Dallas v. Wiland*, 216 S.W.3d 344, 347 (Tex. 2007). Under the employment-at-will doctrine, "employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all." *Montgomery Cnty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998). The Texas Legislature has carved out several exceptions to the employment-at-will doctrine. *Winters v. Houston Chron. Pub. Co.*, 795 S.W.2d 723, 724 (Tex. 1990) (listing statutory limitations to the doctrine). In the same vein, the Supreme Court of Texas has created limited judicial exceptions to the employment-at-will doctrine. For example, an employee may sue for damages if he was discharged solely for refusing to perform an illegal act. *Sabine Pilot*

Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985).

Brandstadt does not allege that he had any employment contract with 7X. He does not plead any recognized exception to the employment-at-will doctrine or cite to any specific statute that his claim arises under. His claim labeled "Hostile Work Environment, Wrongful Termination" should be dismissed.

***5** To the extent that Brandstadt's use of the term "hostile work environment" is an attempt to invoke the protections of Title VII or the Texas Commission on Human Rights Act ("TCHRA"), these statutes apply to discrimination based on a protected characteristic.[20] Brandstadt has not pleaded that he is a member of a protected class, and any claim arising under those statutes should be dismissed. It is also possible that, in using the term "hostile work environment," Brandstadt is attempting to bring a claim for intentional infliction of emotional distress. This claim will be discussed further below.

IV. Emotional Distress

The final paragraph of Brandstadt's complaint is labeled "Emotional distress."[21] Brandstadt alleges that 7X caused him "unbearable emotional distress by their extreme and outrageous misconduct in the workplace, forcing wrongful termination and by their continuous attacks and false accusations against Brandstadt after his resignation."[22] Given Brandstadt's *pro se* status, the Court will construe this paragraph as a counterclaim for intentional infliction of emotional distress ("IIED").

Under Texas Law, the elements of IIED are: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme or outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the plaintiff's emotional distress was severe. *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 796 (Tex. 2006). To be actionable, the alleged conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* "Meritorious claims for intentional infliction of emotional distress are relatively rare precisely because most human conduct, even that which causes injury to others, cannot be fairly characterized as extreme and outrageous." *Id.*

An employer can be held liable for its employee's intentional infliction of emotional distress in certain circumstances. *See GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 613 (Tex. 1999). The Texas Supreme Court has "declined to recognize intentional infliction of emotional distress claims for 'ordinary employment disputes,' emphasizing that extreme conduct in this context 'exists only in the most unusual of circumstances.' " *Texas Farm Bureau Mut. Ins. Companies v. Sears*, 84 S.W.3d 604, 611 (Tex. 2002) (compiling cases). Under Texas law, an action for intentional infliction of emotional distress lies only when the conduct "brings the dispute outside the scope of an ordinary employment dispute and into the realm of extreme and outrageous conduct." *Bruce*, 998 S.W.2d at 613 (citation omitted).

7X moves for dismissal of Brandstadt's IIED claim on two grounds: 1) because his allegations are conclusory; and 2) because he does not adequately plead that his utilities being cut off caused him emotional distress. [23]

As to 7X's first ground for dismissal, the Court does not find that Brandstadt's allegations are too conclusory to support a claim for IIED. [24] Brandstadt describes Pepin, his 7X supervisor, as "having angry fits, throwing things, cussing, demeaning employees, [and] in essence treating them as trash." [25] Brandstadt also alleges that Pepin "[cut] off Brandstadt's utilities to the house where he and his family resided with their animals, attempting to euthanize or run Brandstadt away." [26] A jury could plausibly find this conduct demonstrates the "extreme and outrageous" standard required for an IIED claim. *See Bruce*, 998 S.W.2d at 617 (holding that acts amounting to a course of conduct of "harassment, intimidation, and humiliation" plus "daily obscene and vulgar behavior" meet the standard).

***6** Severe emotional distress does not include mere worry, anxiety, vexation, embarrassment or anger. *Regan v. Lee*, 879 S.W.2d 133, 136 (Tex. App. 1994). But here, Brandstadt alleges more than "worry." He claims that these actions caused him "agony," "extreme mental anguish," and "physical manifestations and illness." [27] Brandstadt pleads enough facts to survive 7X's motion to dismiss, especially given his *pro se* status.

7X next argues that Brandstadt's IIED claim should be dismissed because Brandstadt does not adequately allege that Pepin cutting his utilities off is what caused his emotional distress. [28] 7X points to a portion of Brandstadt's complaint in which he states that his emotional distress was caused by 7X's "lies and greed," and 7X seems to argue that Pepin's conduct does not fall under the category of "lies and greed." [29] Reading the complaint as a whole and construing it liberally, Brandstadt has adequately pleaded that Pepin's behavior proximately caused his emotional distress. It is not the case that Brandstadt *only* alleges 7X caused him emotional distress through "lies and greed." Brandstadt also states that 7X "caused [him] unbearable emotional distress by their extreme and outrageous misconduct in the workplace." [30] And, as stated above, he describes that alleged workplace misconduct in detail. [31]

At this preliminary stage, Brandstadt has successfully pleaded that Pepin acted intentionally or recklessly; his conduct was extreme or outrageous; his actions caused Brandstadt emotional distress; and Brandstadt's emotional distress was severe. Brandstadt has stated a claim for intentional infliction of emotional distress, and 7X's motion to dismiss is denied as to this counterclaim.

V. Request for Attorney's Fees

7X moves to strike Brandstadt's request for attorney's fees because he is proceeding *pro se* and because he has not alleged the existence of any contract that permits fee shifting or asserted a claim under a statute authorizing fee shifting. [32] Texas law allows a party to recover attorney's fees when a statute or contract

provides. *In re Velazquez*, 660 F.3d 893, 895–96 (5th Cir. 2011); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006). "Generally, attorney's fees are not recoverable in an action for tort." *Von Beck-Lutes v. Arning*, 484 F. Supp. 2d 585, 588 (W.D. Tex. 2007) (citing *New Amsterdam Cas. Co. v. Texas Indus.*, 414 S.W.2d 914, 915 (Tex. 1967)). Brandstadt's surviving IIED claim sounds in tort. Brandstadt has not cited to a statute that would permit recovery of attorney's fees as an element of damages for this claim. *See Von Beck-Lutes v. Arning*, 484 F. Supp. 2d 585, 588 (W.D. Tex. 2007) (dismissing cause of action for attorney's fees because Plaintiff's causes of action all sounded in tort). Brandstadt's request for attorney's fees should be stricken.

CONCLUSION

Based on the foregoing, the Court **RECOMMENDS** that 7X's Motion to Dismiss (Doc. 109) be **GRANTED in part and DENIED in part**. Brandstadt's claims for defamation, tortious interference, hostile work environment, and wrongful termination should be dismissed with prejudice. Brandstadt's response and sur-reply give no indication that he could fix the pleading deficiencies present in his second amended counterclaims if permitted to file third amended counterclaims. The Court notified Brandstadt in its June 13, **2024**, Report and Recommendation that, to the extent he wished to amend his pleadings to add allegations regarding a YouTube video, he needed to file a motion seeking leave of Court to do so.[33] Brandstadt has not requested leave to amend his counterclaims.

***7** The Court also recommends that Brandstadt's request for attorneys' fees be stricken.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

So ORDERED and SIGNED this 22nd day of July, **2024**.

All Citations

Slip Copy, 2024 WL 4183301

Footnotes

1 Doc. 87 at ¶ 1.

2 Doc. 87 at ¶ 1.

3 Doc. 87 at ¶ 1.

4 Doc. 87 at ¶ 1.

5 Doc. 87 at ¶ 2.

6 This is not the first iteration of Brandstadt's counterclaims. On February 21, 2021, the Court dismissed Brandstadt's original counterclaims and granted him leave to amend. Doc. 84. Brandstadt filed his amended counterclaims on March 14, **2024**. Doc. 85. 7X moved to dismiss Brandstadt's amended counterclaims. Doc. 89. Before the Court could rule on this motion to dismiss, 7X filed its Second Amended Complaint. Doc. 87. On April 19, **2024**, Brandstadt filed his answer to 7X's Second Amended Complaint along with the counterclaims that are currently before the Court. Doc. 101.

7 Doc. 101.

8 Doc. 101 at ¶ 1.

9 Doc. 101 at ¶ 1.

10 Doc. 133 at 1.

11 Doc. 71.

12 Doc. 127 at 5.

13 Doc. 101 at ¶ 2 (errors in original).

14 Doc. 109 at 6.

15 Doc. 101 at ¶ 2.

16 Doc. 101 at ¶ 2.

17 Doc. 101 at ¶ 3.

18 Doc. 101 at ¶ 3.

19 Doc. 101 at ¶ 3.

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20 Pursuant to Title VII, an employer may not discriminate against its employees or potential employees because of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. Likewise, under the TCHRA, an employer "commits an unlawful employment practice if, because of race, color, disability, religion, sex, national origin, or age, the employer discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment." TEX. LAB. CODE ANN. § 21.051(1).

21 Doc. 101 at ¶ 4.

22 Doc. 101 at ¶ 4.

23 Doc. 101 at 9–10.

24 Doc. 101 at 9.

25 Doc. 101 at ¶ 3.

26 Doc. 101 at ¶ 4.

27 Doc. 101 at ¶ 4.

28 Doc. 109 at 9.

29 Doc. 109 at 9.

30 Doc. 101 at ¶ 4.

31 Doc. 101 at ¶ 4.

32 Doc. 109 at 10.

33 Doc. 127 at 5 (noting that the deadline to amend pleadings without leave of court expired on March 29, **2024**).

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CASE NO. 14

2024 WL 3950677
Only the Westlaw citation
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United States District Court,
E.D. Texas, Tyler Division.

7X CATTLE CO. LLC, Plaintiff,
v.
Daniel BRANDSTADT, et al., Defendants.

Case No

. 6:22-cv-396-JDK-KNM

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Signed August 26, **2024**

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Filed August 27, **2024**

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ORDER ADOPTING THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

JEREMY D. KERNODLE, UNITED STATES DISTRICT JUDGE

***1** This case was referred to United States Magistrate Judge K. Nicole Mitchell for findings of fact, conclusions of law, and recommendations for disposition pursuant to 28 U.S.C. § 636. Before the Court is Plaintiff 7X Cattle Company's motion to dismiss Defendant Daniel Brandstadt's counterclaims with prejudice. Docket No. 109. On July 22, **2024**, the Magistrate Judge issued a Report recommending that the Court grant in part and deny in part Plaintiff's motion. Docket No. 142. Plaintiff timely filed objections. Docket No. 143. Defendant did not file objections.

Where a party timely objects to a Report and Recommendation, the Court reviews the objected-to findings and conclusions of the Magistrate Judge de novo. 28 U.S.C. § 636(b)(1). In conducting a de novo review, the Court examines the entire record and makes an independent assessment under the law. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superseded on other grounds by statute*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

Brandstadt brought the following counterclaims against Plaintiff 7X: (1) defamation of character; (2) tortious interference; (3) hostile work environment/ wrongful termination; and (4) emotional distress. Docket No. 101. The Magistrate Judge recommended dismissing all the counterclaims except the claim for "emotional distress," which the Magistrate Judge construed as a claim for intentional infliction of emotional distress ("IIED"). Docket No. 142 at 12. The Magistrate Judge found that Brandstadt sufficiently pleaded that claim under Rule 12(b)

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(6). *Id.* at 9–12. Plaintiff 7X objects only to the recommendation to allow the IIED claim. Docket No. 143 at 2.

In Texas, the elements of an IIED claim are: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme or outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the plaintiff's emotional distress was severe. *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 796 (Tex. 2006). 7X first objects to the Magistrate Judge's finding that Brandstadt's allegations regarding the conduct of his supervisor, Gilbert Pepin, satisfy the "extreme and outrageous" conduct element of an IIED claim. Docket No. 143 at 4. Brandstadt described Pepin as "having angry fits, throwing things, cussing, demeaning employees, [and] in essence treating them as trash." Docket No. 101 ¶ 3. Brandstadt also alleged that Pepin "[cut] off Brandstadt's utilities to the house where he and his family resided with their animals, attempting to euthanize or run Brandstadt away." *Id.* ¶ 4. 7X argues that the Magistrate Judge improperly considered these allegations because they were included in a paragraph labeled "hostile work environment, wrongful termination," rather than the paragraph labeled "emotional distress." Docket No. 143 at 5.

But Brandstadt is representing himself pro se, and courts generally do not hold pro se litigants to procedural strictures that penalize them "for lacking the linguistic and analytical skills of a trained lawyer." *Perez v. United States*, 312 F.3d 191, 194 (5th Cir. 2002). "[A] pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The Court has a "duty to construe pro se [filings] liberally so that a litigant will not suffer simply because he did not attend law school or find a suitable attorney." *United States v. Ayika*, 554 F. App'x 302, 308 (5th Cir. 2014) (per curiam). Here, Brandstadt referenced "outrageous misconduct in the workplace" in the paragraph titled "emotional distress." Docket No. 101 ¶ 4. Given that Brandstadt is held to a "less stringent" standard as a pro se litigant, the Magistrate Judge did not err in considering his factual allegations regarding Pepin's workplace conduct.

***2** 7X next argues that Brandstadt's allegations amount to a mere employment dispute. Docket No. 143 at 4–8. As the Magistrate Judge acknowledged in her Report, the Texas Supreme Court has declined to recognize intentional infliction of emotional distress claims for "ordinary employment disputes." *Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 611 (Tex. 2002) (compiling cases). For example, in *Hoffmann-LaRoche Inc. v. Zeltwanger*, 144 S.W.3d 438, (Tex. 2004), the court held that evidence of insensitive jokes, unfair performance reviews, and failure to report an employee's sexual harassment concerns did not amount to "extreme and outrageous conduct." But in *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 613–14 (Tex. 1999), the court held that the defendant's conduct was extreme and outrageous and was outside the scope of an ordinary employment dispute when he, over a period of two years, "engaged in a pattern of grossly abusive, threatening, and degrading conduct," including "repeatedly physically and verbally threaten[ing] and

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terroriz[ing]" employees. Here, although the Court recognizes the high burden set forth in *Bruce* and its progeny, Brandstadt's allegations —particularly his allegations that Pepin cut off the utilities to his home—"bring[ ] the dispute outside the scope of an ordinary employment dispute and into the realm of extreme and outrageous conduct." *Id.* at 613.

7X next argues that Brandstadt's allegation that "Pepin cut[ ] off Brandstadt's utilities to the house where he and his family resided with their animals, attempting to euthanize or run Brandstadt away" is both conclusory and plainly implausible. Docket No. 143 at 4. Courts may dismiss an action that fails to "state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). But the standard articulated under *Twombly* "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of' the necessary claims or elements." *In re S. Scrap Material Co., LLC*, 541 F.3d 584, 587 (5th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). And a well-pleaded claim "may proceed even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable." *Twombly*, 550 U.S. at 556. While Brandstadt may not ultimately prevail on his claim, he has alleged sufficient facts to nudge his claim "across the line from conceivable to plausible," especially considering the lighter burden placed on pro se pleadings. *Twombly*, 550 U.S. at 547; *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972).

Finally, 7X objects to the Magistrate Judge's finding that Brandstadt sufficiently alleged he experienced severe emotional distress. Docket No. 143 at 8. 7X is correct that Brandstadt must allege facts beyond the conclusory statement that it caused him "severe emotional distress." *See Vera v. Mulet*, 2005 WL 8164063, at *10 (S.D. Tex. May 11, 2005) ("Given the high standard for 'severe' distress under Texas law, the pleading must do more than recite the term, without supporting factual allegations, to state a claim."); *Yadav v. Frost Bank*, 2020 WL 2733955, at *4 (W.D. Tex. May 26, 2020) (holding that allegations that "plaintiff has severely suffered for more than one year and will be suffering for the rest of his life" and that defendant caused plaintiff "extreme emotional distress" were insufficient to state a claim under Rule 12(b)(6)). But here, Brandstadt has pleaded facts to support his claim that he suffered from severe emotional distress by alleging that 7X caused him agony, extreme mental anguish, and physical manifestations and illness. *See Howe v. Yellowbook, USA*, 840 F. Supp. 2d 970, 982 (N.D. Tex. 2011) (denying motion to dismiss IIED claim because the plaintiff pleaded sufficient facts to support her allegation that she was "mentally, emotionally, and physically damaged and distraught" by the defendant's actions).

Having conducted a de novo review of the record in this case and the Magistrate Judge's Report, the Court has determined that the Report of the Magistrate Judge is correct and that Plaintiff's objections are without merit. Accordingly, the Court hereby **ADOPTS** the Report of the Magistrate Judge (Docket No. 142) as the findings of the District Court. 7X's Motion to Dismiss Brandstadt's counterclaims is **GRANTED** in part and **DENIED** in part. Specifically, 7X's motion to dismiss is **GRANTED** as to

Brandstadt's counterclaims for defamation, tortious interference, and hostile work environment/wrongful termination. These counterclaims are **DISMISSED** with prejudice and Brandstadt's request for attorneys' fees is **STRICKEN**. 7X's motion to dismiss is **DENIED** as to Brandstadt's counterclaim for intentional infliction of emotional distress.

***3** So **ORDERED** and **SIGNED** this **26th** day of **August, 2024.**

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United States District Court,
S.D. Texas, Houston Division.

WESTERN RESERVE MEDTEC SERVICES, LLC, Plaintiff,
v.
STRYKER CORPORATIOn, Defendant.

Civil Action
No.
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CV
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2604

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Signed 05/13/**2019**

Attorneys and Law Firms

Colin Sayer Sherrod, Jett Williams, III, Henke, Williams & Boll, LLP, Houston, TX, for Plaintiff.

Jesse Coleman, Emma Canales Mata, Seyfarth Shaw LLP, Houston, TX, Michael D. Wexler, Seyfarth Shaw LLP, Chicago, IL, for Defendant.

MEMORANDUM AND ORDER

Christina A. Bryan, United States Magistrate Judge

***1** Western Reserve MedTec Services, LLC (WRMS) has sued Stryker Corporation for tortious interference with an existing contract, tortious interference with prospective business relations, and unfair competition. Stryker filed an initial motion to dismiss WRMS's claims under Fed. R. Civ. P. 12(b)(6). Dkt. 3. The court denied Stryker's motion without prejudice and ordered WRMS to replead. WRMS filed an amended complaint. Dkt. 19. Now before the court is Stryker's Renewed Motion to Dismiss for Failure to State a Claim. Dkt. 20. Having considered the parties' submissions and the law, the court denies the motion for the reasons set forth below.

I. Background

WRMS's Amended Complaint alleges the following facts which, for purposes of the motion, the court presumes are true:

Stryker is a manufacturer of medical equipment. WRMS was a supplier of medical equipment to hospitals throughout the United States, including Memorial Hermann Medical Center Memorial City (MHMC). WRMS was both a customer of Stryker (because WRMS distributed Stryker products) and a competitor of Stryker (because Stryker also supplied its products to entities such as MHMC directly).

WRMS alleges that on multiple occasions, Stryker worked to undermine WRMS and caused hospitals to terminate contracts with

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WRMS. In 2012, a Stryker Regional Manager authorized delivery of an email to MHMC that contained disparaging, false, and misleading information about WRMS. Also in 2012, a Stryker employee boasted that he was starting a Facebook group called "Bad Gear from WRMS" and would invite a MHMC decision-maker to join the group.

WRMS also alleges that Stryker's embedded employees at MHMC undermined WRMS by ignoring equipment replacement or repair requests and then contacting MHMC directly so that Stryker could supply or service the equipment. Stryker employees, who were chummy with MHMC supply chain executives, initiated rumors about Stryker taking over WRMS and disseminated misinformation about WRMS's business and reputation.

In late October 2013, WRMS entered a contract with MHMC to supply and service equipment for the period November 1, 2013 through December 1, 2018 (the Agreement). Stryker employees started a rumor that Stryker's takeover of WRMS's service contract was imminent, and misinformed MHMC supply chain executives in a 2104 meeting about WRMS business and reputation. In this way, Stryker started a smear campaign against MRMS.

In September 2014, less than a year after entering into the Agreement, MHMC notified all vendors that it would be centralizing the hospital's supply chain management and terminating all existing contracts. MHMC also told WRMS it would initiate a new bidding process for the award of a centralized contract. In November 2014, MHMC accepted bids only from WRMS and Stryker. Meanwhile, while MHMC was evaluating the bids, WRMS continued to perform under the existing contract.

On January 1, 2016, MHMC notified WRMS that the Agreement would be terminated effective June 30, 2016. Yet, MHMC entered a month-to-month contract with WRMS from June 30, 2016 through September 2016. October 2016 was the first month in which MHMC did not perform or receive payment, either under the original Agreement or a month-to-month contract. Also in October 2016, MHMC notified WRMS that it awarded Stryker the new centralized vendor contract for which both companies had submitted bids.

***2** Prior to October 2016, WRMS believed its business relationship with MHMC would continue. WRMS suffered damages as a result of Stryker's interference that resulted in MHMC's discontinuing the month-to-month or longer-term Agreement with WRMS and entering into a new contract with Stryker to supply and service medical equipment. Ultimately, and as a result of Stryker's unfair competition and interference with WRMS's existing Agreement with MHMC and its prospective business relationship with MHMC, WRMS went out of business.

WRMS filed this suit against Stryker on June 29, 2018. WRMS's First Amended Original Complaint asserts causes of action against Stryker for tortious interference with existing contracts, tortious interference with prospective business relations, and unfair competition.

II. Rule 12(b)(6) Standards

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). In reviewing a motion to dismiss under Rule 12(b)(6), this Court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. *Alexander v. AmeriPro Funding, Inc.*, 848 F.3d 698, 701 (5th Cir. 2017) (citing *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). However, the court does not apply the same presumption to conclusory statements or legal conclusions. *Iqbal*, 556 U.S. at 678-79.

Generally, the court may consider only the allegations in the complaint and any attachments thereto in ruling on a Rule 12(b)(6) motion. However, the court may take judicial notice of public documents, and may also consider documents a defendant attaches to its motion to dismiss under 12(b)(6) if the documents are referenced in the plaintiff's complaint and central to the plaintiff's claims. [1] *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 499 (5th Cir. 2000); *King v. Life Sch.*, 809 F. Supp. 2d 572, 579 n.1 (N.D. Tex. 2011).

"Although dismissal under Rule 12(b)(6) is ordinarily determined by whether the facts alleged in the complaint, if true, give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings." *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir.1986) If the face of the pleadings demonstrate that a cause of action is time-barred, and the pleadings do not raise a basis for tolling, a motion to dismiss based on a statute of limitations defense may be granted. *Taylor v. Bailey Tool & Mfg. Co.*, 744 F.3d 944, 946 (5th Cir. 2014) (citing *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003)).

III. Analysis

Stryker asserts several bases for dismissal of WRMS's claims pursuant to Federal Rule of Civil Procedure 12(b)(6): (1) that all of WRMS's claims are barred by the statutes of limitations (Dkt. 20 at 10-14); (2) that WRMS has failed to meet its burden to plead independently tortious conduct by Stryker (Dkt. 20 at 15-17); (3) and that WRMS has failed to plead the required element of proximate cause (Dkt. 20 at 18-20). In response, WRMS argues that each claim was timely filed or, alternatively, that equitable tolling doctrines apply to toll limitations [2] (Dkt. 21 at 13-19), and that it has adequately pleaded all of the elements of each cause of action, including independently tortious conduct and proximate cause (Dkt. 21 at 19-21). The court addresses each cause of action separately.

A. Tortious Interference with Existing Contract

1. Statute of Limitations

***3** WRMS filed this action in state court on June 29, 2018. Texas law imposes a two-year statute of limitations on claims for tortious interference with an existing contract.[3] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a); *First Nat'l Bank of Eagle Pass v. Levine*, 721 S.W.2d 287, 289 (Tex. 1986); *Burke v. Ins. Auto Auctions Corp.*, 169 S.W.3d 771, 776 (Tex. App. –Dallas, 2005, pet. denied). "The statute of limitations begins to run when the cause of action accrues." *Burke*, 169 S.W.3d at 776 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a)). "Causes of action accrue and statutes of limitations begin to run when facts come into existence that authorize a claimant to seek a judicial remedy." *Exxon Corp. v. Emerald Oil & Gas, Co., L.C.*, 348 S.W.3d 194, 202 (Tex. 2011) (citations omitted). "When a cause of action accrues is normally a question of law." *Id.*

Stryker argues that the existing contractual relations claim accrued on January 1, 2016, when WRMS received notice that MHMC was "exercising its option to terminate the Agreement without cause by providing 180 days written notice." Dkt. 19-2. WRMS, on the other hand, argues the claim could not have accrued before the effective termination date of June 30, 2016.

As discussed below, the accrual date of WRMS's claim for tortious interference with existing contract is not evident from the face of the pleadings. Therefore, dismissal of the claim for interference with existing contract based on the statute of limitations is not appropriate at the motion to dismiss stage.

As one Texas court has stated:

> The first step in ascertaining when the statute of limitations begins to run in a tort action is to determine whether the act causing the damage constitutes a legal injury. If the act complained of constitutes a legal injury to a plaintiff, the wrong is completed and the cause of action accrues from the time the act is committed, even where little, if any, actual damage occurs immediately on commission of the tort. Conversely, if the act complained of does not, by itself, constitute a legal injury, the cause of action accrues when, and only when, the damages are sustained.

Burke, 169 S.W.3d at 776 (citations omitted). The Fifth Circuit has also recognized the need to determine whether the act complained of constitutes a legal injury when deciding when a cause of action accrues:

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> The test to determine when the statute of limitations begins to run against an action sounding in tort is whether the act causing the damage does or does not of itself constitute a legal injury, that is, an injury giving rise to a cause of action because it is an invasion of some right of plaintiff. If the act is of itself not unlawful in this sense, ...the cause of action accrues, and the statute begins to run, when, and only when, the damages are sustained; and this is true although at the time the act is done it is apparent that injury will inevitably result.

Randolph v. Resolution Tr. Corp., 995 F.2d 611, 618 (5th Cir. 1993) (*citing* *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967)).

In order to determine whether WRMS's existing contractual relations claim accrued when WRMS received the January 1, 2016 notice of termination, the court must examine whether the act (notice of termination) is a legal injury in and of itself. *See, id.*; *Burke*, 169 S.W.3d at 776. If it is not, the cause of action did not accrue until the facts establishing a legal injury or damages come into existence. *See* *Burke*, 169 S.W.3d at 777 (citing *Waxler v. Household Credit Services, Inc.*, 106 S.W.3d 277, 281 (Tex. App.–Dallas 2003, no pet.) (negative credit reports were not, themselves, unlawful, so the legal injury and cause of action accrued only when plaintiff was denied credit and damages were sustained).

***4** As Stryker points out in its argument regarding proximate cause, MHMC's January 1, 2016 notice of termination was not a breach of the contract. The contract allowed for termination without cause with 180 days' notice. Thus, at least on the face of the pleading, the January 1, 2016 termination notice was not a legal injury in and of itself. Because the notice was not a legal injury in and of itself, WRMS could not seek a judicial remedy in January 2016 absent actual damages or loss.

Stryker also argues that WRMS's claims are time-barred because the alleged acts of interference with contract occurred in 2012, more than two years before suit was filed. This argument fails first because WRMS has alleged that Stryker's interference continued through September 2016, and second because WRMS alleges it did not suffer damages from MHMC's termination of the contract until after September 2016. WRMS was not harmed until the contract was actually terminated. *See* *Hill v. Heritage Res., Inc.*, 964 S.W.2d 89, 116 (Tex. App. – El Paso 1997, pet. denied) ("A cause of action for tortious interference with an existing contract does not accrue until the contract is interfered with *and* harm caused to the plaintiff. *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967)" (emphasis added)); *Miller v. Amer. Intern. Group, Inc.*, **Civil** **Action** No. 3:04-CV-1417, 2005 **WL** 1131110 at 7 (N.D. Tex. May 9, 2005).

Stryker cites *Exxon Mobile Corp. v. Rincones*, 520 S.W.3d 572, 591 (Tex. 2017), for the proposition that "a claim for tortious interference with a contract accrues at the time a contracting party knows the nature of the injury and the damages, ***regardless of whether the contract is terminated at that time.***" (emphasis added). *Rincones* is not controlling here because the facts in this case materially differ from the facts in *Rincones*. Rincones brought a tortious interference claim against a laboratory that reported an allegedly false positive drug test to his employer. On the date of the false report, Rincones was placed on "inactive" status, which prevented him from receiving any work from or being paid by his employer. *Rincones*, 520 S.W.3d at 578. Thus, as of the date he was placed on inactive status, Rincones was unable to work or be paid, even though his employment was not terminated until a later date. The Texas Supreme Court ruled that his interference claim accrued from the date he was notified of his inactive status, because he was immediately damaged at that point by not earning wages. *Id.* at 591. Here, WRMS continued to perform and receive payment under the existing contract until at least June 30, 2016. Dkt. 19 at ¶ 21. The face of the pleadings and contract show only that WRMS was notified of an imminent injury in January 2016, not that it suffered a legal injury at that time. *See* *Randolph*, 995 F.2d at 617 ("[E]ven an inevitable injury will not result in the accrual of a cause of action for limitations purposes in Texas.").

Dismissal under Rule 12(b)(6) is not appropriate unless the face of the pleadings and exhibits to the motion clearly establish that a claim is barred by limitations. On its face, the Amended Complaint does not demonstrate the existence of facts in January 2016 that would have authorized WRMS to seek a judicial remedy. WRMS could not seek a judicial remedy for tortious interference with the Agreement until it suffered actual damages or loss. *See* *Prudential Ins. Co. of America*, 29 S.W.3d 74, 77 (Tex. 2000) (actual damages or loss is an element of a claim for tortious interference with existing contract). WRMS alleges in the Amended Complaint that it continued to perform and be paid under the Agreement at least through the June 30, 2016 termination date. Dkt. 19 at ¶ 21. Despite the January 2016 notice of termination, WRMS did not know at that time if it would suffer damages from the termination, because it was still possible that the parties would renew or enter a new contract. Thus, the pleadings do not demonstrate the existence of an injury or damages prior to June 30, 2016. Therefore, the motion to dismiss the existing contractual relations claim as time-barred is denied.

2. Proximate Cause

***5** Stryker also moves for dismissal of the existing contractual relations claim on the basis that WRMS has failed to allege and cannot demonstrate proximate cause. According to Stryker, WRMS has failed to allege that Stryker intentionally interfered, offered any inducement, or persuaded MHMC to breach its contract, and therefore has failed to plead the element of proximate cause. Stryker further argues that even if Stryker *had* actively induced MHMC to terminate the Agreement, WRMS cannot meet the proximate cause requirement because "merely inducing a contract obligor to

do what it has a right to do is not actionable interference." *ACS Invest., Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997) (defendant merely negotiated with a party to do what the party had a right to do under its agreement with plaintiff).

With respect to the latter argument, "the terminable-on-notice or terminable-at-will status of a contract is not a defense to an action for tortious interference." *Faucette v. Chantos*, 322 S.W.3d 901, 914 (Tex. App. – Houston [14th Dist.] 2010, no pet.). As the court in *Faucette* explained, it is *possible* to tortiously interfere with a contract that is terminable on notice or at will:

> [A] third party is prohibited from tortiously interfering with a terminable-on-notice or terminable-at-will contract, but 'merely inducing one of the parties to exercise his right to terminate contractual relations after giving the required notice does not *necessarily* constitute tortious interference with contract under Texas law.'

Id. (emphasis in original).

Texas law allows claims for tortious interference with a terminable-on-notice contract, but to plead a plausible claim, WRMS must allege that Stryker did more than merely induce MHMC to exercise its right to terminate the Agreement. Stryker correctly argues that "[t]o establish proximate cause, a party must show that 'the defendant took an active part in persuading a party to a contract to breach it[,]' " and "[m]erely entering into a contract with a party with the knowledge of that party's contractual obligations to someone else is not the same as inducing a breach." *Amigo Broad, LP v. Spanish Broad Sys., Inc.*, 521 F.3d 472, 493 (5th Cir. 2008) (citing *Davis v. HydPro, Inc.*, 839 S.W.2d 137, 139 (Tex. App. – Eastland 1992, writ denied)); *M-I LLC v. Stelly*, 733 F. Supp. 2d 759, 775 (S.D. Tex. 2010).

The proximate cause element of a tortious interference claim requires "active participation." *Lincoln Gen. Ins. v. U.S. Auto Ins. Servs.*, 787 F.3d 716, 731 (5th Cir. 2015). However, WRMS has described willful acts of interference by Stryker and alleges that MHMC would not have taken the actions it did absent Stryker's acts. For example, WRMS alleges that "[f]or years Stryker worked to undermine and disrupt WRMS's services in order to induce WRMS's business partners to terminate their respective agreements and/or relationships and to replace WRMS with Stryker.... Stryker has succeeded in usurping WRMS's contracts and business relationships in the past, and it succeeded again at [MHMC]." Dkt. 19 at ¶ 10. "Stryker's employees regularly communicated with each other to undermine WRMS and damage its business reputation in the community and with [MHMC]. *Id.* at ¶ 11. "[D]uring the term of the Agreement, Stryker delayed or ignored equipment maintenance or replacement requests from WRMS.... Consistently during the term of the Agreement, Stryker would act as [WRMS's] competitor in hopes of forcing WRMS into breaching the Agreement and convincing [MHMC] to terminate the Agreement and its business relationship with WRMS." *Id.* at ¶ 14. "Stryker employees initiated a rumor campaign that Stryker's takeover of WRMS's [Agreement] was imminent." *Id.* at ¶ 15.

Generally, proximate cause is a fact question. *See* Ryder Integrated Logistics, Inc. v. Fayette Cty., 453 S.W.3d 922, 929 (Tex. 2015) ("Because proximate cause is ultimately a question for a fact-finder, we need only determine whether the petition 'creates a fact question' regarding the causal relationship between [defendant's] conduct and the alleged injuries."); J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Beeson, 835 S.W.2d 689, 698 (Tex. App. – Dallas 1992, writ denied) ("The question of causation is a fact question for the jury."). At this stage, the facts alleged by WRMS, if presumed to be true, raise a fact issue regarding proximate cause and preclude dismissal under Rule 12(b)(6).

B. Tortious Interference with Prospective Business Relations

1. Statute of Limitations

***6** The statute of limitations in Texas for a cause of action for tortious interference with prospective business relations is two years. TEX. CIV. PRAC. & REM. CODE § 16.003(a); *First Nat'l Bank of Eagle Pass v. Levine*, 721 S.W.2d 287, 289 (Tex. 1986). "[A] cause of action for tortious interference with business relations does not accrue until existing negotiations, which are reasonably certain of resulting in a contract, are interfered with such that the negotiations terminate and harm to the plaintiff results." *Hill v. Heritage Resources*, 964 S.W.2d 89, 116 (Tex. App. – El Paso 1997, pet. denied). "If the plaintiff is not yet harmed, even in the face of a breach of duty, then the cause of action has not yet accrued and any suit filed thereupon is premature." *Id.* at 116.

WRMS has alleged that once MHMC announced it would be centralizing its supply chain and using a single vendor, it accepted proposals from only two suppliers, WRMS and Stryker. Dkt. 19 at ¶ 16-17. At the time WRMS submitted its proposal to MHMC it had "four years left on its contract and a previous successful relationship of at least six years." *Id.* at ¶ 17. Based at least in part on these facts, WRMS "was hopeful that it would win the bid." *Id.* at ¶ 18.

WRMS has also alleged that even after the January 1, 2016 notification from MHMC that its contract would be terminated effective June 30, 2016, WRMS believed it was still in the running to be awarded the centralized vendor contract and was "never formally advised that Stryker had won the bidding process." *Id.* at ¶ 20. It is plausible that WRMS's belief that it was still in the running may have been reinforced by MHMC's continued renewal of month-to-month contracts between June 30, 2016, and September 30, 2016.

Taking these factual allegations as true, WRMS has alleged that negotiations between WRMS and MHMC, which, based on allegations in the pleadings, were reasonably certain of resulting in a contract, did not terminate until after June 30, 2016. The pleadings do not demonstrate on their face that WRMS's interference with prospective relations claim is time-barred. Therefore, the motion to dismiss the prospective relations claim as time-barred must be denied.

2. Proximate Cause

In a tortious interference with prospective relations case, "[i]t is not necessary to prove that the contract would have certainly been made but for the interference; it must be reasonably probable, considering all of the facts and circumstances attendant to the transaction. More than mere negotiations must have taken place." *Hill*, 964 S.W.2d at 109 (citation omitted); *M-I LLC*, 733 F. Supp. 2d at 775 (plaintiff must plead facts showing a reasonable probability that it would have entered into a business relationship); *Lincoln Gen. Ins.*, 787 F.3d at 731 (5th Cir. 2015).

As described in the section above, WRMS alleges that MHMC invited it to bid for a contract after announcing its intention to centralize its vendor contracts; MHMC repeatedly entered into month-to-month contracts with WRMS, even after the June 30, 2016 termination; WRMS continued performing and being paid by MHMC until the end of September 2016; WRMS believed its bid for the centralized vendor contract was under consideration by MHMC; and MHMC never informed WRMS that it was awarding the centralized vendor contract to Stryker. Again, proximate cause is generally a question for the fact-finder, and as a matter of pleading standards required to survive a motion to dismiss, WRMS has met its burden to allege facts from which a jury could find a contract between MHMC and WRMS was reasonably probable and that Stryker's interference was the proximate cause of WRMS's injury.

3. Independently Tortious Conduct

***7** In order to state a claim for tortious interference with prospective business relations the plaintiff must allege that the defendant's conduct was independently tortious or unlawful. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711 (Tex. 2001); *see also, El Paso Healthcare Sys., Ltd. v. Murphy*, 518 S.W.3d 412, 420-21 (Tex. 2017) ("Tortious interference with a prospective business relationship requires a finding that the defendant engaged in independently tortious or unlawful conduct; interference with an existing contract does not."). In *Sturges*, the Texas Supreme Court wrote at length to clarify just what the phrase "independently tortious or wrongful" means in the context of tortious interference with prospective business relations. The court stated:

> [A]n action for interference with a prospective contractual or business relation provides a remedy for injurious conduct that other tort actions might not reach ... but only for conduct that is already recognized to be wrongful under the common law or by statute.

52 S.W.3d at 713. The example the court gave of actionable conduct was a defendant who threatened a customer with bodily harm if he did business with the plaintiff. In such a case, the defendant's conduct is independently

tortious because it is an assault, but the plaintiff could not sue for assault. *Id.* After examining the history of the tort at common law, and surveying the few Texas cases in which plaintiffs recovered damages under this cause of action, the *Sturges* court concluded that the scope of culpable conduct was fairly limited:

> It appears that in most Texas cases in which plaintiffs have actually recovered damages for tortious interference with prospective business relations, the defendants' conduct was either independently tortious —in the four cases noted, defamatory or fraudulent— or in violation of state law... [W]e see no need for a definition of tortious interference with prospective business relations that would encompass other conduct.

Id. at 726. The *Sturges* Court further observed that "the historical limitation of the tort to unlawful conduct — 'the actor's conduct was characterized by violence, fraud or defamation and was tortious in character' — provides a viable definition and preserves the tort's utility of filling a gap in affording compensation in situations where a wrong has been done." *Id.* The plaintiff need not prove an independent tort as part of an interference with prospective relations claim, but must be able to show the defendant's conduct would be actionable under a recognized tort. *Id.*

WRMS argues in its response to the motion to dismiss that it has alleged conduct that "was independently tortious or unlawful because it was characterized by defamation, disparagement, and fraud." Dkt. 21 at 19 (citing Dkt. 19, at ¶¶ 1-15, 18). WRMS also argues that it is plausible that discovery will reveal further evidence in support of its claim. *See* Twombly, 550 U.S. at 556 ("Asking for plausible grounds to infer an [anti-competitive] agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."). Although WRMS identifies allegedly tortious conduct that occurred in 2012, before MHMC last renewed its agreement with WRMS for a five-year term, it also alleges specific acts in 2014 (Dkt. 19 at ¶ 15), and that Stryker's independently tortious acts continued throughout the entire term of the MHMC Agreement. The court concludes that for purposes of pleading, WRMS has satisfied its burden to state a plausible claim for relief by pleading defamatory conduct by Stryker.

C. Unfair Competition

***8** "Unfair competition under Texas law 'is the umbrella for all statutory and nonstatutory causes of action arising out of business conduct which is contrary to honest practice in industrial or commercial matters.' " *Taylor Pub. Co. v. Jostens, Inc.*, 216 F.3d 465, 486 (5th Cir. 2000). The tort of unfair competition requires that the plaintiff show that an illegal act by the defendant interfered with the plaintiff's ability to conduct its business. *Id.*

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(citing *Schoellkopf v. Pledger*, 778 S.W.2d at 897, 904–05 (Tex. App.—Dallas 1989, writ denied)). The statute of limitations on WRMS's unfair competition claim is two years, *R. Ready Prods., Inc. v. Cantrell*, 85 F. Supp. 2d 672, 693 (S.D. Tex. 2000), and the accrual of WRMS's unfair competition claim is governed by the same legal principals as his tortious interference claims. *See Jackson v. W. Telemarketing Corp. Outbound*, 245 F.3d 518, 523-24 (5th Cir. 2001) ("Under Texas law, claims for unfair competition, unfair trade practices, conversion, tortious interference with contract, misappropriation of trade secrets, and conspiracy must be brought within two years from the time the cause of action accrues. In general, a cause of action accrues and limitations begin running when a wrongful act causes a legal injury." (footnotes and citations omitted)). In addition, the requirement for pleading an illegal act or independent tort also applies to WRMS's unfair competition claim. "Although the illegal act need not necessarily violate criminal law, it must at least be an independent tort." *Taylor*, 216 F.3d at 486 (citations omitted).

WRMS's unfair competition claim appears to be entirely coextensive with its tortious interference with prospective business relations claim. A party is entitled to plead alternative theories for relief. FED. R. CIV. P. 8(d). For current purposes, the court denies Stryker's motion to dismiss WRMS's unfair competition claim for the reasons discussed above in connection with its tortious interference with prospective relations claim.

III. Conclusion

For the reasons discussed above, Stryker's motion to dismiss is **DENIED.**

All Citations

Not Reported in Fed. Supp., 2019 WL 13191641

Footnotes

1 WRMS objects to consideration of the excerpt from the deposition of Jack Coenen attached as Exhibit 1 to Defendant's Reply (Dkt. 23). The objection is sustained, and the court will not consider Exhibit 1.

2 The discovery rule applies where the nature of the plaintiff's injury is inherently undiscoverable and the injury itself is objectively verifiable. *HECI Expl. Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998). The court rejects WRMS's argument that the discovery rule or other tolling doctrines apply to toll limitations in this case. Nonetheless, the court denies the motion on the grounds that it is not apparent from the face of the pleading that WRMS's claims accrued prior to June 30, 2016.

3 Texas substantive law governs this diversity action. *See* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

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CASE NO. 16

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This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. Texas,
Corpus Christi Division.

Monica GARCIA, Plaintiff,
v.
LCS CORRECTIONS SERVICES, INC., et al, Defendants.

Civil Action
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May 24, **2010**.

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Myra Kay Morris, Brian Charles Miller, Royston Rayzor, Andrew J. Lehrman, Jordan Mason Anderson, Sorrell Anderson et al, Corpus Christi, TX, for Defendants.

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

RANDY CRANE, District Judge.

I. Factual and Procedural Background

***1** Now before the Court is Plaintiff's Motion to Remand (Doc. 12). [1] This is a wrongful death and survival action brought by Plaintiff Monica Garcia, individually and as representative of the estate of Mario A. Garcia ("Mr.Garcia"), and as next friend of Mr. Garcia's ten-year-old son, P.G., against Defendants LCS Corrections Services, Inc. ("LCS"), Miguel Niderhauser, and Dr. Michael Pendleton. (Doc. 19). Plaintiff's factual allegations consist of the following. On December 31, 2008, after pleading guilty to a federal offense, Mr. Garcia was remanded to federal custody for suicide watch at Brooks County Detention Center in Falfurrias, Texas, where he died on January 12, 2009. *Id.* The detention center is a private prison operated by LCS, and Niderhauser was the warden at the prison, and Dr. Pendleton a physician there, at the time of Mr. Garcia's death. *Id.* At the time he was remanded to custody, Mr. Garcia had a known seizure disorder for which he was taking medication prescribed to him by his personal physician. *Id* . Mr. Garcia suffered from seizures and headaches while at the prison and was transported to Christus Spohn Hospital in Kingsville, Texas, where "it was noted that the private prison had stopped Mr. Garcia's medications." *Id.* The hospital released Mr. Garcia with instructions given to the prison guards to continue his medications, including his seizure medication. *Id.* As described more

fully *infra,* Plaintiff seeks to recover against Defendants on the grounds that their negligent and grossly negligent acts or omissions caused Mr. Garcia's death. *Id.*

Plaintiff originally filed this cause in the 79th Judicial District Court, Brooks County, Texas, on November 2, 2009, and amended her petition on November 4, 2009. (Doc. 1, Ex. 1–B). On December 2, 2009, LCS removed the action to federal court on the grounds that Plaintiff improperly joined in-state Defendants Niderhauser and Dr. Pendleton to defeat diversity jurisdiction. (Doc. 1). Absent the joinder of these Defendants, it is undisputed that the parties are diverse in citizenship and that the Court has jurisdiction over the case. (Docs.1, 12, 16, 20, 25, 29, 34); *see* 28 U.S.C. §§ 1332, 1441. Plaintiff now moves to remand, claiming that Niderhauser and Dr. Pendleton are proper Defendants to Plaintiff's claims. (Doc. 12). As the removing Defendant, LCS contests remand and requests the dismissal of Plaintiff's claims against Niderhauser and Dr. Pendleton. (Docs.16, 29).

II. Plaintiff's Motion to Remand

A. Improper Joinder

The doctrine of improper joinder constitutes a "narrow exception" to the rule of complete diversity, and the burden of persuasion on a party claiming improper joinder is a "heavy one." *Campbell v. Stone Ins.,* 509 F.3d 665, 669 (5th Cir.2007) (quoting *McDonal v. Abbott Labs.,* 408 F.3d 177, 183 (5th Cir.2005)). The Fifth Circuit has recognized two ways to establish improper joinder: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse defendant in state court. *Smallwood v. Ill. Cent. R.R. Co.,* 385 F.3d 568, 573 (5th Cir.2004) (en banc) (quoting *Travis v. Irby,* 326 F.3d 644, 646–47 (5th Cir.2003)). Here, LCS has not claimed any actual fraud; therefore, this Court's inquiry is limited to whether a reasonable basis exists for predicting that Plaintiff might be able to recover against *either* of the in-state Defendants. *Id.;* (Docs.1, 12, 16, 20, 25, 29, 34). "This means that there must be a reasonable possibility of recovery, not merely a theoretical one." *Ross v. Citifinancial, Inc.,* 344 F.3d 458, 462 (5th Cir.2003) (emphasis omitted). The Fifth Circuit has likened this inquiry to the standard of review for evaluating a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b) (6). *Campbell,* 509 F.3d at 669; *Smallwood,* 385 F.3d at 573. In other words, the court considers the allegations of the complaint to determine whether the plaintiff states a claim under state law against the in-state defendant. *Smallwood,* 385 F.3d at 573. Ordinarily, no improper joinder exists if a plaintiff survives this Rule 12(b)(6)-type analysis. *Id.* However, in cases "in which a plaintiff has stated a claim, but has misstated or omitted discrete facts that would determine the propriety of joinder," the district court may, in its discretion, "pierce the pleadings" and conduct a summary judgment-type inquiry. *Id.* In determining whether improper joinder has occurred, the court must resolve contested fact issues and ambiguities in state law in favor of the plaintiff. *Travis,* 326 F.3d at 649.

B. Analysis

***2** Plaintiff's claims of negligence and gross negligence against all Defendants require a showing that (1) the defendant owed a legal

duty to the plaintiff; (2) the defendant breached that duty; and (3) the defendant's breach proximately caused the plaintiff's damages. *See, e.g., W. Invs. v. Urena,* 162 S.W.3d 547, 550 (Tex.2005) (common law negligence); *Hamilton v. Wilson,* 249 S.W.3d 425, 426 (Tex.2008) (medical negligence). The live pleading at the time of removal, Plaintiff's First Amended Original Petition, alleged the following with respect to the elements of duty, breach, and proximate cause:

> 11. At the time of Mr. Garcia's incarceration, Defendants were responsible for providing for the medical needs of inmates at the Brooks County Detention Center.
>
> 12. Although Mario Garcia was on prescribed medication at the time of confinement, the Defendants intentionally refused him his medication, in deliberate indifference to his medical needs. Further, at the time that the Defendants knew that Mario Garcia's health was deteriorating, they denied him treatment.
>
> 13. The deprivation of proper medication and treatment posed an excessive risk which the medical staff of LCS knew. Prior to Mario Garcia's death, numerous people complained to the Defendants and the medical staff about Mr. Garcia's deteriorating condition and his lack of proper medication.
>
> 14. On January 12, 2009, Mario Garcia died while in confinement. The autopsy revealed that Mr. Garcia died as a result of seizures. The Defendants' violation of the proper standard of care and conscious indifference and willful neglect of Mr. Garcia's serious medical needs and refusal to allow him to have his medication was a direct and proximate cause of his death.

(Doc. 1, Ex. 1–B). Citing to the Texas Supreme Court's decision in *Leitch v. Hornsby,* 935 S.W.2d 114, 117 (Tex.1996), LCS argued in its Notice of Removal that Niderhauser did not owe any duty to Mr. Garcia separate from the duties owed by his employer, as would be required to establish Niderhauser's individual liability. (Doc. 1). LCS also contended that Niderhauser had not personally engaged in any actionable conduct that was the legal cause of Mr. Garcia's injuries. *Id.* Therefore, Plaintiff had no possibility of recovery against this Defendant. *Id.* With respect to Dr. Pendleton, LCS appealed to a toxicology report incorporated into the autopsy of Mr. Garcia that allegedly demonstrated that the deceased had in fact received anti-seizure medication. *Id.* [2] LCS further claimed that Plaintiff had "no evidence to the contrary," and therefore this Defendant was also improperly joined. *Id.*

In response, Plaintiff filed both the motion to remand now pending before this Court and a request for leave to amend her pleading to clarify her allegations of duty, breach, and proximate cause. (Docs.11, 12). The Court granted leave, and Plaintiff now alleges the following with respect to Niderhauser and Dr. Pendleton:

> ***3** 12. Because Mr. Garcia was in confinement, Warden Niderhauser, Dr. Dr. Pendleton and other employees or agents of the Brooks County Detention Center had a duty to provide for Mr. Garcia's care. And, because he was in custody and unable to care for himself, Warden

Niderhauser, Dr. Dr. Pendleton and other employees or agents at the Brooks County Detention Center had a higher duty of care than that owed to persons generally.

13. Warden Niderhauser, Dr. Dr. Pendleton, and other employees and agents at the Brooks County Detention Center breached their duty of care to Mario A. Garcia by failing to care for his medical needs. In particular, Defendants breached their duty of care by:

(a) failure to continue Mario Garcia's medications;

(b) failure to determine what Mario Garcia's medical condition was at the time he was placed in custody;

(c) failure to refer Mario Garcia for competent treatment when he continued to suffer seizures;

(d) failure to attend to Mario Garcia's needs when his condition was deteriorating;

(e) failure to properly diagnose Mario Garcia's medical condition and medical needs;

(f) failure to provide proper training to care for the medical needs of persons placed into custody at the Brooks County Detention Center;

(g) failure to have proper policies and procedures to care for the medical needs of persons who have chronic and/or ongoing medical issues and who are placed into custody at the Brooks County Detention Center.

....

16. Warden Niderhauser's negligence was a proximate cause of Mario Garcia's death, for which the Plaintiff sues.

17. Dr. Pendleton's medical malpractice was a proximate cause of Mario Garcia's death for which the Plaintiff sues. *See* TEX. CIV. PRAC. & REM.CODE § 74.001, *et seq.*

(Doc. 19).

1. Dr. Pendleton

Finding it dispositive of the motion to remand, the Court turns to the issue of whether one of the in-state Defendants, Dr. Pendleton, is a properly joined Defendant to the action. The Court first notes that the response by LCS to the motion to remand abandons any argument that the toxicology report, and Plaintiff's inability to controvert it, demonstrate improper joinder. (Doc. 16). In any event, these arguments are unavailing. If Plaintiff's claims against Dr. Pendleton can survive a Rule 12(b)(6)-type analysis, LCS can only show improper joinder by producing evidence to negate the possibility of liability on the part of Dr. Pendleton. *See Travis,* 326 F.3d at 650. LCS has not shown that the toxicology report negates *any* possible claim against Dr. Pendleton, and "simply pointing to the plaintiff's lack of evidence at this stage of the case is insufficient" to show improper joinder. *Id.* at 650–51.

Nonetheless, LCS continues to assert that Plaintiff improperly joined Dr. Pendleton because her claims against him cannot withstand a Rule 12(b)(6)-type challenge.

(Docs.16, 29). Rule 12(b)(6) allows for dismissal for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Supreme Court confirmed that Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires " 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Id.* at 555 (quoting FED. R. CIV. P. 8(a); *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). "While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment]' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (internal citations omitted). To survive a motion to dismiss, a complaint must contain "enough factual matter (taken as true)" to state a claim for relief that is "plausible on its face." *Id.* at 556, 570.

***4** Most recently, in *Ashcroft v. Iqbal,* —— U.S. ——, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), the Supreme Court explained that "[t]wo working principles underlie our decision in *Twombly." Id.* at 1949. "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1950. A claim has facial plausibility when the plaintiff pleads factual content that allows the court, drawing upon its "judicial experience and common sense," to reasonably infer that the defendant is liable for the misconduct alleged. *Id.* at 1949 (citing *Twombly,* 550 U.S. at 556), 1950. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' " *Id.* at 1950 (quoting FED. R. CIV. P. 8(a)(2)). In keeping with these principles, the Supreme Court in *Iqbal* set forth a "two-pronged" approach to considering Rule 12(b)(6) motions:

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id. at 1950.

No party disputes that Plaintiff's claims against Dr. Pendleton constitute health care liability claims under Chapter 74 of the Texas Civil Practices and Remedies Code. *See* TEX. CIV.

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PRAC. & REM.CODE ANN. § 74.001, *et seq.* (Vernon 2005); (Docs.12, 16, 20, 24, 25, 29, 34). Chapter 74 defines a health care liability claim, in relevant part, as "a cause of action against a ... physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care ..., which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract." TEX. CIV. PRAC. & REM.CODE ANN. § 74.001(13) (Vernon 2005). The claims against Dr. Pendleton sound in negligence, and it is LCS's contention that Plaintiff's "seven bare-boned allegations of negligence and one-sentence generic allegation of causation" fail to state a facially plausible claim for relief against this Defendant. (Doc. 29). In so arguing, LCS ignores the additional, factual allegations that the Court must consider in conducting its Rule 12(b)(6) analysis. Those allegations are that Mr. Garcia had a known seizure disorder, for which he was taking medication prescribed to him by his personal physician, when he was remanded to the custody of Brooks County Detention Center. Mr. Garcia suffered from seizures and headaches while at the prison, necessitating a trip to the hospital where it was determined that the prison had stopped his medications. The hospital discharged Mr. Garcia with instructions given to continue his medications. Shortly thereafter, he died. Against the "framework" of Plaintiff's allegations of negligence in the provision of medical treatment to Mr. Garcia, and proximate cause, these factual allegations are enough to state a facially plausible claim for relief against Dr. Pendleton, allegedly the physician at the prison at the time of Mr. Garcia's death.

***5** Both LCS and Dr. Pendleton further assert that Dr. Pendleton must be dismissed as a Defendant to this action in light of Plaintiff's failure to comply with a specific procedural requirement for Chapter 74 claims. (Docs.16, 24, 29). The Court recognizes that a plaintiff asserting a health care liability claim must serve an expert report on the defendant physician or his attorney within 120 days of filing suit or face the dismissal of her claim with prejudice upon the motion of that defendant. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 74.351 (Vernon 2005). As set forth in Dr. Pendleton's motion to dismiss, Plaintiff first filed her health care liability claims against Dr. Pendleton in federal court on July 22, 2009 and then dismissed that cause and filed the current action in state court on November 4, 2009. (Doc. 24; Doc. 24, Exs. 1, 2, 4). Dr. Pendleton submits that Plaintiff failed to serve an expert report within 120 days of the initial filing and requests the dismissal of Plaintiff's claims against him on this basis. (Doc. 24; Doc. 24, Ex. 4). LCS also notes that Plaintiff has not served the expert report, although it does so to suggest that Plaintiff would have served the report "if [she] were serious about proceeding against Dr. Pendleton for some reason other than disrupting diversity jurisdiction." (Doc. 16). Upon review of the relevant case law, this Court cannot overlook that the vast majority of district courts have held that the expert report requirement does not apply in federal court. *See, e.g.*, *Politis v. Noblin*, 2009 WL 3761748, at *1 (S.D.Tex. Nov.9, 2009); *Mason v. United States*, 486 F.Supp.2d 621, 623–626 (W.D.Tex.2007); *Garza v. Scott & White Mem'l Hosp.*, 234 F.R.D. 617, 621–24 (W.D.Tex.2005).[3] Therefore, this Court must find that the initial filing of suit in a federal

forum did not start the 120–day clock, and the clock had not yet run in the current action when LCS removed it to federal court, where the rule does not apply. Given that Plaintiff's allegations against Dr. Pendleton otherwise state a plausible claim for relief, the Court must remand the case.

2. Attorney's Fees

Finally, the Court notes that Plaintiff's motion to remand requests an award of attorney's fees, expenses, and costs under 28 U .S.C. § 1447(c) on the grounds that LCS lacked an "objectively reasonable basis" for removal. (Doc. 12); *see Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005). Given that the crux of Plaintiff's claims against Dr. Pendleton at the time of removal was the deprivation of medication, LCS reasonably relied on the toxicology report in initially asserting that Plaintiff had no possibility of recovering against Dr. Pendleton based on this theory of negligence. The Court allowed Plaintiff to clarify her allegations after removal, upon which LCS reasonably maintained that Dr. Pendleton was not a properly joined Defendant by appealing to the Supreme Court's recent clarification of the Rule 12(b)(6) standard. For these reasons, the Court concludes that Plaintiff does not merit an award of attorney's fees, expenses, or costs for improper removal.

III. Conclusion

***6** For the foregoing reasons, the Court finds that Plaintiff has stated a facially plausible claim for relief against Defendant Dr. Michael Pendleton. Therefore, the Court lacks diversity jurisdiction over the case and hereby **ORDERS** that Plaintiff's Motion to Remand is hereby **GRANTED** and the case hereby **REMANDED** to the state district court from which it came.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 2163284

Footnotes

1 Also pending are Defendant Dr. Michael Pendleton's and Defendant Miguel Niderhauser's respective Rule 12(b)(6) Motions to Dismiss. (Docs.24, 32). The Court need not rule on these Motions, as the presence of properly joined Defendant Dr. Pendleton in this case requires remand.

2 LCS did not attach a copy of the report to the Notice of Removal.

3 Dr. Pendleton argues that the Court must dismiss the claims against him by citing to *Cruz v. Chang*, 400 F.Supp.2d 906, 915 (W.D.Tex.2005), in which U.S. District Judge Kathleen Cardone concluded that the export report requirement did

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apply in federal court. (Doc. 24). However, in *Mason,* Judge Cardone reached the opposite conclusion "[i]n light of the recent change in law and the persuasive reasons provided by every district court in Texas to consider the issue." *Mason,* 486 F.Supp.2d at 625.

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CASE NO. 17

2023 WL 4249268
Only the Westlaw citation
is currently available.
United States Court of Appeals, Fifth Circuit.

Sara LUEBANO, Plaintiff—Appellant,
v.
OFFICE DEPOT, L.L.C.,
Defendant—Appellee.

No.
22
-
50767
|
FILED June 29, 2023

Appeal from the United States District Court for the Western District of Texas, USDC No. 7:21-CV-233

Attorneys and Law Firms

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Before Clement, Graves, and Higginson, Circuit Judges.

Opinion

Per Curiam: [*]

***1** Sara Luebano was an assistant manager at Office Depot's location in Odessa, Texas. She worked for the company during a mass shooting event in August 2019. In June 2020, Luebano needed knee surgery and applied for time off under the Family and Medical Leave Act. Office Depot granted her leave beyond the twelve weeks required by statute. When Luebano failed to return to work by January 2021, the store terminated her employment. Luebano sued Office Depot for negligence related to the 2019 mass shooting and for violations of the FMLA and the Americans with Disabilities Act. The district court dismissed Luebano's federal claims pursuant to Federal Rule of Civil Procedure 12(b)(6) and declined to take supplemental jurisdiction over her state law claims. We AFFIRM in part and REVERSE in part the district court's order on the motion to dismiss. Consequently, we VACATE the district court's order on the motion to reopen. Finally, we REMAND to the district court for further proceedings consistent with this opinion.

I

A

What follows are the facts as alleged in Luebano's amended complaint. Luebano worked at Office Depot in Odessa, Texas, from June 2016 until January 2021. She started as a copy center associate and worked her way up to an assistant manager. While serving as an assistant manager, on August 31, 2019, an associate informed her that an active shooter was in Odessa. Police activity outside the store was heavy, and her active general manager, Dieter Mullin, ordered Luebano to ask the officers what was happening. Luebano was terrified. But she complied with her

supervisor's instructions and went outside to speak with the police. An officer told her to return to the building and that the situation was serious. Luebano informed the customers and associates that the store was on lockdown due to the ongoing active shooter event. She then locked the door and dropped the gate.

Rumors started to fly around the building that the mass shooter had shot people down the street. However, Mullen was anxious to reopen the store, asking Luebano to pay attention to what a nearby Target was doing. A little later, believing Target had reopened and that the situation was over, Mullen ordered Luebano to open the location for business. However, the store's area loss prevention manager, Blake Langley, countermanded these instructions. After intense confusion, Luebano followed Langley's guidance to conduct an emergency store closing and safely led the remaining people outside the building. The next day, Luebano submitted a letter to Office Depot complaining about how its managers handled the active shooter event. But nothing materialized from her letter.

About a month later, on October 1, 2019, Mullen and Hector Arellano, the new general manager, called Luebano into their office. They presented her with a performance improvement plan, in which Luebano's managers informed her that she was not performing her assistant manager responsibilities appropriately. Luebano disputed the factual basis for the plan, specifically its claim that she had been disciplined in the past for her performance. Mullen and Arellano refused to show her the documents underpinning the performance improvement plan. In response, Luebano declined to sign any disciplinary paperwork. Later, Luebano's management held additional disciplinary discussions regarding her handling of store security, bag checks, laptop inventory, and the store's safe.

***2** Unrelated to these events, on June 10, 2020, Luebano informed Office Depot that she needed to take prolonged medical leave for knee surgery starting June 19. Office Depot's human resources team instructed her to submit a request for FMLA leave, and she complied. Initially, Office Depot approved Luebano for FMLA leave starting June 19 and ending July 30. However, it later extended her leave several times.

But Luebano started to suspect her job might be in jeopardy. Early in October 2020, she saw the Odessa Office Depot advertising for a new assistant manager. Arellano denied any knowledge of a job posting. On October 12, Luebano was cleared to return to work with restrictions. She attempted to get on the work schedule, but Office Depot's HR team extended her leave to December 10, 2020, instead. Oddly, about a month later in November 2020, Office Depot informed Luebano that her leave had caused undue hardship, and it could no longer guarantee her role as an assistant manager at the Odessa store. But Office Depot informed Luebano she would be considered for any positions available at the Odessa location once she fully recovered.

On December 10, 2020, Luebano's leave expired, and Office Depot emailed her the next day. Luebano informed Office Depot that she had another appointment set for December 14, and Office Depot granted a further extension

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of her leave until December 15. On December 16, Luebano received another email indicating that her leave had been exhausted. However, Luebano did not return to work, and on January 7, 2021, she received an email from Fidelity Investments regarding her 401k and the termination of her employment. Concerned, Luebano contacted Arellano, who claimed to be uncertain whether Office Depot had terminated her. A few days later, on January 12, Arellano texted Luebano that Office Depot had fired her.

B

Luebano filed suit on September 27, 2021, in Ector County against Office Depot for violations of the FMLA and Texas law. Office Depot accepted service of her complaint on November 10, 2021, and timely removed to federal court based on federal question jurisdiction. It simultaneously moved to dismiss pursuant to Rule 12(b)(6). Luebano responded to this motion by requesting leave to amend, and the district court allowed her to file an amended complaint. On April 7, 2022, Luebano submitted her amended complaint, which added an ADA cause of action. Later that month, Office Depot again moved to dismiss. Luebano did not file a response to that motion. The district court granted Office Depot's motion to dismiss.

In its order, the district court first found that Luebano had failed to exhaust her ADA claim with the EEOC before filing her lawsuit. It then concluded that Luebano could not plausibly state a violation of the FMLA because she had exhausted her protected leave. Having dispatched her federal claims, the district court refused to take supplemental jurisdiction over Luebano's state law causes of action and dismissed the remainder of the amended complaint.

Luebano responded to the district court's order by moving to reopen the **case** under Federal Rule of Civil Procedure 60(b)(1). In support of her motion, Luebano argued that her attorney could not access the electronic filing system and submit her response to the motion to dismiss. She went on, asking the district court for relief because her attorney got sick while traveling and could not effectively remedy the filing issue before the court ruled on the motion. The district court did not agree that these barriers met the Rule 60(b)(1) threshold and denied Luebano's motion. Luebano timely appealed the order denying her motion to reopen her **case**. [1]

II

***3** "We review the grant of a motion to dismiss under Rule 12(b)(6) de novo, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs." *Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018) (quotation marks and citation omitted). "To survive a motion to dismiss, a complaint must 'plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' " *Nix v. Major League Baseball*, 62 F.4th 920, 928 (5th Cir. **2023**) (alteration adopted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to

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prevent a motion to dismiss." *Id.* (alteration adopted) (citation omitted).

III

Luebano's appeal exclusively challenges the district court's order dismissing her complaint. She first argues that the district court erred in rejecting her ADA claim because she generally alleged administrative exhaustion, which Luebano contends is all that is required of her at the pleading stage. Second, Luebano contends that the district court erred in dismissing her FMLA causes of action by collapsing her FMLA leave with other disability leave that she never requested. We address each argument in turn.

A

The district court concluded that Luebano failed to allege that the EEOC sent her a right-to-sue letter or that the agency had not adjudicated her charge within 180 days. Consequently, it dismissed her ADA claim because Luebano had not demonstrated on the face of her amended complaint that she had exhausted her administrative remedies.

Before an employee can file an ADA **case** in federal court, she must exhaust her administrative remedies. *See* *Dao v. Auchan Hypermarket*, 96 F.3d 787, 788–789 (5th Cir. 1996) (per curiam). In the ADA context, proper exhaustion of administrative remedies requires an employee to submit a timely charge with the EEOC and file her complaint within ninety days after receiving a right-to-sue letter. *Id.* Under the appropriate circumstance, a district court may dismiss a cause of action under Rule 12(b)(6) when the plaintiff fails to show she exhausted her administrative remedies on the face of the complaint. *See* *Taylor v. U.S. Treasury Dep't*, 127 F.3d 470, 478 n.8 (5th Cir. 1997) (per curiam).

However, failure to exhaust is an affirmative defense that a defendant must raise. *See* *Davis v. Fort Bend Cnty.*, 893 F.3d 300, 307 (5th Cir. 2018), *aff'd*, 139 S. Ct. 1843, 1850-52 (2019). And while affirmative defenses, including non-exhaustion, can be appropriately asserted on a 12(b)(6) motion, dismissal on such a basis is appropriate only if the defense is evident on the face of the complaint. *See* *EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank*, 467 F.3d 466, 470 (5th Cir. 2006). Here, Luebano's purported failure to exhaust does not appear on the face of her complaint. Indeed, she affirmatively claims she has exhausted her administrative remedies. For its part, Office Depot did not attach any documentation supporting the application of exhaustion defenses when it moved for 12(b)(6) dismissal. Nor did it move in the alternative for summary judgment based on such evidence. So, the district court erred when it dismissed Luebano's ADA claim for lacking exhaustion pleading in her complaint. [2]

B

***4** Next, we address Luebano's challenge to the district court's decision to dismiss her FMLA claims. The district court found that Luebano had taken all twelve weeks of her statutorily protected FMLA leave. As a

consequence, according to the district court, she could neither plead a prima facie **case** for FMLA interference nor FMLA retaliation. Luebano argues that she adequately pleaded both causes of action and that the district court erred by improperly conflating her FMLA leave with other, non-statutorily protected leave that Office Depot gave her.

1

"The FMLA requires covered employers to grant covered employees up to twelve weeks of unpaid leave for certain qualifying reasons, such as the ... occurrence of a serious health condition." *DeVoss v. Sw. Airlines Co.*, 903 F.3d 487, 490 (5th Cir. 2018). To protect this statutory right, the FMLA bars covered employers from interfering with the right of an employee to take such leave. 29 U.S.C. § 2615(a)(1). In this circuit, to establish her interference claim under the FMLA, Luebano must show: (1) she "was an eligible employee;" (2) her "employer was subject to FMLA requirements;" (3) she "was entitled to leave;" (4) she "gave proper notice of [her] intention to take FMLA leave;" and (5) her "employer denied [her] the benefits to which [s]he was entitled under the FMLA." *Caldwell v. KHOU-TV*, 850 F.3d 237, 245 (5th Cir. 2017). Luebano alleges the first four elements but fails to allege the fifth.

We have held that a plaintiff who exhausts her FMLA leave cannot allege that her employer interfered with her right to take such leave. *See Hunt v. Rapides Healthcare Sys., LLC*, 277 F.3d 757, 763–768 (5th Cir. 2001), *abrogated on other grounds by Wheat v. Fla. Par. Juvenile Justice Comm'n*, 811 F.3d 702 (5th Cir. 2016) (finding in an FMLA leave interference claim where an employer failed to reinstate a plaintiff: "[i]f an employee fails to return to work on or before the date that FMLA leave expires, the right to reinstatement also expires."). [3] The district court correctly concluded that Luebano has not pleaded a claim for FMLA interference. Luebano applied for FMLA-protected leave on June 10, 2020, and Office Depot approved her leave. As alleged, the store allowed her to remain on medical leave until January 2021. Per her complaint, this roughly six-month period of applied-for and received medical leave exceeds the twelve weeks protected under the FMLA. So, given her pleading, Luebano cannot plausibly allege that Office Depot interfered with her FMLA rights.

2

But the district court went too far in dismissing Luebano's FMLA retaliation cause of action by applying the same reasoning it used to dismiss her FMLA interference claim. In employment discrimination **cases**, the complaint need not "contain specific facts establishing a prima facie **case** of discrimination under the framework set forth ... in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002). "The prima facie **case** under *McDonnell Douglas* ... is an evidentiary standard, not a pleading requirement." *Id.* at 510, 122 S.Ct. 992. But Luebano must "plead sufficient facts on all of the ultimate elements" of her claim. *Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 470 (5th Cir. 2016). In framing a motion to dismiss inquiry, "a district court

may find it helpful to reference *McDonnell Douglas*." *Norsworthy v. Hous. Indep. Sch. Dist.*, No. 22-20586, **2023** **WL** 3965065 at *2 (5th Cir. June 13, **2023**).

***5** The district court determined in its order granting the motion to dismiss that Luebano failed to establish her prima facie **case**. It found that she did not plead the third element, specifically that her FMLA leave caused Office Depot's decision to terminate her when Luebano received all her statutorily protected leave. Because a plaintiff is not required to plead a prima facie **case** at the motion to dismiss phase, *Scott v. U.S. Bank Nat'l Ass'n*, 16 F.4th 1204, 1210 (5th Cir. 2021), the district court applied the wrong standard here.

Still, an FMLA retaliation claim does require Luebano to show a causal link between her FMLA leave and the adverse action. *Acker v. Gen. Motors, L.L.C.*, 853 F.3d 784, 790 (5th Cir. 2017). But it is enough to survive a Rule 12(b)(6) motion for Luebano to plead adequate facts that allow us to draw a reasonable causation inference. *Nix*, 62 F.4th at 928. Luebano alleges that she took advantage of FMLA-protected leave and was terminated shortly after doing so. As we have explained in the past, "[t]he FMLA's protection against retaliation is not limited to periods in which an employee is on FMLA leave, but encompasses the employer's conduct both during *and after* the employee's FMLA leave." *Hunt*, 277 F.3d at 768-69 (emphasis added). Accordingly, Luebano effectively pleads causation when her termination took place in close "temporal proximity" to her use of FMLA leave. *Mauder v. Metro. Transit Auth. of Harris Cnty.*, 446 F.3d 574, 583 (5th Cir. 2006). But the timing between Luebano's termination and the end of her statutory leave must be "very close[.]" *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273–74 (2001) (per curiam).

Here, Luebano pleads temporal proximity that is quite tight. Luebano took her FMLA leave in June 2020, which means the statutorily protected period of that leave expired in September 2020. And while Luebano was not formally terminated until January 2021, Office Depot began advertising a vacancy for her position as early as October 4, 2020. In November 2020, she was essentially warned that she was being terminated. In early January 2021, it became official. Based on this alleged timeline, and in light of the fact-intensive nature of the causation question, Luebano has sufficiently alleged a causal link between her statutorily protected leave and Office Depot's decision to fire her, such that her complaint should survive a 12(b)(6) dismissal. Consequently, the district court erred because Luebano's complaint plausibly establishes the elements of her FMLA retaliation cause of action.

IV

For the reasons above, the district court correctly dismissed Luebano's FMLA interference claim. But it erred in dismissing Luebano's ADA and FMLA retaliation claims. And because federal claims remain, the district court erred in dismissing Luebano's state law causes of action. Thus, we AFFIRM in part and REVERSE in part the district court's order granting the motion to dismiss. Consequently, we VACATE the district court's order on the

motion to reopen. Finally, we REMAND to the district court for further proceedings consistent with this opinion.

All Citations

Not Reported in Fed. Rptr., 2023 WL 4249268

Footnotes

* This opinion is not designated for publication. See 5th Cir. R. 47.5.

1 In 2021, the Supreme Court approved an amended Federal Rule of Appellate Procedure 3(c)(5). The amended rule states: "In a civil **case**, a notice of appeal encompasses the final judgment ... if the notice designates ... (B) an order described in Rule 4(a)(4)(A)." Fed. R. App. P. 3(c)(5). Federal Rule of Appellate Procedure 4(a)(4)(A)(vi) includes motions pursuant to Federal Rule of Civil Procedure 60. The upshot of these intertwining rules is that Luebano has properly appealed the district court's order dismissing her complaint pursuant to Rule 12(b)(6) by filing an appeal of the order denying her Rule 60(b)(1) motion.

Additionally, because we ultimately reverse the district court's order granting the motion to dismiss, we do not address the order on the motion to reopen the **case** on the merits. Instead, we vacate that order.

2 Office Depot also asserts on appeal that Luebano's complaint was untimely because she failed to plead that she filed suit within 90 days of receiving a right-to-sue letter. But this argument was not raised to the district court. *See* *Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 397 (5th Cir. 2021) ("A party forfeits an argument by failing to raise it in the first instance in the district court—thus raising it for the first time on appeal...."). In any **case**, this theory suffers from the same problem as before: the ninety-day deadline is "not a jurisdictional prerequisite" and is instead "akin to a statute of limitations." *Espinoza v. Mo. Pac. R.R. Co.*, 754 F.2d 1247, 1249 n.1 (5th Cir. 1985).

3 *Hunt* analytically divides the FMLA rights of employees into two. *See* 277 F.3d at 763. First, "[t]he statute prescriptively provides a series of substantive rights[,]" such as the right to take FMLA leave without interference from an employer. *Id.* Second, the statute protects employees from penalties for exercising their statutory rights. *Id.*

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CASE NO. 18

2022 WL 673854
Only the Westlaw citation
is currently available.
United States District Court, S.D.
Texas, Corpus Christi Division.

Yuriana BRICENO-BELMONTES, Plaintiff,
v.
COASTAL BEND COLLEGE, Defendant.

Civil Action
No.
2
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20
-
CV
-
00114

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Signed 03/05/**2022**
|
Entered 03/07/**2022**

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MEMORANDUM OPINION AND ORDER

Drew B. Tipton, UNITED STATES DISTRICT JUDGE

***1** Plaintiff Yuriana Briceno-Belmontes contends that the Defendant, Coastal Bend College ("CBC"), discriminated against her on the basis of her national origin and retaliated against her for raising allegations of discrimination with her superiors. Before the Court is CBC's Motion to Dismiss Briceno-Belmontes's Second Amended Complaint. CBC argues that Briceno-Belmontes failed to sufficiently state claims upon which relief can be granted. For the reasons that follow, the Court **DENIES** the Motion.

I. BACKGROUND

For purposes of addressing this Motion, the Court accepts all factual allegations in the Complaint as true and views them in the light most favorable to Briceno-Belmontes. CBC is a community college in South Texas. Briceno-Belmontes is a Hispanic woman and citizen of the United States. (Dkt. No. 18 at ¶ 4). In March 2018, Briceno-Belmontes was hired by CBC to work as an academic advisor and recruiter at its Kingsville, Texas campus. (*Id.* at ¶¶ 9–10). Her responsibilities included attending recruiting events and making presentations at various schools. (*Id.* at ¶ 11). Student Services Director Amanda Barrera was Briceno-Belmontes's supervisor from March 2018 through March 2019. (*Id.*). Executive Dean of Student Services Guadalupe Ganceres was Briceno-Belmontes's supervisor from March 2019 through Briceno-Belmontes's termination in June 2019. (*Id.* at ¶¶ 11, 23).

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Briceno-Belmontes's earliest issue at work occurred in August 2018, when she was treated unfairly by an unnamed CBC administrator. (*Id.* at ¶ 13). Starting in January 2019, Briceno-Belmontes was subjected to a "pressure campaign" initiated by Ganceres and Kingsville Site Director Joseph Hayen. (*Id.* at ¶¶ 14–15). The "pressure campaign" is not described in detail in the Second Amended Complaint. Reading it in the light most favorable to Briceno-Belmontes, as the Court must, it appears to be an effort by her supervisors to force Briceno-Belmontes to purchase incidentals for her job and then seek reimbursement from CBC. *See* (*id.* at ¶¶ 13–16). This, Briceno-Belmontes asserts, was contrary to the letter of the purchasing policy of CBC, (*id.* at ¶ 16), and was meant to place her in a position that could compromise her employment. (*Id.* at ¶¶ 13, 17).

Briceno-Belmontes resisted and was accused of insubordination as a result. (*Id.* at ¶ 17, 22). In February 2019, she complained to CBC human resources manager Audrey Ramirez, Student Services Director Barrera, and Dean Ganceres about the reimbursement practice she was pressured to carry out. (*Id.* at ¶ 14). She attributed this mistreatment to national origin discrimination. (*Id.*). In April 2019, she filed a formal complaint against Hayen. (*Id.*). In May 2019, she complained a second time to the administrators about the reimbursement practice pressure campaign and once again attributed the situation to national origin discrimination. (*Id.*). On May 2, 2019, Briceno-Belmontes received an "Employee Discipline Notice" for insubordination and violating CBC policies and procedures. (*Id.* at ¶ 22). The Amended Complaint does not make clear whether Briceno-Belmontes's internal complaint of discrimination or the disciplinary notice came first. Last, Briceno-Belmontes complained to Hector Villarreal, who assumed the role of Interim Kingsville Site Director at an unspecified time. (*Id.* at ¶ 23).

***2** The events culminated in June 2019 when Briceno-Belmontes was fired for insubordination and violating CBC policies and procedures. (*Id.*). But other employees with comparable job titles and responsibilities who also resisted the reimbursement practice were not fired. (*Id.* at ¶ 25). Specifically, Mercy Boamah, a black academic advisor and recruiter at the CBC Alice campus, (*id.*), and Kristen Jambers, a white academic advisor and recruiter at the CBC Pleasanton campus, (*id.* at ¶ 28), did not receive the same treatment. Boamah and Jambers had the same supervisors as Briceno-Belmontes. (*Id.* at ¶¶ 11, 25–26, 28).

On January 15, 2020, Briceno-Belmontes filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") asserting national origin discrimination and retaliation for engaging in protected activity. (*Id.* at ¶ 6). On February 18, 2020, the EEOC sent Briceno-Belmontes a Notice of Right to Sue. (*Id.* at ¶ 7). Briceno-Belmontes filed suit on May 12, 2020. After Briceno-Belmontes filed her Second Amended Complaint, CBC filed a Motion to Dismiss for failure to state a claim. (Dkt. No. 21). Briceno-Belmontes filed a Response, (Dkt. No. 22), and CBC filed a Reply, (Dkt. No. 23).

II. LEGAL STANDARD

A. RULE 12(B)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to move to dismiss for "failure to state a claim upon which relief may be granted." Rule 8(a)(2) requires a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' " it demands more than labels and conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007)). Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* The Defendant, as the moving party, bears the burden of proving that no legally cognizable claim for relief exists. 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed.).

In reviewing a 12(b)(6) motion to dismiss, a court must accept the plaintiff's factual allegations as true and view those allegations in the light most favorable to the plaintiff. *White v. U.S. Corrections, L.L.C.*, 996 F.3d 302, 306–07 (5th Cir. 2021). The court must evaluate whether "a complaint contains sufficient factual matter to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949 (cleaned up). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Dismissal ... is appropriate where the plaintiff fails to allege 'enough facts to state a claim that is plausible on its face' and thus does not 'raise a right to relief above the speculative level.' " *Montoya v. FedEx Ground Package Sys., Inc.*, 614 F.3d 145, 148 (5th Cir. 2010) (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965).

III. DISCUSSION

A. TIMELINESS

As a threshold matter, CBC raises the issue of the timeliness of Briceno-Belmontes's claims. (Dkt. No. 21 at 10). CBC, citing the text of 42 U.S.C. § 2000e–5(e)(1), argues that Title VII plaintiffs in Texas must file a charge of discrimination with the EEOC within 300 days of learning of the conduct alleged, or the claim is barred. Briceno-Belmontes filed her charge on January 15, 2020. (*Id.* at 11). Because of the Title VII statutory bar, CBC asserts that any claims that arise out of discrete events that occurred before March 21, 2019—300 days earlier—must be dismissed. (*Id.*). Those would be Briceno-Belmontes's allegation of unfair treatment in August 2018, (Dkt. No. 18 at ¶ 13), and her allegation of discrimination based on her national origin in February 2019, (*id.* at ¶¶ 12, 14). Briceno-Belmontes responds by highlighting that the May 2019 allegation of national origin discrimination occurred within the 300-day window. (Dkt. No. 22 at ¶ 6).

***3** In Texas, "a title VII plaintiff must file a charge of discrimination with the EEOC within 300 days after learning of the conduct alleged." *Huckabay v. Moore*, 142 F.3d 233, 238 (5th Cir. 1998) (citing 42 U.S.C. § 2000e-5(e)(1)), *abrogated on other grounds by Heath v. Bd. of Supervisors for S. Univ.*, 850 F.3d 731, 737

(5th Cir. 2017). "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 122 S.Ct. 2061, 2072, 153 L.Ed.2d 106 (2002). However, an act that happened outside the filing period "may constitute relevant background evidence in a proceeding in which the status of the current practice is at issue[.]" *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977). A plaintiff can support a Title VII claim with conduct occurring more than 300 days before filing an EEOC charge if the plaintiff can allege facts that could show that "the pre-and post-limitations period incidents involve[d] the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers." *Morgan*, 536 U.S. at 120–21, 122 S.Ct. at 2076 (alteration omitted); *see also Heath*, 850 F.3d at 736–39.

Briceno-Belmontes's claims stem from her June 2019 termination—which occurred within the statutory deadline. *See Morgan*, 536 U.S. at 114, 122 S.Ct. at 2073. The acts that occurred outside the filing period may constitute relevant background evidence. *See Evans*, 431 U.S. at 558, 97 S.Ct. at 1889. Thus, Briceno-Belmontes's claims are not time barred.

B. NATIONAL ORIGIN DISCRIMINATION CLAIM

CBC also challenges Briceno-Belmontes's national origin discrimination claim. CBC asserts that Briceno-Belmontes does not plead any direct evidence to support her Title VII claims, so they must be analyzed under the *McDonnell Douglas* burden shifting paradigm, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), to assess a circumstantial claim of employment discrimination.[1] (Dkt. No. 21 at 11). CBC concedes that, for purposes of the Rule 12(b)(6) pleading standard, Briceno-Belmontes establishes a *prima facie* case of national origin discrimination on the first three prongs of *McDonnell Douglas*. (*Id.* at 12 n.1). But CBC disputes that Briceno-Belmontes successfully pleads the fourth prong: that she was treated less favorably than others outside her protected class who were similarly situated to her. (*Id.* at 12). CBC argues that Briceno-Belmontes's comparators of Mercy Boamah and Kristen Jambers are not similarly situated because Briceno-Belmontes does not assert that they had the same disciplinary history nor adequately describe how they responded to the "pressure campaign" of the school administrators. (*Id.* at 13–17).

Briceno-Belmontes counters that the comparators she identified are sufficient to state a *prima facie* case under the permissive Rule 12 pleading standards. (Dkt. No. 22 at ¶¶ 6–12). Briceno-Belmontes contends that CBC is mistakenly increasing the burden on her at the pleading stage to bring a circumstantial case of employment discrimination under Title VII. (*Id.* at ¶ 9, 11–12). The Court agrees with Briceno-Belmontes.

***4** CBC places too high a burden on Briceno-Belmontes. "At the Rule 12(b)(6) stage, [a court's] analysis of [a] Title VII claim is governed by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)—and not the evidentiary standard set forth in *McDonnell Douglas Corp. v. Green*[.]"

Olivarez v. T-Mobile USA, Inc., 997 F.3d 595, 599 (5th Cir. 2021). Under *Swierkiewicz*, "there are two ultimate elements a plaintiff must plead to support a disparate treatment claim under Title VII: (1) an adverse employment action, (2) taken against a plaintiff *because of* her protected status."[2] *Id.* (internal quotations omitted) (emphasis in original).

Here, Briceno-Belmontes meets this burden. She states that her comparators—Boamah and Jambers—had the same job titles, responsibilities, and supervisors. (Dkt. No. 18 at ¶¶ 25–30). Most importantly, she pleads that they also "resisted the pressure campaign" and that they are a different race and were not fired. (*Id.*). Thus, Briceno-Belmontes plausibly claims that (i) she was subject to an adverse employment action—her termination—(ii) it was taken against her because of her protected status, and (iii) her comparators who are another race were not fired. This meets the *Swierkiewicz* requirements. *See Cicalese v. Univ. of Texas Med. Branch*, 924 F.3d 762, 768 (5th Cir. 2019) ("The district court erred by holding [the plaintiffs] to a heightened pleading standard. The court's analysis of the complaint's allegations—scrutinizing whether [the plaintiffs'] fellow employees were really 'similarly situated' and whether [their superiors'] derogatory statements about Italians amounted to 'stray remarks'—was more suited to the summary judgment phase.").

Furthermore, although a plaintiff does "not have to submit evidence to establish a prima facie case of discrimination [under *McDonnell Douglas*] at this stage, [she must] plead sufficient facts on all of the ultimate elements of a disparate treatment claim to make [her] case plausible." *Chhim v. Univ. of Texas at Austin*, 836 F.3d 467, 470 (5th Cir. 2016) (per curiam). While it is not required at this stage, "it can be 'helpful to reference' [the *McDonnell Douglas*] framework when the court is determining whether a plaintiff has plausibly alleged the ultimate elements of the disparate treatment claim" because the plaintiff will eventually need to satisfactorily assert each element of the *McDonnell Douglas* test to meet her burden to recover. *Olivarez*, 997 F.3d at 600 (internal quotations omitted).

CBC concedes for the purposes of the pleading standards set out in *Twombly* and *Iqbal* that Briceno-Belmontes meets the first three prongs of the *McDonnell Douglas* test but disputes that the fourth prong is satisfied. (Dkt. No. 21 at 12 n.1). The Court disagrees. Briceno-Belmontes pleads sufficiently similar comparators who are of different races but who were not fired for the same conduct. This is enough at the Rule 12(b)(6) stage. Yes, whether Boamah and Jambers are "similarly situated" to Briceno-Belmontes is a question of law and faces a demanding standard in this Circuit, *see Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 259–60 (5th Cir. 2009), but that is for the Court to determine at the summary judgment stage. To impose such a rigorous inquiry at the pleading stage, when discovery has not occurred, would make it nearly impossible to bring a circumstantial case of employment discrimination.

C. RETALIATION CLAIM

***5** To establish Title VII retaliation, a plaintiff must show that (1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) a causal link exists

between the protected activity and the adverse employment action. *Wright v. Union Pac. R.R. Co.*, 990 F.3d 428, 433 (5th Cir. 2021). For the following reasons, the Court finds that Briceno-Belmontes has stated a plausible claim.

1. Protected Activity

The first element of a Title VII retaliation claim requires the plaintiff to have engaged in protected activity. The Fifth Circuit explained, "An employee has engaged in activity protected by Title VII if she has either (1) 'opposed any practice made an unlawful employment practice' by Title VII or (2) 'made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing' under Title VII." *Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996) (citing 42 U.S.C. § 2000e–3(a))

CBC argues that, for the purposes of the Rule 12(b)(6) pleading standard, the only two activities that Briceno-Belmontes engaged in that are protected by Title VII are the instances in which she internally complained to CBC administrators about national origin discrimination. (Dkt. No. 21 at 18–19). Those were in February and May 2019. (*Id.*) Briceno-Belmontes states in her Response, "Plaintiff engaged in protected activity in the month before [she was fired. That is,] in May 2019." (Dkt. No. 22 ¶ 13). Briceno-Belmontes does not state what the protected activity was in which she engaged.

Reading the Second Amended Complaint in the light most favorable to Briceno-Belmontes, the Court finds that she engaged in activity protected by Title VII on at least two occasions —both times she complained internally about national origin discrimination in February and May 2019. (Dkt. No. 18 at ¶ 14). Bringing allegations of national origin discrimination to one's superiors is opposing a practice that is protected by Title VII. *Long*, 88 F.3d at 304.

2. Adverse Employment Action

The next inquiry is whether Briceno-Belmontes has pleaded facts sufficient to demonstrate that CBC took an adverse employment action against her. CBC argues the only adverse employment action was the firing of Briceno-Belmontes on June 10, 2019. (Dkt. No. 21 at 19). Briceno-Belmontes agrees. (Dkt. No. 22 at ¶ 13).

3. Causal Connection

The last element of a Title VII retaliation claim is a causal connection between the protected activity and the adverse employment action. CBC claims that Briceno-Belmontes does not establish the requisite causal connection. First, CBC argues Briceno-Belmontes "does not identify who made the decision to terminate her employment, nor does she allege whether that person was aware of her allegedly protected complaint(s)." (Dkt. No. 21 at 20). Second, CBC asserts that Briceno-Belmontes cannot rely on the temporal proximity of her internal complaints and her firing to create a causal connection. (*Id.*).

Briceno-Belmontes does not provide much of a response to CBC's causation argument.

She does not address CBC's contention that she needs to identify a decisionmaker as to her firing and plead facts sufficient to support a finding that this person was aware of her internal complaints. In the single paragraph devoted to the retaliation claim in her Response, Briceno-Belmontes states that the one-month difference between her complaint to the administrators and her firing is enough to create an inference of causation. (Dkt. No. 22 at ¶ 13). At this juncture, the Court agrees with Briceno-Belmontes.

***6** As with a Title VII discrimination claim, at the pleading stage of a Title VII retaliation claim, a plaintiff need not make out a prima facie case of retaliation to survive a Rule 12(b)(6) motion to dismiss. *Wright*, 990 F.3d at 433. Rather, she only needs to plausibly allege facts "going to the ultimate elements of the claim." *Id.* Briceno-Belmontes satisfies her pleading burden. Her protected activities are her two instances of internal complaints of national origin discrimination. It is uncontested that her firing was an adverse employment action. And, reading the facts alleged in the light most favorable to Briceno-Belmontes, the Court could reasonably infer that CBC terminated her because of her complaints of national origin discrimination.

CBC is correct that, "to establish the causation prong of a retaliation claim, the employee should demonstrate that the employer knew about the employee's protected activity." *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 883 (5th Cir. 2003). This is because "quite logically, if an employer is unaware of an employee's protected conduct at the time of the adverse employment action, the employer plainly could not have retaliated against the employee based on that conduct." *Wright*, 990 F.3d at 434 (cleaned up).

Here, Briceno-Belmontes has met her burden for the moment. Briceno-Belmontes raised her internal complaint of national origin discrimination to her superiors Ramirez, Barrera, Ganceres, and Villarreal. (Dkt. No. 18 at ¶¶ 14, 23). At the motion to dismiss stage, complaining of national origin discrimination to the human resources manager, the student services director, the dean of student services, and the site director is enough to infer that the employer had knowledge of the employee's protected activity—even though Briceno-Belmontes does not state specifically who fired her. After all, pleading enough facts to state a plausible claim of retaliation "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" sufficient to state a claim. *Twombly*, 550 U.S. at 556, 127 S.Ct. at 1965. Discovery will reveal whether the decisionmaker(s) had actual knowledge of Briceno-Belmontes's protected activity, or if she can advance a cat's paw theory, or neither. *See, e.g., Zamora v. City Of Houston*, 798 F.3d 326, 331 (5th Cir. 2015) ("Under [the cat's paw] theory, a plaintiff must establish that the person with a retaliatory motive somehow influenced the decisionmaker to take the retaliatory action.").

Now for the heart of the causation dispute. Briceno-Belmontes maintains that the proximity of the second complaint to the administrators in May 2019 and her firing in June 2019 is enough to create an inference of causation. (Dkt. No. 22 ¶ 13). CBC vigorously

disagrees. (Dkt. No. 21 at 20–21); (Dkt. No. 23 at 5). CBC makes a two-point argument, which it says is dispositive: (1) the Court *must* measure the difference between the February 2019 complaint and Briceno-Belmontes's firing —not the May 2019 complaint and her firing; *and* (2) that four months' difference between the complaint and her firing is too long to create an inference of causation as a matter of law. The Court agrees with Briceno-Belmontes.

First, the cases cited by CBC are distinguishable. CBC provides the Court only with authority at the summary judgment stage for its propositions.[3] At the summary judgment or post-trial stage, the parties have conducted meaningful discovery to unearth the factual record. In contrast, at the motion to dismiss stage the Court's sole duty is to "[focus] on the allegations in the pleadings, not whether a plaintiff actually has sufficient evidence to succeed on the merits." *Ferrer v. Chevron Corp.*, 484 F.3d 776, 782 (5th Cir. 2007).

***7** Second, CBC's line of argument is a tacit recognition that if Briceno-Belmontes's pleading had no mention of her February 2019 complaint, CBC would have no basis to object to the use of her May 2019 complaint and the June 2019 firing to create an inference of causation *See, e.g., Outley v. Luke & Assocs., Inc.*, 840 F.3d 212, 219 (5th Cir. 2016) (concluding that about two months' difference is close enough to show a *prima facie* causal connection, even in the more onerous summary judgment context). It is *Alkhawaldeh*, CBC asserts, that mandates dismissal because *Alkhawaldeh* holds that three to four months' delay between a protected activity and an adverse employment action is insufficient to create an inference, 851 F.3d at 428 n.23, and "a Title VII claimant cannot, with each protected activity, re-start 'the temporal-proximity clock.' " *Id.* The Court disagrees. Again, *Alkhawaldeh* was a summary judgment appeal in a case that was brought under the *McDonnell Douglas* framework. It follows then that the Fifth Circuit would foreclose subsequent protected activity, standing alone, from restarting the "temporal-proximity clock" after the plaintiff had the benefit of discovery. That is, it is logical that the Fifth Circuit would hold plaintiffs to a higher standard at that stage of a case—but at this stage, it is too much.

Garayalde-Rijos v. Municipality of Carolina, from the First Circuit, is instructive. 747 F.3d 15 (1st Cir. 2014). *Garayalde-Rijos* considers the use of temporal proximity to satisfy the causation requirement under a Title VII retaliation claim, but at the Rule 12(b)(6) stage, unlike CBC's cited cases. There, the First Circuit explained:

> The parties have directed us to no case dismissing a Title VII retaliation claim under Rule 12(b)(6) utilizing only a temporal analysis to defeat causation allegations. Once a complaint has alleged enough facts that retaliation for protected conduct is *plausible*, the plaintiff is entitled to proceed to discovery .... And discovery might unearth evidence of retaliation such that at summary judgment or

> trial, the plaintiff will not have to rely heavily on the "temporal proximity" between protected conduct and adverse actions to prove her case.

Garayalde-Rijos, 747 F.3d at 25 n.8 (emphasis in original).

The purpose of a Rule 12(b)(6) motion is to test the sufficiency of the complaint, not to decide the merits of the case. Therefore, the Court finds that Briceno-Belmontes has pleaded sufficient facts showing a causal connection between her protected activity and her firing that would permit the inference that CBC fired her because of her protected activity. *See Wright*, 990 F.3d at 434.

IV. CONCLUSION

Considering the foregoing analysis, the Court **DENIES** CBC's Motion to Dismiss.[4] (Dkt. No. 21).

It is SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2022 WL 673854

Footnotes

1 *See also Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 426 (5th Cir. 2017). Under the *McDonnell Douglas* test, a plaintiff must first make a *prima facie* showing of employment discrimination by demonstrating that she: (1) is a member of a protected class; (2) was qualified for the position that she held; (3) was subject to an adverse employment action; and (4) was treated less favorably than others similarly situated outside her protected class. *Id.* Once the employee makes a *prima facie* case, the burden "shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action." *Id.* If the employer can articulate such a reason, the burden shifts back to the employee to demonstrate that the employer's proffered reason is just a "pretext for discrimination." *Id.*

2 "Disparate-treatment discrimination addresses employment actions that treat an employee worse than others based on the employee's race, color, religion, sex, or national origin. In such disparate-treatment cases, proof and finding of discriminatory motive is required." *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 766 (5th Cir. 2019) (internal quotations and citation omitted).

3 In its Motion to Dismiss, CBC relies on: *Harville v. City of Houston, Mississippi*, 935 F.3d 404 (5th Cir. 2019) (withdrawn) (post–summary judgment appeal); *Gorman*

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v. Verizon Wireless Tex., L.L.C., 753 F.3d 165 (5th Cir. 2014) (post–summary judgment appeal); *Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802 (5th Cir. 2007) (post–summary judgment appeal); and *Widder v. Tex. A&M Univ. Corpus Christi*, No. 2:11-CV-00282, 2012 WL 3776477 (S.D. Tex. Aug. 29, 2012) (summary judgment). In its Reply, CBC again cites the withdrawn *Harville* opinion and cites *Alkhawaldeh*, 851 F.3d at 428 n.23 (post–summary judgment) and *Perkins v. Child Care Assocs.*, 751 F. App'x 469 (5th Cir. 2018) (per curiam) (unpublished and summary judgment).

4 CBC's Motion to Dismiss also briefed that Briceno-Belmontes failed to plead a hostile work environment claim, (Dkt. No. 21 at 9, 17–18), even though Briceno-Belmontes's Second Amended Complaint only brings two counts—for national origin discrimination and retaliation, (Dkt. No. 18 at ¶¶ 31–40). CBC did this out of caution because Briceno-Belmontes states in her factual resume that "she was subjected to harassment on account of her national origin." (Dkt. No. 21 at 17) *citing* (Dkt. No. 18 at ¶ 12). In her Response, Briceno-Belmontes acknowledges that she only brings a national origin discrimination claim and a retaliation claim by again not addressing a hostile work environment claim.

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CASE NO. 19

2020 WL 4261253
Only the Westlaw citation
is currently available.
United States District Court, S.D.
Texas, Corpus Christi Division.

Jose Romero PEREZ, Plaintiff,
v.
BROOKS COUNTY, TEXAS, Defendant.

Civil Action
No.
2
:
19
-
CV
-
391
|

Signed 07/24/**2020**

Attorneys and Law Firms

Charles C. Smith, Attorney at Law, Corpus Christi, TX, for Plaintiff.

Rebecca S. Hayward, Ricardo J. Navarro, Denton Navarro Rocha Bernal & Zech, P.C., Harlingen, TX, for Defendant.

ORDER

NELVA GONZALES RAMOS, UNITED STATES DISTRICT JUDGE

***1** Plaintiff Jose Romero Perez filed this action against his former employer, Defendant Brooks County, Texas, alleging causes of action arising from his termination after suffering on-the-job injuries. D.E. 1, 14. Before the Court is Defendant's Rule 12 Motion to Dismiss Plaintiff's Second Amended Complaint for Failure to State a Claim. D.E. 15. Plaintiff responded (D.E. 16) and Defendant replied (D.E. 17). For the reasons stated below, the motion is GRANTED IN PART and DENIED IN PART.

STANDARD OF REVIEW

The test of pleadings under Rule 12(b)(6) is devised to balance a party's right to redress against the interests of all parties and the court in minimizing expenditure of time, money, and resources devoted to meritless claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Furthermore, "Pleadings must be construed so as to do justice." Fed. R. Civ. P. 8(e). The requirement that the pleader show that he is entitled to relief requires "more than labels and conclusions[;] a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Factual allegations are required, sufficient to raise the entitlement to relief above the level of mere speculation. *Twombly*, 550 U.S. at 555. Those factual allegations must then be taken as true, even if doubtful. *Id*. In other words, the pleader must make allegations that take the claim from conclusory to factual and beyond possible to plausible. *Id*. at 557. The *Twombly*

court stated, "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." Id. at 570.

The Supreme Court, elaborating on *Twombly*, stated, "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. In dismissing the claim in *Iqbal*, the Supreme Court stated, "It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." Id. at 681.

FACTS

***2** Taking the facts alleged as true pursuant to the standard of review, the salient events set out in Plaintiff's second amended complaint form the following timeline:

February 1, 2002 Brooks County hired Plaintiff to work as a full-time operator for its Road and Bridge Department.

February 2003 Plaintiff sustained an on-the-job injury to his back while operating a backhoe. Plaintiff's supervisor, Ruben Gutierrez, filled out an injury report and told him to seek medical attention.

Pursuant to his orthopedic surgeon's treatment plan, Plaintiff was off work for two months for physical therapy.

Plaintiff declined surgery for his herniated disc.

Two Months Later Plaintiff returned to work for the Road and Bridge Department and, after sitting too long as a driver-operator, he complained of back pain.

The Next Day Gutierrez assigned Plaintiff to light duty as a spotter at the County Landfill, where his duties included checking trash, directing others as to where to put the trash, and infrequently operating a backhoe.

The Next Several Years Plaintiff continued to work at the County Landfill, through a succession of supervisors, including Alan Hernandez and ending with David Guerra.

June 9, 2017 Plaintiff experienced an on-the-job injury to his right shoulder.He reported the injury to Supervisor Hernandez and filed a Texas workers' compensation claim.

The Next Several Months Plaintiff was under the care of Doctor Pechero and the Rio Grande Valley Orthopedic Center. He was examined, tested, and diagnosed with a physiological condition affecting his neurological and ambulatory systems. This has an effect on his ability to perform certain manual tasks and is at least part of the cause of a rotator cuff problem. He was treated for this, with appropriate periodic work status reports being provided and signed by his physician.

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September 2017 Plaintiff had surgery to repair four torn ligaments from his June 9, 2017 injury.

March 9, 2018 Plaintiff continued with follow-up appointments with the Orthopedic Center and the resulting series of status reports indicated that his injury had prevented his return to work and that he could not return until May 4, 2018.

April 3, 2018 A Senior Workers' Compensation Adjuster for the Texas Association of Counties Risk Management Pool began a review of Plaintiff's injury and treatment, communicating with Defendant's Human Resources (HR) representative regarding an intention to seek an independent medical examination.

May 1, 2018 There were no medical findings that Plaintiff had healed from his June 9, 2017 injury. Nevertheless, he claims that, despite his medical condition and failure to return to work, he was able to perform the essential functions of his job as a spotter at the County Landfill.

First Week of May 2018 Plaintiff had an MRI at the Orthopedic Center, which indicated that he would need a second shoulder surgery and that he could not return to work until May 21, 2018.

May 21, 2018 Plaintiff obtained another status report signed by his physician, indicating that he could not return to work until August 20, 2018.

May 23, 2018 Supervisor Guerra contacted Plaintiff and instructed him to report to work for the Road and Bridge Department (not the County Landfill) on May 29, 2018.

As a result of the unexplained change in assignment and supervisor, Plaintiff was concerned that his prior light duty accommodation had been rescinded. Plaintiff requested an accommodation from Defendant, but his request was refused by its supervisory staff.

May 24, 2018 The adjuster for the Risk Management Pool informed Defendant's HR department that Plaintiff's recent MRI confirmed a recurrent full thickness tear associated with his shoulder injury. The plan at that time was to hold off on the independent medical examination and, instead, obtain peer review of Plaintiff's medical records.

Plaintiff confronted Supervisor Guerra about an unverified, unsubstantiated, and unsigned "amended" status report on which Guerra was apparently relying in formulating his directive that Plaintiff was to return to work. And Plaintiff disputed a manufactured claim that he had stated that he would injure himself (as he had never said such a thing and was already injured).

***3** Plaintiff went to Guerra's office and produced his May 21, 2018 status report, revealing work restrictions through August 20, 2018. In particular, Plaintiff's work restrictions included no pushing, pulling, overhead reaching, lifting, or

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carrying. Guerra made a copy of it and indicated that there was something wrong with the documentation of Plaintiff's injury, but he nevertheless insisted that Plaintiff return to work on May 29, 2018.

May 29, 2018 Plaintiff reported to work and was assigned to pick up trash while carrying a bucket and a trash grabber. Plaintiff asked Guerra to call his superiors to ask why he was being put to work despite his unresolved injury. After working several hours, Plaintiff's right hand and wrist became noticeably swollen. Before clocking out for lunch, he reported his condition to Guerra. About one hour after Plaintiff clocked back in after lunch, Guerra took him to HR where his employment was terminated with allegations that Plaintiff had followed through on a threat to hurt himself.

June 4, 2018 The Risk Management Pool adjuster informed HR that Plaintiff was in need of additional surgery and that temporary income benefits would continue.

August 21, 2018 Noting that the last status report indicated that Plaintiff could return to work on August 20, 2018, HR emailed the Risk Management Pool adjuster about the DWC Form 1.

September 6, 2018 Plaintiff had a surgical procedure involving "right shoulder subacromial decompressions with RCT repair."

November 18, 2018 Plaintiff filed his EEOC complaint.

September 25, 2019 The EEOC provided Plaintiff with a right to sue letter.

DISCUSSION

Defendant complains at the outset of its motion that, while Plaintiff's second amended complaint sets out five numbered recitations of claims, it discerns only three causes of action. Comparing the amended complaint, motion to dismiss, and response, the Court reads Plaintiff as attempting to claim:

1. Disability discrimination in the form of a violation of equal rights under unspecified law, which could include the Equal Protection Clause of the Fourteenth Amendment (D.E. 14, ¶¶ 48-52);

2. Disability discrimination under the basic anti-discrimination provision of the Americans with Disabilities Act (ADA), § 12112(a) (D.E. 14, ¶¶ 48-52);

3. Disability discrimination in the form of failure to accommodate Plaintiff's disability under the ADA, §§ 12111(9), 12112(b) (D.E. 14, ¶¶ 53-58; D.E. 15, p. 2; D.E. 16, ¶¶ 11, 14);

4. Disability discrimination in the form of failure to engage in an interactive process to generate an accommodation for Plaintiff's disability (D.E. 14, ¶ 33);

5. Retaliation for complaints made to Supervisor Guerra upon being ordered back to work (D.E. 14, ¶¶ 59-63; D.E. 15, p.5; D.E. 16, ¶ 17);

6. Deliberate indifference to Plaintiff's unspecified constitutional rights (D.E. 14, ¶¶ 64-66; D.E. 16, ¶ 17); and

7. Violation of Plaintiff's First Amendment rights, through 42 U.S.C. § 1983 (D.E. 14, ¶¶ 67-69; D.E. 15, p.1).

The viability of each is discussed below.

A. Disability Discrimination in the Form of a Violation of Equal Protection

***4** On its face, Plaintiff's first cause of action is pled in the form of an equal protection challenge under the Fourteenth Amendment, although it does not use those terms. He claims that his disability placed him in a protected class and that he was treated differently than those who were similarly situated outside the protected class. D.E. 14, p. 15. Setting aside Plaintiff's failure to name a single similarly situated comparator, it is clear that Plaintiff has not alleged a viable equal protection claim under the United States Constitution.

Disability is not a class that supports an equal protection challenge.

> [T]he result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. They could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.

Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 367–68 (2001) (referring to *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)). To the extent that Plaintiff seeks to raise an equal protection challenge, the motion is GRANTED IN PART and the claim is DISMISSED.

B. Disability Discrimination under ADA § 12112(a)

The "positive law" that protects a disabled individual from employment discrimination is embodied in the ADA. The general rules states:

> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

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42 U.S.C. § 12112(a). When relying on circumstantial evidence of discrimination,[1] a prima facie case involves four elements: (1) plaintiff is disabled or is regarded as disabled; (2) he is qualified for the job; (3) he was subjected to an adverse employment action on account of his disability; and (4) he was replaced by or treated less favorably than non-disabled employees. *Gowesky*, 321 F.3d at 511.

Mindful that this case is at the pleading stage, the Court liberally construes the second amended complaint to satisfy the first and third elements of his discrimination claim. He pleads that he has a physical impairment that substantially limits his ability to perform manual tasks, lift, and work and that affects his neurological and ambulatory function. *See* 42 U.S.C. § 12102(1)(A) & (2). He suffered termination immediately after complaining that his disability was exacerbated by his work assignment, which is a classic adverse employment action. *See*, 42 U.S.C. § 12112(a); *EEOC v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 622 (5th Cir. 2009).

The second and fourth elements, however, are not adequately pled. With respect to whether he is qualified for the job, his pleading is conclusory and contradicted by his other factual pleadings. Specifically, he pleads:

- He has a physiological condition that makes him prone to physical injury;

***5** • He sustained a major back injury while assigned to the Road and Bridge Department;

- He sustained a major shoulder injury while assigned to light duty at the County Landfill;

- He had not yet recovered from the shoulder injury and thus could not return to his County Landfill job;

- He vehemently objected to reassignment to the Road and Bridge Department because he could not perform the essential functions of the job there; and

- In the course of working one-half day in the Road and Bridge Department, he exacerbated his shoulder injury, when he should not have been working at all because of his disability.

D.E. 14. These are not facts that would support a finding that Plaintiff was a qualified individual for any of Defendant's relevant positions.

To be qualified, Plaintiff must, with or without reasonable accommodation, be able to perform the essential functions of the employment position that he holds or desires. 42 U.S.C. § 12111(8). Plaintiff pleads that he cannot perform the essential functions of work in the Road and Bridge Department and he has actively resisted his assignment to that department. He further pleads that, even with his accommodation of light duty with the County Landfill, he got injured performing the basic functions of the job and was not medically released to return to work.

The Supreme Court has defined an otherwise qualified person as "one who is able to meet

all of a program's requirements in spite of his handicap." *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979). "The definition of a qualified handicapped individual also includes a personal safety requirement—an otherwise qualified handicapped individual is defined as one who 'can perform the essential functions of the position in question without endangering the health and safety of the individual or others.' " *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993) (quoting *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991)).

Plaintiff does not allege that he can safely perform the essential functions of either position. Rather, he has pled that, while performing those essential functions, he was and will continue to be injured because of his underlying disability. He has affirmatively pled himself out of the required element of being qualified.

Last, as noted above, Plaintiff does not name a comparator or describe other circumstances to satisfy the fourth element: that he was replaced by, or treated less favorably than, a non-disabled employee. Thus, Plaintiff has failed to plead a prima facie case of disability discrimination under ADA § 12112(a). The motion is GRANTED IN PART and the Court DISMISSES Plaintiff's claim for disability discrimination by disparate treatment.

C. Disability Discrimination Under ADA § 12112(b): Failure to Accommodate/ Failure to Engage in Interactive Process

In addition to the basic disability discrimination case addressed above, an individual can claim discrimination in the form of a failure to accommodate a disability under ADA § 12112(b):

> As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—
>
> ***6** ...
>
> (5)(A) ***not making reasonable accommodations*** to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
>
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on ***the need of such covered entity to make reasonable accommodation*** to the physical or mental impairments of the employee or applicant;
>
> ....

42 U.S.C. § 12112 (emphasis added). The elements of a failure to accommodate claim are: (1) plaintiff is a qualified individual with a disability; (2) defendant knew of the disability and its consequential limitations; and (3) defendant failed to reasonably accommodate those known limitations. *Anderson v. Harrison Cnty., Miss.*, 639 Fed. App'x 1010, 1015 (5th Cir. 2016) (citing *Feist v. La. Dep't of Justice, Office of the Attorney Gen.*, 730 F.3d 450, 452 (5th Cir. 2013)).

As noted above, Plaintiff has not pled that he is a qualified individual. In connection with his failure-to-accommodate claim, he appears to imply that he would be qualified if extended a reasonable accommodation. After all, "The term 'qualified individual' means an individual who, ***with or without reasonable accommodation***, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added).

In that regard, Defendant challenges Plaintiff's pleadings as failing to allege that (a) he made a request for an accommodation[2] and (b) a specific reasonable accommodation was available. These are issues on which Plaintiff bears the burden of proof. *See generally*, *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5th Cir. 1997). While he pled that he requested an accommodation at the time that his supervisor required him to return to work and then terminated him, he did not plead any particular reasonable accommodation that would render him qualified for the position. The only accommodation he mentions is the transfer to the County Landfill, which was insufficient—by facts apparent in his own pleadings—to qualify him for work. And requesting an indefinite amount of time off (paid or unpaid) is not a reasonable accommodation. *Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476, 481 (5th Cir. 2016). So Plaintiff has not pled a failure to accommodate. The motion is GRANTED IN PART and that claim is DISMISSED.

***7** Plaintiff contends that his allegations that Defendant failed to engage in an interactive fact-gathering process to generate a reasonable accommodation is a separate claim. This position is supported by *Gardea v. DialAmerica Mktg., Inc.*, EP-12-CV-158-KC, 2013 WL 1855794, at *6 (W.D. Tex. Apr. 30, 2013). "Under the ADA, once the employee presents a request for an accommodation, the employer is required to engage in the interactive process so that together they can determine what reasonable accommodations might be available." *Chevron*, 570 F.3d at 622.

Defendant has failed to address this as a separate claim. Neither has Defendant briefed any basis for not treating it as a separate claim or for treating the request as futile. For that reason, the motion is DENIED IN PART and the Court RETAINS Plaintiff's claim for failure to engage in an interactive process toward an accommodation of his disability.

D. Retaliation for Complaints of Discrimination

The elements of a claim for retaliation under the ADA are that (1) plaintiff participated in a protected activity; (2) defendant took an adverse employment action against him; and (3) a causal connection exists between the protected activity and the adverse action." *Clark v. Charter Commc'ns, L.L.C.*, 775 Fed. App'x 764, 767 (5th Cir. 2019) (citing *Feist*, 730 F.3d at 454). Plaintiff has not set out the specific facts on which he relies for his retaliation claim. Reading his complaint generously, there are three different events that could conceivably trigger a retaliation claim:

- He filed a workers' compensation claim for his February 2003 back injury;

- He filed a workers' compensation claim for his June 2017 shoulder injury; and
- He objected to the May 23, 2018 order to return to work.

D.E. 14.

As a result of both workers' compensation claims, Plaintiff was directed to seek medical attention and received time off from work. Nothing in the pleading or briefing asserts an adverse employment action causally related to either of his compensation claims. In fact, his complaint states, "Plaintiff's employment with Brooks County was not placed in jeopardy until after May 23, 2018 and May 24, 2018 when Plaintiff questioned and challenged the May 23, 2018 notice to return to work." D.E. 14, ¶ 44.

That leaves the objection to the order to return to work. Defendant challenges the retaliation claim arising from this event on the basis that Plaintiff complains of unspecified policies, his allegations are conclusory, and he fails to show how his complaints amount to a protected activity. Defendant reads the complaint too narrowly, in violation of the standard of review. Plaintiff's outcry included not only objections based on Defendant's own policies, but the fact that he was not yet medically released to return to his job and the work order involved being placed in a position with greater physical demands than the position he had left. Plaintiff clearly pleads that he wanted to avoid returning to the Road and Bridge Department and to remain in his less demanding job at the County Landfill.

This outcry can be construed as a request for an accommodation. Requesting an accommodation is a protected activity. *Jenkins v. Cleco Power, LLC*, 487 F.3d 309, 316 & n.3 (5th Cir. 2007). As mentioned, termination is an adverse employment action —a proposition Defendant does not contest. And while Defendant challenges the pleading of a causal connection, it is clear from the allegations that the termination followed just a few days after the protected activity, which is sufficient to support causation. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (holding that a "very close" temporal relationship between the protected activity and the adverse action can support a prima facie case of causation, citing cases with temporal proximity of three to four months as sufficient).

***8** Thus, in the context of Rule 12(b)(6), the Court finds that Plaintiff has adequately pled a cause of action for retaliation based on his objection to returning to work in May 2018. The motion is DENIED IN PART and the Court RETAINS the retaliation claim.

E. First Amendment Violations

The outcry does not fare as well in the context of a First Amendment claim. A prima facie free-speech retaliation claim requires pleading "four elements: (1) he suffered an adverse employment action; (2) his speech involved a matter of public concern; (3) his interest in commenting on matters of public concern outweighs the employer's interest in promoting efficiency; and (4) his speech motivated the employer's adverse employment action." *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 184 (5th Cir. 2005).

While satisfying the first and fourth elements, Plaintiff's pleading does not address any public concern as required by the second element. Neither does it suggest that any public concern outweighs the employer's legitimate interests regarding its workforce as required by the third element. The issue was a private one: whether it was appropriate to order Plaintiff back to work before he was medically released and whether the position to which he would return should involve some accommodation of his particular physical needs. This failure to meet the second and third requirements for this First Amendment claim was not addressed in Plaintiff's response to the motion to dismiss. In fact, there was no mention of this claim whatsoever in his defense of the complaint.

Plaintiff has failed to state a First Amendment claim. He has cited no other constitutional claim, and thereby has failed to state a claim under 42 U.S.C. § 1983. Consequently, the motion is GRANTED IN PART and the Court DISMISSES the claims that he lists in his second amended complaint as his fourth and fifth causes of action. D.E. 14.

CONCLUSION

For the reasons set out above, the motion to dismiss (D.E. 15) is **GRANTED IN PART** and the Court **DISMISSES**: (1) Plaintiff's claim for disability discrimination to the extent that it is couched in terms of equal protection; (2) Plaintiff's claim for disability discrimination under ADA § 12112(a); (3) Plaintiff's claim for failure to accommodate his disability under ADA § 12112(b); (4) Plaintiff's claim for retaliation based on his exercise of free speech; and (5) Plaintiff's unspecified constitutional claims brought under 42 U.S.C. § 1983. The motion is **DENIED IN PART** and the Court **RETAINS**: (1) Plaintiff's claim for failure to engage in an interactive process to generate potential accommodations for his disability; and (2) Plaintiff's claim for retaliation for seeking an accommodation for his disability. The Court **DENIES** without prejudice Plaintiff's general request for leave to amend his complaint because Plaintiff has failed to apprise the Court of the substance of any intended amendment so as to demonstrate that it would not be futile.

ORDERED this 24th day of July, **2020**.

All Citations

Not Reported in Fed. Supp., 2020 WL 4261253

Footnotes

1 Plaintiff has pled his disability discrimination claim in the form prescribed for a claim based on circumstantial evidence. Such a claim uses the *McDonnell Douglas* burden-shifting framework. *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503,

511 (5th Cir. 2003); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). He does not plead or argue a direct evidence discrimination claim.

2 When an employee's limitations caused by a disability are not "open and obvious" to the employer, it is the employee's responsibility to notify the employer of the limitations and suggest a reasonable accommodation. *Chevron*, 570 F.3d at 621 (citing *Taylor v. Principal Fin. Grp., Inc.*, 93 F.3d 155, 165 (5th Cir.1996)). We need not be concerned with this rule because, whether or not Plaintiff's disability was open and obvious, he did plead that he made the request for an accommodation.

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CASE NO. 20

779 F.Supp.3d 910
United States District Court, S.D. Texas, Corpus Christi Division.

Chic HENDERSON, Plaintiff,
v.
WELLS FARGO BANK, Defendant.

CIVIL ACTION NO. 2:23-CV-00166
|
Signed March 31, 2025

Synopsis

Background: Customer brought state court action against bank, alleging bank failed to provide fraud protection services and allowed unauthorized third-party access to customer's account before wire transfer occurred, and asserting claims for breach of contract and negligence. Following removal to federal court, the United States District Court for the Southern District of Texas, Julie K. Hampton, United States Magistrate Judge, 2024 WL 5184469, issued a memorandum and recommendation to grant bank's motion to dismiss customer's action. Customer filed objections.

Holdings: The District Court, David S. Morales, J., adopted in part and rejected in part memorandum and recommendation and held that:

[1] customer's claim for breach of contract was not preempted by Article 4A of Uniform Commercial Code (UCC);

[2] customer's claim for negligence premised on third-party access to account was not preempted by Article 4A;

[3] customer's claim for negligence alleging bank's failure to recall transferred funds was preempted by Article 4A;

[4] customer stated claim for breach of contract; but

[5] customer failed to state negligence claim.

Motion granted in part and denied in part.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim; Motion to Amend the Complaint.

West Headnotes (18)

[1] United States Magistrate Judges Plain error, clear error, and manifest injustice review

As to any portion for which no objection to findings and recommendations of a magistrate judge is filed, district court reviews for clearly erroneous factual findings and conclusions of law. 28 U.S.C.A. § 636(b)(1).

1 Case that cites this headnote

[2] Finance, Banking, and Credit Funds Transfers

To the extent the conduct falls within the scope of Article 4A of the

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Texas Uniform Commercial Code (UCC), the statute controls, whether the common law is inconsistent or duplicative of it. Tex. Bus. & C. Code § 4A.102.

[3] **Finance, Banking, and Credit** 🔑 Funds Transfers

When claims are based on alleged conduct occurring before or after an automated funds transfer, they are not preempted by Article 4A of the Texas Uniform Commercial Code (UCC). Tex. Bus. & C. Code § 4A.102.

[4] **Finance, Banking, and Credit** 🔑 Funds Transfers

When evaluating if a claim is preempted by Article 4A of the Texas Uniform Commercial Code (UCC), courts consider if additional facts or conduct potentially lying outside the scope of Article 4A are at issue; if the conduct is not squarely addressed by Article 4A's provisions, preemption is less likely to apply. Tex. Bus. & C. Code § 4A.102.

[5] **Finance, Banking, and Credit** 🔑 Unauthorized orders; effect of fraud or other misconduct

Finance, Banking, and Credit 🔑 Banks and similar financial institutions, obligations and practices of

Bank customer's claim against bank for breach of contract, alleging bank's failure to uphold promised fraud protection and to prevent third-party access to his account, was not preempted by Article 4A of the Uniform Commercial Code (UCC), as adopted in Texas, in customer's action arising from fraudulent activity that culminated in customer wiring funds based on fraudsters' instructions; underlying contract did not involve a security procedure under Article 4A, and customer alleged neither failure to verify identity nor errors in transmission of funds, but instead customer sued bank for allowing unauthorized third parties to access his banking information prior to the transfer process and for bank's failure to notice the activity and inform customer of it. Tex. Bus. & C. Code §§ 4A.102, 4A.201.

More cases on this issue

[6] **Finance, Banking, and Credit** 🔑 Funds Transfers

Whether Article 4A of the Texas Uniform Commercial Code (UCC) preempts a plaintiff's claims depends on whether the conduct and facts giving rise to the claims are squarely covered by Article 4A. Tex. Bus. & C. Code § 4A.102.

[7] **Finance, Banking, and Credit** Negligent hiring, retention, training, or supervision

Finance, Banking, and Credit Unauthorized orders; effect of fraud or other misconduct

Finance, Banking, and Credit Banks and similar financial institutions, obligations and practices of

Bank customer's claim against bank for negligence, alleging bank's failure to prevent third parties from accessing customer's account and to train its employees, was not preempted by Article 4A of the Uniform Commercial Code (UCC), as adopted in Texas, in customer's action arising from fraudulent activity that culminated in customer wiring funds based on fraudsters' instructions; duties to prevent unauthorized access did not relate to the wire transfer itself, and failure to train employees was not covered by Article 4A. Tex. Bus. & C. Code § 4A.102.

[8] **Finance, Banking, and Credit** Unauthorized orders; effect of fraud or other misconduct

Bank customer's claim against bank for negligence, alleging bank's failure to issue timely recall after wire transfer, was preempted by Article 4A of the Uniform Commercial Code (UCC), as adopted in Texas, in customer's action arising from fraudulent activity that culminated in customer wiring funds based on fraudsters' instructions, since Article 4A spoke directly to procedures for canceling and amending payment orders. Tex. Bus. & C. Code §§ 4A.102, 4A.211.

[9] **Contracts** Grounds of action

To satisfy a claim for breach of contract under Texas law, a plaintiff must show: (1) a valid contract between the parties; (2) performance was completed or tendered by the plaintiff; (3) the defendant breached the contract; and (4) the plaintiff was damaged as a result of the breach.

[10] **Contracts** Pleading contract or specifications

To state a plausible breach of contract claim under Texas law, a plaintiff must allege which provision of an identified contract has been breached.

[11] **Finance, Banking, and Credit** Banks and similar financial institutions, obligations and practices of

Bank customer's allegations, that terms of service for his personal checking and savings accounts contained provision concerning fraud protection and that bank's failure to provide contracted-for

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protection against fraud allowed unauthorized third party to access his account, were sufficient to state claim against bank for breach of contract under Texas law.

More cases on this issue

[12] **Contracts** Pleading contract or specifications

To pass muster under Texas law, a breach of contract claim must contain the substance of the contract which supports the pleader's right to recover; a claim meets this standard if it either identifies what provisions were breached or provides factual allegations about the terms of the contract.

[13] **Finance, Banking, and Credit** Actions

Bank customer failed to plausibly allege that bank's actions or omissions proximately caused customer's harm, precluding customer's claim for negligence under Texas law arising from unauthorized access to customer's account by third party, absent allegations as to the foreseeability of fraudsters hacking and manipulating customer's account.

[14] **Negligence** In general; foreseeability of other cause

Under Texas law, the intervening act of a third party can break causation and relieve a potential tortfeasor of liability.

[15] **Federal Civil Procedure** Alternate, Hypothetical and Inconsistent Claims

The Federal Rules of Civil Procedure allow a party to assert separate claims under alternative theories of liability. Fed. R. Civ. P. 8(d)(2).

[16] **Federal Civil Procedure** Alternate, Hypothetical and Inconsistent Claims

Plaintiff does not need the magic words "in the alternative" to successfully plead an alternative theory. Fed. R. Civ. P. 8(d)(2).

[17] **Federal Civil Procedure** Liberality in allowing amendment

While leave to amend is not automatic, district court must possess substantial reason to deny party's request for leave to amend. Fed. R. Civ. P. 15(a).

[18] **Federal Civil Procedure** Complaint

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When evaluating request to amend complaint, district court may consider undue delay, bad faith or dilatory motive on part of movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to opposing party, and futility of amendment. Fed. R. Civ. P. 15(a).

Attorneys and Law Firms

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ORDER ADOPTING IN PART MEMORANDUM AND RECOMMENDATION

DAVID S. MORALES, UNITED STATES DISTRICT JUDGE

***912** Before the Court is Magistrate Judge Julie K. Hampton's Memorandum and Recommendation ("M&R"). (D.E. 33). The M&R recommends that the Court:

(1) Grant Defendant's Motion to Dismiss, (D.E. 27); and

(2) Dismiss Plaintiff's cause of action, (D.E. 26).

(D.E. 33, p. 1, 16). Plaintiff filed written objections to the M&R. (D.E. 34). Defendant filed written responses to Plaintiff's objections to the M&R. (D.E. 35).

[1] When a party objects to the findings and recommendations of a magistrate judge, the district judge "shall make a de ***913** novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). As to any portion for which no objection is filed, a district court reviews for clearly erroneous factual findings and conclusions of law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989) (per curiam).

I. Analysis

A. Preemption of Breach of Contract and Negligence Claims

Plaintiff objects to the M&R's findings that his common law claims for negligence and breach of contract are preempted by Article 4A of the Texas Business and Commerce Code. (D.E. 34, p. 4). In support, Plaintiff argues that the preemption provision of Article 4A is not absolute and does not preempt all common law claims between parties to a funds transfer. (D.E. 34, p. 1-2). Rather, the provision only preempts claims that contradict one of the Article's clauses. *Id.*

[2] **[3]** **[4]** "Article 4A establishes 'precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits of liability' regarding funds

transfers." *Sols. v. First State Bank of Brownsboro*, No. 6:19-CV-329-JDK, 2020 WL 12991132, at *3 (E.D. Tex. Apr. 16, 2020) (Kernodle, J.) (quoting Tex. Bus. & Com. Code Ann. § 4A.102, cmt.). "[T]o the extent the conduct falls within the scope of Article 4A, the statute controls, whether the common law is inconsistent or duplicative of it." *Id.* (collecting cases). "This does not mean that Article 4A displaces all common law claims." *Id.* (citing *Regions Bank v. Provident Bank, Inc.*, 345 F.3d 1267, 1274 (11th Cir. 2003)). In other words, when "claims are based on alleged conduct occurring before or after the automated funds transfer, they are not preempted." *Id.* at *4. When evaluating if a claim is preempted, courts also consider if "additional facts or conduct potentially lying outside the scope of Art[icle] 4A are at issue." *Consorcio Indus. de Construccion Titanes, S.A. de C. V. v. Wells Fargo Bank, N.A.*, No. 3:10-CV-2111-K, 2012 WL 13019678, at *3 (N.D. Tex. July 12, 2012) (Kinkeade, J.). If the conduct is not squarely addressed by Article 4's provisions, preemption is less likely to apply. *See id.* (collecting cases).

i. Preemption of Breach of Contract Claim

[5] In support of his breach of contract claim, Plaintiff emphasizes this claim "is not based on the wire transfer itself or on any claim that [Defendant] mishandled the wire transfer." (D.E. 34, p. 5). Rather, he maintains that Defendant "[failed] to provide the standard fraud protection associated with [Plaintiff's] checking and savings accounts, as well as additional fraud protection for which [Plaintiff] was billed." *Id.* Based on Plaintiff's second amended complaint, these failures include: (1) not detecting when third parties gained access to the online banking application before the transfer, and (2) failing to provide the contracted-for fraud protection. (D.E. 33, p. 4; D.E. 26, p. 5). Upon review, Article 4A does not preempt the conduct alleged by Plaintiff.

[6] "To determine whether a claim is 'covered by particular provisions' of Article 4A, courts look to whether 'additional facts or conduct potentially lying outside the scope of [Article 4A] are at issue.' " *Ison-Newsome v. JP Morgan Chase Bank, Nat'l Ass'n*, No. 3:22-CV-2805-L-BH, 2023 WL 5022287, at *4 (N.D. Tex. July 21, 2023) (Ramirez, Mag. J.) (quoting *Consorcio*, 2012 WL 13019678, at *3), *adopted*, No. 3:22-CV-2805-L, 2023 WL 5022681 (N.D. Tex. Aug. 7, 2023) (Lindsay, J.). "If the conduct at issue or factual circumstances of the claim are 'not addressed ***914** squarely by the provisions of the article, courts are more likely to find that preemption does not apply.' " *3T Oil & Gas Servs., LLC v. JPMorgan Chase Bank, N.A.*, No. A-18-CV-131-LY, 2018 WL 5018483, at *3 (W.D. Tex. Oct. 16, 2018) (Austin, Mag. J.) (quoting *Consorcio*, 2012 WL 13019678, at *3), *adopted*, 2018 WL 6220139 (W.D. Tex. Nov. 1, 2018) (Yeakel, J.). In other words, whether Article 4A preempts Plaintiff's claims depends on whether the conduct and facts giving rise to the claims are squarely covered by Article 4A. *Id.*

Article 4A's scheme consists of "the interlocking provisions of" § 4A.202, § 4A.203, and § 4A.204. *Ison-Newsome*, 2023 WL 5022287, at *4 (citing *Essilor Int'l SAS v. J.P. Morgan Chase Bank, N.A.*, 650 F. Supp. 3d 62, 75 (S.D.N.Y. 2023) (Liman, J.)).

Article 4A's scheme covers a receiving bank's obligations when it receives an unauthorized or ineffective payment, § 4A.204(a); when a payment order is authorized, § 4A.202(a); and when a payment order is effective, § 4A.202(b). Each of these provisions deals with "[w]hether the bank or customer bears the risk of loss for a fraudulent wire transfer ...." *Ison-Newsome*, 2023 WL 5022287, at *4 (citing *Essilor, 650* F. Supp. 3d at 75).

The conduct Plaintiff alleges does not involve the issuance or acceptance of the payment order. He similarly neither alleges issues with the execution of the payment order, nor that it was ineffective or unauthorized under Article 4A. Lastly, he does not allege errors related to payment. *See generally* (D.E. 26, p. 5–6). While his harm ultimately resulted from the wire transfer, Plaintiff alleges that the actionable harm central to his breach of contract claim is Defendant's failure to uphold the contracted fraud protection and its failure to prevent third-party access to his account. To the extent Plaintiff has alleged conduct preceding the wire transfer and encompassing Defendant's obligation to provide said fraud prevention services, that conduct is not covered by Article 4A. *See Ison-Newsome v. JPMorgan Chase Bank, Nat'l Ass'n*, No. 3:22-CV-2805-L-BH, 2023 WL 5022287, at *4 (noting that Article 4A only displaces claims that "create rights, duties and liabilities inconsistent with" Article 4A, or when the circumstances "giving rise to that claim are directly addressed or specifically covered by the provisions of Article 4A." (citations omitted)).

The M&R relied on *Grainmarket, LLC v. PNC Bank, N.A.*, No. 3:22-CV-2419-X, 2023 WL 4162278 (N.D. Tex. June 23, 2023) (Starr, J.), *see* (D.E. 33, p. 7-8), but that case is distinguishable. There, the plaintiff's common law claims were preempted where he alleged the bank failed to verify that the payment order was between the bank and himself. *Grainmarket*, 2023 WL 4162278, at *2. This was because Article 4A "governs situations in which 'a bank and its customer have agreed that the authenticity of payment orders ... will be verified pursuant to a security procedure.' " *Id.* at *2 (quoting Tex. Bus. & Com. Code Ann. § 4A.202(b)).

By contrast, Plaintiff's underlying contract does not involve a security procedure under Article 4A. Article 4A defines "security procedures" as procedures for "(i) verifying that a payment order or communication amending or cancelling a payment order is that of the customer, or (ii) detecting error in the transmission or the content of the payment order or communication." Tex. Bus. & Com. Code Ann. § 4A.201. As such, actions arising from verifying a payment order or detecting error in a payment's transmission fall within Article 4A's ambit. But here, Plaintiff alleges netiher failures to verify identity nor errors in transmission. Rather, Plaintiff sues Defendant for "allow[ing] unauthorized third-parties to access [his] ***915** banking information" prior to the transfer process and for Defendant's failure to "notice this activity or inform [him] of it." (D.E. 33, p. 4). These alleged duties exceed the scope of Article 4A because they do not seek to assign duties and liabilities for wire-transfer procedures. *Ison-Newsome*, 2023 WL 5022287, at *4 (citing *Essilor*, 650 F. Supp. 3d at 75). [1]

Likewise, insofar as Plaintiff's breach of contract claims exceed the scope of issuing, accepting, and executing wire transfers, they implicate obligations "that go well beyond the scope of wire transfer services." *See* Hedged Inv. Partners, 578 N.W.2d at 771. Indeed, Plaintiff asserts "[his] breach of contract claim is not based on the wire transfer itself or on any claim that [Defendant] mishandled the wire transfer, but rather is based on alleged failures by [Defendant] before the wire transfer occurred." (D.E. 34, p. 5).

Accepting this pleading as true, Plaintiff's breach of contract claim is not preempted. *See* Ison-Newsome, 2023 WL 5022287, at *4; Essilor, 650 F. Supp. 3d at 84 (claim not preempted where plaintiff's allegations implicated actions that did not involve wire transfers and were not about how wire transfers were conducted).

Therefore, the Court **SUSTAINS** Plaintiff's objection to the M&R's findings that Plaintiff's breach of contract claim is preempted.

ii. Preemption of Negligence Claims

Similarly, Plaintiff maintains that Article 4A does not preempt his negligence claim because he does not assert negligent mishandling of the wire transfer itself. (D.E. 34, p. 6). Rather, Plaintiff maintains (1) that before the transfer was executed, "[Defendant] failed to meet its duty to provide 'reasonable fraud protection methods to prevent unauthorized access to [Plaintiff's] accounts,' " (D.E. 34, p. 6); and (2) Defendant failed to take action in a timely manner, including issuing a necessary wire transfer recall after the transfer. *Id.* at 5-6.

[7] Article 4A does not preempt Plaintiff's negligence claims relating to failures *before* the transfer. Duties to prevent unauthorized access do not relate to the wire transfer itself and are not covered by Article 4A. *See* 3T Oil, 2018 WL 5018483, at *3 (holding no preemption as negligent misrepresentation claim was not based on the wire transfer itself). Article 4A also does not preempt Plaintiff's negligence claims to the extent they arise out of Defendant's failure to train its employees. *See* Squeeze Me Once, LLC v. SunTrust Bank, No. CV 19-787-JWD-RLB, 2020 WL 12968001, at *10 (M.D. La. Aug. 3, 2020) (deGravelles, J.) (concluding that negligent claims arising out of failure to train employees on fraud and take reasonable investigative action were *not* preempted as they did not fall squarely within Article 4A's ambit).

[8] On the other hand, Article 4A does preempt Plaintiff's negligence claim relating to failures *after* the transfer. As the M&R observed, such claims clearly relate to a provision of Article 4A. (D.E. 33, p. 8–9). ***916** Article 4A speaks directly to procedures for cancelling and amending payment orders. Tex. Bus. & Comm. Code Ann. § 4A.211. Thus, Plaintiff's negligence claims as to the wire transfer recall are preempted. *See* Sols., 2020 WL 12991132, at *4 (preempting negligence claims based on automated funds transfers governed by § 4A.207, but not claims based on conduct occurring before or after the transfers).

Therefore, the Court **SUSTAINS** Plaintiff's objection as to his negligence claims relating

to conduct before the wire transfer but **OVERRULES** his objection relating to conduct after the transfer—specifically, the duty to provide a wire transfer recall.

B. Failure to State a Claim Upon Which Relief Can Be Granted

Plaintiff objects to the M&R's findings that he has failed to adequately plead a breach of contract claim. (D.E. 34, p. 8–9). Plaintiff also objects to the finding that he had failed to plead a negligence claim as barred by the economic loss doctrine. *Id.* at 9–10.

To survive a Rule 12(b)(6) motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019) (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937). While a sufficient complaint does not require detailed factual allegations, the facts pled must raise the plaintiff's "right to relief above the speculative level." *Id.* (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). Courts must draw all reasonable inferences in favor of the plaintiff, *Allen v. Vertafore, Inc.*, 28 F.4th 613, 617 (5th Cir. 2022); however, a plaintiff must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action" to survive a motion to dismiss. *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955.

i. Failure to State a Breach of Contract Claim

[9] **[10]** "To satisfy a claim for breach of contract under Texas law, a plaintiff must show: (1) a valid contract between the parties; (2) performance was completed or tendered by the plaintiff; (3) the defendant breached the contract; and (4) the plaintiff was damaged as a result of the breach." *Siegfried v. JPMorgan Chase*, N.A., No. 1:18-CV-1026-LY, 2019 WL 13194134, at *7 (W.D. Tex. Oct. 25, 2019) (Lane, Mag. J.) (citing *Garofolo v. Ocwen Loan Servicing, L.L.C.*, 669 F. App'x 219, 220 (5th Cir. 2016)).[2] As the M&R noted, *see* (D.E. 33, p. 10), "to state a plausible breach of contract claim a plaintiff must allege which provision of an identified contract has been breached." *Caine v. Wells Fargo Bank, N.A.*, No. CV H-17-2046, 2018 WL 3195102, at *3 (S.D. Tex. June 8, 2018) (Stacy, Mag. J.) (citing *Williams v. Wells Fargo Bank, N.A.*, 560 F. App'x. 233, 238 (5th Cir. 2014) (per curiam)), *adopted*, No. 4:17-CV-02046, 2018 WL 3159783 (S.D. Tex. June 28, 2018) (Bennett, J.).

[11] **[12]** To pass 12(b)(6) muster, a breach of contract claim must contain "the substance of the contract which supports the pleader's right to recover." *See* ***917** *Bayway Servs., Inc. v. Ameri-Build Const., L.C.*, 106 S.W.3d 156, 160 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (citing *Cadle Co. v. Castle*, 913 S.W.2d 627, 630-31 (Tex.App.—Dallas 1995, writ denied)). A claim meets this standard if it either "identif[ies] what provisions were breached or provide[s] factual allegations about the terms of the [contract]." *See Innova Hosp. San Antonio, L.P.* v. *Blue Cross & Blue Shield of Georgia, Inc.*, 995 F. Supp. 2d 587,

603 (N.D. Tex. 2014) (O'Connor, J.). Here, Plaintiff's amended complaint points to the "standard fraud protection" and "additional fraud protection" as provisions of the contract that Defendant allegedly breached. (D.E. 26, p. 5). Plaintiff contends that Defendant's failure "to provide the contracted-for protection" against fraud allowed an unauthorized third-party to access his account. *Id.* Moreover, Plaintiff provides factual allegations about the terms of the contract. Plaintiff alleges that, "[u]nbeknownst to [Plaintiff], [Defendant] was not providing [Plaintiff] with any meaningful fraud protection." *Id.* at 2. This factual allegation allows the Court to infer that the contract had at least one term that required Defendant to provide meaningful fraud protection.

While Defendant claims that Plaintiff now fails to identify any contract despite "acknowledging and attaching the controlling agreement" in his first amended complaint, *see* (D.E. 27, p. 9), Plaintiff's operative complaint alleges a *different* contract—namely, the "terms of service for personal checking and savings accounts" that contains a "fraud protection" provision. *See* (D.E. 26, p. 5; D.E. 34, p. 9). And that is the contract he alleges Defendant breached. (D.E. 26, p. 5; D.E. 34, p. 9).

Plaintiff has pled factual content—Plaintiff and Defendant had a contract that provided for "standard fraud protection" and "additional fraud protection"—that allows the Court to draw the reasonable inference that Defendant could be liable for breach of contract. *See Cicalese*, 924 F.3d at 765. In other words, if Plaintiff and Defendant contracted for fraud protection and additional fraud protection in Defendant's terms of service agreement, and Defendant failed to provide the agreed fraud protection, then Plaintiff has a viable breach of contract claim. *See* (D.E. 26, p. 5). As the Court must take the complaint's allegations as true, Plaintiff states a breach of contract claim.[3] *See Cicalese*, 924 F.3d at 765.

Thus, the Court **SUSTAINS** Plaintiff's objections to the M&R's conclusion that Plaintiff has failed to state a claim for breach of contract.

ii. Failure to State a Negligence Claim

[13] The M&R next concluded that the economic-loss doctrine barred Plaintiff's negligence claim. (D.E. 33, p. 13). The M&R reasoned that any duty Defendant had to engage in fraud protection or recall the wire transfer (and any corresponding duty to train its employees on those two duties) was based in Plaintiff's contract with Defendant —specifically, "his account agreements and the wire transfer agreement." *Id.* Plaintiff objects, contending that "[he] did not have an expectation under the parties' contract that [Defendant] would properly train its employees to combat ***918** known fraud after a wire transfer." (D.E. 34, p. 10). Instead, Plaintiff maintains that [Defendant's] duties are "general obligations that are imposed by law." *Id.*

[14] However, as Defendant points out, Plaintiff fails to plausibly allege that Defendant's actions or omissions proximately caused Plaintiff's harm. (D.E. 27, p. 12). Plaintiff alleges that "[i]t was foreseeable that [Defendant's] failure to" act on the wire transfer

would cause Plaintiff harm. (D.E. 26, p. 6). But, as Defendant points out, the intervening act of a third party can break causation and relieve the potential tortfeasor of liability. *See, e.g.*, *Parker & Parker Const. Co. v. Morris*, 346 S.W.2d 922 (Tex. App.—El Paso 1961, *writ ref'd n.r.e.)* (reversing judgment where a third party causing an accident sufficed as an "independent, intervening cause" that severed causation). Plaintiff's complaint contains no allegations as to the foreseeability of fraudsters hacking and manipulating his account (or bank accounts in general). *Cf.* *Urbach v. United States*, 869 F.2d 829, 833 (5th Cir. 1989) (torts foreseeable "because of prior experiences"). In other words, Plaintiff alleges no prior experiences that might make the intervening act —here, the criminal(s) who defrauded Plaintiff —foreseeable to Defendant. *See generally* (D.E. 26, p. 2–6).

[15] **[16]** In sum, Plaintiff's negligence claim cannot pass 12(b)(6) muster based on causation. Thus, the Court **OVERRULES as moot** Plaintiff's objections to the M&R's conclusion that the economic loss doctrine bars Plaintiff's negligence claim. [4]

C. Leave to file Third Amended Complaint

[17] **[18]** Plaintiff requests the opportunity to once again amend his complaint. (D.E. 34, p. 11). Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely granted when justice so requires." FED. R. CIV. P. 15(a). While "[l]eave to amend is [not] automatic," the "district court must possess a 'substantial reason' to deny a party's request for leave to amend." *See* *Marucci Sports, L.L.C. v. NCAA*, 751 F.3d 368, 378 (5th Cir. 2014) (quoting *Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987, 994 (5th Cir. 2005)). When evaluating a request to amend, the court may consider "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment." *Matter of Southmark Corp.*, 88 F.3d 311, 314–15 (5th Cir. 1996) (first citing ***919** *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); and then citing *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993)).

After careful review, the Court will allow Plaintiff to file a motion for leave to amend his complaint as to the negligence claims, with the proposed amended complaint attached to the motion.

II. Conclusion

Having reviewed the proposed findings and conclusions of the M&R, the record, the applicable law, and having made a de novo review of the portions of the M&R to which Plaintiff's objections are directed, 28 U.S.C. § 636(b)(1)(C), the Court **SUSTAINS in part** and **OVERRULES in part** Plaintiff's objections, (D.E. 34), and **ADOPTS in part** the M&R, (D.E. 33). Accordingly, the Court **GRANTS in part** and **DENIES in part** Defendant's motion to dismiss. (D.E. 27).

Plaintiff may move to amend his complaint, as to his negligence claims, with the proposed

amended complaint attached to the motion, **on or before April 14, 2025.**

SO ORDERED.

All Citations

779 F.Supp.3d 910, 116 UCC Rep.Serv.2d 906

Footnotes

1 Other state courts have also recognized breach of contract claims which are not preempted by Article 4A. For example, in *Hedged Investment Partners, L.P. v. Norwest Bank Minnesota, N.A.*, the plaintiffs sued under a breach of contract theory based on the parties' Agency Agreement which created several fiduciary duties. 578 N.W.2d 765, 768 (Minn. Ct. App. 1998). The plaintiffs similarly sought to recover wire transfers, but the defendant's employees were not aware of the required procedures or terms of the Agency Agreement. *Id.* at 769. The Minnesota court concluded that Article 4A did not provide exclusive relief because "[t]he Agency Agreement between HIP and Norwest cover[ed] specific fiduciary responsibilities that go well beyond the scope of wire transfer services." *Id. at* 771.

2 In *Siegfried*, a week after the M&R addressing the defendant's motion to dismiss was entered, the parties entered an agreed stipulation. *See Siegfried*, No. 1:18-CV-1026, (D.E. 49). The court subsequently denied the motion to dismiss based on the agreed stipulation, obviating the need to address the M&R. *Id.* (D.E. 52).

3 Plaintiff's complaint suggests the possibility that two different contracts exist, each of which had fraud protection provisions (the standard fraud protection and the additional fraud protection). (D.E. 26, p. 5). Because there are sufficient facts to support a breach of contract claim on at least one contract, the Court does not determine whether second contract, which provides for "additional fraud protection," exists. The Court notes, however, that neither party has submitted the terms of service contract for the Court's review. While not necessary to pass the motion to dismiss stage, the specific terms of the contract would have assisted the Court in determining whether Plaintiff failed to state a claim.

4 The "Federal Rules of Civil Procedure allow a party to assert separate claims under alternative theories of liability." *Fulcrum Credit Partners LLC v. ChipMOS Techs. Inc.*, 2010 WL 11444280, at *8 (W.D. Tex. Mar. 30, 2010) (Sparks, J.) (citing FED. R. CIV. P. 8(d)(2)). And a plaintiff does not need the magic words "in the alternative" to successfully plead an alternative theory. *Id.* (citation omitted). Here, Plaintiff pleads in the alternative. (D.E. 26, p. 6). Other courts have found

dismissing negligence claims—at the motion to dismiss stage—on economic-loss doctrine grounds is inappropriate because plaintiffs can plead under alternative theories. *See e.g.,* *Hybrid Energy Servs., Ltd. v. Magness Oilfield Brokerage*, LLC, No. 5:16-CV-090-C, 2016 WL 11673473, at *3 (N.D. Tex. Aug. 5, 2016) (Cummings, J.) ("Dismissal on [the economic-loss rule] ground is inappropriate at this stage of the litigation, however, because [the plaintiff] is entitled to plead meritorious claims under alternative theories of contract and negligent misrepresentation or fraud, even if it cannot ultimately recover under each of these theories."); *Sunday Riley Mod. Skin Care, L.L.C. v. Maesa*, No. CIV.A. H-12-1650, 2014 WL 722870, at *5 (S.D. Tex. Feb. 20, 2014) (Harmon, J.) ("The economic loss rule does not prevent parties from pleading multiple theories of liability; it bars them from recovering economic losses caused by a breach of contract on a negligence theory." (collecting cases)).

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CASE NO. 21

2024 WL 3297361
Only the Westlaw citation
is currently available.
United States District Court,
S.D. Texas, Houston Division.

Suzanne STEWART, Plaintiff,
v.
CITY OF ARCOLA, Defendant.

CIVIL ACTION
NO.
4
:
23
-
cv
-
04387

Signed July 3, **2024**

Attorneys and Law Firms

Connor Throckmorton, Throckmorton Law Firm PLLC, Houston, TX, for Plaintiff.

William Scott Helfand, Lewis Brisbois Bisgaard Smith LLP, Houston, TX, for Defendant.

ORDER

Andrew S. Hanen, United States District Judge

***1** Before the Court is Defendant City of Areola's ("the City" or "Defendant") Motion to Dismiss. (Doc. No. 8). Plaintiff Suzanne Stewart ("Stewart" or "Plaintiff") responded in opposition. (Doc. No. 10). The City replied. (Doc. No. 11). For the reasons explored below, the Court hereby **GRANTS IN PART** and **DENIES IN PART** the City's motion to dismiss. (Doc. No. 8).

BACKGROUND

Stewart filed this employment discrimination lawsuit against the City, her former employer, for sex discrimination and retaliation under Title VII. Stewart is a biracial female who was employed by the City of Arcola as a police officer between 2019 and 2021. In 2021, at a City-sponsored barbeque cookoff, Stewart alleges that Areola's mayor Fred Burton ("Burton") made a public announcement over a microphone in which he referred to Stewart as an "overweight lover." (Doc. No. 1 at 2). She further alleges that Burton referred to her as "Mrs. Stewart" rather than "Officer Stewart." (*Id.*) Stewart allegedly made several complaints about Burton's behavior but was met with "the same response," that "Fred Burton [is] the mayor and could do what he wanted to." (*Id.*) Stewart also appears to allege that Burton made other "sexually inappropriate comments to and about her," but does not provide further specifics. She further alleges that she complained to the mayor about his conduct. Several weeks later, she was terminated. Based on these instances, Stewart claims that her termination was pretextual and retaliatory and that Burton's behavior was "severe and pervasive" such that it altered the terms and conditions of Stewart's employment.

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The City filed this Motion to Dismiss, arguing that Stewart's complaint fails to state a claim of sex discrimination, hostile work environment, or retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII").

LEGAL STANDARD

A defendant may file a motion to dismiss a complaint for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). To defeat a motion to dismiss under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' " *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955).

In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007). The Court is not bound to accept factual assumptions or legal conclusions as true, and only a complaint that states a plausible claim for relief survives a motion to dismiss. *Iqbal*, 556 U.S. at 678–79, 129 S.Ct. 1937. When there are well-pleaded factual allegations, the court assumes their veracity and then determines whether they plausibly give rise to an entitlement to relief. *Id.*

ANALYSIS

***2** At the outset, the parties disagree about the relevant pleading standard for employment discrimination cases under Title VII. The City argues that Stewart needs to allege facts to support each element of a *prima facie* case of sex discrimination and retaliation to survive a 12(b)(6) motion to dismiss. Stewart responds that the City "conflates" the motion to dismiss standard with the summary judgment standard and that she "need not provide a concrete factual basis for every claim she makes at the pleading stage." (Doc. No. 10 at 3).

At the motion to dismiss stage, the complaint is liberally construed in favor of the plaintiff and all reasonable inferences are drawn in favor of the plaintiff's claims. Nonetheless, "conclusory allegations and unwarranted factual deductions will not suffice to avoid a motion to dismiss." *Toronka v. Conti. Airlines, Inc.*, 649 F. Supp. 2d 608, 611 (S.D. Tex. 2009). In considering motions to dismiss discrimination claims, courts "typically look to the elements of a *prima facie* case to determine whether the plaintiff has plead a valid claim for relief."

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Id. Although Stewart does not need to meet the heightened evidentiary burden reserved for the summary judgment stage, she does need to plausibly allege facts that tend to establish that the City is liable for the alleged conduct – the Court will accordingly look to the *prima facie* elements of each claim as a guide to determine whether Stewart's claims survive a 12(b)(6) motion to dismiss.

A. Sex discrimination under Title VII

"Under Title VII, it is an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Hamilton v. Dall. Cty.*, 79 F.4th 494, 502 (5th Cir. 2023). To plead a disparate-treatment claim under Title VII, a plaintiff must allege facts plausibly showing (1) an adverse employment action, (2) taken against a plaintiff because of her protected status. *Id.* Accepting the allegations as true, Mayor Burton publicly called plaintiff an "overweight lover," which (taken in the light most favorable to the plaintiff) could be considered a gender-based remark. Burton also allegedly called her "Mrs. Stewart" rather than "Officer Stewart." (Doc. No. 1 at 2). Plaintiff was later terminated. Based solely on those alleged facts. Plaintiff claims that "but for her gender," she would not have been terminated from her position as a police officer (or, in the alternative, that her gender was a "motivating factor" in her termination).

"In order to make a sufficient claim of disparate treatment under Title VII, a plaintiff must 'plead sufficient facts on all of the ultimate elements' to make her case plausible." *Jenkins v. State Workforce Comm'n*, 713 F. App'x 242, 244 (5th Cir. 2017). Stewart has failed to do so here. She has pleaded that she belonged to a protected class (female), but she has not pleaded facts leading to a reasonable inference that she was terminated because of her gender. The "overweight lover" comment, without more, is not sufficient to tie her termination to her protected status. The allegation that her termination would not have occurred "but-for" her gender (or even that her gender was a "motivating factor" in her termination") is therefore conclusory. Plaintiff's disparate treatment claim is deficient as currently pleaded and Defendant's motion to dismiss is granted as to this claim.

B. Hostile Work Environment [1]

***3** To survive summary judgment on a hostile work environment claim under Title VII, a plaintiff must show that (1) she is a member of a protected class; (2) she suffered unwelcomed harassment; (3) the harassment was based on her membership in a protected class; (4) the harassment "affected a term, condition, or privilege of employment"; and (5) "the employer knew or should have known" about the harassment and "failed to take prompt remedial action." *West v. City of Houston*, 960 F.3d 736, 741–42 (5th Cir. 2020) (quoting *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002)).

Of course, at the 12(b)(6) stage, Stewart does not need to bring forth evidence raising a fact issue as to each of these factors. The Court must accept all well-pleaded allegations as

true. Stewart has alleged that she belongs to a protected class (female). Her complaint alleges that Mayor Burton's comments to her and about her (including the "overweight lover" remark at the barbeque cookoff) were "sexually charged" and "offensive to a reasonable person" such that they constituted harassment under Title VII. Further, Stewart alleges that the mayor's harassment was "so severe or pervasive that it altered the conditions of [her employment]." (Doc. No. 1 at 3). She further alleges that she complained to the mayor about his behavior, that he failed to take remedial action, and that she was subsequently terminated. When viewed in the light most favorable to the plaintiff, these facts are sufficient to state a claim for hostile work environment under Title VII. Defendant's motion to dismiss is denied as to Stewart's hostile work environment claim.

C. Retaliation

"To state a Title VII retaliation claim, the Plaintiff must allege facts that tend to establish: (1) she engaged in an activity protected by Title VII; (2) an adverse employment action occurred; and (3) a causal link existed between the protected activity and the adverse action." *Richards v. JRK Prop. Holdings*, 405 Fed. Appx. 829, 831 (5th Cir. 2010) (unpublished). The City argues that Stewart has not sufficiently alleged that she participated in any protected activity prior to her termination. "Protected activity is defined as opposition to any practice rendered unlawful by Title VII, including making a charge, testifying, assisting, or participating in any investigation, proceeding, or hearing under Title VII" *Ackel v. Natl. Commun., Inc.*, 339 F.3d 376, 385 (5th Cir. 2003). In her complaint, however, Stewart claims that she engaged in protected activity when she complained to the mayor about what she reasonably believed to be unlawful discrimination. Taken as true, this qualifies as protected activity under Title VII. Furthermore, her termination is clearly an adverse employment action.

Defendant argues that Plaintiffs allegations "fall well short of alleging causation." (Doc. No. 8 at 11). She was terminated on December 14, 2021, only few weeks after the "overweight lover" comment was made at the barbeque on November 12, 2021. Stewart essentially claims that this "temporal proximity" is enough to plausibly plead a retaliation claim under Title VII. While temporal proximity standing alone is often not enough to prove causation, the Court finds that the close temporal proximity in this case is enough to satisfy the low 12(b)(6) motion to dismiss standard. *See Roy v. Veolia Envtl. Servs.*, No. 1:19-CV-00443-MJT, 2020 U.S. Dist. LEXIS 121583 at *13 (E.D. Tex. June 15, 2020). Defendant's motion to dismiss is denied as to Stewart's retaliation claim.

***4** The Court hereby **GRANTS IN PART** and **DENIES IN PART** the City's motion to dismiss as outlined above. (Doc. No. 8).

All Citations

Slip Copy, 2024 WL 3297361

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Footnotes

1 Stewart's complaint does not include a separate heading for her hostile work environment claim; however, given that she alleges that Burton's behavior was "so severe or pervasive that it altered the conditions of Stewart's employment," the Court liberally construes the complaint to state a hostile work environment claim under Title VII.

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CASE NO. 22

2023 WL 6393885
Only the Westlaw citation
is currently available.
United States District Court, S.D.
Texas, Corpus Christi Division.

Priscilla GARCIA, Plaintiff,
v.
OCEANS HEALTHCARE, L.L.C., Defendant.

Civil Action
No.
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22
-
CV
-
00219

Signed September 30, **2023**

Attorneys and Law Firms

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MEMORADUM OPINION AND ORDER

Drew B. Tipton, UNITED STATES DISTRICT JUDGE

***1** Plaintiff Priscilla Garcia began working for Defendant Oceans Healthcare, L.L.C. in September 2020 as a registered nurse. The sole caretaker of her mother who suffers from cirrhosis of the liver, Garcia began taking a few days off every month in preparation for her mother's liver transplant. In October 2021, Garcia was fired from her position at Oceans Healthcare. Garcia alleges that she was wrongfully terminated under theories of associational disability discrimination and retaliation. Oceans Healthcare contends that she was terminated for failing to show up for her scheduled shift without giving prior notice.

Pending before the Court is Defendant's Rule 12(b)(6) Motion to Dismiss. (Dkt. No. 16). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the Motion.

I. BACKGROUND [1]

In September 2020, Plaintiff Priscilla Garcia started working for Defendant Oceans Healthcare L.L.C. as a registered nurse in the Corpus Christi branch. (Dkt. No. 9 at 3). Garcia is the sole caretaker of her mother, who suffers from liver cirrhosis. (*Id.*). Garcia alleges that the Director of Nursing at Oceans Healthcare and many of her co-workers were aware of her mother's condition. (*Id.*).

Beginning in May 2021, Garcia started taking her mother to San Antonio for medical care. (*Id.*). Around the same time, Garcia started to plan for her husband to donate a portion of his liver to her mother. (*Id.*). Garcia alleges

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that she discussed her mother's condition and liver transplant with her supervisors at Oceans Healthcare, including the Director of Nursing. (*Id.*). Specifically, Garcia alleges she communicated that she would need to take two to three days off every month to take her mother and husband to their medical appointments to prepare for the procedure. (*Id.*).

Garcia took three days off in June 2021, one day off in September 2021, and two days off in October 2021 without any issues. (*Id.*). However, conflict later arose in October 2021, when Garcia needed two additional days off to take her husband to a liver donor evaluation as part of her mother's ongoing treatment. (*Id.* at 4). Garcia alleges that in accordance with Oceans Healthcare's time-off policy, she requested the days off at least two weeks in advance. (*Id.*). However, when Garcia did not receive either an approval or a denial for her leave request by October 25, Garcia approached the Director of Nursing to follow up. (*Id.*). The Director of Nursing informed Garcia that the time off would be approved. (*Id.*). Garcia alleges that later that day, Garcia received a text message from Oceans Healthcare's HR Department approving her leave request. (*Id.*).

But on October 27, when Garcia was allegedly taking her approved leave, she received a text message from her administrator asking if she was going to make it in for her shift that day. (*Id.*). She added that Oceans Healthcare has a zero-tolerance policy for no-call-no-shows. (*Id.*). Garcia explained that she was on leave, but her administrator would not discuss the matter with her. (*Id.* at 5). Garcia contacted HR, who told her she was being terminated for failing to show up to her shift without giving prior notice. (*Id.*). Garcia was formally terminated from Oceans Healthcare the next day. (*Id.*).

***2** On September 21, 2022, Garcia filed suit against Oceans Healthcare asserting that she was wrongfully terminated in violation of the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, and the Family and Medical Leave Act ("FMLA"). (*See* Dkt. No. 1); (Dkt. No. 9). Pending before the Court is Oceans Healthcare's Motion to Dismiss. (Dkt. No. 16). With briefing complete, the Motion is ripe for review.

II. LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to move to dismiss for "failure to state a claim upon which relief can be granted." Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than ... 'labels and conclusions.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* The defendant, as the moving party, bears the burden of proving that no legally cognizable claim for relief exists. *Flores v. Morehead Dotts Rybak, Inc.*, No. 2:21-CV-00265, 2022 WL 4740076, at *2 (S.D. Tex. Sept. 29, 2022) (citing 5B Charles Alan Wright & Arthur R.

Miller, Federal Practice and Procedure § 1357 (3d ed.)).

In reviewing a Rule 12(b)(6) motion to dismiss, a court must accept the plaintiff's factual allegations as true and view those allegations in the light most favorable to the plaintiff. *White v. U.S. Corrections, L.L.C.*, 996 F.3d 302, 306–07 (5th Cir. 2021). The court must evaluate whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. at 1974). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. at 1974). "Dismissal ... is appropriate where the plaintiff fails to allege 'enough facts to state a claim to relief that is plausible on its face' and thus does not 'raise a right to relief above the speculative level.' " *Montoya v. FedEx Ground Package Sys., Inc.*, 614 F.3d 145, 148 (5th Cir. 2010) (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965).

III. DISCUSSION

In her First Amended Complaint, Garcia raises four claims: (1) a claim for associational disability discrimination under the ADA; (2) a claim for associational disability discrimination under the Rehabilitation Act; (3) a claim for retaliation under the ADA; and (4) a claim for violation of the FMLA. (Dkt. No. 9 at 5–8). Oceans Healthcare moves to dismiss each claim. (*See* Dkt. No. 16 at 4–13).

A. ASSOCIATIONAL DISABILITY DISCRIMINATION UNDER THE ADA

Garcia asserts that she satisfies all the elements of an associational disability discrimination claim, and that Oceans Healthcare's reason for terminating her is pretextual. (Dkt. No. 9 at 5–6). In its Motion to Dismiss, Oceans Healthcare argues that Garcia's claim fails because the Fifth Circuit has never recognized the existence of an associational disability discrimination claim. (Dkt. No. 16 at 5–6). Moreover, Oceans Healthcare contends that even if such a claim was cognizable, Garcia has not alleged any facts to support a prima facie case of such discrimination. (*Id.* at 6–8). More specifically, Oceans Healthcare argues that (1) Garcia has failed to allege any facts showing that her mother's disability was a determining factor in her termination, (2) she is unable to allege such facts because on October 27 when she did not show up for her shift, she was at an appointment for her husband, not her mother, and (3) Garcia makes no allegations that the decisionmakers at Oceans Healthcare made any negative comments about her mother's disability. (Dkt. No. 16 at 7–8).

***3** Garcia responds that the statutory language of the ADA allows someone who is associated with a disabled person to bring a discrimination claim. (Dkt. No. 18 at 5–6). She further contends that nearly all the Circuits recognize an associational disability discrimination cause of action, the Fifth Circuit has neither recognized nor foreclosed such a cause of action, and district courts within the Fifth Circuit have recognized such a cause of

action. (*Id.* at 6–13). Garcia maintains that she has properly pleaded a prima facie case for associational disability discrimination. (*Id.* at 15). Garcia argues that she was terminated under circumstances that give rise to a reasonable inference that her mother's disability was a determining factor in the decision. (*Id.* at 15–17). Oceans Healthcare replies that Garcia has not made any allegations that would give rise to a reasonable inference that her mother's disability itself was a determining factor in her termination. (Dkt. No. 19 at 6–8). The Court agrees with Oceans Healthcare.

The ADA prohibits an employer from discriminating against an employee as a result of "the known disability of an individual with whom [the employee] is known to have a relationship or association[.]" 42 U.S.C. § 12112(b)(4). This statutory language has been found by the Second, Sixth, Tenth, and Eleventh Circuits to create an independent cause of action for associational disability discrimination. *See* *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 432 (2d Cir. 2016); *Stansberry v. Air Wis. Airlines Corp.*, 651 F.3d 482, 486–87 (6th Cir. 2011); *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1084–85 (10th Cir. 1997); *Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1230–31 (11th Cir. 1999).

The Fifth Circuit, however, has "not explicitly recognized a cause of action for discrimination based on association with a handicapped individual ... nor described what such a claim requires." *Grimes v. Wal-Mart Stores Tex., L.L.C.*, 505 F.App'x 376, 380 n.1 (5th Cir. 2013) (per curiam); *see also* *Besser v. Tex. Gen. Land Off.*, 834 F.App'x 876, 886 (5th Cir. 2020) (per curiam); *Spencer v FEI, Inc.*, 725 F.App'x 263, 267 (5th Cir. 2018) (per curiam). District courts within the Fifth Circuit appear split on whether a cause of action for associational disability discrimination is cognizable. *Compare* *Hartman v. Lafourche Par. Hosp.*, 262 F.Supp.3d 391, 398–99 (E.D. La. 2017) (recognizing a cause of action for associational disability discrimination), *and* *Spinks v. TruGreen Landcare, L.L.C.*, 322 F.Supp.2d 784, 795 (S.D. Tex. 2004) (same), *with* *Balachandran v. Valvtechnologies, Inc.*, No. 4:20-CV-01078, 2021 **WL** 3639806, at *2 (S.D. Tex. July 30, 2021) (declining to recognize a cause of action for associational disability discrimination), *and Roth v. Canon Sols. Am., Inc.*, No. 3:18-CV-02196, 2019 **WL** 4597583, at *5 (N.D. Tex. Sept. 23, 2019) (same).

Although the Fifth Circuit has declined to formally adopt an associational disability discrimination cause of action, it has stated that if such a cause of action were to exist:

> A prima facie case of associational discrimination would require that the Plaintiff show (1) her qualification for the job, (2) an adverse employment action, (3) the employer's knowledge of the employee's disabled relative, and (4) that the adverse employment action occurred under circumstances raising a reasonable inference that the relative's disability was a

> determining factor in the employer's adverse action.

Grimes, 505 F.App'x at 380. The Parties in this case focus on the fourth element, *i.e.*, whether Garcia has asserted any facts that raise a reasonable inference that her mother's alleged disability was a determining factor in her termination. To create a reasonable inference that her mother's disability was a determining factor, Garcia points to the temporal proximity between her taking leave and her termination. (Dkt. No. 9 at 6); (Dkt. No. 18 at 16–17).

The Court finds that Garcia's purported facts do not create a reasonable inference that her mother's alleged disability was a determining factor in Oceans Healthcare's decision to terminate her. First, Garcia's reliance on temporal proximity alone is insufficient to show that her mother's alleged disability was a determining factor in her termination. Generally, being fired one day after taking leave, as is the case here, would be sufficient evidence of causality to establish a prima facie case. *See* *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 1511, 149 L.Ed.2d 509 (2001) (explaining that temporal proximity alone can suffice if the protected activity and adverse employment action are "very close"). But temporal proximity is gauged between a *protected activity* and an adverse employment action. *Id.* On October 27, Garcia took leave to care for her *non-disabled* husband. (Dkt. No. 9 at 4). This activity is not a protected activity under the ADA. Because Ocean's Healthcare was not obliged to agree to Garcia's time-off request, that request could not be a protected activity under the ADA. Therefore, the temporal proximity between an *unprotected activity* and Garcia's termination cannot suggest that her mother's disability was a determining factor in her termination.

***4** Second, to determine whether a relative's alleged disability was a determining factor in a plaintiff's termination, courts generally look for some indication of negative animus. *See e.g.*, *Gomez v. Off. Ally, Inc.*, 796 F.App'x 224, 225–26 (5th Cir. 2020) (per curiam); *Spinks*, 322 F.Supp.2d at 795–96 (focusing on the fact the plaintiff's employer never made any comments regarding plaintiff's disabled sister or daughter, or their ailments); *Murphy v. Univ. Health Shreveport, LLC*, No. 5:20-CV-00614, 2022 WL 277347, at *8 (W.D. La. Jan. 27, 2022) (finding that the plaintiff did not allege that her employer made any negative comments about plaintiff's disabled son). Here, Garcia's First Amended Complaint is devoid of any allegations that any of the decisionmakers at Oceans Healthcare made negative comments about her mother's alleged disability. (*See* Dkt. No. 9). The Court finds that Garcia has failed to assert a legally cognizable claim for associational disability discrimination under the ADA.

B. ASSOCIATIONAL DISABILITY DISCRIMINATION UNDER THE REHABILITATION ACT

In her First Amended Complaint, Garcia raises a claim for associational disability discrimination under the Rehabilitation Act, codified at 29 U.S.C. §§ 701–97. (Dkt. No. 9 at 6–7). In its Motion to Dismiss, Oceans Healthcare argues that Garcia's associational disability discrimination claim under the Rehabilitation Act suffers from the same defect

that her ADA claim does—Garcia has not shown that her mother's disability was a determining factor in her termination. (Dkt. No. 16 at 8–10). The Court agrees with Oceans Healthcare.

Under the Rehabilitation Act's nondiscrimination provision: "No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency[.]"[2] 29 U.S.C. § 794(a). The Rehabilitation Act and the ADA define the term "disability" in "substantially the same terms[.]" *Espina v. City of San Antonio*, No. 5:21-CV-01176, 2022 WL 3362286, at *4 (W.D. Tex. Aug. 15, 2022) (citations omitted). Accordingly, Garcia extends the concept of associational disability discrimination found in the ADA to her Rehabilitation Act claim. (Dkt. No. 18 at 17–18).

"A prima facie case of discrimination under the Rehabilitation Act is operationally identical to the test under the Americans with Disabilities Act (ADA)[.]" *Espina*, 2022 WL 3362286, at *4 (citation omitted). "The only additional requirement for a Rehabilitation Act cause of action is the alleged discrimination must be solely by reason of the disability, instead of just a motivating factor as is required by the ADA." *Id.* (citations omitted); *see also Longoria v. Via Metro. Transit*, No. 5:21-CV-01171, 2022 WL 1445396, at *12 (W.D. Tex. May 6, 2022) ("To the extent that the Rehabilitation Act allows claims of associational discrimination ... such a claim requires a showing that the adverse actions were solely caused by an association with a disabled person." (internal quotations omitted)).

As discussed previously, Garcia fails to allege that her association with an allegedly disabled relative—her mother—was a determining factor in her termination, let alone the sole factor. *Franklin v. Union Pac. R.R. Co.*, No. 5:17-CV-00020, 2018 WL 8576557, at *11 (W.D. Tex. May 15, 2018). Accordingly, Garcia has failed to state a claim upon which relief can be granted.

C. RETALIATION UNDER THE ADA

***5** In her First Amended Complaint, Garcia raises a claim for retaliation under the ADA. (Dkt. No. 9 at 5–6). In its Motion to Dismiss, Oceans Healthcare argues that Garcia's claim fails because she has not established that she was engaged in an activity protected under ADA. (Dkt. No. 16 at 10–11). Garcia responds that she has properly pleaded a claim for retaliation. (Dkt. No. 18 at 17). Garcia claims that "she requested leave that her employer knew was for the purpose of assisting her disabled mother ... she was terminated ... and there is a connection between the activity and [her] termination[.]" (*Id.*). Oceans Healthcare replies that requesting leave for the purpose of caring for a disabled relative is not a protected activity under the ADA. (Dkt. No. 19 at 9). The Court agrees with Oceans Healthcare.

The ADA prohibits an employer from retaliating against an employee who seeks to exercise her rights under the ADA. *See* 42 U.S.C. § 12203(a) ("No person shall

discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA].”). “To establish a prima facie case of unlawful retaliation under the ADA, the plaintiff must show that: (1) she engaged in an activity protected by the ADA, (2) she suffered an adverse employment action, and (3) there is a causal connection between the protected activity and the adverse action.” *Lyons v. Katy Indep. Sch. Dist.*, 964 F.3d 298, 304 (5th Cir. 2020).

In this case, the Parties dispute whether Garcia was engaged in a protected activity under the ADA. Protected activities are those statutorily covered by the ADA, including opposing or complaining about discrimination based on disability. *See Besser*, 834 F.App'x at 886–87. Here, Garcia claims she engaged in a protected activity when “she requested leave that her employer knew was for the purpose of assisting her disabled mother[.]” (Dkt. No. 18 at 17). However, the Fifth Circuit has clearly articulated that under the ADA, an employer is under no obligation to provide a non-disabled employee accommodations such as a modified work schedule or allowing them to miss work to care for a disabled relative. *See Besser*, 834 F.App'x at 886–87 (citing 29 C.F.R. § 1630.8). Therefore, the Court finds that Garcia has failed to allege that she engaged in protected activity as required.

D. VIOLATION OF THE FMLA

In her First Amended Complaint, Garcia raises a claim for violation of the FMLA. (Dkt. No. 9 at 7–8). In its Motion to Dismiss, Oceans Healthcare argues that Garcia's claim under the FMLA fails because Garcia “alleges no facts that she requested, applied for, or took FMLA leave at any point during her employment[.]” (Dkt. No. 16 at 11). Even if she had done so, Oceans Healthcare argues that on October 27, Garcia took leave to care for her husband who does not have a “serious health condition” as is required to be eligible for leave under the FMLA. (*Id.* at 11–13). Garcia responds that by attributing the “serious health condition” requirement to her husband instead of her mother, Oceans Healthcare misstates her claim. (Dkt. No. 18 at 18). Garcia maintains that she has properly pleaded a claim under the FMLA. (*Id.*). Oceans Healthcare replies that because Garcia took leave on October 27 for her husband, she must show that her husband has a “serious health condition.” (Dkt. No. 19 at 9–10).

The FMLA entitles an eligible employee to twelve weeks of leave during any twelve-month period “[i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.” 29 U.S.C. § 2612(a)(1)(C). Further, the FMLA makes it unlawful for any employer to interfere with, restrain, deny, or retaliate against an employee that exercises, or attempts to exercise, her rights under the FMLA. *See* 29 U.S.C. § 2615(a)(1); *Acker v. Gen. Motors, L.L.C.*, 853 F.3d 784, 788 (5th Cir. 2017). It is unclear from Garcia's First Amended Complaint whether the alleged FMLA violation occurred because she was entitled to leave under the FMLA and it was denied, or, alternatively, she was retaliated against for rightfully using her FMLA leave.

However, given the Court's obligation at this stage of the litigation to view allegations in the light most favorable to Garcia, the Court will proceed as if Garcia has advanced both claims.

1. FMLA Interference

***6** To establish a prima facie case of FMLA interference, Garcia must show: (1) she was an eligible employee; (2) her employer was subject to FMLA requirements; (3) she was entitled to leave; (4) she gave proper notice of her intention to take FMLA leave; and (5) her employer denied her the benefits to which she was entitled under the FMLA. *Hester v. Bell-Textron, Inc.*, 11 F.4th 301, 306 (5th Cir. 2021).

After careful review, the Court finds that Garcia has alleged a facially plausible claim for FMLA interference. First, Garcia alleges that she was an eligible employee as defined by the FMLA. (Dkt. No. 9 at 7). Second, she claims that Oceans Healthcare was subject to FMLA requirements. (*Id.*). Third, Garcia claims that she was entitled to leave because her mother suffered from a serious health condition, and the leave was taken in order to care for her mother.[3] (*Id.* at 7–8). Fourth, she asserts that the management of Oceans Healthcare was aware of her mother's medical issues and of her husband's plan to donate a portion of his liver to Garcia's mother, which places Oceans Healthcare on notice of her leave. (*Id.* at 8). And fifth, she claims that despite using the proper procedure for requesting leave, she was denied benefits under the FMLA. (*Id.* at 4–5, 8).

While Oceans Healthcare disputes the validity of some of these alleged facts, they are viewed in Garcia's favor at the motion to dismiss stage.

2. FMLA Retaliation

To establish a prima facie case of retaliation under the FMLA, Garcia must show that "(1) she engaged in protected activity; (2) the employer took a materially adverse action against her; and (3) a causal link exists between her protected activity and the adverse action." *Wheat v. Fla. Par. Juv. Just. Comm'n*, 811 F.3d 702, 705 (5th Cir. 2016).

The Court finds that Garcia has alleged a facially plausible claim for retaliation under the FMLA. First, Garcia alleges she was engaged in a protected activity—taking FMLA leave. (Dkt. No. 9 at 7–8). Second, she alleges that she was terminated. (*Id.* at 8). Third, she alleges that the temporal proximity between her protected activity and her termination is enough to establish a casual link. (*See id.* at 6); *see also Besser*, 834 F.App'x at 884 (stating that that when the temporal proximity is very close, proximity alone suffices to establish causation in a prima facie case of retaliation).[4] These factual allegations are sufficient to survive a 12(b)(6) motion.

IV. CONCLUSION

***7** Considering the foregoing analysis, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's Rule 12(b)(6) Motion to Dismiss. (Dkt. No. 16). The Court **GRANTS** the Motion with respect to the Garcia's ADA

and Rehabilitation Act claims and **DENIES** the Motion with respect to Garcia's FMLA claim.

The Court finds that Garcia has failed to plead sufficient facts to support her claims of associational disability discrimination under the ADA and the Rehabilitation Act, as well as her claim for ADA retaliation. These claims are dismissed without prejudice, and Garcia may amend her Complaint no later than 14 days from the date of this Order in an effort to remedy these deficiencies. Oceans Healthcare may re-urge dismissal at the summary judgment stage after appropriate discovery.

It is SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2023 WL 6393885

Footnotes

1 For purposes of addressing this Motion, the Court accepts all factual allegations in the Complaint as true and views them in the light most favorable to Garcia. *See White v. U.S. Corr., L.L.C.*, 996 F.3d 302, 306–07 (5th Cir. 2021).

2 Notably, the briefing from both Parties is devoid of any information about whether Oceans Healthcare is subject to the requirements of the Rehabilitation Act—namely whether Oceans Healthcare receives federal funding. For purposes of this Motion, the Court will assume that as a public hospital Oceans Healthcare receives federal funding and is therefore subject to the provisions of the Rehabilitation Act.

3 As mentioned previously, the Parties dispute the significance of Garcia taking leave on October 27 to care for her husband instead of her mother. The Court finds that, for purposes of FMLA leave, it is immaterial that the leave was to take her husband to an appointment; Garcia only needs to show that her mother has a serious health condition.

The FMLA entitles eligible employees to take leave "[i]n order to care for" certain family members. *See* 29 U.S.C. § 2612(a)(1)(C). While the FMLA does not define what "care for" entails, the Fifth Circuit has stated that "caring for a family member with a serious health condition involves some level of participation in ongoing treatment of that condition." *Baham v. McLane Foodservice, Inc.*, 431 F.App'x 345, 348 (5th Cir. 2011) (per curiam) (quoting *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045, 1047 (9th Cir. 2005)) (internal quotation marks omitted).

For example, in *Baham* the Fifth Circuit found that when the plaintiff was mowing his lawn, cleaning his house, and padding the furniture, he was not caring for his

daughter under the FMLA. *Id.* at 349. In contrast, here, Garcia took leave to take her husband to an evaluation for the ongoing treatment of her mother's liver cirrhosis. (Dkt. No. 9 at 8). It was not as though her husband's evaluation offered some incidental benefit to Garcia's mother; her husband's evaluation was an essential step in her mother's ongoing treatment.

4 The Court earlier found that the use of temporal proximity for Garcia's ADA claim was insufficient to establish a causal link because taking leave to care for a disabled relative is *not* a protected activity under the ADA. *See supra* Part III.A. The use of temporal proximity to establish a causal link is sufficient for Garcia's FMLA claim because taking FMLA leave in order to care for a relative is a protected activity. *See Clark Cnty. Sch. Dist.*, 532 U.S. at 273, 121 S.Ct. at 1511.

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CASE NO. 23

2016 WL 6638845
Only the Westlaw citation
is currently available.
United States District Court,
S.D. Texas, McAllen Division.

M.D.C.G., individually and as next friend of N.L.M.C., a minor, et al, Plaintiffs,
v.
UNITED STATES of America, Defendant.

CIVIL ACTION
NO.
7
:
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–
CV
–
552

Signed 09/13/**2016**

Attorneys and Law Firms

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Eric Paxton Warner, U.S. Attorneys' Office, McAllen, TX, for Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

Randy Crane, United States District Judge

I. Factual and Procedural Background

***1** Now before the Court is Defendant United States of America's Motion to Dismiss filed pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Dkt. No. 11). Plaintiffs M.D.C.G., individually and as next friend of N.L.M.C., a minor, and D.E.G., as next friend of J.M.A.E., a minor, filed this suit on December 23, 2015, seeking to hold the United States liable under the Federal Tort Claims Act ("FTCA") for injuries inflicted on three of the Plaintiffs by U.S. Border Patrol Agent Esteban Manzanares. (Dkt. No. 1). Plaintiffs allege that on March 12, 2014, Manzanares was dressed in uniform, armed, and driving his official vehicle when he encountered M.D.C.G., her minor daughter N.L.M.C., and minor female J.M.A.E., all aliens from Honduras who had crossed the U.S.–Mexico border without authorization. *Id.* [1] Manzanares apprehended and bound them, and over the course of several hours drove them around in his official vehicle, intermittently stopping to physically (and in some cases, sexually) abuse them. *Id.* The alleged abuse ended at Manzanares's apartment in Mission, Texas, where he committed suicide after law enforcement arrived. *Id.* Plaintiffs assert claims under the FTCA for: (1) assault and battery; (2) false imprisonment/false arrest; (3) intentional and negligent infliction of emotional distress; (4) negligence; and (5) negligent hiring, retention, and supervision. *Id.* Defendant now moves to dismiss all but the latter for lack of subject-matter jurisdiction under Rule 12(b)(1), on the grounds that the FTCA does not waive the government's sovereign immunity from suit because Manzanares was not acting within the scope of his employment when he committed the alleged torts. (Dkt. No. 11). Defendant also moves for dismissal of the same claims under

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Rule 12(b)(6) for failure to plead sufficient facts to support Plaintiffs' allegations that Manzanares was acting in the scope of his employment. *Id.* Finally, Defendant moves to dismiss Plaintiffs' negligent hiring, retention, and supervision claims under Rule 12(b)(6), appearing to challenge the duty and proximate cause elements of these claims by asserting that Manzanares's conduct was not foreseeable to his employer. *Id.* Upon consideration of the Motion and Plaintiffs' response (Dkt. No. 17), in light of the relevant law, the Court finds that that all causes of action dependent on the allegation that Manzanares was acting in the scope of his employment must be dismissed, and all other causes of action may remain.

II. Overview of Factual Allegations

A. Facts Relevant to All Plaintiffs

Plaintiffs' Original Complaint alleges that from 2008 until his death, Esteban Manzanares was employed as an Agent/Officer of U.S. Customs and Border Protection ("CBP" or "Border Patrol"), a sub-agency of the U.S. Department of Homeland Security ("DHS"). (Dkt. No. 1 at ¶¶ 2, 3, 14).[2] In March 2014, Agent Manzanares was assigned to a post along the Rio Grande River Sector, in what is believed to be near the town of Abram, in Hidalgo County, Texas. *Id.* at ¶ 15. He is believed to have been affiliated with the Rio Grande Valley Sector (Texas), CBP McAllen Station, during the relevant time. *Id.*

***2** On March 12, 2014, M.D.C.G., her 15–year–old daughter N.L.M.C., and 14–year–old J.M.A.E., who had been traveling together, were sitting on the side of a dirt road in Hidalgo County. *Id.* at ¶ 16. The road runs parallel to the Rio Grande River, and follows a bend in the river. *Id.* Plaintiffs had recently crossed the river and the U.S.–Mexico border without authorization, and were sitting on the U.S. side, resting. *Id.* Manzanares was driving by in his official vehicle when he spotted Plaintiffs. *Id.* He was in uniform, armed, and in possession of multiple communication devices either issued by CBP, or possessed by Manzanares with CBP's knowledge. *Id.* at ¶ 17. Manzanares stopped and asked whether Plaintiffs were alone, and when they said they were, told Plaintiffs to come with him. *Id.* at ¶ 16. He told Plaintiffs that they were in his custody and control, and to follow his instructions. *Id.* Plaintiffs surrendered without incident to Manzanares, with the understanding that he was armed and was a federal law enforcement officer. *Id.* at ¶ 17.

Manzanares advised Plaintiffs that they would be transported to a facility for mothers and their children. *Id.* at ¶ 18. He then drove around, making multiple stops, and at one point stopped to place black restraint bands on Plaintiffs, and to transfer Plaintiffs to the back of his vehicle. *Id.* He eventually made a stop at what appeared to be a government building occupied by other individuals, including personnel who appeared to be uniformed CBP employees. *Id.* After driving further for an unknown distance, Manzanares stopped again in an unpopulated area. *Id.* at ¶ 19. He took Plaintiffs out of the vehicle and taped their mouths and wrists, telling them he was doing so due to a secondary order he had received. *Id.*

During the several hours he transported Plaintiffs from place to place, Manzanares used keys that are believed to have been given to

him by CBP to operate the gates. *Id.* at ¶ 20. Plaintiffs saw at least one other uniformed CBP employee along the roadway while they were being transported through the gates. *Id.* Manzanares eventually stopped the vehicle in a new area, where he forcibly removed M.D.C.G. and her daughter N.L.M.C., who were still restrained, one at a time from the truck. *Id.*

B. Facts Specific to M.D.C.G.

Manzanares dragged M.D.C.G. out of the vehicle and forced her to the ground, striking her face and body for several minutes. *Id.* at ¶ 22. When M.D.C.G. began to struggle, Manzanares dragged her up a hill, struck and kicked her, strangled and choked her, and twisted her neck. *Id.* M.D.C.G. feared for her life, and became temporarily unconscious or disoriented when Manzanares was strangling and choking her. *Id.*

At some point, Manzanares pulled out a knife and began to cut M.D.C.G.'s arms and wrists. *Id.* at ¶ 23. She believed that Manzanares was torturing her, or possibly making it look as if she had killed herself, and eventually lost consciousness. *Id.* When she regained consciousness, M.D.C.G. could hear Manzanares beating her daughter, N.L.M.C. *Id.* at ¶ 24. Since she was bleeding and knew that Manzanares had weapons, that she and the girls were restrained, and that Manzanares had been overpowering them, M.D.C.G. decided to leave the scene and run for help. *Id.*

M.D.C.G. eventually encountered a CBP officer who questioned her at gunpoint. *Id.* at ¶ 25. She told the officer what happened and why she was disheveled and covered in blood, and that the person who had done this to her was still doing it to her daughter and to another girl. *Id.* When the officer asked who was doing this, M.D.C.G. responded that the perpetrator was "dressed just like you." *Id.* The officer began to communicate by radio and call for assistance, and other "CBP-dressed" individuals began to arrive, followed by emergency medical personnel. *Id.*

M.D.C.G. was placed in an ambulance and transported to a hospital in McAllen, where she was placed under guard in the custody of CBP. *Id.* at ¶ 26. Some time passed before M.D.C.G. learned what happened to her daughter, and she was not permitted to see N.L.M.C. until the third day. *Id.*

C. Facts Specific to N.L.M.C.

***3** N.L.M.C. watched, restrained, as Manzanares forcibly removed her mother, M.D.C.G., from the vehicle. *Id.* at ¶ 27. She witnessed the injuries her mother received until Manzanares dragged M.D.C.G. away from the truck. *Id.* N.L.M.C. could then hear the beatings and sounds of distress from her mother. *Id.*

Manzanares then returned to the vehicle and forcibly removed N.L.M.C. *Id.* at ¶ 28. N.L.M.C. struggled while he strangled and choked her and twisted her neck in a manner that led her to believe he was trying to break her neck. *Id.* At some point, N.L.M.C. became temporarily unconscious or disoriented. *Id.* Eventually, she acted as if she were unconscious or dead in an attempt to limit Manzanares's actions. *Id.* Even then, Manzanares "continued to touch and assault her in an offensive and provocative manner." *Id.* at ¶ 29. Manzanares manipulated N.L.M.C.'s clothing to gain access to her breast and vaginal

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area, and touched her provocatively with his hands and other body parts. *Id.* at ¶ 30. He also walked around her, taking pictures of her semi-unclothed body. *Id.*

Manzanares then used his knife to cut N.L.M.C.'s left arm. *Id.* at ¶ 31. N.L.M.C. was awake, but continued to act unresponsive in an attempt to save her life. *Id.* Manzanares then covered N.L.M.C. with dirt, debris, and brush, and left the area. *Id.* After she heard him drive away, N.L.M.C. dug herself out and began to look for her mother. *Id.* Eventually she found another individual dressed as a CBP officer, and was placed in an ambulance and transported to the hospital. *Id.* N.L.M.C. was placed under guard at the hospital, in the custody of CBP, and was not permitted to see her mother until the third day. *Id.* at ¶ 32.

D. Facts Specific to J.M.A.E.

Manzanares eventually returned to the vehicle without M.D.C.G. or N.L.M.C., and refused to tell J.M.A.E. what he had done with them despite her pleas. *Id.* at ¶ 33. He drove around for a while before taking J.M.A.E. to a deserted area, where he tied her to a tree and left her for a few hours. *Id.* at ¶ 34.

Manzanares eventually returned and took J.M.A.E. to his apartment in Mission, Texas. *Id.* There, he cut away her clothing, forcibly bathed her, and tied her to a bed. *Id.* While she was restrained, he photographed her naked body and over the course of several hours, "took physical liberties with J.M.A.E., including touching her provocatively and offensively, fondling her, penetrating her vaginally, and other assaults...." *Id.* at ¶¶ 35, 36. At some point, he left the apartment and returned. *Id.* at ¶ 37. Several hours later, J.M.A.E. heard a loud pounding on the door and loud voices, and shortly thereafter, gunfire and "explosions of gaseous chemicals" in the apartment. *Id.* at ¶ 38. She was later told that Manzanares had killed himself with his own weapon. *Id.*

When law enforcement officers entered the apartment, they found J.M.A.E. still tied to the bed. *Id.* at ¶ 39. She was transported to the hospital and placed under guard, and was not allowed to see her family for a month. *Id.*

E. Facts Relevant to Negligent Hiring, Retention, and Supervision Claims

On the basis of information released to Plaintiffs and in press reports, Plaintiffs believe that one or more agencies of Defendant (specifically, Immigration and Customs Enforcement ("ICE") and/or the Federal Bureau of Investigation ("FBI")) knew of Manzanares "having abused persons in his custody and control," "that there had been investigations into abuse and his wrongful use of excessive force," and that "[t]he prior allegations included complaints of attacks on women in a physical, mental, and/or sexual manner." *Id.* at ¶ 40. Plaintiffs also allege that "[i]t has further been reported that the CBP Sector/Station in question has been placed on notice by other governmental agencies and non-governmental agencies about a direct failure of managerial level employees to enforce policies, regulations, statutes, and/or internal protocol regarding the excessive use of force, the handling of unaccompanied minors, and women." *Id.* at ¶ 41.

III. Defendant's 12(b)(1) Motion to Dismiss

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A. Standard of Review

***4** A court properly dismisses a case for lack of subject-matter jurisdiction under Rule 12(b)(1) " 'when the court lacks the statutory or constitutional power to adjudicate the case.' " *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996)). The court may determine lack of subject-matter jurisdiction on the basis of: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

B. FTCA Waiver of Sovereign Immunity

As a general rule, the United States has sovereign immunity from suit, depriving federal courts of subject-matter jurisdiction over claims against the government. *E.g.*, *Bodin v. Vagshenian*, 462 F.3d 481, 484 (5th Cir. 2006). However, the FTCA provides a broad waiver of sovereign immunity for claims against the United States for personal injury

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1); *id.* By its terms, the waiver only applies when the tortfeasor acts in the scope of his government employment. *Id.* Even if he does, another section of the FTCA makes the waiver inapplicable to certain enumerated intentional tort claims, including any claim "arising out of" assault, battery, false imprisonment, or false arrest, *unless* the tortfeasor was an "investigative or law enforcement officer." 28 U.S.C. § 2680(h); *see id.*; *Davila v. United States*, 713 F.3d 248, 256 (5th Cir. 2006) (law enforcement proviso of § 2680(h) provides "an exception to the exception" to § 1346(b)(1)). The FTCA defines "investigative or law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). The U.S. Supreme Court recently held that "the waiver effected by the law enforcement proviso extends to acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest." *Millbrook v. United States*, 133 S.Ct. 1441, 1446 (2013). In other words, the focus of the law enforcement proviso is on "the *status* of persons whose conduct may be actionable, not the types of activities that may give rise to a tort claim against the United States." *Id.* at 1445 (emphasis in original).

C. Overview of Defendant's Grounds for Dismissal: Manzanares Not Acting in Scope of Employment

Defendant does not dispute that on March 12, 2014, Manzanares held the status of "investigative or law enforcement officer" for purposes of the FTCA waiver of sovereign immunity. *See* (Dkt. No. 11). Rather, Defendant seeks dismissal of Plaintiffs' intentional tort and negligence causes of action on the grounds that Manzanares was not acting within the scope of his employment at the time of his alleged tortious conduct, in which case the FTCA waiver does not apply and the Court lacks subject-matter jurisdiction over these causes of action. *Id.* Since the issue of whether an employee is acting in the scope of his employment is governed by the law of the state in which the wrongful act occurred, *Bodin*, 462 F.3d at 484, the Court looks to Texas law to determine this question.

***5** The general rule in Texas is that an employee's conduct falls within the scope of his employment, therefore subjecting his employer to liability under the theory of respondeat superior, if the employee's actions were: "(1) within the general authority given him; (2) in furtherance of the employer's business; and (3) for the accomplishment of the object for which the employee was employed." *Id.* (quoting *Counts v. Guevara*, 328 F.3d 212, 214 (5th Cir. 2003)) (internal quotations omitted); *Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573, 577 (Tex. 2002). The Texas Supreme Court has also directed that, for an employee's acts to be imputed to his employer, his conduct "must be of the same general nature as that authorized or incidental to the conduct authorized." *Minyard Food Stores*, 80 S.W.3d at 577 (quoting *Smith v. M Sys. Food Stores, Inc.*, 156 Tex. 484, 297 S.W.2d 112, 114 (1957)). "If the purpose of serving the master's business actuates the servant to any appreciable extent his acts are within the scope of his employment." *Bodin*, 462 F.3d at 485 (quoting *Howard v. Am. Paper Stock Co.*, 523 S.W.2d 744, 747 (Tex. Civ. App.–Ft. Worth 1975), *reformed and aff'd*, 528 S.W.2d 576 (Tex. 1975)). "However, when the servant turns aside, for however short a time, from the prosecution of the master's work to engage in an affair wholly his own, he ceases to act for the master, and the responsibility for that which he does in pursuing his own business or pleasure is upon him alone." *Id.* (quoting *Tex. & P. Ry. Co. v. Hagenloh*, 247 S.W.2d 236, 241 (1952)) (internal quotations omitted); *see also Minyard Food Stores*, 80 S.W.3d at 577 ("[I]f an employee deviates from the performance of his duties for his own purposes, the employer is not responsible for what occurs during that deviation.").

Defendant acknowledges that when Manzanares allegedly apprehended Plaintiffs by the side of the road near the Rio Grande River, restrained them with black restraint bands, placed them in the back of his official vehicle, and drove them to what appeared to be a government building, his actions were "consistent with [those of] a Border Patrol agent who has detained individuals who have illegally entered into the United States." (Dkt. No. 11). However, Defendant takes the position that any conduct alleged to have been committed by Manzanares after he left the government building with Plaintiffs was outside the performance of his duties and committed for his own purposes, and cannot

be imputed to the United States. *Id.* The Court finds it appropriate to consider Defendant's argument separately with respect to each of the torts allegedly committed by Manzanares.

D. Assault and Battery

1. Elements of Cause of Action and Plaintiffs' Allegations

"Texas courts have recognized private causes of action for both assault and battery for well over a century." *City of Watauga v. Gordon*, 434 S.W.3d 586, 589 (Tex. 2014). "These two intentional torts are related, but conceptually distinct." *Id.* "An assault occurs when a person is in apprehension of imminent bodily contact, whereas a battery is committed when an individual actually sustains a harmful or offensive contact to his or her person." *Id.* "Today, the Texas Penal Code combines common-law concepts of assault and battery," providing that a person commits an "assault" if he either:

> (1) intentionally, knowingly, or recklessly causes bodily injury to another...;
>
> (2) intentionally or knowingly threatens another with imminent bodily injury...; or
>
> (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Id. at 589–90 (quoting TEX. PENAL CODE § 22.01(a)). "The statute's second alternative definition mirrors the traditional notion of common-law assault, while the first and last alternatives correspond to separate forms of common-law battery." *Id.* at 590. "The Second Restatement of Torts similarly identifies two forms of battery: one form that results in harmful bodily contact and another that results in offensive bodily contact." *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965)).

Plaintiffs' Complaint alleges that Manzanares's actions fall within each of the three definitions of assault provided by the Texas Penal Code, as follows:

> ***6** (1) Manzanares intentionally and knowingly inflicted bodily injury on M.D.C.G. and N.L.M.C. when he dragged them out of his truck and dragged M.D.C.G. up a hill, "roughed them up," knifed them, strangled and choked them, twisted their necks as if attempting to kill them, and rendered them unconscious for brief periods;
>
> (2) Manzanares's infliction of bodily injury on M.D.C.G. and N.L.M.C. to the point that they would temporarily lose consciousness, and thought they were going to die, also constituted the intentional and knowing threat of imminent bodily injury to M.D.C.G., N.L.M.C., and finally J.M.A.E., who assumed the others were dead "and that she was next"; and
>
> (3) Manzanares intentionally and knowingly engaged in offensive or provocative physical contact with M.D.C.G., N.L.M.C., and J.M.A.E. when he was "rough and offensive" with them and "engaged in provocative physical contact with the two minors."

(Dkt. No. 1 at ¶¶ 51–55).

2. Respondeat Superior Claims for Assault and Battery

Under Texas law, "[i]t is not ordinarily within the scope of a servant's authority to commit an assault on a third person," since "[u]sually assault is the expression of personal animosity and is not for the purpose of carrying out the master's business." *Hagenloh*, 247 S.W.2d at 239. However, "[t]he nature of the employment may be such as necessarily to involve at times the use of force...so that the act of using force may be in furtherance of the employer's business, making him liable even when greater force is used than is necessary," and "even though the master has expressly forbidden the particular act...." *Id.* (citing *Int'l & G.N. Ry. Co. v. Anderson*, 17 S.W. 1039 (Tex. 1891)). In determining whether an assault was committed in the scope of employment, Texas courts consider "whether the assault was so connected with and immediately arising out of authorized employment tasks as to merge the task and the assaultive conduct into one indivisible tort imputed to the employer." *Buck v. Blum*, 130 S.W.3d 285, 289 (Tex. App.–Houston [14th Dist.] 2004, no pet.). The plaintiff bears the burden to prove that the employee acted for reasons other than personal animus, which is generally a fact question. *Bodin*, 462 F.3d at 485 (citing Texas cases).

3. Analysis

a. Overview of Parties' Arguments

Citing mostly to FTCA and Texas respondeat superior cases involving alleged sexual assaults, Defendant makes two main arguments in support of its position that Manzanares was not acting in the scope of his employment: (1) as soon as Manzanares left the government building with Plaintiffs still restrained in the back of his vehicle, and drove to an unpopulated area, his actions were no longer consistent with those of a Border Patrol agent; and (2) Manzanares's criminal acts "were clearly not undertaken to further the interests of the United States" or "to accomplish any purpose for which Manzanares was employed," and were instead "prompted solely by [his] own motives." (Dkt. No. 11). In their response, Plaintiffs reject the supposed inference that criminal acts, and more specifically sexual assault, are not actionable under the FTCA. (Dkt. No. 17). They also claim that in contrast to most of the cases on which Defendant relies, in this case Manzanares was authorized to use force as part of his job, and that Manzanares's purpose for acting is a fact question that may not be resolved at this stage. *Id.* The Court will examine each of Plaintiffs' responsive arguments in turn.

b. FTCA Liability for Criminal Acts

***7** Plaintiffs' response first takes issue with an inference they believe Defendant's Motion and citation to authority attempts to make: that criminal acts, including sexual assault, cannot fall within the scope of a person's employment for purposes of the FTCA. (Dkt. No. 17). To the extent that Defendant intends the inference, the Court agrees that that the criminal nature of Manzanares's actions does not determine the scope inquiry; if it did, the federal government could never be held liable for an assault in Texas, given that the intentional tort of assault "is identical to criminal assault" under Texas law. *Davila*, 713 F.3d at 261. Defendant's Motion relies in part on the district court's observation in *Davis v. United States*, 474

F. Supp. 2d 829, 832 (N.D. Tex. 2007), that "when a prison guard turns from the duties of the job to violate [Federal Bureau of Prisons] policy and the law by intentionally raping an inmate, the government is not liable for his intentional, criminal actions." As Plaintiffs observe, this observation was *dicta*, given that the plaintiff sought to hold the government liable not for the prison guard's intentional tort, but for the negligence of other prison guards in allowing the rape to occur. (Dkt. No. 17); *see id.* Plaintiffs also point out that since the district court's decision in *Davis*, the U.S. Supreme Court decided *Millbrook*—also an FTCA case involving a BOP officer's sexual assault of an inmate—in which the government conceded that the offending officer was acting within the scope of his employment. The Supreme Court did not, therefore, engage in a scope inquiry, but its holding that an officer need not have committed an intentional tort in the course of executing a search, seizing evidence, or making an arrest for the government to be held liable under the FTCA for his tortious conduct leaves open the possibility that the United States may be held liable for a sexual assault committed outside those contexts. The dispositive question under Texas law is not whether the tortfeasor's actions are criminal, but whether those actions are sufficiently connected to the exercise of his authorized duties and the purpose given him by his employer.

c. Authority to Use Force

Plaintiffs attempt to distinguish five of the assault cases cited by Defendant by emphasizing that these cases "do not analyze the course and scope of an employee who was *authorized to use force* in carrying out his duties, as Manzanares was." (Dkt. No. 17) (emphasis in original); *see* (Dkt. No. 11) (citing *Bodin*, 462 F.3d at 483–87 (psychiatrist's "illegal, inappropriate, and unnecessary physical examinations of [patients'] genitalia" during regularly scheduled visits were not within scope of his employment with U.S. Department of Veterans Affairs); *Hagenloh*, 247 S.W.2d at 240 (hitting and knocking down suspected thief not in scope of tortfeasor's employment as railway company "special agent," whose duties to investigate claims for and find property missing from baggage "were not of such nature as to involve the use of force"); *Buck*, 130 S.W.3d at 290 (neurologist who placed his penis in patient's hand during grip test was not acting within scope of his employment with hospital, in part because "neurology is not an inherently sexual profession and never requires the action allegedly perpetrated by [the doctor]"); *Mackey v. U.P. Enters., Inc.*, 935 S.W.2d 446, 454 (Tex. App.–Tyler 1996, no writ) (brushing up against and fondling employee not within scope of tortfeasors' duties as food service managers); *Kelly v. Stone*, 898 S.W.2d 924, 928 (Tex. App.–Eastland 1995, writ denied) (supervisor's sexual advances not within scope of his employment as office services manager at electric cooperative)). Plaintiffs instead attempt to analogize this case to other cases in which Texas appellate courts have found employers liable for assaults committed by employees with the authority to use some degree of force in performing their job duties. (Dkt. No. 17) (citing *G.T. Mgmt., Inc. v. Gonzalez*, 106 S.W.3d 880, 884 (Tex. App.–Dallas 2003, no pet.) (nightclub bouncers' assault of patron within scope of their employment where they were authorized to use force to carry out duties to break up fights, walk parties out of club,

and control patrons, and assault was incidental to their use of that force); *Durand v. Moore*, 879 S.W.2d 196, 199–201 (Tex. App.–Houston [14th Dist.] 1994, no writ) (nightclub bouncer's assault of complaining customers amounted to "overzealous" enforcement of authorized task of controlling admittance of customers into club, and was within scope of his employment); *Frito–Lay Inc. v. Ramos*, 770 S.W.2d 887 (Tex. App.–El Paso 1989), *rev'd on other grounds*, 784 S.W.2d 667 (Tex. 1990) (under circumstances of "being responsible for what he thought was company equipment," district sales manager who pushed customer while retrieving equipment was acting in scope of employment)).

A similarity among all of these cases is the factually intensive nature of the scope of inquiry, which in this case requires consideration of the type of force authorized by Manzanares's employer, and the extent to which the force used against Plaintiffs fell within the scope of that authority. In the FTCA context, the Fifth Circuit has found that federal officers such as Manzanares "are peace officers for the purpose of the Texas criminal assault statute and its civil privilege defense," and are therefore justified in using force "when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest or search." *Davila*, 713 F.3d at 261 (quoting TEX. PENAL. CODE § 9.51(a)). The Texas Penal Code further justifies the use of force "to prevent the escape of an arrested person from custody...when the force could have been employed to effect the arrest under which the person is in custody." TEX. PENAL CODE § 9.52. Plaintiffs also direct the Court to several publicly available documents: (1) the CBP "Use of Force Policy, Guidelines and Procedures Handbook," dated May 2014 ("Use of Force Handbook"); (2) the CBP "National Standards on Transport, Escort, Detention, and Search," dated October 2015 ("National Standards"); (3) the Stipulated Settlement Agreement in *Flores v. Reno*, Case No. CV 85–4544–RJK(px) (C.D. Cal. Jan. 17, 1997) ("*Flores* Agreement"); (4) a DHS report on "CBP's Handling of Unaccompanied Alien Children" in compliance with the *Flores* Agreement, dated September 2010 ("*Flores* Agreement Report"); and (5) a CBP memorandum addressing agency policy for "Hold Rooms and Short Term Custody," dated June 2, 2008 ("Custody Policy"). (Dkt. No. 17).[3] These documents provide the following insight into the responsibilities of CBP agents/officers, and the authority given them and requirements imposed on them:

***8** • CBP is the agency responsible for protecting U.S. borders and enforcing immigration laws through the apprehension and detention of aliens who attempt to enter the county illegally, *Flores* Agreement Report at p. 2;[4]

- Agents are to make "[e]very effort...to promptly process, transfer, transport, remove, or release those in custody as appropriate and as operationally feasible," Custody Policy at p. 3;

- Agents may use restraints on juveniles only in "exigent circumstances," and otherwise "in a manner that is safe, secure, humane, and professional," not "in a punitive manner or in a manner that causes detainees undue pain," National Standards at pp. 5, 15, 23;

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- Agents may use "objectively reasonable and necessary" force to carry out their law enforcement duties, including the use of: (1) "empty-hand strikes" as a compliance tool, and "other strikes (e.g., punches, kicks, etc.)" as a defensive tactic, "on a subject offering, at a minimum, assaultive resistance"; and (2) "any available weapon" for self-defense or defense of others in "threatening, emergent situations," Use of Force Policy at pp. 1, 23, 27, 37;

- Agents must not leave detainees unattended in a vehicle, and must report any observed or reported injury and provide timely, appropriate medical care, National Standards at pp. 5–6; and

- "Whenever operationally feasible," transport must be conduct by two agents "with at least one being of the same gender...as the detainee(s)," and agents are obligated to take precautionary measures and other actions necessary to protect detainees from sexual abuse and assault, National Standards at pp. 6, 24–25.

Plaintiffs also point out that the *Flores* Agreement, which governs policy for CBP's treatment of unaccompanied alien children in federal custody, requires that CBP treat minors "with dignity, respect and special concern for their particular vulnerability as minors," "place each detained minor in the least restrictive setting appropriate to the minor's age and special needs," and ensure the safety and well-being of minors detained in CBP facilities. *Flores* Agreement at ¶¶ 11, 12; *Flores* Agreement Report at pp. 1–3, 19.

Obviously, Manzanares may not assert the Texas civil privilege defense for his alleged assaults, and Plaintiffs in fact emphasize that his actions were in clear violation of CBP standards and policies. (Dkt. No. 11). However, standing alone, that Manzanares misused the authority given him does not foreclose a showing that he acted within the scope of his employment; again, an employee's assault may be imputed to his employer even when he uses greater force than necessary, and even when the employer has forbidden the particular act. *See* *Hagenloh*, 247 S.W.2d at 239. The caveat, which the Court finds dispositive in this case, is that the employee's misapplication of force must be sufficiently connected to his employer's purpose to impute liability.

d. Purpose

***9** Plaintiffs claim that Manzanares's purpose for committing the various assaults is a fact-driven inquiry best reserved for a later stage. (Dkt. No. 17). However, the Court finds, as did the Texas court of appeals in *Buck*, that Plaintiffs' pleaded allegations and other documents properly considered at this stage are dispositive of this question. In *Buck*, the court affirmed the trial court's summary judgment for a hospital sued under the theory of respondeat superior for a neurologist's sexual assault of a patient. The plaintiff in *Buck* alleged that while performing a neurological examination, the doctor placed his penis in her hand instead of using the metal weight he had used previously. *Buck*, 130 S.W.3d at 289. Looking only to the plaintiff's pleaded allegations, the appellate court reasoned that "it cannot be fathomed that the action was in furtherance of the employer's business or for the accomplishment of an object

for which [the doctor] was employed," since "[a]t the very moment [the doctor] placed his body part in [the plaintiff's] hand (assuming he did), he was acting in his own prurient interest and ceased to be acting for the employer." *Id.* at 289–90. Citing to *Durand*, *supra*, the court also found that the assault

> was [not] so connected with and immediately arising out of [the doctor's] employment tasks as to merge the activities into one indivisible tort. A club bouncer has an inherently confrontational job that may well require physical force; whereas, neurology is not an inherently sexual profession and never requires the action allegedly perpetrated by [the doctor].

Buck, 130 S.W.3d at 290 (internal citation omitted). On these bases, the court concluded as a matter of law that the neurologist's conduct did not arise out of the course and scope of his employment. *Id.* Plaintiffs rely on the contrast to *Durand* drawn by *Buck*, but neither *Durand* nor *G.T. Mgmt.*, *supra*—both cases involving assaults committed by club bouncers and imputed to the employer—are of aid to Plaintiffs in this case. (Dkt. No. 17). *Durand* involved evidence that the bouncer had the responsibility to control the admittance of customers into the club, and that his assault of the plaintiff immediately followed their discussion of why the bouncer was giving preferential treatment to certain customers—evidence that the assault "was overzealous enforcement of the criteria and procedures used to select waiting customers for admittance into the club." *Durand*, 879 S.W.2d at 200. In *G.T. Mgmt.*, the court cited to evidence that "the bouncers' duties were to break up the fights and walk the parties out of the club," that they "were expected to signal for back-up with their flashlights when fights occurred," and that they "used choke holds to control the patrons." *G.T. Mgmt.*, 106 S.W.3d at 884. The evidence also included testimony that the plaintiff was under suspicion by one bouncer for having thrown a bottle in the club, and that after back-up was summoned, the force employed by the bouncers included grabbing the plaintiff from behind and pinning his arms, hitting him in the face with their flashlights, and throwing him down the steps of the club entrance. *Id.* at 882. The court concluded that the case before it was similar to *Durand*, in that the bouncers' assault of the plaintiff was incidental to their use of authorized force against him. *Id.* at 884.

In contrast to these cases, which involve a close connection between (1) the employees' duties and the use of force sanctioned by their employers, and (2) the force actually employed, Manzanares's duties to apprehend, detain, and transport Plaintiffs, and the authority given him by CBP to use "objectively reasonable and necessary" force to carry out these duties, are in stark contrast to the alleged abuse inflicted by Manzanares on Plaintiffs in this case: dragging M.D.C.G. and N.L.M.C. out of his truck and dragging M.D.C.G. up a hill; knifing, strangling, and choking M.D.C.G. and N.L.M.C. and twisting their necks to the point that they were rendered unconscious;

tying J.M.A.E. to a tree; and finally, sexually assaulting the minors. The Court recognizes, as Plaintiffs emphasize, that "[e]ven if the employee's act would not be imputed to the employer when the act is considered in isolation, the employer can be found liable if the employee's act is connected with and immediately grows out of another act of the employee that is imputable to the master." (Dkt. No. 17) (citing *Houston Transit Co. v. Felder*, 208 S.W.2d 880, 881 (Tex. 1948) (after plaintiff's car rear-ended company bus, bus driver who approached plaintiff's car to get information, and in the course of doing so struck plaintiff with a money-changing box, committed assault "while...about his master's business and before he had finished his mission"); *Gulf, C. & S. F. Ry. Co. v. Cobb*, 45 S.W.2d 323, 325–26 (Tex. App.Austin 1931, writ dism'd w.o.j.) (railway company employee's shooting of plaintiff, even if it exceeded his authority and was accomplished with personal weapon carried in violation of employer's rules, immediately grew out his efforts to prevent plaintiff from interfering with his duties to control switching of railroad cars and to protect employer's property, train crew, and other persons from improper switching of cars upon plaintiff's signals); *Hooper v. Pitney Bowes, Inc.*, 895 S.W.2d 773, 777 (Tex. App.–Texarkana 1995, writ denied) (alleged defamatory statements about plaintiff were made in course of supervisors' effort to investigate plaintiff's conduct as their subordinate, and were within scope of employment even if investigation was in part conducted through activities of which company would not have approved)). However, in contrast to the cases cited by Plaintiffs, in this case Plaintiffs' allegations make clear that any acts imputable to the employer met their end well enough before the assaults began as to eliminate the requisite close connection. That is, Plaintiffs allege that after Manzanares first apprehended Plaintiffs and took custody over them in his official vehicle, he told them that they would be transported to a facility for mothers and children—actions consistent with his duties as a CBP agent. After making several stops, and at some point placing restraint bands on Plaintiffs and transferring them to the back of his vehicle, Manzanares stopped at "what appeared to be a government building" occupied by CBP personnel. Similar to *Buck*, the Court can pronounce on the basis of the current record that no CBP agent would ever have reason to do what Manzanares allegedly did next: drive away from the government building and instead transport three restrained female detainees, two of them minors, to unpopulated or private areas and then remove them from his vehicle, one by one, to inflict unprovoked physical and sexual abuse on them. Although the assaults may have been *facilitated* by Manzanares's duties and authority to use force, they were not so *connected* with the purpose and authority given him by CBP as to render his actions within the scope of his employment.

***10** Plaintiffs cite to an additional case in an effort to show that even if Manzanares's tortious actions were in part for his own purposes, they can still be within the scope of his employment. (Dkt. No. 17). In *Best Steel Buildings, Inc. v. Hardin*, 553 S.W.2d 122 (Tex. App.–Tyler, writ ref'd n.r.e.), a wrongful death case arising from an automobile-truck collision attributed to the employee's negligence while acting in the scope of his employment, the court

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observed that even if "the preponderate motive of the servant is to benefit himself or a third person," Texas law directs that "[i]f the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act otherwise is within the service of his employer." *Best Steel Bldgs.*, 553 S.W.2d at 128 (citing cases). Thus, the court determined that "[e]ven had it been established that [the employee] attended to some personal business or visited his family while on the trip" during which the accident occurred, "if, as the jury found, he was directed to make the trip in furtherance of the affairs of his employer, he would nevertheless be in the course and scope of his employment." *Id.* Here, Plaintiffs' allegations themselves, and other documents properly considered at this stage, make evident that any actions that could have been directed by CBP in furtherance of its purposes ended when Manzanares proceeded, with three female detainees bound in the back of his vehicle, away from any government facility, and instead to unpopulated or private areas conducive to his unprovoked assaults.

Finally, Plaintiffs contend that "the personal animosity exception does not mean that the employee cannot become angry, displeased, abusive, or even violent in the course and scope of his employment," citing to *Soto v. El Paso Natural Gas Co.*, 942 S.W.2d 671 (Tex. App.–El Paso, writ denied), for support. (Dkt. No. 17). *Soto* involved evidence that a supervisor became angry with a secretary, "berated her with his face in hers, and pushed into her breast with the side of his hand," thereby assaulting her, when she failed to type a label quickly enough to suit him. *Soto*, 942 S.W.2d at 681. Since evidence existed that the incident occurred at the work place during regular hours, that the supervisor had the authority to ask the secretary to type labels for him, and that typing labels was a regular part of the secretary's duties, the court determined that a fact question existed as to whether the supervisor's acts were in the scope of his employment. *Id.* Although Manzanares's abuse of Plaintiffs may have occurred, in part, during work hours, for the reasons explained *supra*, the record at this stage makes clear that he did not become abusive in the course of carrying out any authorized task.

The Court agrees with Plaintiffs that the scope inquiry is a factually intensive one, but in this case, the detailed, pleaded facts are dispositive. It is irrelevant what Manzanares's actual motive was—personal animosity or, as Plaintiffs posit, "a desire and need for power and control over others"—since the record makes clear that his motive was not his employer's. (Dkt. No. 17). When he inflicted physical and sexual abuse on Plaintiffs, Manzanares was departing from CBP's purposes to such an extent that his actions must be deemed his own, and his employer may not be held liable for them under the theory that he was acting in the scope of his employment. Accordingly, the FTCA does not waive Defendant's sovereign immunity to suit for Manzanares's alleged assaults, and the Court must dismiss this cause of action for lack of subject-matter jurisdiction.

E. False Imprisonment/False Arrest

In Texas, the essential elements of the intentional tort of false imprisonment are: (1) willful detention; (2) without consent; and (3) without authority of law. *E.g.*, *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). "A detention may be accomplished

by violence, by threats, or by any other means that restrains a person from moving from one place to another." *Id.* at 644–45. "Where it is alleged that a detention is effected by a threat, the plaintiff must demonstrate that the threat was such as would inspire in the threatened person a just fear of injury to her person, reputation, or property." *Id.* at 645. False arrest is not a separate cause of action, but a means of committing a false imprisonment. *Whirl v. Kern*, 407 F.2d 781, 790 (5th Cir. 1968); *see Villegas v. Griffin Indus.*, 975 S.W.2d 745, 754 (Tex. App.–Corpus Christi 1998, no pet.) (where justness of imprisonment depends on whether officers had probable cause to arrest, false imprisonment and false arrest claims are indistinguishable and share the same elements).

***11** Plaintiffs' Complaint alleges that Manzanares initially had the consent of M.D.C.G., N.L.M.C., and J.M.A.E. "to detain them and take them to a CBP facility." (Dkt. No. 1 at ¶ 60). However, when he instead took Plaintiffs to various remote areas and kept them in restraints while he abused them, Manzanares's willful detention of Plaintiffs lacked their consent and the authority of law. *Id.* Plaintiffs also allege that the false imprisonment did not end when they were rescued from Manzanares. *Id.* at ¶ 61. Rather, M.D.C.G. and N.L.M.C. were separated and not permitted to see each other for days, and J.M.A.E. was kept under guard and not permitted to be with her family for nearly a month. *Id.*

In sum, Plaintiffs claim false imprisonment by (1) Manzanares and (2) those agents of Defendant responsible for taking custody of Plaintiffs after their rescue, and seek to impute the alleged tortious conduct of these agents to the United States. Again, Defendant moves for dismissal of this claim on the grounds that Manzanares could not have been acting in the scope of his employment when he engaged in this conduct. (Dkt. No. 11). Plaintiffs' briefing concentrates largely on their assault claim, and offers no citation to any Texas case discussing employer liability for false imprisonment. (Dkt. No. 17).[5] The failure is inconsequential, however, as the Court finds that precedent applicable to all Texas respondeat superior claims requires a finding that Manzanares's actions could not have been within scope of his employment for reasons set forth in Plaintiffs' own pleading: they allege that Manzanares "never had any intention of detaining them lawfully to take them directly to a CBP detention center or office; rather he detained them *for his own personal purposes*...." (Dkt. No. 1 at ¶ 62) (emphasis added). Plaintiffs' detailed factual allegations, and the CBP standards and policies to which they cite, reinforce this admission. Although Manzanares had the general authority to detain Plaintiffs when he encountered them illegally in the United States, and although this authority may have facilitated his actions, he wholly departed from the employer-sanctioned purpose for the authority given when he continued his detention of Plaintiffs in order to drive them to remote locations and finally his apartment, remove them one by one from his vehicle, and physically and sexually abuse them.

With respect to Plaintiffs' false imprisonment claim premised on the actions of federal agents other than Manzanares, Defendant does not move to dismiss this claim against the

government on any basis. *See* (Dkt. No. 11). Arguably, these agents were acting in the scope of their employment when they placed Plaintiffs under guard and separated them from their family members, and the Court has no occasion to determine whether any such detention meets the elements of a false imprisonment claim. Therefore, the Court will allow Plaintiffs' false imprisonment claim to proceed in this limited respect.

F. Intentional and Negligent Infliction of Emotional Distress

To recover for the tort of intentional infliction of emotional distress in Texas, a plaintiff must prove that (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. *E.g.*, *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). To be extreme and outrageous, conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (quoting RESTATEMENT (SECOND) OF TORTS 46 cmt. d (1965)). Texas does not recognize a cause of action for negligent infliction of emotional distress. *Id.* at 620–61.

***12** In support of their emotional distress claim, Plaintiffs allege that "none of the injuries they sustained were accidental," and that Manzanares's conduct—the "brutal and drawn out torture of each plaintiff," in part within the others' view or earshot—"will remain mental scars years after physical injuries diminish." *Id.* at ¶ 64 (emphasis omitted). According to Plaintiffs, each suffers from "severe post-traumatic stress disorder (PTSD) as a result of her harrowing ordeal with Manzanares." *Id.* at ¶ 65. Plaintiffs also allege that "their trauma did not end when they were rescued from Manzanares," but continued as "M.D.C.G. and her minor daughter, N.L.M.C., were separated for three days while the other could only imagine the state the other was in after their ordeal." *Id.* Further, "[e]ven after the nightmare she'd experienced, the minor then-14–year–old plaintiff J.M.A.E., who'd been tortured for nearly 24 hours, was not permitted to be with her family for a month." *Id.*

Plaintiffs' emotional distress claim against Defendant, like their false imprisonment claim, is premised on the actions of (1) Manzanares and (2) other federal agents who detained Plaintiffs after the ordeal with Manzanares had ended, and who separated them from their family members. With respect to the claim stemming from Manzanares's conduct, the Court first notes that this claim plainly "arises out of" Manzanares's alleged assault and false imprisonment of Plaintiffs for purposes of the FTCA law enforcement proviso waiver of sovereign immunity. *See* *Truman v. United States*, 26 F.3d 592, 595 (5th Cir. 1994) ("[i]f the conduct on which [the plaintiff] bases her claim for intentional infliction of emotional distress constitutes a claim 'arising out of' what is traditionally taken to be a tort enumerated in section 2680(h)," emotional distress claim barred under intentional tort exception to FTCA waiver of immunity). For this reason, and for the reasons discussed *supra*, the Court agrees with Defendant that Manzanares could not have been acting in the scope of his employment when he inflicted

emotional distress on Plaintiffs in the course of engaging in the conduct also alleged to constitute assault and false imprisonment. *See* (Dkt. No. 11). Defendant does not, however, challenge Plaintiffs' emotional distress claim premised on the actions of the agents other than Manzanares. *See id.* Therefore, the Court will allow Plaintiffs' intentional infliction of emotional distress claim, as limited, to proceed.

G. Negligence of Manzanares

The elements of a negligence cause of action under Texas law are (1) the existence of a legal duty; (2) a breach of that duty; and (3) damages proximately caused by the breach. *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004). Manzanares's alleged breaches of the duties owed to Plaintiffs consist entirely of actions also alleged to constitute the intentional torts of assault and false imprisonment, and thus for the reasons discussed *supra*, the Court agrees with Defendant that these actions could not have been taken within the scope of Manzanares's employment for purposes of the FTCA waiver of sovereign immunity. *See* (Dkt. No. 1 at ¶ 69; Dkt. No. 11).[6] Accordingly, Plaintiffs' negligence claim must be dismissed in its entirety for lack of subject-matter jurisdiction.

IV. Defendant's Rule 12(b)(6) Motion to Dismiss

A. Standard of Review

Dismissal is proper under Federal Rule of Civil Procedure 12(b)(6) for a party's "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Rule 12(b)(6) is read in conjunction with the pleading standard set forth in Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2); *see Ashcroft v. Iqbal*, 556 U.S. 662, 677–68 (2009). This standard does not require detailed factual allegations. *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). However, a party's "obligation to provide the 'grounds' of his 'entitle[ment]' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal citations omitted). To survive a Rule 12(b)(6) motion, the complaint and any other matters properly considered[7] must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows the court, drawing upon its "judicial experience and common sense," to reasonably infer that the defendant is liable for the misconduct alleged. *Id.* at 678 (citing *Twombly*, 550 U.S. at 556), 679. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' " *Id.* at 679 (quoting FED. R. CIV. P. 8(a)(2)).

B. Overview of Grounds for Dismissal

***13** Defendant invokes Rule 12(b)(6) as an alternate basis for the dismissal of Plaintiffs' assault and battery, false imprisonment/false arrest, intentional and negligent infliction of emotional distress, and negligence claims to the extent that they are premised on the alleged

tortious conduct of Manzanares, on the grounds that Plaintiffs fail to state a plausible claim that Manzanares acted within the scope of his employment. (Dkt. No. 11). Since the Court has already dismissed these claims under Rule 12(b)(1), Defendant's Rule 12(b)(6) Motion is moot in this respect. [8]

Defendant also moves for dismissal of Plaintiffs' negligent hiring, retention, and supervision claims under Rule 12(b)(6), but in doing so, does not dispute that the agents/officers whose acts or omissions form the bases for these claims were acting in the scope of their employment for purposes of the FTCA. *See* (Dkt. No. 11). Further, as Plaintiffs observe, Defendant does not challenge the existence of the requisite private analog for these claims under Texas law. (Dkt. No. 17); *see id.* Rather, Defendant moves for dismissal on the grounds that Plaintiffs have failed to plead anything other than conclusory allegations to support the foreseeability element of these claims. (Dkt. No. 11).

C. Analysis

Plaintiffs allege that Defendant, through its agents or officers other than Manzanares, was negligent in its hiring and retention of Manzanares by: (1) failing to perform an appropriate investigation of Manzanares prior to March 12, 2014, "particularly in view of prior complaints/evidence of his abuse, assault(s), and/or excessive use of force by Officer Manzanares with regard to females while previously performing authorized duties or otherwise on-duty"; and (2) failing "to have accurately and/or adequately reported results of [the] investigation concerning, and/or [to have] taken prospective/remedial action with regard to" Manzanares prior to March 12, 2014. (Dkt. No. 1 at ¶ 71). Plaintiffs further allege that Defendant was negligent in its supervision of Manzanares by failing to ensure that he "did not have isolated access to...females, including migrants/immigrants, while performing his job on or about March 12, 2014, particularly in view of prior complaints/evidence of abuse, assault(s), and/or excessive use of force by Officer Manzanares with regard to other females while previously performing authorized duties or otherwise on-duty." *Id.* Plaintiffs also make more generalized allegations of negligent hiring, retention, and supervision, including that Defendant was negligent in its "enforcement of policies, procedures, regulations, and/or other directives," and in its "use of independent contractors or outside agencies to conduct otherwise fundamental processes relating to hiring, supervision, and/or retention of CBP employees" prior to March 12, 2014. *Id.* Plaintiffs assert that Defendant's negligence was a proximate cause of and/or significant contributing factor to Plaintiffs' injuries. *Id.*

Defendant correctly observes that under Texas law, Plaintiffs' negligent hiring, retention, and supervision claims all require a showing that (1) the employer owed a legal duty to protect third parties from the employee's actions; and (2) the third party sustained damages proximately caused by the employer's breach of that legal duty. (Dkt. No. 11) (citing *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 655 (Tex. App.–Dallas 2002, pet. denied)). The threshold inquiry in all negligence cases is the existence of a duty —"a question of law for the court to decide

from the facts surrounding the occurrence in question." *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). "In determining whether the defendant was under a duty, the court will consider several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." *Id.* "Of all these factors, foreseeability of the risk is the foremost and dominant consideration." *Id.* (quoting *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987)) (internal quotations omitted). Foreseeability is also one of two elements comprising proximate cause. *IHS Cedars Treatment Ctr.*, 143 S.W.3d at 798. "Foreseeability means that an actor, as a person of ordinary intelligence, should have anticipated the dangers that his negligent act created for others." *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001) (quoting *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992)) (internal quotations omitted). The other element of proximate cause is cause-in-fact, which is established "when the act or omission was a substantial factor in bringing about the injuries, and without it, the harm would not have occurred." *IHS Cedars Treatment Ctr.*, 143 S.W.3d at 798–99. [9]

***14** Defendant appears to ask that the Court decline to find the existence of a duty or proximate cause on the basis of Plaintiffs' allegations, asserting that "Plaintiffs have failed to plead sufficient facts to show that the United States should have foreseen a risk of Manzanares committing" the conduct alleged in this case. (Dkt. No. 11). Emphasizing the criminal nature of that conduct, Defendant analogizes to cases in which courts have declined to impose liability on employers for the criminal acts of their employees, resulting in injury to third parties. *Id.* For example, in *Guidry v. National Freight, Inc.*, 944 S.W.2d 807 (Tex. App.–Austin 1997, no writ), a woman sexually assaulted by a truck driver sued the driver's employer under theories of negligent hiring, retention, and supervision. *Guidry*, 944 S.W.2d at 809. After stopping his truck in a parking lot, the driver had wandered through an adjacent neighborhood, eventually encountering the plaintiff on her walk home and dragging her into an adjoining apartment complex to rape her. *Id.* The court of appeals recognized that "[a]n employer can be held directly liable for hiring or retaining an incompetent employee, especially where the occupation at issue could cause hazard to others or requires skilled or experienced persons." *Id.* at 810 (citing RESTATEMENT (SECOND) OF TORTS § 378 (1965)). Further, "[l]iability is imposed when [an employer] brings into contact or association with [a] vulnerable person an individual whom the entity knows or should know is particularly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct." *Id.* (citing *Golden Spread Council of Boy Scouts v. Akins*, 926 S.W.2d 287, 291 (Tex. 1996); RESTATEMENT (SECOND) OF TORTS § 302B, cmt. e (1965)). Although the employer in *Guidry* had a duty to hire competent drivers, the court declined to impose the additional duty to determine whether prospective or current employees have a non-vehicular criminal record, and to refuse to hire or retain them on that basis. *Id.* at 810. The court explained that

the driver should never have come into contact with the plaintiff in the exercise of his duties as an employee, and thus the sexual assault was not foreseeable by the employer at the time of hiring. *Id.* at 811. The plaintiff also was not a member of a vulnerable or specially protected group with whom the driver could be expected to come into contact during his work. *Id.* Since the employer's obligation with respect to hiring, retaining, and supervising its drivers "did not flow to [the plaintiff] so as to impose upon [the employer] a duty to protect one in her position from sexual assault by one of its drivers," the employer could not be held liable. *Id.* at 811–12.

In *Houser v. Smith*, 968 S.W.2d 542 (Tex. App.–Austin 1998, no pet.), also cited by Defendant, the court of appeals relied on *Guidry* in holding that the employer was not liable for negligently hiring or supervising an employee of his transmission shop who sexually assaulted the plaintiff after hours at the shop. The plaintiff was a customer of the shop, and at the employee's invitation, accompanied him to an employer-sponsored barbecue at a tavern, leaving her car in the shop so they could drive to the event together. *Houser*, 968 S.W.2d at 543. At the end of the night, the plaintiff drove them both back to the shop to retrieve her car, and upon their return was sexually assaulted by the employee at gunpoint. *Id.* The court recognized that "the theory of negligent hiring and supervision imposes a general duty on an employer to adequately hire, train, and supervise employees." *Id.* at 544 (citing *Dieter v. Baker Serv. Tools*, 739 S.W.2d 405 (Tex. App.–Corpus Christi 1987, writ denied)). Although the employee need not be acting in the scope of his employment to impose liability on the employer, as is required for respondeat superior claims, "the theory of negligent hiring and supervision does require that a plaintiff's harm be the result of the employment." *Id.* (citing *Dieter*, 739 S.W.2d at 408). As in *Guidry*, the court in *Houser* determined that the criminal conduct at issue and the harm inflicted on the plaintiff were not foreseeable, and concluded that the employer did not owe a legal duty to his customers, including the plaintiff, beyond the duty to provide a competent transmission mechanic. *Id.* at 545. Also as in *Guidry*, the plaintiff was not a member of a vulnerable or specially protected group so as to impose a duty on the employer to diligently investigate the employee's background. *Id.* at 545–46.

In arriving at its holding, *Houser* distinguished the facts before it from those at issue in *Estate of Arrington v. Fields*, 578 S.W.2d 173 (Tex. Civ. App.–Tyler 1979, writ ref'd n.r.e.), in which the employer was found liable for negligently hiring an employee with a long criminal record for the position of an armed security guard. *Id.* at 545 (citing *Estate of Arrington*, 578 S.W.2d at 184). *Houser* reasoned that "[t]he foreseeability that some harm might come to a customer is greater when the employee is armed and charged with carrying out a hazardous job that requires skill or experience." *Id.* (citing *Estate of Arrington*, 578 S.W.2d at 178). In contrast, the transmission shop employee's job "did not require him to be in close and possibly confrontational situations with customers or to carry a dangerous weapon, nor did it require skill or experience beyond that of a mechanic." *Id.*

***15** *Guidry* and *Houser* serve to highlight the weakness of Defendant's challenge to foreseeability at the pleading stage of this case, which is more akin to *Estate of Arrington*. Manzanares was not hired as a truck driver or a mechanic, but as an armed Border Patrol agent. In that capacity, it was certainly expected that he would come into contact—often in remote areas—with persons who had illegally entered the United States, including women and minors specially protected as vulnerable persons under the *Flores* Agreement. Defendant also could reasonably anticipate that its agents stationed along the U.S.–Mexico border, as Manzanares was, would be placed in situations requiring competency in the use of force, and also affording an opportunity for the misuse of force against those taken into their custody, including women and children.[10] Importantly, "[f]oreseeability does not require an actor to anticipate the precise manner in which the injury will occur; instead, the injury need only be of a general character that the actor might reasonably anticipate." *Lee Lewis Constr.*, 70 S.W.3d at 785. The Court finds that Defendant could be expected to foresee at least the general character, if not the degree, of the conduct and the harm inflicted here—the physical and even sexual abuse of female detainees, including minors, by its Border Patrol agents—in the absence of the duties indicated by Plaintiffs' Complaint: adequate background investigations into prospective and current agents,[11] internal reporting of complaints of similar abuse by prospective and current agents while on duty, appropriate remedial actions taken in response to such complaints, and adequate supervision of these agents so as to guard against repeated abuse.

Defendant also takes the position that foreseeability does not exist under the facts of this case "in light of Plaintiffs' failure to allege that the United States had any knowledge of information that might have even hinted that Manzanares would engage in criminal misconduct." (Dkt. No. 11). However, Plaintiffs have alleged that Defendant through its agencies, thought to be ICE and/or the FBI, knew of Manzanares "having abused persons in his custody and control," "that there had been investigations into abuse and his wrongful use of excessive force," and that "[t]he prior allegations included complaints of attacks on women in a physical, mental, and/or sexual manner." (Dkt. No. 1 at ¶ 40; *see also* ¶ 71). Plaintiffs also allege that the CBP Sector/Station to which Manzanares was assigned was "placed on notice" about a direct failure by managerial level employees to enforce policies and/or internal protocol regarding the use of excessive force and the handling of women and unaccompanied minors. *Id.* at ¶ 41. At this stage, these combined allegations at least state a plausible claim that the general character of the conduct and harm that occurred in this case were the reasonably foreseeable result of Defendant's hiring and retention of Manzanares despite its knowledge of the complaints against him, and of Defendant's failure to adequately supervise him—for example, as alleged by Plaintiffs, by ensuring that Manzanares did not gain isolated access to females by patrolling alone. In sum, the Court finds that Plaintiffs have made sufficient allegations of foreseeability to support the duty and proximate cause elements of their negligent hiring, retention, and supervision claims.

V. Conclusion

***16** For the foregoing reasons, the Court hereby **ORDERS** that Defendant's Rule 12(b)(1) Motion to Dismiss is **GRANTED** with respect to Plaintiffs' FTCA claims for (1) assault and battery, (2) false imprisonment/false arrest, (3) intentional and negligent infliction of emotional distress, and (4) negligence, all premised on the conduct of U.S. Border Patrol Agent Manzanares; and **DENIED** with respect to Plaintiffs' FTCA claims for (1) false imprisonment/false arrest and (2) intentional infliction of emotional distress, both premised on the conduct of those agents or officers of Defendant responsible for detaining Plaintiffs after their rescue.

The Court further **ORDERS** that Defendant's Rule 12(b)(6) Motion is **DENIED** with respect to Plaintiffs' FTCA negligent hiring, retention, and supervision claims, and otherwise **MOOT**.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 6638845

Footnotes

1 The remaining Plaintiff, D.E.G., was not directly involved in the incident, and sues only on behalf of her minor daughter, J.M.A.E.

2 The Court will employ Plaintiffs' interchangeable use of the terms "agent" and "officer," and "CBP" and "Border Patrol."

3 The Court finds it appropriate to take judicial notice of these documents, which may be found at: (1) https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf; (2) https://www.cbp.gov/sites/default/files/documents/cbp-teds-policy-20151005_1.pdf; (3) https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf; and (4) https://www.oig.dhs.gov/assets/Mgmt/OIG_10-117_Sep10.pdf; and (5) http://foiarr.cbp.gov/streamingWord.asp?i=378. *See* FED. R. EVID. 201.

4 In its attempt to draw a contrast between the lawful objectives of CBP and Manzanares's conduct, Defendant also draws the Court's attention to a publicly available document of which the Court takes judicial notice: the CBP website page entitled "Border Patrol Overview," which also describes the agency's primary mission as detecting and preventing the illegal entry of aliens into the United States. (Dkt. No. 11) (citing https://www.cbp.gov/border-security/along-us-borders/overview).

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5 Plaintiffs do offer a citation to *Wal–Mart Stores, Inc. v. Odem*, 929 S.W.2d 513 (Tex. App.–San Antonio 1996, writ denied), in which the court upheld the jury's verdict that a Wal–Mart employee had falsely imprisoned a customer while searching her purse for suspected stolen merchandise. However, the court did not discuss the employer's liability for this tort.

6 Again, regardless of whether this claim "arises out of" the intentional torts of assault and false imprisonment under § 2680(h), or is for personal injury caused by Manzanares's "negligent act" under § 1346(b)(1), Manzanares must have been acting within the scope of his employment for the United States to be held liable for his conduct under the FTCA.

7 "Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, 'documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.' " *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (quoting *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008)); *see also Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (court's review on 12(b)(6) motion "is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint.").

8 As to the claims that survive the Rule 12(b)(1) challenge—Plaintiffs' false imprisonment/false arrest and intentional infliction of emotional distress claims premised on the actions of those agents responsible for detaining Plaintiffs after their rescue—Defendant offers no basis for dismissal under Rule 12(b)(6). *See* (Dkt. No. 11).

9 Defendant refers to the absence of well-pleaded facts to support this element in the heading preceding its argument, but not in the argument itself, which focuses on foreseeability. *See* (Dkt. No. 11).

10 The Court's observation is supported by the publicly available (although partially redacted) report cited by Plaintiffs' response, and of which the Court takes judicial notice: the "CBP Use of Force Training and Actions to Address Use of Force Incidents" ("CBP Use of Force Report") published by DHS in September 2013, and therefore during Manzanares's employment and approximately six months before the incident in question. (Dkt. No. 17) (citing CBP Use of Force Report, available at https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf). The document discusses DHS's internal review of allegations regarding the use of excessive force by CBP employees, including incidents categorized as detainee/alien abuse and criminal misconduct, and reports that within CBP Office of Border

Patrol ("OBP"), "98 percent of FY 2011 uses of force and 98 percent of FY 2012 uses of force were along the southwest border." (CBP Use of Force Report at pp. 6, 13).

11 Plaintiffs emphasize that the CBP Use of Force Report discussed the implementation of pre-employment polygraph examinations to detect "unsuitable candidates who might otherwise have been selected," and that they "believe the evidence will likely show Manzanares was one of the officers who fell through the cracks of the system." (Dkt. No. 17); *see* (CBP Use of Force Report at pp. 5, 21). These allegations are outside the bounds of Plaintiffs' pleading, and in any event, the Court's determination of the Motion does not require a finding of a specific duty to polygraph prospective CBP agents; any such duty is subsumed within the duty to conduct adequate pre-employment background investigations.

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CASE NO. 24

2025 WL 699353
Only the Westlaw citation
is currently available.
United States District Court, W.D.
Texas, San Antonio Division.

Michael GAONA and Aleshea Chanel Thames, Plaintiffs,
v.
WELLS FARGO BANK, N.A. and Timothy Wells, Defendants.

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Signed February 13, **2025**

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REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Henry J. Bemporad, United States Magistrate Judge

***1 To the Honorable United States District Judge Fred Biery:**

This Report and Recommendation concerns Defendants' Motion for Summary Judgment and Brief in Support (Docket Entry 25). Pretrial matters have been referred to the undersigned for consideration. (Docket Entry 5.) For the reasons set out below, I recommend that the motion be **GRANTED IN PART** and **DENIED IN PART**.

I. Jurisdiction.

Plaintiffs assert one federal claim and two related state-law claims arising out of the termination of their employment with Defendant Wells Fargo Bank, N.A. ("Wells Fargo"). (Docket Entry 1-1, at 5–7.) The Court has original jurisdiction over the federal claim pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over the related state-law claims pursuant to 28 U.S.C. § 1367. The undersigned has the authority to issue this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

II. Background.

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A. ***Plaintiffs' Employment at Wells Fargo.***

Plaintiff Michael Gaona began working for Wells Fargo on January 29, 2007, as a lead teller at a branch in Lakehills, Texas. (Docket Entry 25-1, at 3.) Sometime shortly thereafter, Gaona transferred to the Marbach branch in San Antonio, Texas, still working as a lead teller. (*Id.* at 4.) In the Spring of 2008, Gaona was promoted to the role of personal banker at the Marbach branch, where he remained for several years. (*Id.* at 5–6.) Sometime in the Spring of 2012, Gaona was promoted to the role of branch manager for the Martin Luther King Plaza branch. (*Id.* at 8.) Gaona spent one year managing that branch before being promoted again, in 2013, to the role of branch manager for the larger Foster Road branch. (*Id.*) Gaona remained in that role—and received two pay raises and a stellar performance review—until his termination on June 17, 2022. (*Id.* at 8, 15; Docket Entry 25-6, at 10; Docket Entry 34-5, at 2.)

Plaintiff Aleshea Thames, is another former employee of Wells Fargo. She was hired on February 6, 2015, as a personal banker at the branch in La Vernia, Texas. (Docket Entry 25-2, at 3.) Approximately one year later, in March of 2016, Thames transferred to the Foster Road branch in San Antonio, Texas, where Gaona was serving as branch manager. (*Id.* at 4.) Thames remained at the Foster Road branch until her termination on June 17, 2022. (Docket Entry 34-8, at 3.)

B. ***Gaona's Military Service.***

On October 18, 2019, about six years after assuming his position as branch manager for the Foster Road branch, Gaona enlisted in the Texas Army National Guard ("TANG"). (Docket Entry 25-1, at 9.) On January 2, 2020, Gaona left his position at the Foster Road branch for 10 weeks to attend basic training. (*Id.* at 10–11.) Upon his return from basic training, on March 13, 2020, Gaona was reinstated in his branch manager position at Foster Road. (*Id.* at 11–12.) Gaona left the Foster Road branch again on June 1, 2020, after the Governor activated his TANG unit following the murder of George Floyd by police in Minnesota. (*Id.* at 12; Docket Entry 25-3, at 2.) Two weeks later, Gaona returned to his position as branch manager at Foster Road. (Docket Entry 25-1, at 14; Docket Entry 25-3, at 2.) On June 29, 2020, an article was published on Wells Fargo's employee-intranet page, praising Gaona as a "San Antonio Hero" for his service. (Docket Entry 25-3, at 2.) Gaona left at least once more in December of 2021 to attend TANG annual training, and again was reinstated as branch manager at Foster Road upon his return. (Docket Entry 25-1, at 24.)

***2** On May 2, 2022, Gaona received official orders from TANG to appear at ROTC summer training at Fort Knox, Kentucky. (Docket Entry 25-4, at 11.) The training was to last 35 days, beginning on July 5, 2022, and ending on August 8, 2022. (*Id.*) Gaona already had a general understanding that he would be required to attend such training in the Summer of 2022, and verbally notified Defendant Timothy Wells—Wells Fargo's district manager and Gaona's direct supervisor. (Docket Entry 34-6, at 15.) Once he received his official orders, Gaona immediately emailed a copy of said orders to Wells. (Docket Entry 25-4, at 2.) However, as described in greater detail below, Gaona would no longer be employed by Wells

Fargo by the time he arrived at his scheduled ROTC training. (See id. at 11; Docket Entry 25-6, at 10; Docket Entry 34-1, at 6–7.)

C. *Wells Fargo's Investigation into Falsification of Bank Records and Subsequent Termination of Plaintiffs.*

In early 2022, Wells Fargo conducted an investigation into the falsification of bank records at bank branches in the San Antonio area. The issue apparently first arose when, in December 2021, Cindy Delgado, manager at the North Star branch, confronted Sasha Shimohata, one of the personal bankers, about some missing documentation. (Docket Entry 25-7, at 8.) Delgado had assigned Shimohata to complete the "control online task" ("COT") of reviewing and documenting any technical exceptions ("TEs") for November of 2021. (*Id.*) Shimohata had marked the COT complete on November 18, 2021, and Delgado certified that Shimohata completed the COT as directed on December 8, 2021. (*See id.*; Docket Entry 34-15, at 2.) However, when the personal banker assigned to complete the task for December asked Shimohata for the documents from the previous month, Shimohata reported that she did not have them. (Docket Entry 25-7, at 8) When Delgado asked her where the documents were, Shimohata reported that there were none because there were no TEs in November of 2021. (*Id.*) Delgado told Shimohata that there were, in fact, five TEs. (*Id.*) Admonishing Shimohata that marking COTs complete without reviewing or documenting TEs was a "falsification of bank records," Delgado reported the matter to Wells Fargo's HR department. (*Id.*)

On December 24, 2021, Sarah Nelson, Wells Fargo's risk management specialist, advised district manager Wells of the Shimohata incident. (Docket Entry 25-5, at 3–6.) Wells reached out to Delgado, instructing her to consult with Wells Fargo's employee relations ("ER") department as to how to proceed. (Docket Entry 25-5, at 6.) An investigation into the matter was initiated on January 6, 2022. (Docket Entry 34-9, at 4.) Wells Fargo's investigators concluded that, on November 18, 2021, Shimohata marked a COT as complete without reviewing and documenting the TEs. (Docket Entry 34-9, at 4.) Shimohata reported that the error was not intentional: she may have reviewed the wrong report because she did not see any TEs. (*Id.* at 2, 4.) Wells Fargo's ER department recommended that Shimohata be terminated, and that Delgado be "coach[ed] ... for having withheld reporting of additional similar incidents by other employees." (*Id.* at 2–4.)

Wells fired Shimohata on February 28, 2022. (Docket Entry 25-5, at 9; Docket Entry 34-9, at 3.) Delgado, however, was not fired for improperly certifying that Shimohata completed the COT correctly. (Docket Entry 34-6, at 9–10; Docket Entry 34-15, at 2; *see* Docket Entry 25, at 7; Docket Entry 36, at 3–4.) In January of 2022, Wells Fargo stopped using personal bankers and branch managers to complete and certify COTs. (Docket Entry 34-7, at 2.) From that point on, Wells Fargo entrusted those tasks to a branch supervision program. (*Id.*)

In light of the North Star incident, district manager Wells initiated an investigation into the rest of the branches under his supervision,

to determine whether COTs were being falsely marked or certified as completed anywhere else. (Docket Entry 25-5, at 6; Docket Entry 25-6, at 11–12.) The investigation uncovered that the same misrepresentations had occurred at the Foster Road branch and the branch in Seguin, Texas. (Docket Entry 25-5, at 7.) At the Foster Road branch, the conclusions of the investigation were that Thames had falsely reported completing three consecutive COTs —for October of 2021, November of 2021, and December of 2021—and that Gaona, in turn, had falsely certified their completion. (Docket Entry 25-6, at 2; Docket Entry 25-9, at 2–4; Docket Entry 34-1, at 7; Docket Entry 34-10, at 2–3; Docket Entry 34-13, at 2.) Upon completion of the investigation, Wells Fargo's Regional President, Joe Atkinson, instructed Wells to fire Thames and Gaona. (Docket Entry 25-5, at 8–9.) Wells terminated their employment on June 17, 2022. (Docket Entry 25-1, at 25–26; Docket Entry 25-2, at 5; Docket Entry 25-6, at 10, 13; Docket Entry 34-1, at 6–7.)

***3** When Gaona learned of his termination, he denied any wrongdoing, reminded Wells how much he had given to Wells Fargo, and then left the building. (Docket Entry 25-1, at 27.) Thames cried upon learning of her termination. (Docket Entry 25-2, at 6.) Neither Gaona nor Thames asked for any clarification as to the stated reasons for their termination. (Docket Entry 25-1, at 26; 25-2, at 6.) Thames was permitted to gather her things and say goodbye to her coworkers before she left. (Docket Entry 25-2, at 6.)

D. *Procedural History.*

Plaintiffs filed suit in state court on January 24, 2023. (Docket Entry 1-1.) In their petition, Plaintiffs assert three claims in total—two pertaining to Gaona and one as to Thames. (*Id.* at 5–7.) As to Gaona, Plaintiffs claim that his termination constituted discrimination on the basis of his TANG-based leaves of absences, in violation of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4311(a), and its state-law equivalent in the Texas Government Code ("TXSERRA") TEX. GOV. CODE ANN. § 437.2131. (*Id.* at 5–6.) As to Thames, Plaintiffs claim intentional infliction of emotional distress ("IIED"), alleging that her termination was "part of a scheme to fabricate a pretext for terminating Gaona's employment on the basis of [his] service in the TANG." (*Id.* at 7.)

Defendants removed the case to this Court on March 7, 2023 (Docket Entry 1), and they have now moved for summary judgment (Docket Entry 25).

III. Summary Judgment Standard.

The purpose of summary judgment is "to isolate and dispose of factually unsupported claims or defenses." *Hayes v. Locke Supply Co.*, 724 F. Supp. 3d 609, 612 (E.D. Tex. 2024) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986)). Summary judgment is warranted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Allen v. United States Postal Serv.*, 63 F.4th 292, 300 (5th Cir. 2023) (quoting

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A disputed fact is material when it "might affect the outcome of the suit under the governing law." *Id.* (quoting *Anderson*, 447 U.S. at 248).

The party moving for summary judgment "bears the initial burden of ... demonstrat[ing] the absence of a genuine issue of material fact." *Espinoza v. State Farm Mut. Auto. Ins. Co.*, No. 7:19-CV-00299, 2020 WL 5040409, at *1 (S.D. Tex. Aug. 26, 2020) (quoting *Lynch Props. v. Potomac Ins. Co. of Ill.*, 140 F.3d 622, 625 (5th Cir. 1998)). To demonstrate such absence, "the movant must point to competent evidence in the record, such as documents, affidavits, and deposition testimony and must 'articulate precisely how this evidence supports [it].' " *Espinoza*, 2020 WL 5040409, at *1 (quoting *RSR Corp. v. Int'l Ins. Co.*, 612 F.3d 851, 857 (5th Cir. 2010)). If the movant fails to do so, summary judgment "must be denied, regardless of the nonmovant's response." *Espinoza*, 2020 WL 5040409, at *1 (quoting *Pioneer Expl., L.L.C. v. Steadfast Ins. Co.*, 767 F.3d 503, 511 (5th Cir. 2014)). If the movant meets its burden, "the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial." *Mary Kay, Inc. v. Weber*, 601 F. Supp. 2d 839, 851 (N.D. Tex. 2009) (citing *Celotex*, 477 U.S. at, 323–24).

***4** When the movant "also carries the burden of proof at trial"—*e.g.*, a defendant moving for summary judgment on an affirmative defense —"[its] burden is even higher." *Guzman v. Allstate Assur. Co.*, 18 F.4th 157, 160 (5th Cir. 2021). In that scenario, the movant must "establish beyond peradventure all of the essential elements of the claim [or defense]." *Id.*; *see Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)). "[B]eyond peradventure" is a "heavy" standard. *Carolina Cas. Ins. Co. v. Sowell*, 603 F. Supp. 2d 914, 924 (N.D. Tex. 2009) (citation omitted). But if the movant succeeds, the burden then shifts to the nonmovant to "direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial." *Mary Kay, Inc.*, 601 F. Supp. 2d at 851 (citing *Celotex*, 477 U.S. at 323–24).

When considering a motion for summary judgment, the Court "may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Instead, the Court "must view all facts and evidence in the light most favorable to the non-moving party." *Feist v. La., Dep't of Just., Off. of the Atty. Gen.*, 730 F.3d 450, 452 (5th Cir. 2013). This also means that the Court must "construe all reasonable inferences in [the non-movant's] favor." *Guzman*, 18 F.4th at 160. However, the Court may only do so "when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts.' " *Meaux v. Cooper Consol., LLC*, 477 F. Supp. 3d 515, 523 (E.D. La. 2020) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc)). In making its determinations, the Court need only consider the party's cited materials. FED. R. CIV. P. 56(c)(3); *see Am. Fam. Life Assur. Co. of Columbus v. Biles*, 714 F.3d 887, 896 (5th Cir. 2013) ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence ....") (citation omitted).

IV. Analysis.

Defendant's have moved for summary judgment on Gaona's USERRA claim and Thames's IIED claim. For the reasons set out below, I recommend that summary judgment be denied as to the USERRA claim, but granted as to the IIED claim. [1]

A. *Gaona's USERRA Claim.*

Gaona claims that he was terminated in violation of USERRA's antidiscrimination provision, 38 U.S.C. § 4311(a). Section 4311(a) provides that a servicemember "shall not be denied ... retention in employment ... or any benefit of employment" because of his or her military service. 38 U.S.C. § 4311(a). An employer violates this prohibition when "membership, ... service, ... or obligation for service in the uniformed services is a motivating factor" in an employment decision. 38 U.S.C. § 4311(c)(1). Military status is a "motivating factor" if it is "one of the reasons" for the employer's action. *Garcia-Ascanio v. Spring Indep. Sch. Dist.*, 74 F.4th 305, 310 (5th Cir. 2023) (citing *Bradberry v. Jefferson Cnty., Tex.*, 732 F.3d 540, 545 (5th Cir. 2013) (citing 20 C.F.R. § 1002.22 (2006))).

***5** Like other federal employment discrimination laws, USERRA employs a "burden-shifting framework." *Garcia-Ascanio*, 74 F.4th at 310. Similar to Title VII cases, the plaintiff in a USERRA case "has the [initial] burden of proving that a status or activity protected by USERRA was one of the reasons for the employer's decision." *Bradberry*, 732 F.3d at 545 (citing 20 C.F.R. § 1002.22). Put otherwise, "a plaintiff must first establish a prima facie case of discrimination, demonstrating that his participation as a service member was a motivating factor behind the employer's adverse employment action." *Hansen v. Alamo Mobile X-Ray & Ekg Servs., Inc.*, No. SA-14-CA-01070-FB, 2016 **WL** 7486370, at *2 (W.D. Tex. Feb. 10, 2016). Discriminatory motive may be reasonably inferred from several factors, including:

> [1] proximity in time between the employee's military activity and the adverse employment action, [2] inconsistencies between the proffered reason and other actions of the employer, [3] an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and [4] disparate treatment of certain employees compared to other employees with similar work records or offenses.

Garza v. Energy Transfer Partners, L.L.C., No. 3:23-CV-0027-D, 2024 **WL** 991588, at *6-7 (N.D. Tex. Mar. 7, 2024) (citation omitted), *aff'd*, No. 24-10208, **2025** **WL** 304527 (5th Cir. Jan. 27, **2025**).

If a plaintiff establishes a prima facie case of discrimination, the burden shifts, but the rules are different than those under Title VII. Instead of imposing a simple burden of production as

to a legitimate non-discriminatory reason for its action, USERRA requires the employer "to prove the affirmative defense that it would have taken the action anyway." *Garcia-Ascanio*, 74 F.4th at 310 (citing *Bradberry*, 732 F.3d at 547). An employer cannot satisfy its burden by showing that it was motivated *in part* by a legitimate reason—"[r]ather, the employer must show that its legitimate reason, standing alone, would have induced it to make the same decision." *Robinson v. Morris Moore Chevrolet-Buick, Inc.*, 974 F. Supp. 571, 576 (E.D. Tex. 1997); *accord. Mayeaux v. Hous. Indep. Sch. Dist.*, 986 F. Supp. 2d 842, 850–51 (S.D. Tex. 2014). Additionally, in contrast with Title VII cases, the burden under USERRA does not shift back to the plaintiff to demonstrate that the employer's legitimate reason is pretext—"the burden [remains] on the employer to show lack of pretext." *Mayeaux*, 986 F. Supp. 2d at 848 (quoting *Velazquez-Garcia v. Horizon Lines of P.R., Inc.*, 473 F.3d 11, 17 (1st Cir. 2007)).

1. *Plaintiffs' Prima Facie Case.*

Defendants argue that Plaintiffs cannot carry their initial burden of establishing a *prima facie* case of discrimination. They argue (a) that Plaintiffs have produced no evidence that Defendants ever considered Gaona's TANG service when terminating his employment; (b) that there is no comparator evidence showing disparate treatment of other employees; and (c) that temporal proximity cannot support a prima facie case here. (Docket Entry 25, at 16.) Each argument is addressed below.

a. Consideration of Gaona's National Guard service.

Defendants point out that they continued to employ Gaona after his enlistment in TANG on October 18, 2019, and allowed him to take several military leaves of absence, always to be reinstated in his job upon his return. (Docket Entry 25, at 16, 19; *see* Docket Entry 25-1, at 10–12, 14, 24; Docket Entry 25-3, at 2). Defendants also point to provisions of Wells Fargo's employee handbook advising employees of their rights under USERRA, including the right to have their jobs reinstated upon return from military leave. (Docket Entry 25, at 16; Docket Entry 25-13, at 4.) Defendants argue that such a policy is evidence that they "respect[ed] and honor[ed] military service," and therefore lacked any discriminatory animus against veterans and servicemen. (*Id.* (quoting *Gill v. Petroleum Co-Ordinators, Inc.*, No. 6:14-CV-02869, 2016 WL 4574169, at *5 (W.D. La. Aug. 31, 2016).) And, as further evidence that they were supportive of Gaona's military service, Defendants point to the article posted by Delgado on Wells Fargo's intranet system on June 29, 2020, praising Gaona as a hero. (Docket Entry 25, at 20; Docket Entry 25-3, at 2.)

***6** To counter Defendants' evidence that they were perfectly accommodating to Gaona or any other servicemembers employed by Wells Fargo, Plaintiffs rely upon portions of Gaona's and Wells' deposition testimonies. (Docket Entry 34, at 8–9, 11.) Plaintiffs point to Gaona's testimony that when he told Wells about his scheduled ROTC training for the Summer of 2022, Wells responded that he was not sure

Wells Fargo could allow that and that he would have to check with the HR department to confirm one way or the other. (*Id.* at 8; Docket Entry 24-1, at 28.) Gaona assured Wells that the absence was permitted, providing him with information regarding USERRA. (Docket Entry 24-1, at 28.) Gaona also testified that one of Wells Fargo's employees who was to be serve as the acting branch manager during Gaona's leaves of absences was a military veteran, and that he quit his job because the work environment was hostile to servicemembers. (Docket Entry 25, at 9; Docket Entry 25-1, at 11.)

With regard to Wells, Plaintiffs point to his testimony that he had never "managed a service member before" Gaona, and that he researched USERRA once Gaona notified him of his ROTC training in the Summer of 2022, "because it was an extended [amount of] time" for Gaona to be on leave. (Docket Entry 34, at 11 (citing Docket Entry 34-6, at 16–17).) Based on the aforementioned testimony, Plaintiffs argue that it is reasonable to infer "that the adverse employment action against Gaona was related to the extended [ROTC] leave, which was to commence on July 5, 2022." (Docket Entry 34, at 11.)

It is somewhat doubtful that the testimony cited by Plaintiffs, standing alone, is sufficient to withstand summary judgment in this case. However, it is evidence that the Court may wish to consider with the other evidence below in determining whether a genuine dispute of material has been raised regarding Plaintiff's prima facie case.

b. Disparate treatment.

Defendants argue that Plaintiffs have failed to establish a prima facie case of discrimination because they have produced no evidence of disparate treatment of comparable employees. (Docket Entry 25, at 17.) They point out that two other employees—Thames and Shimohata—were terminated for committing the same alleged violations as Gaona—*i.e.*, "falsification of [bank] records." (*Id.*) Plaintiffs respond that the proper comparator employee is neither Thames nor Shimohata; instead, the proper comparator is Cindy Delgado, a branch manager like Gaona. (Docket Entry 34, at 7, 11–12.) The point is well taken. Whereas Thames and Shimohata were both personal bankers who allegedly falsely marked that COTs were completed, Gaona and Delgado were both branch managers alleged to have *certified* that their bankers had properly completed the COTs. As such, Delgado appears to be the proper comparator for determining whether disparate treatment occurred.

With Delgado as the comparator, Gaona argues that he can show disparate treatment in this case. Even though Delgado certified that Shimohata completed the COT for November of 2021 when she had not (Docket Entry 34-6, at 9–10; 34-15, at 2), Defendants did not terminate Delgado's employment. (Docket Entry 34, at 11–12; *see* Docket Entry 25, at 17; Docket Entry 36, at 3–4.) Instead, Delgado ostensibly received "coaching." (Docket Entry 34, at 11–12; Docket Entry 34-9, at 2–4.) Gaona, on the other hand, was fired for certifying that Thames had properly completed her COTs when she allegedly had not. (Docket

Entry 25-1, at 25–26; Docket Entry 25-5, at 8–9; Docket Entry 25-6, at 2, 10; Docket Entry 25-11, at 4–5; Docket Entry 34-1, at 6–7.)

Defendants argue that the comparison is improper because "Gaona's and Delgado's behavior with respect to the control online task certification could not have been more different." (Docket Entry 36, at 4.) Specifically, Defendants argue that Delgado "confronted Ms. Shimohata" regarding her one failure to properly complete the COT for November of 2021 and "promptly reported it," whereas Gaona "certified tasks in three (3) consecutive months, ... failed to identify the mistake on his own, and did not report [the] mistake." (Docket Entry 25, at 17.) As Defendants tell it, Shimohata made a mistake and Delgado did everything correctly upon discovering it. But their account fails to acknowledge that Delgado improperly certified the mistake just as Gaona had; moreover, there is some evidence in the record that she had failed to report similar mistakes made by several other employees in the past. (*See* Docket Entry 34-9, at 2–4; Docket Entry 34-15, at 2.) This evidence is sufficient to raise a genuine dispute as to whether Gaona received treatment disparate from that received by a similarly-situated employee.

c. Temporal proximity.

***7** Defendants lastly argue that discriminatory motive should not be inferred from the close temporal proximity between Gaona's termination and his scheduled leave for ROTC training. (Docket Entry 25, at 18–19.) That leave was scheduled from July 5, 2022, to August 8, 2022; Gaona was terminated on June 17, 2022. (Docket Entry 25-4, at 2, 11; Docket Entry 25-6, at 10.) Thus, Gaona was fired a mere 18 days before he was to depart for his month-long ROTC training.

Defendants direct the Court's attention to out-of-circuit cases which stand for the proposition that temporal proximity cannot suffice by itself to establish a plaintiff's prima facie case under USERRA that their military leave was a motivating factor in their termination. (Docket Entry 25, at 18–19.)[2] Plaintiffs, however, have done more than just point to the temporal proximity between Gaona's ROTC leave and his termination. As noted above, they have additionally produced evidence which, if construed in Plaintiffs favor, shows that Wells was taken aback by how long Gaona's ROTC leave was scheduled to last; that a former employee left on account of hostility toward military veterans; and that another branch manager received coaching rather than termination for similar conduct. This evidence, when combined with the fact that Gaona was fired 18 days before he was to go on military leave, establishes a prima facie case of discrimination under USERRA sufficient to withstand a summary judgment motion.

2. Defendants' Affirmative Defense.

Defendants argue that, even if a reasonable jury could infer from the evidence recounted above that Gaona's military service may have been one of the reasons for his termination, he would have been fired regardless of his military status. (Docket Entry 25, at 20–21.) Specifically, they argue that, after a thorough

investigation, a bank investigator found that Gaona violated Wells Fargo's policies by committing acts tantamount to falsifying bank records. (Docket Entry 25, at 21.) Defendants then point out that falsification of bank records is a terminable offense under the terms of Wells Fargo's Employee Handbook. (Docket Entry 25, at 21; Docket Entry 25-8, at 3.) Thus, according to Defendants, Gaona's termination was inevitable.

Defendants' argument fails to justify a grant of summary judgment in their favor, for two reasons. First, Wells Fargo's Employee Handbook does not actually *require* termination for falsifying bank records. To the contrary, it specifically states that "[f]alsifying required documentation can result in corrective action, which *may* include termination of ... employment." (Docket Entry 25-13, at 3.) Even when discussing grounds for immediate termination, the policy hedges: [f]alsification of records.... *may* result in immediate termination of employment." (Docket Entry 25-8, at 2–3.) "[T]he word 'may' clearly connotes discretion." *Biden v. Tex.*, 597 U.S. 785, 802 (2022) (emphasis omitted). And the discretionary nature of the policy is confirmed by the facts of this case: Gaona was fired for allegedly falsifying a certification, but Delgado was not. (*Compare* Docket Entry 25-9 *with* Docket Entry 34-15.)

***8** Second, Plaintiffs have produced some evidence which calls into question the credibility of the investigator upon whose report Gaona's termination was based. Specifically, Plaintiffs identify several statements in the investigator's report where, they claim, he misstated or otherwise falsely characterized their responses to interview questions. (Docket Entry 34, at 8; Docket Entry 34-1, at 4, 8–10; Docket Entry 34-17, at 4–5.) And they point out that Atkinson—Wells Fargo's regional president who ultimately directed Wells to fire Gaona—testified that if "factual findings in the investigative reports turned out to be incorrect," then it would have "ha[d] an impact" on his decision to do so. (Docket Entry 34-14, at 6.) The Court should not resolve the credibility of the investigator: on summary judgment, it "may not make credibility determinations or weigh the evidence," *Reeves*, 530 U.S. at 150. Suffice it to say that, Given Atkinson's testimony, the discrepancies in the investigator's notes raise additional questions as to the Defendants' asserted basis for terminating Gaona's employment which preclude the Court from finding, beyond peradventure, that Defendants would have terminated Gaona's employment regardless of his TANG service because he certified incomplete COTs. As such, Defendants are not entitled to summary judgment on Gaona's USERRA claim.

B. *Thames's IIED Claim.*

Thames asserts an IIED claim, alleging that Defendants "terminated [her] employment as part of a scheme to fabricate a pretext for terminating Gaona's employment on the basis of [his] service in the TANG." (Docket Entry 1-1, at 7.) Plaintiffs allege that Thames' termination was extreme and outrageous, that Defendants intended to cause her severe emotional distress, and that she suffered severe emotional distress as a result. (*Id.* at 7–8.) Plaintiffs' claim fails.

1. *Applicable Law.*

"Under Texas law, a plaintiff bringing an IIED claim must demonstrate that the defendant [1] intentionally or recklessly [2] engaged in extreme or outrageous conduct [3] that resulted in severe emotional distress." *Stelly v. Duriso*, 982 F.3d 403, 407–08 (5th Cir. 2020) (citing *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 66 (Tex. 1998)). "The severity of distress is an element of the cause of action, not merely of the damages." *Munoz v. H&M Wholesale, Inc.*, 926 F. Supp. 596, 612 (S.D. Tex. 1996) (collecting cases).

To establish that the defendant acted intentionally or recklessly, a plaintiff must prove that emotional distress was the "intended or primary consequence of the defendant's conduct." *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 611 (Tex. 1999) (citing *Standard Fruit*, 985 S.W.2d at 68); *accord. Espinosa v. Aaron's Rents, Inc.*, 484 S.W.3d 533, 546 (Tex. App.—Houston [1st Dist.] 2016, no pet.). An IIED claim is not available when the "emotional distress is solely derivative of or incidental to the intended or most likely consequence of the actor's conduct." *McManaway v. KBR, Inc.*, No. 4:10-CV-1044, 2015 WL 13679501, at *6 (S.D. Tex. Oct. 23, 2015) (quoting *Standard Fruit*, 985 S.W.2d at 67).

To establish that the defendant's conduct was "extreme and outrageous," a plaintiff must prove that it was "beyond all possible bounds of decency," "atrocious," and "utterly intolerable in a civilized society." *Jones v. Dall. Cnty.*, 47 F. Supp. 3d 469, 479 (N.D. Tex. 2014) (quoting *Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 610 (Tex. 2002)). "[T]hat an action is intentional, malicious, or even criminal does not, standing alone, mean that it is extreme or outrageous for purposes of [IIED]." *Brewerton v. Dalrymple*, 997 S.W.2d 212, 215 (Tex. 1999) (citing RESTATEMENT (SECOND) OF TORTS § 46(1) (1965)) "Courts must determine as a threshold matter whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *City of Midland v. O'Bryant*, 18 S.W.3d 209, 216–17 (Tex. 2000) (citation and internal quotation marks omitted). "Only when reasonable minds may differ is it for the jury" to decide. *Jones*, 47 F. Supp. 3d at 479 (citing *GTE Sw.*, 998 S.W.2d at 616). "[T]he kind of extreme conduct necessary to raise a fact question of [IIED] in the workplace 'exists only in the most unusual of circumstances.' " *O'Bryant*, 18 S.W.3d at 217 (quoting *GTE Sw.*, 998 S.W.2d at 612–13). Thus, "[t]he fact of [a] discharge itself as a matter of law cannot constitute outrageous behavior." *Munoz*, 926 F. Supp. at 612 (quoting *Wornick Co. v. Casas*, 856 S.W.2d 732, 735 (Tex. 1993)).

***9** To establish that the emotional distress is sufficiently severe to support liability for IIED, a plaintiff "must prove 'distress that is so severe that no reasonable person could be expected to endure it." *Jones*, 47 F. Supp. 3d at 479 (quoting *GTE Sw.*, 998 S.W.2d at 618). In short, IIED claims require proof of "an extraordinarily damaging impact on a plaintiff." *Amin v. United Parcel Serv., Inc.*, 66 F.4th 568, 574 (5th Cir. 2023) (holding that emotional distress was insufficiently severe where the plaintiff did not seek treatment, was "withdrawn and no longer happy," and suffered from "anger, depression, and humiliation").

Courts in Texas have held emotional distress to be sufficiently severe where it resulted in "severe psychosomatic symptoms, suicidal ideation, a marked degradation in physical appearance, or post-traumatic stress disorder," *id.* (citing cases), or "psychiatric problems, ... debilitating headaches, ... [and] suicidal, reactive depression," *Munoz*, 926 F. Supp. at 613 (citing cases).

2. *Discussion.*

Defendants argue that Thames' IIED claim must fail because courts have routinely found in favor of employers whose conduct was substantially worse than what Thames alleges took place here. (Docket Entry 25, at 24–27 (citing cases).) As such, Defendants argue, Thames can produce no evidence that their conduct rose to the level of "extreme and outrageous." (*Id.*) In response, Plaintiffs point to the discrepancies between what Wells Fargo's investigator reported and Thames' testimony as to what she told him. (Docket Entry 34, at 24 ("Thames told the ... investigator that she had completed the task, ... yet the investigator put in his notes that she said she was 'not sure.' ").) Aside from that, the only evidence Plaintiffs produced to substantiate Thames' assertion that her termination was extreme and outrageous is the fact of her termination itself. But "the fact of discharge itself as a matter of law cannot constitute outrageous behavior." *Munoz*, 926 F. Supp. at 612; *Wornick*; 856 S.W.2d at 735.

Even if it were true, as Plaintiffs insist, that Defendants terminated Thames' employment as part of a scheme to terminate Gaona's employment, her termination is not thereby elevated to the level of extreme and outrageous for purposes of IIED. *See Brewerton*, 997 S.W.2d 215 ("[T]hat an action is intentional, malicious, or even criminal does not, standing alone, mean that it is extreme or outrageous for purposes of [IIED]."). Plaintiffs have failed to produce evidence to raise a genuine dispute that Defendants acted "beyond all possible bounds of decency," by firing Thames —an at-will employee. *Sears*, 84 S.W.3d at 610; *see Wornick*; 856 S.W.2d at 735 ("In exercising its rights as an employer-at-will, ... [defendant's] conduct as a matter of law did not exceed all possible bounds of decency and was not utterly intolerable in a civilized community.") (citations and internal quotation marks omitted).

Plaintiffs have also failed to produce any evidence that Defendants intended Thames' emotional distress or that said distress was sufficiently severe to support an IIED claim. As to intent, Plaintiffs do no more than assert in their response that Thames "believes [Defendants] intended her distress by including her in the scheme to terminate Gaona." (Docket Entry 34, at 24.) To support this claimed belief, Plaintiffs cited to portions of Thames' deposition; however, they failed to attach these portions as evidence to their response. Even if they had, "[a] plaintiff's subjective inference, without proof from which an inference might be drawn, is not enough to survive summary judgment." *Corbin v. Sw. Airlines, Inc.*, No. CV H-17-2813, 2018 WL 4901155, at *13 (S.D. Tex. Oct. 9, 2018) (Rosenthal, J.) (citation omitted).

Most fatal to the intent element of Thames' IIED claim is Plaintiffs' assertion that her termination "[w]as part of a scheme to fabricate a pretext for terminating Gaona's employment." (Docket Entry 1-1, at 7.) Plaintiffs have consistently characterized Thames' termination as a mere means by which Defendants could accomplish their ultimate end—firing Gaona. If their primary goal was to terminate Gaona, Defendants could not have intended Thames' emotional distress for purposes of an IIED claim: "a claim for [IIED] will not lie if emotional distress is not the intended or primary consequence of the defendant's conduct." *GTE Sw.*, 998 S.W.2d at 611; *see also McManaway*, 2015 WL 13679501, at *6 (IIED is not available when emotional distress is "derivative of or incidental to the intended or most likely consequence of the actor's conduct").

***10** Even if all these weaknesses could be overcome, Plaintiffs have presented no evidence whatsoever as to the severity of Thames' emotional distress. Plaintiffs assert that Thames suffers from anxiety and depression as a result of her termination, and that she can no longer sleep without the assistance of medication. (Docket Entry 34, at 24.) However, Plaintiffs have produced no evidence to support these assertions. Again, Plaintiffs purported to rely on portions of Thames' deposition but failed to actually attach those portions to their response. (*See id.*) As the deposition excerpts are not part of the summary judgment record, they need not be considered. FED. R. CIV. P. 56(c)(3). In any event, neither anxiety, depression, nor sleeplessness amount to the sorts of "extraordinarily damaging impact[s]" that are necessary to support an IIED claim. *See Amin*, 66 F.4th at 574; *Munoz*, 926 F. Supp. at 613; *McCray v. DPC Indus., Inc.*, 875 F. Supp. 384, 392 (E.D. Tex. 1995) (holding that emotional distress resulting in insomnia "is not severe as a matter of law").

Based on the foregoing, Plaintiffs have failed to raise a genuine dispute as to any of the elements of Thames' IIED claim. Accordingly, Defendants are entitled to summary judgment on that claim and Thames should be dismissed from this case.

V. Conclusion and Recommendation.

For the foregoing reasons, I recommend that Defendants' Motion for Summary Judgment (Docket Entry 25) be **GRANTED IN PART** and **DENIED IN PART**. Specifically, I recommend that Defendants' motion be **DENIED** as to Gaona's USERRA and TXSERRA claims, and **GRANTED** as to Thames' IIED claim. Because IIED is Thames' only claim, I recommend that she be dismissed from this case.

VI. Notice of Right to Object

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the Clerk of Court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written objections to this Report and Recommendation must be filed **within 14 days** after being served with a copy of the same, unless this time period is modified by the District Court. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).

The parties shall file any objections with the Clerk of the Court and serve the objections on all other parties. An objecting party must specifically identify those findings, conclusions, or recommendations to which objections are being made and the basis for such objections; "objections that are frivolous, conclusory, or general in nature needn't be considered." *Williams v. Lakeview Loan Serv. LLC*, 694 F. Supp. 3d 874, 881 (S.D. Tex. 2023) (citing *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987)).

A party's failure to file written objections to the proposed findings, conclusions, and recommendations contained in this Report and Recommendation shall bar the party from a *de novo* review by the District Court. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions, and recommendations contained in this Report and Recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to, proposed findings and conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

All Citations

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Footnotes

1 While Defendants attack the adequacy of evidence produced to support the USERRA and IIED claims, they make no mention of the TXSERRA claim. Nor is this claim addressed in Plaintiffs' response (Docket Entry 34) or Defendants' reply (Docket Entry 36).

> TXSERRA provides that:
>
> [A] service member of the Texas military forces who is ordered to state active duty or to state training and ... is entitled ... to the same benefits and protections provided to persons ... performing services in the uniformed services as provided by [USERRA] ... may retain private legal counsel and ... file a civil action in a district court in this state if the service member is aggrieved by a violation of or is denied a benefit or protection guaranteed under ... [USERRA].

TEX. GOV. CODE § 437.2131(a)–(b). Although the undersigned had found no cases interpreting TXSERRA the language of § 473.2131 would suggest that Defendants cannot prevail on Gaona's TXSERRA claim unless they also prevail on his USERRA claim. As discussed *infra*, summary judgment should be denied as to Gaona's

USERRA claim. Accordingly, even assuming that Defendants' motion has requested summary judgment on the TXSERRA claim, the Court should deny the request.

2 *See, e.g.,* *Vega-Colon v. Wyeth Pharm.*, 625 F.3d 22, 29 (1st Cir. 2010) ("[T]hough the proximity in time between ... [plaintiff's military] leave and ... [the adverse employment action] is a factor for consideration, it alone is not sufficient."); *Herrera v. City of Hialeah, Fla.*, No. 21-14271, 2023 WL 238999, at *5 (11th Cir. Jan. 18, 2023) ("[S]how[ing] a temporal proximity between the [adverse employment action] ... and [the plaintiff's] military service ... would not automatically meet [the plaintiff's] prima facie burden").

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CASE NO. 25

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Texas, San Antonio Division.

Michael **GAONA**, and Aleshea Chanel Thames, Plaintiffs,
v.
WELLS FARGO BANK, and Timothy Wells, Defendants.

CIVIL ACTION NO. SA-23-CA-00280-FB
|
Signed March 4, 2025

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Jacqueline Del Villar, Brian D. Guerinot, Stephen J. Roppolo, Fisher & Phillips L.L.P., Houston, TX, for Defendant Timothy Wells.

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

FRED BIERY, UNITED STATES DISTRICT JUDGE

***1** Before the Court is the Report and Recommendation of United States Magistrate Judge (docket no. 37), filed in the above captioned cause on February 13, 2025. This Report and Recommendation concerns Defendants' Motion for Summary Judgment and Brief in Support. (Docket no. 25). To date, no objections to the Report and Recommendation have been received. [1]

Plaintiffs Michael **Gaona** and Aleshea Chanel Thames assert three claims in total against Defendants **Wells Fargo Bank** and Timothy Wells. (Docket no. 1-1). Two pertain to Plaintiff **Gaona** and one as to Plaintiff Thames. (*Id.* at 5-7). As to Plaintiff **Gaona**, Plaintiffs claim that his termination constituted discrimination on the basis of his Texas Army National Guard ("TANG") based leaves of absences, in violation of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4311(a), and its state-law equivalent in the Texas Government Code ("TXSERRA"), Tex. Gov. Code Ann. § 437.2131. (*Id.* at 5-6). As to Plaintiff Thames, Plaintiffs claim intentional infliction of emotional distress ("IIED"), alleging that her termination was "part of a scheme to fabricate a pretext for terminating **Gaona's** employment on the basis of [his] service in the TANG." (*Id.* at 7).

Because no party has objected to the Magistrate Judge's Report and Recommendation, the Court need not conduct a de novo review. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). The Court has reviewed the Report and Recommendation and finds its reasoning to be neither clearly erroneous nor contrary to law.

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United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918 (1989).

IT IS THEREFORE ORDERED that the Report and Recommendation of United States Magistrate Judge (docket no. 37) is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) such that Defendants' Motion for Summary Judgment (docket no. 25) is GRANTED IN PART and DENIED IN PART. Specifically, Defendants' motion is DENIED as to Plaintiff **Gaona's** USERRA and TXSERRA claims, and GRANTED as to Plaintiff Thames' IIED claim. Because IIED is Plaintiff Thames' only claim, she is DISMISSED from this case. This case continues to be referred to the Magistrate Judge for further proceedings.

It is so ORDERED.

All Citations

Slip Copy, 2025 WL 696546

Footnotes

1 Any party who desires to object to a Magistrate's findings and recommendations must serve and file his, her or its written objections within fourteen days after being served with a copy of the findings and recommendation. 28 U.S.C. § 635(b)(1). If service upon a party is made by mailing a copy to the party's last known address, "service is complete upon mailing." FED. R. CIV. P. 5(b)(2)(C). If service is by electronic means, "service is complete upon transmission." *Id.* at (E).

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CASE NO. 26

810 Fed.Appx. 237
This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, EX REL., Gwendolyn PORTER, Relator, Plaintiff - Appellant
v.
MAGNOLIA HEALTH PLAN, INCORPORATED, Defendant - Appellee

No. 18-60746
|
FILED April 15, 2020

Synopsis

Background: Licensed registered nurse (RN) brought qui tam False Claims Act (FCA) action alleging that her former employer, a coordinated care organization that contracted with Mississippi Division of Medicaid, committed fraud by employing licensed practical nurses (LPN) as care and case managers. The United States District Court for the Southern District of Mississippi, Halil Suleyman Ozerden, J., 2018 WL 9866507, dismissed. Nurse appealed.

Holdings: The Court of Appeals held that:

[1] nurse failed to adequately plead materiality requirement for FCA action, and

[2] nurse's request to amend complaint was futile.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim; Motion to Amend the Complaint.

West Headnotes (2)

[1] United States 🔑 Materiality

Plaintiff failed to adequately plead materiality requirement for qui tam False Claims Act (FCA) action involving alleged fraud in administration of Medicaid services in Mississippi via defendant's use of licensed practical nurses (LPN) rather than registered nurses (RN) to provide case or care services in defendant's role as coordinated care organization, where complaint failed to identify a specific contractual provision requiring that a case manager or care manager position be staffed by an RN, complaint failed to identify any specific federal or state statute or regulation mandating that an RN provide those services, and complaint failed to otherwise establish that the staffing of case manager or care manager positions was a material term of contracts. 31 U.S.C.A. § 3729(a)(1)(A, B); Social Security Act § 1900, 42 U.S.C.A. § 1396 et seq.

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14 Cases that cite this headnote

[2] **Federal Civil Procedure** Form and sufficiency of amendment; futility

Plaintiff's request to amend complaint was futile, and therefore leave to amend would not be granted in qui tam False Claims Act action involving alleged fraud in administration of Medicaid services in Mississippi via defendant's use of licensed practical nurses (LPN) rather than registered nurses (RN) to provide case or care services in defendant's role as coordinated care organization, where contracts in question did not require that case or care services be performed by an RN, and Mississippi Medicaid program continued paying and contracting with defendant after plaintiff reported defendant's staffing practices and filed complaint. 31 U.S.C.A. § 3729(a)(1)(A, B); Social Security Act § 1900, 42 U.S.C.A. § 1396 et seq.

5 Cases that cite this headnote
More cases on this issue

Appeal from the United States District Court for the Southern District of Mississippi, USDC No. 1:16-CV-75

Attorneys and Law Firms

Clinton William Walker, III, Greenville, MS, Timothy Dylan Moore, Attorney, Moore & Ogletree, P.L.L.C., Jackson, MS, Derrick Terrell Simmons, Simmons & Simmons, P.L.L.C., Greenville, MS, for Plaintiff - Appellant

John Burley Howell, III, Jackson & Arrington, P.L.L.C., Hattiesburg, MS, Hugh Ruston Comley, Timothy Lee Sensing, Esq., Watkins & Eager, P.L.L.C., Jackson, MS, for Defendant - Appellee

Before SOUTHWICK, GRAVES, and ENGELHARDT, Circuit Judges.

Opinion

JAMES E. GRAVES, Jr., Circuit Judge: *

***238** This is a *qui tam* False Claims Act suit involving the administration of Medicaid services in Mississippi. The relator alleges that her former employer, which contracts with the Mississippi Division of Medicaid, is violating the False Claims Act by using licensed professional nurses for tasks that require the expertise of registered nurses. The federal government declined to intervene, and the district court dismissed the suit with prejudice. We affirm.

I. BACKGROUND

Medicaid is a "joint state–federal program in which healthcare providers serve poor or disabled patients and submit claims for

government reimbursement." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, ___ U.S. ___, 136 S.Ct. 1989, 1996–97, 195 L.Ed.2d 348 (2016) (citing 42 U.S.C. § 1396 *et seq.*). The Mississippi Division of Medicaid contracts with third parties to co-administer the state's Medicaid program through a program commonly known as MississippiCAN. Companies that contract with MississippiCAN are known as Coordinated Care Organizations ("CCOs"). CCOs provide a "comprehensive package" of services including, "at a minimum, the current Mississippi Medicaid benefits which must be medically necessary." They operate call centers, process claims, and contract with health service providers for the provision of covered services. CCOs are expected to provide "care management"[1] services. During the time period at issue, Magnolia Health Plan, Inc. ("Magnolia" or "Defendant") operated as a CCO pursuant to several consecutive contracts.[2]

Gwendolyn Porter ("Relator" or "Plaintiff-Appellant") is a licensed registered nurse ("RN") in Mississippi. She was employed by Magnolia from February 2011 through September 2012. While there, she allegedly learned that licensed practical nurses ("LPNs") were serving as case and care managers. Plaintiff-Appellant alleges that this practice violates state and federal law. She reported the alleged violation to the Mississippi Division of Medicaid in late 2011 or early 2012.[3] She also informed the local U.S. Attorney of Magnolia's alleged violation.

In March 2016, Plaintiff-Appellant filed a complaint in federal court alleging claims under state common law and the federal False Claims Act. About two weeks later, she filed an amended complaint. The government filed a notice of its election to decline intervention. Magnolia then filed a motion to dismiss, arguing that the amended complaint did not satisfy the materiality element of the False Claims Act. In her response, Plaintiff-Appellant withdrew all claims other than those made pursuant to the False Claims Act. The district court granted Magnolia's motion to dismiss and dismissed the False Claims Act claims ***239** with prejudice.[4] Plaintiff-Appellant appealed.

II. DISCUSSION

Plaintiff-Appellant makes three arguments on appeal. She first asserts that the district court erred in declining to consider certain exhibits to her first amended complaint. She next argues that the district court erred in ruling that the amended complaint failed to adequately plead that alleged misrepresentations made by Magnolia were "material" misrepresentations as that term is used in the False Claims Act. Finally, she contends that the district court erred in declining to grant leave to amend.

A. Whether the district court erred in declining to consider certain exhibits to the first amended complaint

Plaintiff-Appellant complains that the district court "erred in excluding from consideration exhibits attached to the [amended] complaint on the basis that they did not form part of the [c]ontracts between [MississippiCAN] and Magnolia." The exhibits in question

are documents published either by Magnolia or by its parent company, Centene. They include a press release, policy and procedure manual, job description, list of frequently asked questions, company handbook excerpt, and PowerPoint presentation. The district court found that it "need not consider" those exhibits because Plaintiff-Appellant did not identify "any contractual provision that incorporated [those] documents" into the contracts between Magnolia and MississippiCAN. But even if Plaintiff-Appellant is correct that the district court made that finding in error, none of the exhibits in question establish that the staffing of the case manager or care manager positions was a material term of the contracts. And materiality is a key component of Plaintiff-Appellant's claims, as explained below. We therefore assume *arguendo* that the district court committed error and proceed to the substance of Plaintiff-Appellant's claims.

B. Whether the district court erred in ruling that the amended complaint failed to adequately plead materiality

Plaintiff-Appellant's first amended complaint, the operative pleading, lists claims under two provisions of the False Claims Act. Plaintiff-Appellant first attempts to state a claim pursuant to Section 3729(a)(1)(A) of the Act, which is violated when a person "knowingly presents, or causes to be presented," a false or fraudulent claim to the government for payment or approval. 31 U.S.C. § 3729(a)(1)(A). She also attempts to state a claim under Section 3729(a)(1)(B) of the Act, under which liability attaches when a person "knowingly makes, uses, or cause to be made or used, a false record or statement material to a false or fraudulent claim." *Id.* at § 3729(a)(1)(B).[5] The district court dismissed both claims because it could not find that Magnolia's staffing of care manager and case manager positions by licensed practical nurses, and not registered ***240** nurses, was material to its contracts with MississippiCAN. We agree.

1. Legal Standards

To survive a motion to dismiss, a complaint "must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.' " *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Complaints filed pursuant to the False Claims Act must also satisfy the "heightened" pleading standard of Federal Rule of Civil Procedure 9(b). *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185 (5th Cir. 2009). Under Rule 9(b), a party alleging fraud or mistake "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "We apply Rule 9(b) to fraud complaints with bite and without apology." *Grubbs*, 565 F.3d at 185 (quotation marks and citation omitted). However, "to plead with particularity the circumstances constituting fraud for a False Claims Act § 3729(a)(1) claim, a relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Id.* at 190.

2. Analysis

The False Claims Act, 31 U.S.C. § 3729 *et seq.*, "imposes significant penalties on those who defraud the Government." *Escobar*, 136 S.Ct. at 1995. There are four elements of a False Claims Act claim. Plaintiffs suing under the statute must show that (1) "there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a claim)." *Abbott v. BP Expl. & Prod., Inc.*, 851 F.3d 384, 387 (5th Cir. 2017) (citing *United States ex rel. Longhi v. United States*, 575 F.3d 458, 467 (5th Cir. 2009)). Both Magnolia's motion to dismiss and the district court order granting that motion addressed only the third element of this test: materiality.

In 2016, the Supreme Court clarified how courts should interpret the materiality requirement. The Court noted that the False Claims Act itself defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *Escobar*, 136 S.Ct. at 1996 (citing 31 U.S.C. § 3729(b)(4)). Describing the materiality standard as "demanding" and "rigorous," *id.* at 2002–03, the Court explained:

> The False Claims Act is not "an all-purpose antifraud statute" or a vehicle for punishing garden-variety breaches of contract or regulatory violations. A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial.

Id. at 2003 (citations omitted). The Court went on:

> [W]hen evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the ***241** Government consistently refuses to pay claims in the mine run of cases based on noncompliance with

> the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Id. at 2003–04. In so holding, the Court expressly rejected the view of materiality advanced by the federal government and the U.S. Court of Appeals for the First Circuit: "that any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation." *Id.* at 2004.

[1] Here, the district court dismissed Plaintiff-Appellant's claims because her amended complaint failed to (1) identify a specific provision in any of the three contracts between Magnolia and MississippiCAN requiring that a case manager or care manager position be staffed by a registered nurse, (2) identify any specific federal or state statute or regulation mandating that a registered nurse provide those services, or (3) otherwise establish that the staffing of the case manager or care manager positions was a material term of the contracts. De novo review leads this panel to conclude the same.

Plaintiff-Appellant relies on two general categories of documents to support her claims that Magnolia committed fraud by employing licensed practical nurses as care or case managers: (1) the contracts between Magnolia and MississippiCAN; and (2) Mississippi statutes, regulations, and administrative materials. Neither work in her favor.

The contracts in question identify the minimum services to be performed by case or care managers, but do not require that those services be performed by a registered nurse. Indeed, while Plaintiff-Appellant alleges that Magnolia is "[i]n no event ... to assign a Case Manager who is neither a Registered Nurse nor a licensed Social Worker," that allegation is contradicted by the contracts themselves. "When a plaintiff attaches documents to the complaint, courts are not required to accept the plaintiff's interpretation of those documents." *Kamps v. Baylor Univ.*, 592 F. App'x 282, 284 n.1 (5th Cir. 2014) (per curiam) (unpublished). If "an allegation is contradicted by the contents of an exhibit attached to the pleading, then indeed the exhibit and not the allegation controls." *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 377 (5th Cir. 2004) (citation omitted).

Each contract does, however, require Magnolia to "strictly adhere to all applicable federal and state law (statutory and case law), regulations and standards ... including ... the policies, rules, and regulations" of the Mississippi Division of Medicaid. Plaintiff-Appellant argues that Magnolia's staffing practices violate Mississippi law and therefore constitute material fraud. We assume *arguendo* that Plaintiff-Appellant's characterization of the Mississippi statutes and regulations is correct. But the Supreme Court has explicitly rejected the argument that "any statutory, regulatory, or contractual violation is material so long as the defendant knows that the [g]overnment would be entitled to refuse payment were it aware of the violation." *Escobar*, 136 S.Ct. at 2004. Indeed, "a misrepresentation cannot be deemed material merely because the [g]overnment designates compliance with a particular statutory, regulatory, or contractual requirement ***242** as a condition of payment." *Id.* at 2003. Here, the district court concluded that the contracts between Magnolia and MississippiCAN "contain broad boilerplate language generally requiring a contractor to follow all laws, which is the same type of language *Escobar* found too general to support a FCA claim." We agree.

Moreover, we note that the Mississippi Division of Medicaid took no action after Plaintiff-Appellant informed the Division that Magnolia was staffing care and case manager positions with licensed practical nurses. Instead, it continued payment and renewed its contract with Magnolia several times. And even after Plaintiff-Appellant's suit was unsealed, MississippiCAN awarded Magnolia a contract for the fourth time. *See Mississippi True v. Dzielak*, 28CH1:18-CV-557, Order, Dkt. 96, at 1, 3 (Hinds Cty. Ch. Ct. Sept. 28, 2018).[6] "[C]ontinued payment by the federal government after it learns of the alleged fraud substantially increases the burden on the relator in establishing materiality." *United States ex rel. Harman v. Trinity Indus.*, 872 F.3d 645, 663 (5th Cir. 2017).[7] Plaintiff-Appellant has not met that burden.

In summary: Plaintiff-Appellant's first amended complaint makes no specific allegations regarding the materiality of Magnolia's alleged fraud. The contracts between Magnolia and MississippiCAN do not require Magnolia to staff care or case manager positions with registered nurses, and they contain only broad, boilerplate language requiring Magnolia to follow all laws. And *Escobar* dictates that MississippiCAN's continued payments to and contracts with Magnolia substantially increase the burden on Plaintiff-Appellant in establishing materiality. *See Harman*, 872 F.3d at 663. We therefore affirm the district court's conclusion that Plaintiff-Appellant did not plead sufficient facts to survive a motion to dismiss.

C. Whether the district court erred in declining to grant leave to amend

The district court denied Plaintiff-Appellant leave to amend, explaining that the request was futile. We agree.

Rule 15(a) requires a trial court "to grant leave to amend 'freely,' and the language of this rule 'evinces a bias in favor of granting leave to amend.' " *Lyn–Lea Travel Corp. v. Am. Airlines*, 283 F.3d 282, 286 (5th Cir. 2002)

(quoting *Chitimacha Tribe of La. v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1162 (5th Cir. 1982)). A district court must have a "substantial reason" to deny a request for leave to amend. *Id.* (quoting ***243** *Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985)). "However, decisions concerning motions to amend are entrusted to the sound discretion of the district court." *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004) (quotation marks and citation omitted).

Ordinarily, this court reviews the denial of a motion for leave to file an amended complaint for abuse of discretion. *City of Clinton, Ark. v. Pilgrim's Pride Corp.*, 632 F.3d 148, 152 (5th Cir. 2010). "When the district court's sole reason for denying such an amendment is futility, however, we must scrutinize that decision somewhat more closely, applying a de novo standard of review similar to that under which we review a dismissal under Rule 12(b)(6)." *Wilson v. Bruks-Klockner, Inc.*, 602 F.3d 363, 368 (5th Cir. 2010) (citing *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 872–73 (5th Cir.2000)).

[2] Here, the district court denied leave to amend because Plaintiff-Appellant had not met, and "indeed cannot meet," her burden. The court concluded that "any amendment to continue to pursue" the theory advanced by Plaintiff-Appellant "would be futile." For the reasons articulated above, we find no error in this conclusion. Given the terms of the contracts between Magnolia and MississippiCAN, as well as MississippiCAN's election to continue paying and contracting with Magnolia after Plaintiff-Appellant reported Magnolia's staffing practices and filed this complaint, there is no reasonable basis to predict that Plaintiff-Appellant can recover on her claims.

CONCLUSION

The district court did not err in granting Defendant's Motion to Dismiss with prejudice. Its order doing so is AFFIRMED.

All Citations

810 Fed.Appx. 237, Med & Med GD (CCH) P 306,754

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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1 The Mississippi Division of Medicaid has referred to these services as both "care management" services and "case management" services. The parties do not contend that these terms apply to different services.

2 Mississippi CCOs, including Defendant, receive a "prepaid monthly capitated payment." Capitation payments are fixed, pre-arranged monthly payments based on the number of patients enrolled in a health plan.

3 There is no indication in the record that the Division took any action in response.

4 While the motion to dismiss was pending, Magnolia was awarded a MississippiCAN contract for the fourth time.

5 Both claims implicate the implied false certification theory of liability. Under that theory, which has been accepted by the Supreme Court "in some circumstances," when "a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided." *Escobar*, 136 S.Ct. at 1999.

6 "Taking judicial notice of directly relevant public records is proper on review of a 12(b)(6) motion." *Biliouris as next friend of Biliouris v. Patman*, 751 F. App'x 603, 604 (5th Cir. 2019) (per curiam) (citing *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011)).

7 Plaintiff-Appellant directs the court to *Campie*, in which the U.S. Court of Appeals for the Ninth Circuit applied *Escobar* and reversed a district court's dismissal of a False Claims Act suit involving HIV drugs. *See* *United States ex rel. Campie v. Gilead Sciences, Inc.*, 862 F.3d 890 (9th Cir. 2017). *Campie*, which is not precedential authority here, is also easily distinguished. In that case, "questions remained as to whether the approval by the [agency] was itself procured by fraud," "there existed other potential reasons for continued approval that prevent[ed] judgment for the defendant on 12(b)(6)," "the continued payment came after the alleged noncompliance had terminated," and "the parties dispute[d] exactly what and when the government knew." *Harman*, 872 F.3d at 664 (quoting *Campie*, 862 F.3d at 906–07). Here, Plaintiff-Appellant has made no allegations that MississippiCAN's contracts with Magnolia were themselves the product of fraud or that continued approval persisted for reasons other than non-materiality. Moreover, Plaintiff-Appellant alleges that the asserted noncompliance persists to this day.

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CASE NO. 27

559 Fed.Appx. 406 (Mem)
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4.
(Find CTA5 Rule 28 and Find CTA5 Rule 47)
United States Court of Appeals,
Fifth Circuit.

Raymond V. GUTIERREZ,
Plaintiff–Appellant,
v.
CORRECTIONS CORPORATION OF AMERICA, Defendant–Appellee.

No. 13–60451
|
Summary Calendar.
|
April 3, 2014.

Attorneys and Law Firms

Raymond V. Gutierrez, Tutwiler, MS, pro se.

Appeal from the United States District Court for the Northern District of Mississippi, USDC No. 3:13–CV–98.

Before JOLLY, SMITH, and CLEMENT, Circuit Judges.

Opinion

***407** PER CURIAM: [*]

Raymond Gutierrez, California prisoner # F–12264, appeals the dismissal of his 42 U.S.C. § 1983 action against Corrections Corporation of America ("CCA") as frivolous and for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B). He also moves for appointment of counsel; that motion is DENIED.

Gutierrez is confined in a CCA facility in Mississippi. His action arose from the denial of his request for Catholic-oriented television programming from the Eternal Word Television Network ("EWTN") in light of the broadcast of non-denominational programming from the Trinity Broadcasting Network ("TBN"), which Gutierrez characterizes as Protestant-oriented.

Gutierrez contends that the district court erred by denying his postjudgment motion to amend the complaint. He avers that he stated his Equal Protection Clause claim in the motion to amend sufficiently for that claim to proceed. He lists other claims that he also put into his motion to amend, but he fails to brief those claims or to address whether the district court erred by declining to allow him to amend the complaint to add them. *See* *Yohey v. Collins*, 985 F.2d 222, 224–25 (5th Cir.1993). The district court did not abuse its discretion by denying Gutierrez's postjudgment motion to amend the complaint to elaborate on the Equal Protection Clause argument that already had been raised and decided. *See* *Briddle v. Scott*, 63 F.3d 364, 379 (5th Cir.1995).

Gutierrez claims he was deprived of equal protection of the law because CCA does not provide EWTN programming for Catholic prisoners but provides TBN programming for Protestant prisoners. He notes that an Arizona

district court found that a similar claim he raised while incarcerated in a CCA facility there stated a violation sufficient to require a response before that case was dismissed for failure to exhaust administrative remedies.

A complaint is frivolous if it lacks "an arguable basis in law or fact," and dismissal on that ground is reviewed for abuse of discretion. *Berry v. Brady,* 192 F.3d 504, 507 (5th Cir.1999). Dismissal for failure to state a claim is reviewed *de novo,* applying the standard used to review a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Hart v. Hairston,* 343 F.3d 762, 763–64 (5th Cir.2003). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal quotation marks and citation omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Because the district court dismissed the complaint both as frivolous and for failure to state a claim, the dismissal is reviewed *de novo. See Geiger v. Jowers,* 404 F.3d 371, 373 (5th Cir.2005).

To establish a claim under the Equal Protection Clause, Gutierrez "must allege and prove that he received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent." *Taylor v. Johnson,* 257 F.3d 470, 473 (5th Cir.2001). The Clause does not require "that every religious sect or ***408** group within a prison—however few in numbers—must have identical facilities or personnel"; it requires only that prison officials afford inmates "reasonable opportunities ... to exercise the religious freedom guaranteed by the First and Fourteenth Amendment[s]." *Baranowski v. Hart,* 486 F.3d 112, 123 (5th Cir.2007) (internal quotation marks and citation omitted).

Gutierrez does not allege any discriminatory intent on the part of CCA. A document attached to his complaint indicated that the Religious Review Committee ("RRC") reporting to the California Department of Corrections indicated that TBN is a "non-denominational channel" carrying programming from various denominations. It is not evident from the record whether any specifically Catholic programming is carried on the channel or whether the teachings on the channel could be considered consistent with Catholic doctrines and practices, and CCA's prisons presumably house a fair number of Catholic prisoners. However, the RRC determined that it was not feasible to provide each religious denomination with a specific television channel. If CCA were required to provide every prisoner of a particular faith with access to a religion-specific television channel because TBN is broadcast into CCA facilities, that might "spawn a cottage industry of litigation and could have a negative impact on prison staff, inmates, and prison resources." *Id.* at 122 (internal quotation marks and citation omitted). Moreover, Gutierrez has made no allegation suggesting that Catholic prisoners are not able to attend Mass or engage in the sacraments, study the Bible and other teachings, or

otherwise exercise their right to practice their religion. *See id.* at 123. Additionally, Gutierrez has no constitutionally protected right to watch television. *Montana v. Comm'rs Court,* 659 F.2d 19, 23 (5th Cir.Unit A Sept.1981) (per curiam).

Gutierrez's allegations suggest at most that Catholic prisoners have less access to television programming specific to their faith than do Protestant prisoners. Gutierrez has failed to state a plausible claim of a violation of the Equal Protection Clause. *See Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937. Additionally, the Arizona district court's finding that Gutierrez's equal protection claim was sufficient to warrant a response was not relevant to the ultimate dismissal of that complaint, *see Gutierrez v. Corr. Corp. of Am.,* No. 10–0117, 2011 WL 2836705 (D.Ariz. July 18, 2011), is not precedential in this circuit, *see Orellana–Monson v. Holder,* 685 F.3d 511, 520 (5th Cir.2012), and is not persuasive in light of this court's jurisprudence addressing the Equal Protection Clause, dismissal for failure to state a claim, and dismissal as frivolous. The district court did not err by dismissing Gutierrez's complaint as frivolous and for failure to state a claim. *See Geiger,* 404 F.3d at 373.

The appeal is DISMISSED as frivolous. *See* 5TH CIR. R. 42.2. The dismissal of the § 1983 action and the dismissal of this appeal both count as a strike for purposes of 28 U.S.C. § 1915(g). *See Adepegba v. Hammons,* 103 F.3d 383, 388 (5th Cir.1996). Gutierrez is cautioned that, if he accumulates three such strikes, he will no longer be allowed to proceed IFP in any civil action or appeal filed while he is incarcerated or detained in any facility unless he "is under imminent danger of serious physical injury." § 1915(g).

All Citations

559 Fed.Appx. 406 (Mem)

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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CASE NO. 28

421 Fed.Appx. 349
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4.
(Find CTA5 Rule 28 and Find CTA5 Rule 47)
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Aurelio BASULTO–REINA, Defendant–Appellant.

No. 10–40860
|
Summary Calendar.
|
April 5, 2011.

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the Southern District of Texas, to being unlawfully present in the United States following deportation and was sentenced to 24 months in prison following a 16 level enhancement. Defendant appealed.

Holding: The Court of Appeals, Jerry E. Smith, Circuit Judge, held that defendant's conviction for aggravated battery under Georgia law was a crime of violence.

Affirmed.

West Headnotes (1)

[1] **Sentencing and Punishment** Offense or adjudication in other jurisdiction

Defendant did not show a realistic probability that Georgia aggravated battery statute could apply in the absence of force, and therefore, his conviction for aggravated battery under Georgia law was a crime of violence warranting a sentencing enhancement following his guilty plea to being unlawfully present in the United States following deportation, absent any Georgia cases applying statute in the absence of force. West's Ga.Code Ann. § 16–5–24(a); U.S.S.G. § 2L1.2(b)(1)(A)(ii), 18 U.S.C.A.

4 Cases that cite this headnote

Attorneys and Law Firms

***350** Mary Jane Harmon, James Lee Turner, Assistant U.S. Attorney, U.S. Attorney's Office, Houston, TX, for Plaintiff–Appellee.

Marjorie A. Meyers, Federal Public Defender, Sarah Beth Landau, Assistant Federal Public Defender, H. Michael Sokolow, Assistant Federal Public Defender, Federal Public Defender's Office, Houston, TX, for Defendant–Appellant.

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Appeal from the United States District Court for the Southern District of Texas, No. 2:10–CR–363–1.

Before DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

Opinion

JERRY E. SMITH, Circuit Judge: [*]

****1** Aurelio Basulto–Reina challenges the district court's conclusion that aggravated battery under Georgia law is a "crime of violence" ("COV") under U.S.S.G. § 2L1.2(b)(1)(A)(ii). We affirm, because Georgia aggravated battery involves the use of force and is thus a COV.

I.

Basulto–Reina pleaded guilty to one count of being found unlawfully present in the United States following deportation, in violation of 8 U.S.C. § 1326(a) and (b). The district court imposed a 16–level sentencing enhancement under § 2L1.2(b)(1)(A)(ii) because Basulto–Reina had been deported following a felony conviction for a COV. The underlying felony was a 1997 conviction in Georgia for aggravated battery. After a three-level reduction for acceptance of responsibility, the enhancement gave Basulto–Reina a total offense level of 21; he had a criminal history category of I. The guideline range was 37–46 months, but the district court gave 24 months. Basulto–Reina challenges the 16–level enhancement, arguing that Georgia aggravated battery is not a COV.

II.

The categorization of prior convictions as COV's is a legal issue that we review *de novo*. [1] The application notes define a COV as

> any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses ..., statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

U.S.S.G. § 2L1.2 cmt. n. 1 (B)(iii). Thus, an offense can qualify as a COV either because it is part of an enumerated category or because it falls within the physical-force provision. Because we decide that the use of physical force is an element of aggravated battery in Georgia, we need not determine whether it is part of an enumerated category. For purposes of the guidelines, the " 'use' of force requires that a defendant intentionally avail himself of that force." *United States v. Vargas–Duran*, 356 F.3d 598, 599 (5th Cir.2004). To determine whether an offense involves the use of force, we employ the categorical approach in *Taylor v. United States*, 495 U.S. 575, 600–02, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), examining the elements of the offense rather than the facts underlying the ***351** conviction. *United States v. Moreno–Florean*, 542 F.3d 445, 449 (5th Cir.2008). Nonetheless, "if the statute of conviction

contains a series of disjunctive elements, this court may look beyond the statute to certain records made or used in adjudicating guilt to determine which subpart of the statute formed the basis of the conviction." *Id.* (citations omitted).

A person commits aggravated battery in Georgia "when he or she maliciously causes bodily harm to another by depriving him or her of a member of his or her body, by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member thereof." GA.CODE ANN. § 16–5–24(a). The indictment for Basulto–Reina's 1997 conviction reveals that his conviction arose from disfigurement. Therefore, our inquiry is whether "maliciously caus[ing] bodily harm to another ... by seriously disfiguring his or her body" requires the use, attempted use, or threatened use of physical force.

****2** Basulto–Reina contends that causing bodily harm does not necessarily require physical force. His argument is supported by *United States v. Lopez–Hernandez*, 112 Fed.Appx. 984, 985 (5th Cir.2004) (per curiam), in which we evaluated a Georgia family violence battery conviction. A conviction for family violence battery requires " 'intentionally caus[ing] substantial physical harm or visible bodily harm to another' person who is a family member." *Id.* (quoting GA.CODE ANN. § 16–5–23.1(a)). We reasoned that "[t]he Georgia offense is results-oriented and does not contain a requirement that the offender apply force, but rather, leaves open the possibility that harm to the victim might result from omission or from the actions of another person or animal controlled by the offender." *Id.* Basulto–Reina urges that the same reasoning applies to a conviction for aggravated battery.

Because *Lopez–Hernandez* is unpublished, it is not precedential, and we find it unpersuasive. In particular, it ignores that Georgia courts have interpreted even simple battery to require the use of physical force. In *Hammonds v. State*, 263 Ga.App. 5, 587 S.E.2d 161, 163 (2003), for example, the court examined the element of simple battery requiring "intentionally causing physical harm to another." GA.CODE ANN. § 16–5–23(a)(2). That requirement, the court held, "contemplates a touching that goes beyond insult to the infliction of pain or physical injury,"[2] and any touching that inflicts pain necessarily requires the use of force.[3] If a requirement of "intentionally causing physical harm" requires physical force, therefore, so must the stricter requirement of "maliciously causing bodily harm to another ... by seriously disfiguring his or her body."

Admittedly, Georgia uses the *results* of a forceful touching to distinguish among simple battery, battery, and aggravated battery.[4] Thus, battery and aggravated battery are defined by the level of harm a defendant "causes" and do not explicitly mention an offensive touching or the use of ***352** force. That classification scheme does not mean, however, that a forceful touching has dropped out of the offense as the severity increases to battery and aggravated battery. Thus, one Georgia court has construed the aggravated battery statute with reference to the common law definition of battery as the " 'unlawful touching or striking of the person of another by the aggressor himself or by any substance put in

motion by him, done with the intention of bringing about a harmful or offensive contact or apprehension thereof.' "[5] Similarly, another court has assumed that aggravated battery qualifies under the Georgia statute allowing self-defense to prevent "forcible felonies."[6] Georgia thus treats aggravated battery as including an element of force.

In support of its holding, *Lopez–Hernandez* cited *J.A.T. v. State,* 133 Ga.App. 922, 212 S.E.2d 879, 882 (1975), which held that one can commit battery by siccing a dog on another. *J.A.T.* does not hold, however, that committing battery in such a fashion involves the absence of force. Instead, the court noted that by letting the dog go, the defendant "set[ ] a force in motion which ultimately produce[d] the result." *Id.* at 881. As the government points out, pulling the trigger on a gun also sets in motion a separate force that actually causes the harm, but it certainly involves the use of force. Siccing a dog on another must therefore involve using force as well, at least when that act is committed intentionally, as in *J.A.T.*[7]

****3** It is hypothetically possible that at some point the defendant's actions become so attenuated from the application of force to the victim that he cannot be said to have "used force," even though he is still guilty of battery. We need not engage in speculation to identify such remote possibilities, however. The Supreme Court's reasoning when determining whether a crime fell within an enumerated category of COV's is equally applicable here:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that ***353** falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Gonzales v. Duenas–Alvarez, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007). Basulto–Reina has cited no Georgia cases applying the aggravated-battery statute in the absence of force, so he has not shown a "realistic probability" that the statute could apply in such situations. We thus conclude that aggravated battery in Georgia involves the use of force and is a COV under U.S.S.G. § 2L1.2(b)(1)(A)(ii).

AFFIRMED.

All Citations

421 Fed.Appx. 349, 2011 WL 1251284

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1 *United States v. Hernandez–Galvan,* 632 F.3d 192, 196 (5th Cir.2011) (citing *United States v. Sanchez–Ruedas,* 452 F.3d 409, 412 (5th Cir.2006)).

2 *Hammonds,* 587 S.E.2d at 163; *accord McKinney v. State,* 218 Ga.App. 633, 463 S.E.2d 136, 139 (1995) ("Physical contact is required for a simple battery...."); *Lyman v. State,* 188 Ga.App. 790, 374 S.E.2d 563, 565 (1988) (stating that § 16–5–23(a)(2) "concerns the intentional causation of physical harm, a touching which goes beyond insult to the infliction of pain"); *Anderson v. State,* 170 Ga.App. 634, 317 S.E.2d 877, 878 (1984) (stating that a simple battery conviction under § 16–5–23 "requires physical contact"); *Tuggle v. State,* 145 Ga.App. 603, 244 S.E.2d 131, 133 (1978) (same).

3 *See Hernandez v. U.S. Att'y Gen.,* 513 F.3d 1336 (11th Cir.2008) (declining to insert the word "violent" before "physical force" in the definition of COV and concluding that "simple physical contact.... satisfie[s] the 'use of physical force' definition of a 'crime of violence' " (citing *United States v. Griffith,* 455 F.3d 1339, 1342 (11th Cir.2006))).

4 *Williams v. State,* 248 Ga.App. 316, 546 S.E.2d 74, 78 (2001) ("The legislature has created three distinct categories of battery: simple battery, OCGA § 16–5–23 (offensive touching or physical harm); battery, OCGA § 16–5–23.1 (substantial physical harm or visible bodily injury); and aggravated battery, OCGA § 16–5–24 (loss of body member or serious disfigurement). These statutes evidence a legislative intent to categorize the types of battery by the severity of the harm inflicted and to provide harsher penalties for batteries that result in more severe bodily harm.").

5 *Blanch v. State,* 293 Ga.App. 750, 667 S.E.2d 925, 926 (2008) (emphasis removed) (quoting *Brown v. State,* 57 Ga.App. 864, 197 S.E. 82, 84 (1938)).

6 *See Wicker v. State,* 285 Ga.App. 294, 645 S.E.2d 712, 713 (2007) (rejecting a defendant's requested self-defense instruction because she did not introduce

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evidence that she feared her victim would commit aggravated battery, but acknowledging that aggravated battery can be a forcible felony justifying self-defense).

7 *J.A.T.*, 212 S.E.2d at 880. *J.A.T.* suggests that one can also be convicted of battery if one was "criminally negligent" when letting the dog go, *id.* at 881, and one might argue that a criminally negligent defendant did not "use" force because "using" force requires using force "intentionally," *Vargas–Duran*, 356 F.3d at 599. *J.A.T.* stated that criminally negligent defendants can be convicted of battery, however, only because "[e]very person is presumed to intend the natural and necessary consequence of his acts." *J.A.T.*, 212 S.E.2d at 881 (citations and internal quotation marks omitted). Even a defendant convicted of battery because of criminal negligence has therefore used force "intentionally" and has thus committed a COV.

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CASE NO. 29

2009 WL 29688
Only the Westlaw citation
is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. Texas,
Houston Division.

UNITED STATES of America
v.
Michael D. KIM.

Criminal
No.
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406
.
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Jan. 5, 2009.

Attorneys and Law Firms

Albert A. Balboni, United States Attorneys Office, Financial Litigation, U.S. Attorney'S Office, U.S. Marshal, U.S. Pretrial Svcs, U.S. Probation, Houston, TX, for Plaintiff.

MEMORANDUM AND ORDER

LEE H. ROSENTHAL, District Judge.

***1** The defendant was convicted by a jury on September 2, 2008. He was represented by retained counsel who conducted a vigorous defense on behalf of his client. On November 5, 2008, new retained counsel moved for an extension of time under Rule 45 of the Federal Rules of **Criminal** Procedure to file a motion for a judgment of acquittal and motion for new trial. The government opposed on the ground that there had been no showing of excusable neglect. This court agreed and denied the motion. The defendant has now filed a motion for reconsideration.

The primary basis for the motion is that prior counsel rendered ineffective assistance in failing to renew the motion for judgment of acquittal-which had been urged at the close of the government's case-at the close of all the evidence. Rule 29 governs motions for a judgment of acquittal and Rule 33 governs motions for new trial. Rule 29 requires that a defendant (or his counsel) "move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict ...." FED. R.CRIM. P. 29. Similarly, unless a motion for new trial is "grounded on newly discovered evidence," Rule 33 requires such a motion to be filed "within 7 days after the verdict or finding of guilty." FED. R.CRIM. P. 33. When a motion for judgment of acquittal or a new trial is filed outside the time frames allowed by Rule 29 or 33, Rule 45 may provide an avenue for the court to reach the merits of the motion. *See, e.g., United States v. Walton,* 2007 WL 2108118, at *8 (E.D.Pa. July 20, 2007) (applying Rule 45(b)(1)(B) to Rule 33(b)(2)); *United States v. Dade,* 2006 U.S. Dist. LEXIS 76286, at *7 (D.Idaho Oct. 19, 2006) (concluding "the Court may still consider Defendant's motion for new trial if he shows excusable neglect for not filing

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the motion in a timely manner"). Rule 45(b), in pertinent part, provides:

> (1) *In General.* When an act must be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made ... (B) after the time expires if the party failed to act because of excusable neglect.
>
> (2) *Exception.* The court may not extend the time to take any action under Rule 35, except as stated in that rule.

FED. R.CRIM. P. 45(b). [1]

The determination of whether excusable neglect exists "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship,* 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). In making this determination, the court must consider four factors: (1) the danger of prejudice to the nonmoving party; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for that delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. *Pioneer,* 507 U.S. at 395; *see also Stutson v. United States,* 516 U.S. 193, 196, 116 S.Ct. 600, 133 L.Ed.2d 571 (1996) (suggesting the *Pioneer* factors apply in the **criminal** context); *Kohl's Dep't Stores, Inc. v. Levco-Route 46 Assoc., L.P.,* 121 F. App'x 971, 974-76 (3d Cir.2005) (not precedential) (discussing "excusable neglect" in the context of Fed.R.Civ.P. 60(b)(1)).

***2** This court considered each of these factors in its prior order and concluded that the record provided no basis to find excusable neglect. The motion for reconsideration argues ineffective assistance of prior counsel in failing to renew the motion for judgment of acquittal after the close of all the evidence. But the motion does not identify any basis to find excusable neglect in the delay in filing a motion for new trial or judgment of acquittal after the jury verdict. After again considering the factors, the court again concludes that there is no basis to find excusable neglect in failing to file a timely motion for new trial or judgment of acquittal.

The motion for reconsideration, Docket Entry No. 92, is denied.

All Citations

Not Reported in F.Supp.2d, 2009 WL 29688

Footnotes

1 Rule 45(b)(2) was amended in December 2005. The former Rule 45(b)(2) provided: "The court may not extend the time to take any action under *Rules 29*, *33*, *34*, *and* *35*, except as stated in those rules." Former FED. R.CRIM. P. 45(b)(2) (emphasis added). The 2005 amendment removed the constraints placed on the

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court for motions filed under Rules 29, 33, and 34 of the Federal Rules of **Criminal** Procedure. *See* FED. R.CRIM. P. 45(b)(2).

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CASE NO. 30

2015 WL 11251771
Only the Westlaw citation
is currently available.
United States District Court,
W.D. Texas, El Paso Division.

Alma Rosa BLAIR, Plaintiff,
v.
PRIDE INDUSTRIES, INC., Defendant.

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CV
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DCG
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Signed 01/27/**2015**

Attorneys and Law Firms

Enrique Chavez, Jr., Miguel Luis Hernandez, Chavez Law Firm, Daniel Salvador Gonzalez, El Paso, TX, for Plaintiff.

Clara B. Burns, Jose Abelardo Howard-Gonzalez, Kemp Smith LLP, El Paso, TX, for Defendant.

ORDER DENYING PLAINTIFF'S MOTIONS

DAVID C. GUADERRAMA, UNITED STATES DISTRICT JUDGE

***1** Presently before the Court are Plaintiff Alma Rosa Blair's ("Plaintiff" or "Blair") "Motion[s] to Quash and For Protective Order" ("Motions") (ECF Nos. 11-16), filed on September 5, 2014. After reviewing the motions, the responses and the applicable law, the Court hereby denies the instant Motions.

I. BACKGROUND

This is an employment discrimination and retaliation suit under federal and state law. In her Original Petition, Plaintiff claims she was discriminated against based on her race, sex, and age. *See* Notice of Removal 4-7, ECF 1. She also claims she was retaliated against by her former employer, the defendant in the **case**, for opposing its alleged discriminatory practices. *See id.* at 5.

The instant action originated in state court. On May 16, 2014, Defendant removed the above-captioned cause to this Court. *See* Notice of Removal 1-3. On September 3, 2014, Defendant served its "Notice of Intent to Take Depositions by Written Questions" and served a subpoena on several of Plaintiff's previous employers, including Home Depot, Tyson Prepared Foods, Levi Strauss & Co., Research Analysis and Maintenance Insurance, and Zenith Electronics Corp.; and her current employer, Sears Methodist Retirement Systems. *See* Mots. 1.[1] Specifically, Defendant requested from each employer:

> The entire files(s) of ALMA R. BLAIR, including but not limited to: any

> and all medical, attendance and disciplinary files, job description, application for employment, new employee forms, attendance records, discipline and counseling forms, and if applicable, documents relating to her separation from employment and the reasons for the separation [from] her employment, wage and payroll information, files on employee benefits which ALMA R. BLAIR has received, is/was entitled to receive to include plans, statements, and summaries concerning said benefits available to ALMA R. BLAIR.

Mots. 1-2.

Plaintiff filed the instant Motions on September 5, 2014, seeking to quash the subpoenas. Defendant filed two responses on September 11, 2014, one addressing Plaintiff's past employers ("Response PE") and the other addressing Plaintiff's current employer ("Response CE"). *See* ECF Nos. 17, 18. All matters are now ripe for review.

II. ANALYSIS

A. Whether to Grant Plaintiff's Motions

"Discovery matters are entrusted to the 'sound discretion' of the district court." *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) (per curiam) (citing *Richardson v. Henry*, 902 F.2d 414, 417 (5th Cir. 1990)); accord *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 684 (5th Cir. 1985). Federal Rule of Civil Procedure 26(b)(1) allows parties to "obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense ...." Fed. R. Civ. P. 26(b)(1). At the discovery stage, relevancy is broadly construed: "information is relevant if it encompasses any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the **case**." *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991) (citation omitted) (internal quotation marks omitted). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

***2** A party may seek an order limiting the scope of discovery request pursuant to Federal Rule of Civil Procedure 26(c). In order to prevail, a party seeking a protective order must establish good cause and a specific need for protection. *See Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 435 (5th Cir. 1990) (citing Fed. R. Civ. P. 26(c)), *opinion modified on denial of reh'g* (Apr. 27, 1990). "Good cause" exists when justice requires the protection of "a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.* (quoting Fed. R. Civ. P. 26(c)(1)). To establish good cause, the party seeking the protective order must articulate particular and specific facts to support its request and cannot rely on speculative or conclusory statements. *See In re Terra Int'l, Inc.*, 134 F.3d 302, 306 (5th Cir.

1998) (quoting *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)). Likewise, a party seeking to quash a subpoena under Rule 45(c)(3) bears the burden of proof. *See Anzures v. Prologis Texas I LLC*, 300 F.R.D. 316, 317 (W.D. Tex. 2012) (citing *Williams v. City of Dallas*, 178 F.R.D. 103, 109 (N.D. Tex. 1998)).

Defendant argues that it is entitled to Plaintiff's past (1) disciplinary records; (2) termination documents; (3) job description; (4) job application; (5) resume; and (6) pay records that identify her wages and benefits. *See* Resp. PE 3-4; Resp. CE 3. Defendant first argues that Plaintiff has raised questions about her credibility. In response to Defendant's interrogatory requesting that Plaintiff "identify each document which constitutes or contains evidence relevant to your claim that you were discriminated against," Plaintiff produced a resume that is different from the one she furnished Defendant during her application process. *See* Resp. PE 2; Resp. CE 2. Defendant argues that in light of this discrepancy, Plaintiff's credibility is in question. *See* Resp. PE 3; Resp. CE 3.

Defendant also argues that the documents sought are relevant to damage assessment, both in regards to a possible after-acquired evidence defense and mitigation of damages. *See* Resp. PE 4-5; Resp. CE 4-5. Under the after-acquired evidence doctrine, an employer can limit its damages for discrimination to back pay up through when the new evidence was discovered if the employer can establish that an employee's wrongful act was severe enough to terminate the employee on those grounds alone. *See McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 361-62 (1995). In this **case**, Defendant would have to establish that it would have terminated Plaintiff upon discovery of the alleged application falsification. Defendant also argues that employees have a duty to mitigate their damages, and thus payment information related to her prior and subsequent employment is relevant.

Plaintiff contends that the subpoenas are "overly broad [and] unduly burdensome, require[ ] disclosure of proprietary and privileged documents with no applicable waiver, and [are] not likely to lead to the discovery of admissible evidence." Mots. 3. Plaintiff contemporaneously moves for a protective order based on "the annoyance, embarrassment, and oppression that production of the requested documents would cause ...." Mots. 4. Plaintiff contends that the subpoenas have "no legitimate purpose other than to harass and inform Plaintiff's previous and subsequent employers that the Plaintiff has filed a suit against one of her previous employers." *See* Mots. 4. Finally, Plaintiff argues that even proof of after-acquired evidence is not sufficient if Defendant's subpoenas are merely fishing expeditions. *See* Mots. 2-3.

The Court finds that Plaintiff has not articulated specifics to support her Motions. Instead, Plaintiff's Motions set forth only general objections and conclusory statements. *See Anzures*, 300 F.R.D. at 318 (denying a plaintiff's motion to quash and for a protective order regarding past employment records on the grounds that the objections were conclusory).

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***3** The Court agrees with Defendant that the information sought is relevant and reasonably calculated to lead to the discovery of admissible evidence. First, Plaintiff put her resume and past work experience into question by producing it in response to Defendant's interrogatory request. Second, there is little question that the payroll records are relevant to Defendant's mitigation. Any information related to Plaintiff's earnings is relevant to the determination of potential damages in this **case**. In fact, Plaintiff appears to concede as much by stating that such production would be duplicative of already-produced documents. *See* Mots. 4. Finally, Defendant has raised the existence of a discrepancy in Plaintiff's past employment history. Such a discrepancy could give rise to the after-acquired evidence defense, which would be relevant to any potential remedy by Plaintiff in this **case**. *See* *Bowers v. Sears, Roebuck & Co.*, No. A-13CV-348-AWA, 2014 **WL** 4269090, at *2 (W.D. Tex. Aug. 29, 2014) (permitting discovery of a plaintiff's past employers because there was a discrepancy in information provided to employer and discovery responses). [2]

In conclusion, Plaintiff has failed to carry her burden of establishing good cause to quash the third party subpoenas and for a protective order. Aside from conclusory assertions, Plaintiff has not provided any argument as to how retrieving this information from her past and current employers would lead to "annoyance, embarrassment, and oppression," The Court notes that any such result would be mitigated by a protective order limiting Defendant's use of the records to the instant litigation.

B. Whether to Grant Expenses to Defendant

When a motion to compel discovery or for protective order is denied, the Court must consider expenses under Rule 37(a)(5) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(c)(3). That Rule states that the Court

> must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(5)(B). Defendant did not ask for expenses. Regardless, the Court finds that Plaintiff's Motions were substantially justified. Therefore both parties will incur their own expenses.

III. CONCLUSION

Accordingly, **IT IS HEREBY ORDERED THAT** Plaintiff Alma Rosa Blair's "Motion[s] to Quash and For Protective Order" (ECF Nos. 11-16) are **DENIED**.

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IT IS ALSO ORDERED THAT the parties **SHALL** submit a joint protective order limiting the use of Plaintiff Alma Rosa Blair's employment records to the instant action within **twenty-one (21)** days of this Order.

So ORDERED and SIGNED this 27th day of January, 2015.

All Citations

Not Reported in Fed. Supp., 2015 WL 11251771

Footnotes

1 Plaintiff's Motions are identical with the exception that each addresses a different former employer.

2 Plaintiff cites primarily to *Premer v. Corestaff Svcs., L.P.*, 232 F.R.D. 692, 693 (M.D. Fla. 2005) for the proposition that proof of after-acquired evidence is not sufficient to allow discovery of past employment records. The Court notes that both that **case** and all other **cases** cited by Plaintiff are outside of the Fifth Circuit and are not precedential. Moreover, the Court finds that the **cases** are distinguishable from the **case** at bar because Defendant has provided additional independent bases for the discovery requests. In regards to *McKennon*, Plaintiff's argument is flawed because the Supreme Court ultimately allowed, albeit with concern for possible abuse, the employer to rely upon after-acquired evidence of wrongdoing to limit damages.

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CASE NO. 31

2004 Mass.App.Div. 120
Massachusetts Appellate Division, District Court Department, Northern District.

MEDFORD CO–OPERATIVE BANK
v.
David P. SKERRY.

No. 9875.
|
Heard May 19, 2004.
|
Opinion Certified Aug. 12, 2004.

Synopsis
Background: After bank repaid Social Security Administration (SSA) to cover unauthorized deposits into its deceased customer's account, it brought conversion action against administrator for estate, both in his official capacity and individually. Administrator filed counterclaims for abuse of process and unfair and deceptive practices. The District Court Department, Somerville Division, McGuinness, J., entered judgment for administrator on his counterclaims, and bank appealed.

Holdings: The District Court Department, Appellate Division, Merrick, J., held that:

[1] sufficient evidence supported determination that bank's conversion action constituted an abuse of process;

[2] administrator's allegations supported unfair and deceptive practices claim;

[3] fact that administrator practiced law did not preclude his counterclaim for unfair and deceptive practices; and

[4] administrator was entitled to recover his appellate attorney fees.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (5)

[1] Pretrial Procedure 🔑 Evidence

Plaintiff's motion for involuntary dismissal of defendant's counterclaims for abuse of process and unfair and deceptive practices was properly denied, since record was not devoid of evidence probative of defendant's counterclaims. Rules Civ.Proc., Rule 41(b)(2), 43A M.G.L.A.

1 Case that cites this headnote

[2] Process 🔑 Weight and sufficiency

Determination that bank's conversion action against administrator for estate, individually, to recover amounts it had paid to cover unauthorized social security deposits into deceased customer's account was pursued for an ulterior or illegitimate purpose, so as to constitute an abuse of process, was supported by evidence that bank officer did not think administrator

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had misappropriated funds, that bank had not brought individual actions in similar cases, and that bank's mistaken handling of the repayment may have jeopardized its ability to recover fully from the estate.

[3] **Antitrust and Trade Regulation** Defenses; answer and counterclaim

Administrator for estate who had been sued by bank in conversion in his individual capacity could recover on his counterclaim for unfair and deceptive trade practices based on bank's abuse of process, even though his counterclaim referred specifically to a violation of the Fair Debt Collection Practices Act, since his allegations supported a claim for relief on an abuse of process theory. 15 U.S.C.A. § 1692(a)-(o); M.G.L.A. c. 93A.

1 Case that cites this headnote

[4] **Antitrust and Trade Regulation** Persons and Transactions Covered Under General Statutes

Fact that administrator for estate practiced law did not preclude him from recovering on counterclaim against bank for unfair and deceptive trade practices. M.G.L.A. c. 93A, § 2, 9, 11.

[5] **Antitrust and Trade Regulation** Attorney fees

Antitrust and Trade Regulation Proceedings to impose; evidence

Costs, Fees, and Sanctions Affirmance

Costs, Fees, and Sanctions Proceedings to Award; Taxation

Where judgment in favor of administrator for estate on his counterclaims against bank for abuse of process and unfair and deceptive trade practices was upheld on appeal, attorney was entitled to recover appellate attorney fees upon motion, detailed affidavit, and notice.

1 Case that cites this headnote

In the Somerville Division, McGuinness, J., No. 0010–CV–0828.

Attorneys and Law Firms

Herbert William Boudreau, Jr., Medford, MA, for Plaintiff.

Daniel J. Harrington, Melrose, MA, for Defendant.

Before MERRICK, P.J., COVEN & GRECO, JJ.

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Opinion

MERRICK, J.

***1** After a trial without a jury, judgment was entered for the defendant on his counterclaims for abuse of process and G.L. c. 93A unfair and deceptive practices. The plaintiff filed this Dist./Mun. Cts. R.A.D.A. 8C appeal of the denial of its Mass. R. Civ. P. 41(b)(2) motion for involuntary dismissal of the defendant's counterclaims. As the plaintiff challenges the sufficiency of the evidence to support the court's judgment, we view the evidence in the light most favorable to the defendant for the purposes of this appeal. *Edwards v. Sullivan and Cogliano Cos.*, 2002 Mass.App. Div. 43; *Hale v. Building 19 1/6,* 2002 Mass.App. Div. 38.

The defendant and plaintiff-in-counterclaim, David P. Skerry ("Skerry"), has practiced law in the City of Medford for 35 years. More than half of his practice has involved serving as a fiduciary or representing fiduciaries. In 1991, he was appointed as conservator for Mary J. Culkeen ("Culkeen") and served in that capacity until her death on July 31, 1999. Culkeen, confined to a nursing home, had received monthly Social Security payments by direct deposit to an account in the name of "David P. Skerry, Conservator, Property of Mary Culkeen" at the Medford Co-operative Bank (the "Bank"), the plaintiff and defendant-in-counterclaim herein. Skerry promptly notified the Social Security Administration ("SSA") in August, 1999 of Culkeen's death, forwarded a copy of her death certificate and thereafter contacted SSA on numerous occasions to terminate Culkeen's monthly benefits. Despite these efforts, Social Security payments continued to be deposited in the conservator account through February, 2000. The total amount of these overpayments after Culkeen's death, to which she and her estate were not entitled, was $5,925.00.

On August 31, 1999, Skerry was appointed administrator of Culkeen's estate. The estate's principal asset was a two-family house occupied by elderly tenants. The house was in disrepair and the heating system was not functioning. Skerry used conservator account funds to pay for repairs and insurance on the house. He also paid Culkeen's funeral and final expenses as well as a very small percentage of the fees due to him in the amount of $1,098.00. An inventory filed by Skerry, as administrator, in the Probate and Family Court on December 29, 1999 reflected a balance in the conservator account of $181.40. The estate's only other assets were the house, valued at $175,000.00, and the decedent's personal effects, worth only $150.00.[1]

***2** At the end of February, 2000, the SSA made a demand upon Skerry for repayment of the $5,925.00 in benefits deposited after Culkeen's death. Skerry replied by letter dated March 1, 2000 that there was very little cash in the estate and that it would be needed to maintain the estate's principal asset. He further stated that the house would be sold and offered to pay the $5,925.00 out of the proceeds of the sale. Skerry testified that in his 35 years of experience, the SSA customarily agreed to such arrangements for the correction of the very common problem of continued automatic payments after the death of a social security recipient. During the month of March, 2000,

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Skerry transferred most of the remaining funds in the conservator account at the Bank to an estate account he had opened, as Culkeen's administrator, at the Century Bank.

On March 2, 2000, Skerry was contacted by Henry T. Sampson ("Sampson") of the plaintiff Bank about the Bank's receipt of a U.S. Treasury Department "Notice of Reclamation" of the overpayments. Skerry advised Sampson that he was handling the matter with the SSA and provided copies of his correspondence with the SSA, including his March 1, 2000 letter outlining the proposed settlement. Skerry testified that Sampson did not contact him again. Sampson testified that he knew Skerry to be an honest man, that Skerry had been on the list of attorneys the Bank retained for real estate closings, and that he would not have been on that list if he had not had a reputation in the community for honesty. Sampson was also aware that Skerry had sued Sampson's boss, Robert Surabian ("Surabian"), the president of the Bank, on behalf of Surabian's niece over a family matter and had obtained a settlement in the niece's favor against Surabian for a substantial amount of money.

Sampson also testified that although he was the vice-president of the Bank for residential lending and had no knowledge of, or experience with, notices of reclamation or social security, he was asked to handle the Culkeen matter. The "Notice of Reclamation" received by the Bank clearly stated that the Bank's liability would be limited if it followed the instructions set forth in the Notice within 60 days. The Notice directed that if the account funds were less than the social security overpayment amount, the existing funds should be paid by the Bank. If the account balance was zero, the Bank should instead simply provide the names and addresses of all withdrawers. In either event, the Notice of Reclamation obligated the Bank to mail notice to the account holder of any action it had taken or planned to take in response to the Notice. Neither Sampson, nor anyone at the Bank, responded to the Notice of Reclamation. The Bank subsequently elected to pay the $5,925.00 in its entirety to the U.S. Treasury Department. Sampson testified that the Bank had no legal obligation to do so, and had never requested a return of the funds from the SSA after its voluntary payment. The Bank did not issue any notice to Skerry of either its intent to make such payment, or of the fact that it had done so.

***3** Unaware of the Bank's action, Skerry paid $2,500.00 to the SSA as the first repayment installment.[2] On July 10, 2000, the Bank filed suit against both "David P. Skerry, Administrator of the Estate of Mary J. Culkeen" and "David P. Kerry, Individually." Service of the complaint on July 27, 2000 was not only the first notice Kerry received that the Bank had paid the Treasury Department, but also the first demand upon him for reimbursement. The complaint set forth claims for unjust enrichment and money had and received, and further alleged that Skerry, both as administrator and individually, had converted the $5,925.00 to his own use. Sampson testified that he never believed Skerry had converted the funds to his personal use, and that the Bank's usual approach in such situations was to sue the estate and not the individual. There was further testimony that the Bank had obtained a lien on the Culkeen house and that such lien was senior to any lien by the Department of

Medical Insurance for medicaid payments for the nursing home care of Culkeen.

Skerry retained two separate attorneys to represent him as administrator and individually, and filed separate answers and counterclaims. As administrator, he submitted a Mass. R. Civ. P. 68 offer of judgment in the amount of $6,083.30,[3] which the Bank accepted. The parties executed a stipulation of dismissal of all claims and counterclaims in the case against Skerry as administrator. Despite full satisfaction of its claim, the Bank delayed for a year, until the eve of trial, before filing a voluntary dismissal of its action against Skerry individually. Skerry's counterclaims were tried without a jury, and the judge assessed $10,000.00 in damages on the abuse of process counterclaim and doubled that sum for an award of $20,000.00 on the G.L. c. 93A counterclaim. The Bank argues on this appeal that the denial of its motion for involuntary dismissal was error because the evidence was insufficient as a matter of law to support a finding for Skerry on either counterclaim.

[1] 1. The Bank's Rule 41(b)(2) motion for involuntary dismissal was properly denied if "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn" in favor of Skerry. *Sonogram of New England, Inc. v. Metropolitan Prop. & Cas. Ins. Co.*, 2002 Mass.App. Div. 68, 70–71, quoting *Raunela v. Hertz Corp.*, 361 Mass. 341, 343, 280 N.E.2d 179 (1972). See also *DeVito v. Cellular Mobile Communications, Inc.*, 1993 Mass.App. Div. 48, 48–49. As the record is not devoid of evidence probative of Skerry's counterclaims, the Bank was not entitled to judgment in its favor as a matter of law. The Bank's Rule 41(b)(2) motion was, therefore, properly denied.

2. Abuse of process is the use of legal process "to accomplish some ulterior purpose for which it was not designed or intended, or which was not the legitimate purpose of the particular process employed." *Jones v. Brockton Public Markets, Inc.*, 369 Mass. 387, 389, 340 N.E.2d 484 (1975). It is "a form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money." *Vittands v. Sudduth*, 49 Mass.App.Ct. 401, 406, 730 N.E.2d 325 (2000), quoting from *Cohen v. Hurley*, 20 Mass.App.Ct. 439, 442, 480 N.E.2d 658 (1985). The essential elements of the tort are that "(1) process was used; (2) for an ulterior or illegitimate purpose; (3) resulting in damage." *Gutierrez v. Massachusetts Bay Transp. Auth.*, 437 Mass. 396, 407, 772 N.E.2d 552 (2002). There is no question here that the first and third elements were satisfied. Process was clearly used and Skerry suffered damage, including the legal fees he was compelled to incur to retain separate counsel to represent himself individually.

***4** **[2]** Skerry also points to the potential damage to his personal and professional reputation by the Bank's (or more properly, its executives') filing of what it knew to be groundless allegations that he had converted to his personal use funds he held as a fiduciary. The "ulterior or illegitimate purpose" element has been found in cases where, e.g., supplementary process was used to collect a debt known to have been already paid, *Lorusso v. Bloom*, 321 Mass. 9, 71 N.E.2d 218

(1947) or where property has been attached to enforce a claim known to be groundless. *Reardon v. Sadd,* 262 Mass. 345, 159 N.E. 751 (1928). Proof of motive or intent ordinarily requires the drawing of an inference. *Powers v. Leno,* 24 Mass.App.Ct. 381, 383–384, 509 N.E.2d 46 (1987). While the evidence is hardly overwhelming on this point, it would have permitted the trial judge to infer that the Bank proceeded with questionable intentions to level a groundless charge of conversion against Skerry. The responsible officer at the Bank regarded Skerry as a man of unquestioned probity and did not believe he had in any way misappropriated funds. The Bank, through this officer, knew that Skerry had repeatedly advised the SSA of the overpayments and had proposed a settlement plan for their return, and that Skerry handled the funds in the regular course of his administration of Culkeen's estate. The Bank had sued Skerry as administrator of that estate, and had secured its recovery on any judgment that may have entered in its favor by a lien on the estate's principal asset. The value of that asset far exceeded the $5,925.00 sought by the Bank. Yet the Bank departed from its customary practice of proceeding only against the estate and brought an additional, individual action against the very attorney who had prevailed in a costly lawsuit against the Bank's president.

While proof of ill will, bad intentions, or knowledge that a claim is groundless is not alone sufficient (or necessary) to establish liability for abuse of process, see *Beecy v. Pucciarelli,* 387 Mass. 589, 596, 441 N.E.2d 1035 (1982); *Bednarz v. Bednarz,* 27 Mass.App.Ct. 668, 673–674, 542 N.E.2d 300 (1989), it is relevant in proving ulterior or illegitimate purpose. *Ladd v. Polidoro,* 424 Mass. 196, 199–200, 675 N.E.2d 382 (1997); *Fishman v. Brooks,* 396 Mass. 643, 652, 487 N.E.2d 1377 (1986). See *Cady v. Marcella,* 49 Mass.App.Ct. 334, 342, 729 N.E.2d 1125 (2000). Further, where there is evidence that process has been utilized as a "threat or a club" to coerce or extort some collateral advantage, *Cohen v. Hurley, supra* at 442, 480 N.E.2d 658, or to "put pressure upon the [defendant] to compel him ... to take some ... action," *Powers v. Leno, supra* at 384, 509 N.E.2d 46, the requisite ulterior purpose may be found. The trial judge may well have inferred that the Bank's negligence in failing to comply with the Notice of Reclamation, compounded by its embarrassing mistake in electing to make a complete payment to the U.S. Treasury, rendered it particularly anxious to recover the money. The Bank may have questioned its ability to recover fully from the Culkeen estate what a trial court might have viewed as a gratuitous Bank payment of social security benefits that the estate was already repaying directly to the SSA. Thus it could have been reasonably concluded that the Bank's conversion claim against Skerry individually, with its threat to Skerry's reputation and practice, was designed to pressure him into quickly concluding the action by reimbursing the Bank in his capacity as administrator. So viewed, the Bank's groundless conversion claim was tortiously used as an "instrument of persuasion rather than a means of satisfaction," *Koonce v. Aldo Realty Trust,* 8 Mass.App.Ct. 199, 201, 392 N.E.2d 549 (1979), and constituted an abuse of process.

***5** 3. There was also no error in the denial of the Bank's motion for involuntary dismissal

of Skerry's G.L. c. 93A counterclaim for unfair and deceptive practices. Conduct amounting to an abuse of process may also constitute a violation of G.L. c. 93A and serve as the basis for a recovery under that statute. See, e.g., *Wyler v. Bonnell Motors, Inc.*, 35 Mass.App.Ct. 563, 624 N.E.2d 116 (1993).

[3] The Bank argues that because Skerry's G.L. c. 93A counterclaim referred specifically to a violation of the Fair Debt Collection Practices Act, 15 U.S.C. 1692(a)-(o), Skerry cannot recover under G.L. c. 93A for unfair and deceptive practices based upon abuse of process. Such argument overstates Massachusetts "notice pleading" principles which do not require that a complaint or counterclaim state a correct substantive theory of recovery and which do not require dismissal when the claim would support relief on an alternative theory. *Gallant v. Worcester,* 383 Mass. 707, 709–710, 421 N.E.2d 1196 (1981); *Berish v. Bornstein,* 437 Mass. 252, 269, 770 N.E.2d 961 (2002). It is established that the scope of "unfair and deceptive acts or practices" actionable under G.L. c. 93A is broader than common law or other statutory bases of recovery. See, e.g., *U.S. Funding, Inc. of America v. Bank of Boston Corp.,* 28 Mass.App.Ct. 404, 407, 551 N.E.2d 922 (1990). Moreover, Skerry's c. 93A counterclaim incorporated by reference the factual allegations of his first counterclaim[4] asserting, *inter alia,* that despite the Bank's knowledge that Skerry had negotiated a settlement with the SSA and had no knowledge of the Bank's voluntary payment, the Bank engaged in conduct "to harass ... and abuse" Skerry in an attempt to obtain reimbursement. Such allegations supported Skerry's claim for relief on an abuse of process theory.

[4] There is also no merit in the Bank's final contention that because Attorney Skerry practices law, he could not recover on his counterclaim pursuant to G.L. c. 93A, §§ 2 and 9 because § 9 excludes claims by persons engaged in "trade or commerce" who are entitled to recover under G.L. c. 93A, § 11. We need not decide whether the allegations of conversion of funds to his own use brought in a suit against Skerry as an individual amounted solely to an injury to him as one in trade or commerce. Given that Skerry's G.L. c. 93A claim was raised as a counterclaim and thus required no demand letter, and that there are no other differences between §§ 9 and 11 which are pertinent to this case, the distinction is immaterial.

[5] 4. We authorize an award of appellate attorney's fees to Skerry to be assessed by a trial court judge upon motion, detailed affidavit and notice. *Patry v. Liberty Mobilehome Sales, Inc.,* 394 Mass. 270, 272, 475 N.E.2d 392 (1985).

Judgment affirmed.

So ordered.

All Citations

Not Reported in N.E.2d, 2004 Mass.App.Div. 120, 2004 WL 1853343

Footnotes

1 No objection was ever filed to the inventory and accounts submitted by Skerry as conservator or administrator.

2 The record does not indicate whether the overpayment to the SSA was recovered.

3 This figure was apparently the sum of the $5,925.00 overpayment amount and costs.

4 Skerry's first counterclaim was captioned “Violation of Fair Debt Collection Practices Act.” His voluntary dismissal of that counterclaim prior to trial should have been a clear signal to the Bank that his G.L. c. 93A counterclaim was based on grounds other than the Bank's alleged violation of the federal statute.

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CASE NO. 32

2024 WL 5036568
Only the Westlaw citation
is currently available.
United States District Court,
S.D. Texas, Houston Division.

ASG CHEMICAL HOLDINGS, LLC, Plaintiff,
v.
BISLEY INTERNATIONAL, LLC, Defendant.

Civil Action H
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Signed November 18, 2024
|
Entered November 19, 2024

Attorneys and Law Firms

Laura Gibson, Mukul S. Kelkar, Dentons US LLP, Houston, TX, Cody Shane Paschall, James David Tuck, Dentons US LLP, Dallas, TX, for Plaintiff.

Dorsey R. Carson Jr., Kathryn Pickett Goff, Carson Law Group PLLC, Jackson, MS, for Defendant.

MEMORANDUM AND RECOMMENDATION

Peter Bray, United States Magistrate Judge

***1** This case has been referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1). ECF No. 45. Pending before the court is Third-Party Defendants Ward and B4 Arrow Consulting, LLC's 12(b)(6) Motion to Dismiss Bisley's Amended Third-Party Complaint (ECF No. 36), ECF No. 41. The court recommends that the motion be **GRANTED** in part and **DENIED** in part.

1. Background and Procedural Posture

ASG Chemical Holdings, LLC (ASG) filed suit against Bisley International, LLC (Bisley) alleging several causes of action including breach of contract, trademark infringement, unfair competition, and false advertising. ECF No. 40-1 at 1. In response, Bisley asserted counterclaims against ASG and filed a third-party complaint against John Ward and B4 Arrow Consulting, LLC (Ward and B4), among others. *See* ECF No. 36 at 19–20. Bisley alleges thirteen claims against Ward and B4 related to fraud, theft, misappropriation of trade secrets, and tortious interference with contractual relationships, among others. *See id.* at 38–65. Ward and B4 argue that Bisley has failed to allege facts that, if true, would demonstrate Ward and B4's liability, and they seek to have Bisley's claims against them dismissed under Federal Rule of Civil Procedure 12(b)(6).[1] ECF No. 41 at 5.

Bisley alleges that Ward and his company, B4 Arrow Consulting, LLC, were part of a larger concerted effort to steal Bisley's inventory, destroy Bisley's cash flow, and otherwise harm Bisley's business. ECF No. 36 ¶¶ 130, 132, 280.

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Bisley alleges that Ward "was a double agent acting on behalf of and/or for the benefit of **ASG**, himself, and [his] co-conspirators, while simultaneously operating as an employee of Riteks." *Id.* ¶ 6. According to **Bisley**, Riteks was a **Bisley** customer.[2] *Id.* ¶ 84. **Bisley** also alleges that Ward and B4 worked with others in this scheme, including:

- Ken Pryde, the former Vice President of **Bisley's** Operations, who "was a double agent acting on behalf of and/or for the benefit of **ASG**, himself, and [his] co-conspirators," *id.* ¶ 5;
- **ASG**, which is an **LLC** that conducted business with **Bisley**, *id.* ¶¶ 2, 16; and
- Jeff Koebrick and Claudio Manissero, who are the owners and operators of **ASG**, *id.* ¶ 2.

Bisley alleges a conspiracy between **ASG**, Ward and B4, and the remaining third-party defendants (Koebrick, Manissero, and Pryde). **Bisley** states that "**ASG** and Third-Party Defendants agreed to: terminate the non-compete clause between **ASG** and **Bisley** to take **Bisley's** current and potential business; retain monies owed to **Bisley**; purchase **chemicals** that were then converted to **ASG** and/or the co-conspirators, either directly or indirectly; stole inventory; and sold inventory off the books." ECF No. 36 ¶ 279.

***2** **Bisley** states that one part of the effort to harm **Bisley** included a plan to fraudulently request large orders of sodium aluminate from **Bisley**. *Id.* ¶ 160(k). Normally, when **Bisley's** customer, Riteks, needed sodium aluminate, Ward would issue a delivery request to **Bisley**. *Id.* ¶¶ 134–35. When **Bisley** received the request, **Bisley** would ship the inventory to the location that Ward requested for Riteks. *Id.* ¶ 136. **Bisley** would then issue an invoice to Riteks for payment. *Id.* ¶ 137. **Bisley** alleges that Ward deviated from that normal practice as part of his conspiracy against **Bisley**.

Bisley alleges that "B4 Arrow Consulting and Ward, along with the other Third-Party Defendants, conspired and issued fraudulent requests for the delivery of sodium aluminate, purportedly on behalf of Riteks, which resulted in **Bisley** shipping sodium aluminate and never receiving payment." ECF No. 36 ¶ 160(k). Specifically, "[o]n seven separate occasions, **Bisley** shipped 40,000 lbs of sodium aluminate to Riteks, at Riteks' request, but the shipments never arrived." *Id.* ¶ 138. **Bisley** alleges that "[u]pon information and belief, the shipments were re-routed, by Ward and/or B4 Arrow Consulting, and delivered to an undisclosed location. Neither Riteks nor **Bisley** requested that the carrier re-route any of the seven shipments." *Id.* ¶ 139.

Bisley also claims that Ward and B4 entered an agreement with Pryde and **ASG** to fraudulently inflate commissions paid by **Bisley** to Ward and B4. ECF No. 36 ¶¶ 187, 190. "Specifically, the price payable to Riteks was increased to account for commissions payable to B4 Arrow Consulting and/or John Ward." *Id.*

Bisley also alleges that Ward and B4 used **Bisley's** trade secrets to take **Bisley's** current and future potential customers. *Id.* ¶ 240. **Bisley** alleges that its customer information, the probability of its shipments, the prices it charges, revenue information, and the amount

it pays its carriers are all trade secrets that Pryde shared with Ward and B4. ECF No. 36 ¶¶ 234–39, 253, 257. **Bisley** states that Ward and B4 "now use **Bisley's** trade secrets and proprietary information in competition with **Bisley** to divert and steal, among other things, **Bisley's** current customers and future customers via **Bisley** leads." *Id.* ¶ 240.

Bisley claims that it reasonably protects its confidential and trade secret information, in part, by: "requiring all employees to maintain [ ] confidentiality ...; restricting employee access to proprietary and trade secret information ...; and enforcing disciplinary action against employees for improper use or disclosure of proprietary and trade secret information." ECF No. 36 ¶¶ 254, 260.

2. Rule 12(b)(6) Motion to Dismiss Standard

Rule 12(b)(6) authorizes the court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Generally, the court is constrained to the "four corners of the complaint" to determine whether the plaintiff has stated a claim. *Morgan v. Swanson*, 659 F.3d 359, 401 (5th Cir. 2011); *see also Loofbourrow v. Comm'r*, 208 F. Supp. 2d 698, 708 (**S.D**. **Tex**. 2002) ("[T]he court may not look beyond the four corners of the plaintiff's pleadings.").

"The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff," and "drawing all reasonable inferences in that party's favor." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205–06 (5th Cir. 2007). The pleading rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11 (2014); *see Skinner v. Switzer*, 562 U.S. 521, 530 (2011) ("[A] complaint need not pin plaintiff's claim for relief to a precise legal theory.").

***3** A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must also plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

3. Analysis

A. Fraud Claims: Counts I and II

Special pleading rules apply to claims of fraud. Fed. R. Civ. P. 9(b). Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Id.*; *see Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001) ("Rule 9(b) applies by its plain language to all averments of fraud, whether they are part of a claim of fraud or not.").

Generally, courts have required the pleading to lay out "the who, what, when, where, and how" of the alleged fraud to comply with Rule 9(b). *See Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir.), *modified on other grounds*, 355 F.3d 356 (5th Cir. 2003). Rule 9(b)'s application is context-specific, however, and "[d]epending on the

claim, a plaintiff may sufficiently 'state with particularity the circumstances constituting fraud or mistake' without including all the details of any single court-articulated standard —it depends on the elements of the claim at hand." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 188 (5th Cir. 2009). Where the facts are particularly within the perpetrator's knowledge, the pleading requirements are **held** to a lower standard. *See United States ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 385 (5th Cir. 2003).

i. Fraud: Count I

In Texas, the elements of fraud are:

> (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

Aquaplex, Inc. v. Rancho La Valencia, Inc., 297 S.W.3d 768, 774 (Tex. 2009) (quoting *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001)).

Ward and B4 argue that **Bisley** has not met its heightened burden under Rule 9(b) and that **Bisley** has not alleged any "representation" at all by Ward or B4. ECF No. 41 at 5. The court disagrees.

According to **Bisley**, when Riteks needed sodium aluminate in the normal course of business, Ward would issue a delivery request to **Bisley** on behalf of Riteks. ECF No. 36 ¶¶ 134–35. When **Bisley** received the request, **Bisley** would ship the inventory "to the location specified by Riteks through Ward." *Id.* ¶ 136. Then, **Bisley** would issue an invoice to Riteks for payment. *Id.* ¶ 137.

Bisley alleges that "B4 Arrow Consulting and Ward, along with the other Third-Party Defendants, conspired and issued fraudulent requests for the delivery of sodium aluminate, purportedly on behalf of Riteks, which resulted in **Bisley** shipping sodium aluminate and never receiving payment." ECF No 36 ¶ 160(k). Specifically, "[o]n seven separate occasions, **Bisley** shipped 40,000 lbs of sodium aluminate to Riteks, at Riteks' request, but the shipments never arrived." *Id.* ¶ 138. **Bisley** alleges that "[u]pon information and belief, the shipments were re-routed, by Ward and/or B4 Arrow Consulting, and delivered to an undisclosed location. Neither Riteks nor **Bisley** requested that the carrier re-route any of the seven shipments." *Id.* ¶ 139.

***4** The "statements" at issue here are fraudulent orders for sodium aluminate. The allegations include who made the fraudulent

orders, what the orders were for, and how the defendants engaged in fraud. Although **Bisley** does not state the specific dates those orders were placed or shipped, **Bisley** has stated with particularity the circumstances constituting fraud—that is, Ward, B4, and other third-party defendants placed seven large, false orders with **Bisley** that never arrived to the customer. Much of the information that **Bisley** does not allege in its complaint is information that is in Ward or B4's control, such as whether Riteks requested the orders of sodium aluminate, where Riteks asked for the orders to be shipped, and how Ward allegedly re-routed the shipment.

A party may meet the Rule 9(b) standard "without including all the details of any single court-articulated standard." *Grubbs*, 565 F.3d at 188. Here, **Bisley** alleged the circumstances of its fraud claims sufficient to survive Ward and B4's motion to dismiss. Ward and B4's motion to dismiss **Bisley's** fraud claim should be denied.

ii. Fraudulent Inducement: Count II

Texas law imposes "a duty to abstain from inducing another to enter into a contract through the use of fraudulent misrepresentations." *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018). Fraudulent inducement is a type of common law fraud that requires all the same basic elements of fraud and is actionable when the fraudulent misrepresentation "is a false promise of future performance made with a present intent not to perform." *Id.* Fraudulent inducement only arises in the context of an agreement, so "with a fraudulent inducement claim, the elements of fraud must be established as they relate to an agreement between the parties." *Haase v. Glazner*, 62 S.W.3d 795, 798–99 (Tex. 2001).

Ward and B4 argue that they "cannot be **held** liable for fraudulently inducing a contract to which they were not a party." ECF No. 41 at 8. Ward and B4 argue that they were not a party to the 2022 agreement between **Bisley** and **ASG** and that that they were not parties to any agreement with **Bisley** about their commission. *Id.*

Bisley agrees that Ward was not a party to the 2022 agreement. ECF No. 48 at 8. **Bisley** argues that its fraudulent inducement claim against Ward and B4 is based on "the *multiple* sales agreements Ward fraudulently induced **Bisley** to execute, including the sodium aluminate scheme." *Id.* 8–9. As discussed above, **Bisley** alleges that Ward was part of a scheme to harm **Bisley**. If **Bisley's** allegations are true, Ward induced **Bisley** to send seven large shipments of sodium aluminate as part of that scheme. ECF No. 36 ¶¶ 132–41. That is, Ward's fraudulent requests were not on behalf of Riteks, they were on behalf of Ward himself and his alleged co-conspirators. Any agreement requiring **Bisley** to send the seven orders of sodium aluminate would have been between Ward and **Bisley**. **Bisley** has met its burden at this stage in the proceedings. Accordingly, Ward and B4's motion should be denied on **Bisley's** fraudulent inducement claim.

B. Theft: Count IV

The Texas Theft Liability Act (TTLA) creates a civil cause of action against a person who

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commits theft under the Texas Penal Code. Tex. Civ. Prac. & Rem. Code §§ 134.002–.005. **Bisley** alleges (1) theft of property in violation of § 31.03 of the Texas Penal Code and (2) theft of services in violation of § 31.04 of the Texas Penal Code. ECF No. 36 ¶ 205–06. The court considers each in turn.

The Texas Penal Code provides that a person commits theft "if he unlawfully appropriates property with intent to deprive the owner of property." Tex. Penal Code § 31.03(a). Ward and B4 argue that "**Bisley** offers no specific or plausible allegations of what happened to these products." ECF No. 41 at 9–10. **Bisley** alleges that "**ASG** and Third-Party Defendants worked together to steal the products purchased by **Bisley** through numerous different schemes." ECF No. 36 ¶ 213.

***5** One theft scheme that **Bisley** alleges is Ward and B4's involvement in requesting seven fraudulent orders of sodium aluminate, discussed above. If **Bisley's** allegations are true, Ward and B4 placed false orders for large amounts of sodium aluminate and re-routed the shipments so they would not arrive to the customer. *See* ECF No. 36 ¶ 160(k). That is, based on **Bisley's** allegations, it is at least plausible that Ward and B4, along with others, fraudulently (i.e., without **Bisley's** effective consent) appropriated sodium aluminate with intent to deprive **Bisley** of the property. **Bisley** thus states a plausible claim for theft of property and Ward and B4's motion should be denied on this claim.

The Texas Penal Code also provides that a person commits theft of services if:

> with intent to avoid payment for service that the actor knows is provided only for compensation:
>
> (1) the actor intentionally or knowingly secures performance of the service by deception, threat, or false token; [or]
>
> (2) having control over the disposition of services of another to which the actor is not entitled, the actor intentionally or knowingly diverts the other's services to the actor's own benefit or to the benefit of another not entitled to the services[.]

Tex. Penal Code § 31.04(a).

Based on **Bisley's** amended pleadings, Ward and B4 argue that they "still do not know what services they supposedly stole or how they supposedly stole them." ECF No. 41 at 10. But **Bisley** alleges that, via the sodium aluminate scheme detailed above, Ward and B4 received **Bisley's** services of shipping the sodium aluminate through deception. ECF No. 36 ¶ 138. Thus, **Bisley** has adequately pleaded its claim for theft of services and Ward and B4's motion to dismiss should be denied on this claim.

C. Conversion: Count VII

Conversion is the "unauthorized and wrongful assumption and exercise of dominion and control over the personal property of another, to the exclusion of or inconsistent with the owner's rights[.]" *Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 447 (Tex. 1971). To establish conversion, a plaintiff must show that:

> (1) the plaintiff owned or had possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return the property.

Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc., 300 S.W.3d 348, 365–66 (Tex. App.—Dallas 2009, pet. denied).

Ward and B4 argue that "**Bisley** does not plausibly allege that Ward did anything improper with respect to [the sodium aluminate] shipments, when the shipments/conversion supposedly occurred, how the conversion occurred, or any details beyond the fact that **Bisley** thinks it is missing inventory and is guessing at the cause." ECF No. 41 at 10–11.

As discussed above, if **Bisley's** allegations are true, Ward and B4 placed false orders for large amounts of sodium aluminate and re-routed the shipments so they would not arrive to the customer. ECF No. 36 ¶¶ 132–41. That is, **Bisley** alleges that Ward and B4, along with others, exercised control over the sodium aluminate shipments inconsistent with **Bisley's** rights. **Bisley** states a plausible claim for conversion and Ward and B4's motion should be denied on this claim.

D. Trade Secret Claims: Counts V and VI

i. Trade Secret Misappropriation: Count V

To make a claim for misappropriation under the Texas Uniform Trade Secrets Act (TUTSA), a plaintiff must show that "(1) a trade secret existed, (2) the trade secret was acquired through a breach of a confidential relationship or was discovered by improper means, (3) the defendant used the trade secret without the plaintiff's authorization, and (4) the plaintiff suffered damages as a result." *Malone v. PLH Group, Inc.*, No. 01-19-00016-CV, 2020 **WL** 1680058, at *5 (Tex. App.—Houston [1st Dist.] Apr. 7, 2020, pet. denied); *see also* Tex. Civ. Prac. & Rem. Code § 134A. "Discovery by 'improper means' includes 'theft, fraud, unauthorized interception of communications, inducement of or knowing participation in a breach of confidence, and other means either wrongful in themselves or wrongful under the circumstances of the case.' " *Hoover Panel Sys., Inc. v. HAT Contract, Inc.*, 819 F. App'x. 190, 198 (5th Cir. 2020).

***6** Ward and B4 argue that **Bisley** has not alleged "which supposed secret or secrets the Ward Parties misappropriated." ECF No. 41 at 11. Ward and B4 also argue that **Bisley** did not allege that Ward or B4 used the secrets. *Id.* **Bisley** alleges that its customer information, the probability of its shipments, the prices it

charges, and the amount it pays its carriers are all trade secrets that Pryde shared with Ward and B4. ECF No. 36 ¶¶ 234–39. **Bisley** further alleges that Ward and B4 "now use **Bisley's** trade secrets and proprietary information in competition with **Bisley** to divert and steal, among other things, **Bisley's** current customers and future customers via **Bisley** leads." *Id.* ¶ 240. Ward and B4's arguments are without merit.

Ward and B4 also argue that **Bisley** did not allege when or how Pryde shared the secrets or how Ward or B4 engaged in any "improper means." ECF No. 41 at 11. **Bisley** need not allege the specifics about how Ward and B4 learned the alleged secrets. **Bisley's** burden is to plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Even so, **Bisley** alleges that Ward and B4, along with **ASG**, Koebrick, Manissero, and Pryde, are part of various schemes to steal **Bisley's** inventory, destroy **Bisley's** cash flow, and otherwise harm **Bisley's** business. ECF No. 36 ¶¶ 130, 132, 280. It is plausible that learning **Bisley's** customer list and prices as part of a larger effort to harm **Bisley** is "wrongful under the circumstances of the case." *See Hoover Panel Sys.*, 819 F. App'x. at 198. **Bisley's** motion to dismiss should be denied on this claim.

ii. Violation of DTSA: Count VI

The federal Defend Trade Secrets Act (DTSA) and TUTSA are both based on the Uniform Trade Secrets Act, and the elements under each are similar but not identical. *See DBG Grp. Invs., **LLC** v. Puradigm, **LLC***, **Civil Action** No. 3:21-CV-678-S, 2022 **WL** 313435, at *2 (N.D. Tex. Feb. 2, 2022). To allege a claim under the DTSA, the plaintiff must show that "(1) a trade secret existed, (2) the trade secret was acquired through a breach of a confidential relationship or discovered by improper means, and (3) the defendant used the trade secret without authorization from the plaintiff." *CAE Integrated, **L.L.C**. v. Moov Techs., Inc.*, 44 F.4th 257, 262 (5th Cir. 2022).

First, Ward and B4 argue that **Bisley's** DTSA claim fails because **Bisley** does not "identify specific trade secret information it claims has been misappropriated." ECF No. 41 at 12 (quoting *Clearline Techs. Ltd. v. Cooper B-Line, Inc.*, No. CIV.A. H-11-1420, 2012 **WL** 43366, at *11 (**S.D**. **Tex**. Jan. 9, 2012)). Ward and B4's argument is not persuasive. The court in *Clearline* did not define a cause of action under the DTSA. *Clearline Techs. Ltd.*, 2012 **WL** 43366, at *11. Rather, the cause of action in that case was the Illinois Trade Secret Act. *Id.* Also, the allegations of misappropriation in that case included that the defendant used "technical and financial information," and that the parties entered a Proprietary Information Agreement. *Id.* The court dismissed the claim and **held** that it "will not infer that trade secrets exist merely from the existence of a proprietary information agreement." *Id.*

Here, **Bisley's** allegations are clear. **Bisley** alleges that Ward and B4 used **Bisley's** "recent customer list and contact information, load counts, revenue information, and pricing and profit numbers." ECF No. 36 ¶¶ 253, 257. **Bisley** states that "[t]hese documents and information are unique to **Bisley** and are not

commonly known or available to the public." *Id.* ¶ 253.

***7** Ward and B4 also argue that **Bisley** failed to allege that the trade secret was not generally known or readily ascertainable by proper means. ECF No. 41 at 12–13. Courts have "routinely dismiss[ed] trade secret claims where the allegations of the complaint fail to separate the alleged trade secret from public knowledge and, therefore, do not establish that the alleged trade secret was 'not generally known' or 'readily ascertainable by proper means.' " *See Pie Development, **LLC** v. Pie Insurance **Holdings**, Inc.*, 2021 **WL** 3206043 (S.D. Miss. July 21, 2021), *aff'd*, No. 21-60593, 2023 **WL** 2707184 (5th Cir. Mar. 30, 2023). **Bisley's** allegations state that:

> **Bisley** takes reasonable steps to protect the secrecy of its confidential, proprietary, and trade secret information. **Bisley's** reasonable steps include but are not limited to: requiring all employees to maintain the confidentiality of proprietary and trade secret business information; restricting employee access to proprietary and trade secret information to employees with a legitimate business need to know such information; and enforcing disciplinary action against employees for improper use or disclosure of proprietary and trade secret information.

ECF No. 36 ¶¶ 254, 260 ("information misappropriated by **ASG** and Third-Party Defendants derives independent economic value from not being known within the industry to **Bisley's** competitors"). Thus, Ward and B4's argument fails here.

Ward and B4 also argue that "**Bisley** does not offer any explanation of how the Ward Parties supposedly 'disclosed or used' any of **Bisley's** alleged trade secrets." ECF No. 41 at 13. **Bisley** alleges that "**ASG** and Third-Party Defendants disclosed and used **Bisley's** recent customer list and contact information, load counts, revenue information, and pricing and profit numbers and other trade secret and proprietary information for the unlawful economic benefit of **ASG**[.]" ECF No. 36 ¶ 257. **Bisley** also alleges that Ward and B4 "use **Bisley's** trade secrets and proprietary information in competition with **Bisley** to divert and steal, among other things, **Bisley's** current customers and future customers via **Bisley** leads." *Id.* ¶ 233–42. **Bisley** has met its burden and Ward and B4's motion to dismiss **Bisley's** DTPA claim should be denied.

iii. TUTSA Preemption

TUTSA "displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret." Tex. Civ. Prac. & Rem. Code § 134A.007(a). TUTSA preemption prevents inconsistent theories of relief for the

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same underlying harm by displacing alternative common law theories of recovery that are based on trade secret misappropriation. *Super Starr Int'l, LLC v. Fresh Tex Produce, LLC*, 531 S.W.3d 829, 843 (Tex. App.—Corpus Christi–Edinburg 2017, no pet.). Trade secrets are defined broadly and include:

> all forms and types of information, including business [information], ... or list[s] of actual or potential customers or suppliers, whether tangible or intangible ... if:
>
> (A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
>
> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Id. § 134A.002(6). Whether a trade secret exists "is properly considered a question of fact to be decided by the judge or jury as fact-finder." *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 150 (5th Cir. 2004).

Federal district courts in Texas are not in agreement about how to apply TUTSA's preemption provision. *See, e.g., DHI Group, Inc. v. Kent*, 397 F. Supp. 3d 904, 922 (S.D. Tex. 2019) (comparing *Embarcadero Techs., Inc. v. Redgate Software, Inc.*, 1:17-cv-444-RP, 2018 WL 315753, at *3 (W.D. Tex. Jan. 5, 2018) (finding that TUTSA's preemption extends to "all claims based on the alleged improper taking of confidential business information") with *AMID, Inc. v. Medic Alert Found. United States, Inc.*, 241 F.Supp.3d 788, 827 (S.D. Tex. 2017) (allowing the plaintiff to allege misappropriation of information in the alternative under TUTSA as trade secrets and under common law as confidential)); *see also Topstone Communications, Inc. v. Xu*, No. 4:22-CV-00048, 2024 WL 1517637, at *6 (S.D. Tex. Apr. 8, 2024) ("TUTSA's preemption provision is best read to preempt only those claims that allege misappropriation of trade secrets.").

***8** Despite the widespread disagreement on certain aspects of TUTSA preemption, "[m]ost district courts in Texas hold that if a plaintiff's tort claim is premised on the same factual allegations as its claim for trade secret misappropriation, the claim is preempted by TUTSA." *Recif Res., LLC v. Juniper Cap. Advisors, L.P.*, Civil Action No. H-19-2953, 2020 WL 6748049, at *13 (S.D. Tex. Nov. 17, 2020); *see also Embarcadero Techs., Inc.*, 2018 WL 315753, at *3 (stating that "allow[ing] multiple theories of relief for [the] same underlying harm would be to read the preemption provision too narrowly"); *Amid, Inc.*, 241 F.Supp.3d at 826 (stating that the focus of the preemption analysis is "on whether the facts relied on to support the unfair-competition claim differ from those supporting the TUTSA claim"); *360 Mortg. Grp., LLC v. Homebridge Fin. Servs., Inc.*, CAUSE NO.: A-14-CA-00847-SS, 2016 WL 900577, at *8 (W.D. Tex. Mar. 2, 2016) (stating that a claim for conversion "based on the same facts as those underlying [a] claim for misappropriation of trade secrets" was wholly preempted).

The undersigned has previously considered this issue on multiple occasions. *See* *EthosEnergy Field Services, **LLC** v. Axis Mech. Group, Inc.*, No. CV H-21-3954, 2022 **WL** 2707734 (**S.D. Tex.** June 10, 2022), *R&R adopted*, No. CV H-21-3954, 2022 **WL** 2704853 (**S.D. Tex.** July 11, 2022); *see also* *Stress Eng'g Services, Inc. v. Olson*, No. CV H-21-3210, 2022 **WL** 4086574 (**S.D. Tex.** Aug. 4, 2022), *R&R adopted*, No. CV H-21-3210, 2022 **WL** 4084433 (**S.D. Tex.** Sept. 6, 2022). Here, as before, the court relies on the common thread among district courts. That is, common law claims are preempted when they are based on the same facts as a TUTSA claim.

Ward and B4 argue that *portions* of **Bisley's** claims are preempted by TUTSA because they depend on facts that **Bisley** relies on as trade secrets in its TUTSA claims. ECF No. 41 at 23. **Bisley** identifies its "customer and supplier lists, financial data, including the cost, revenue, and the probability of **Bisley's** shipments" as well as its customer information, prices it charges, and the amount it pays its carriers as trade secrets. ECF No. 36 ¶¶ 233–35.

None of **Bisley's** claims, aside from those under TUTSA and the DTSA, rely wholly on alleged trade secrets. Accordingly, to the extent that **Bisley's** tort claims are based on misappropriation of that which **Bisley** defines as its trade secrets, those theories of recovery should be dismissed. This ruling would not dismiss any claim in its entirety.

E. Civil Conspiracy: Count VIII

The elements of civil conspiracy are: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Agar Corp., Inc. v. Electro Circuits **Int'l**, **LLC***, 580 S.W.3d 136, 141 (Tex. 2019) (quoting *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983)).

Ward and B4 argue that **Bisley** fails to allege the third, fourth, and fifth elements. ECF No. 41 at 20. **Bisley** alleges that "**ASG** and Third-Party Defendants agreed to: terminate the noncompete clause between **ASG** and **Bisley** to take **Bisley's** current and potential business; retain monies owed to **Bisley**; purchase **chemicals** that were then converted to **ASG** and/or the co-conspirators, either directly or indirectly; stole inventory; and sold inventory off the books." ECF No. 36 ¶ 279. **Bisley** also alleges that, as part of the alleged conspiracy, Ward and B4 were part of a scheme to fraudulently request seven orders of sodium aluminate that never arrived to the customer. *Id.* ¶¶ 138–39, 160(k). Considering all of **Bisley's** allegations, **Bisley** has plausibly alleged each element of a conspiracy. That is, Ward and B4 were part of a meeting of the minds with **ASG**, Pryde, Koebrick, and Manissero; Ward and B4 performed overt acts in furtherance of the agreement, such as fraudulently ordering sodium aluminate; and **Bisley** was injured by the conspiracy.

***9** Ward and B4's comparison to *Twombly* is not instructive here. The court has already found that **Bisley** plausibly alleged fraud, theft, and conversion as part of the scheme to harm **Bisley**, which is more than "rational and

competitive business strategy [.]" *Twombly*, 550 U.S. at 566. Thus, **Bisley's** conspiracy claim survives and Ward and B4's motion should be denied for this claim.

F. Good Faith and Fair Dealing: Count XII

"Texas law does not impose a generalized contractual duty of good faith and fair dealing and, in fact, rejects it in almost all circumstances." *Hux v. S. Methodist Univ.*, 819 F.3d 776, 781 (5th Cir. 2016). A duty of good faith and fair dealing arises if the parties are (1) in a formal fiduciary relationship or (2) "in a special or confidential relationship." *Id.* A "special relationship" is "earmarked by specific characteristics including: long standing relations, an imbalance of bargaining power, and significant trust and confidence shared by the parties." *Id.* Texas courts have restricted "special relationships" to narrow situations between an insurer and an insured and have declined to extend the relationship to other situations including employer-employee, lender-borrower, and supplier-distributor. *Id.* at 781–82 (citing cases).

Bisley does not allege a formal fiduciary relationship nor a special relationship with Ward or B4. **Bisley** alleges that "Ward was a double agent acting on behalf of and/or for the benefit of **ASG**, himself, and [his] co-conspirators, while simultaneously operating as an employee of Riteks." ECF No. 36 ¶ 6. **Bisley** also alleges that Ward approved "inflated" commission prices "in his capacity as a Sales Director for Riteks," *id.* ¶ 328, and that the commissions arrangement "appears to have been separately agreed between Pryde, **ASG**, and Ward. Relevantly, these commissions were paid to B4 Arrow Consulting by **ASG**, rather than directly from **Bisley**." *Id.* ¶ 329.

Ward and B4 state that "Ward was an independent contractor/consultant engaged to locate potential customers for **Bisley**/**ASG**[.]" ECF No. 41 at 13 n.4.

Bisley has not alleged a formal fiduciary relationship, and the allegations do not show that Ward and **Bisley** had a long-standing relationship, an imbalance of bargaining power, nor that the parties shared significant trust. Accordingly, **Bisley** has not shown that it is plausibly entitled to relief, and Ward and B4's motion to dismiss should be granted on the breach of good faith and fair dealing claim.

G. Aiding and Abetting Breach of Fiduciary Duty: Count XIV

Ward and B4 argue that Texas does not recognize claims for aiding and abetting breach of fiduciary duty. ECF No. 41 at **18**. The Supreme Court of Texas recently stated that it "has not expressly decided whether Texas recognizes a cause of action for aiding and abetting." *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 224 (Tex. 2017).

Bisley cites to a case from the Southern District of Texas that analyzes a claim for aiding and abetting breach of fiduciary duty on a motion for summary judgment. ECF No. 48 at 20-21 (citing *PrevMED, Inc. v. MNM-1997, Inc.*, No. CV H-15-2856, 2017 **WL** 785656, at *12 (**S.D**. **Tex**. Feb. 28, 2017)). In that case,

similar to *First United Pentecostal Church of Beaumont*, it does not appear that the parties argued that the cause of action did not exist. *PrevMED, Inc.*, 2017 **WL** 785656, at *11–12; *see also* *First United Pentecostal Church of Beaumont*, 514 S.W.3d at 224 ("the parties do not raise or brief the question of whether such a cause of action exists in Texas, so we will assume, without deciding, that it does."). The court ultimately granted a motion for summary judgment on the claim for aiding and abetting breach of fiduciary duty. *PrevMED, Inc.*, 2017 **WL** 785656, at *11–12

***10** Texas appellate courts have not conclusively decided whether a claim for aiding and abetting exists. In 2011, the Dallas Court of Appeals recognized an aiding and abetting breach of fiduciary duty claim. *Darocy v. Abildtrup*, 345 S.W.3d 129, 137-38 (Tex. App.—Dallas 2011, no pet.). In analyzing this claim, the court stated that "[w]hen a defendant knowingly participates in the breach of a fiduciary duty, he becomes a joint tortfeasor and is liable as such." *Id.* at 137.

But in 2020, the San Antonio Court of Appeals separated a claim for "knowing participation in breach of fiduciary duty" from a claim of "aiding and abetting a breach of fiduciary duty." *Straehla v. AL Glob. Services, **LLC***, 619 S.W.3d 795, 803–04 (Tex. App.—San Antonio 2020, pet. denied). There, the court stated that the parties "do not dispute that knowing participation is a viable cause of action under Texas law. We, therefore, consider [Plaintiffs] claims to be for knowing participation in breach of fiduciary duty, and we do not separately consider aiding-and-abetting claims. We offer no opinion on whether an aiding-and-abetting cause of action is viable under Texas law." *Id.* at 803 n.3. Similarly, the Corpus Christi-Edinburg Court of Appeals noted that "when a breach of fiduciary duty claim fails, so should an aiding and abetting in the breach of fiduciary duty claim, *to the extent one exists in Texas.*" *Super Starr **Int'l**, **LLC***, 531 S.W.3d at 847 (emphasis added).

The Fifth Circuit **held** in 2018 that a party was not entitled to relief on an aiding and abetting claim and the defendant was entitled to judgment as a matter of law "because no such claim exists in Texas." *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 782 (5th Cir. 2018). There, the court **held** that "a federal court exceeds the bounds of its legitimacy in fashioning novel causes of action not yet recognized by the state courts." *Id.* at 781. When the district court recognized a cause of action for aiding and abetting, "despite ample warning, the district court exceeded its circumscribed institutional role and 'expanded Texas law beyond its presently existing boundary.' " *Id.*

Because the Supreme Court of Texas has not ruled on this issue and because the Fifth Circuit **held** that aiding and abetting claims do not exist in Texas, **Bisley** has not shown that it is entitled to relief on this claim. As such, Ward and B4's motion to dismiss should be granted on the aiding and abetting breach of fiduciary duty claim.

H. Tortious Interference Claims: Counts XV and XVI

i. Tortious Interference with Existing Contracts: Count XV

The elements for tortious interference with an existing contract are: "(1) an existing contract subject to interference, (2) a willful and intentional act of interference with the contract, (3) that proximately caused the plaintiff's injury, and (4) caused actual damages or loss." *Prudential Ins. Co. of Am. v. Fin. Review Services, Inc.*, 29 S.W.3d 74, 77 (Tex. 2000).

Ward and B4 argue that **Bisley** has not alleged the second or third elements of its claim. The court disagrees.

Bisley alleges that, as part of a larger scheme to harm **Bisley**, Ward and B4 "increased sales prices causing **Bisley** to pay inflated commission rates that exceeded the rates agreed to in the Agreements" and "conspired to destroy **Bisley's** cash flow by ordering mass amounts of sodium aluminate on 'consignment' for Riteks." ECF No. 36 ¶¶ 349–50. **Bisley's** allegations state that **Bisley** had to "pay inflated commission rates" due to Third-Party Defendants' actions. *Id.* ¶ 349. As such, **Bisley** has plausibly stated a claim to relief and Ward and B4's motion should be denied for **Bisley's** tortious interference with existing contracts claim.

ii. Tortious Interference with Prospective Contracts: Count XVI

***11** The elements for tortious interference with prospective contracts require:

> (1) a reasonable probability that the parties would have entered into a contractual relationship; (2) an "independently tortious or unlawful" act by the defendant that prevented the relationship from occurring; (3) the defendant did such act with a conscious desire to prevent the relationship from occurring or knew that the interference was certain or substantially certain to occur as a result of his conduct; and (4) the plaintiff suffered actual harm or damage as a result of the defendant's interference.

Faucette v. Chantos, 322 S.W.3d 901, 914 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

Ward and B4 argue that **Bisley** failed to allege "the elements of this cause of action for any of these potential customers[.]" ECF No. 41 at 15. But **Bisley** has met its burden. For example, **Bisley** alleges that, after a potential customer contacted **Bisley** through its website, **Bisley** sent that potential customer a sample of its product. ECF No. 36 ¶ 52. Then, Ward, with others, excluded **Bisley** from further conversations with the customer and negotiated a sale by **ASG**, "bypassing and stealing business from **Bisley**." *Id.* ¶¶ 49–57. This plausibly states that Ward, as part of a larger scheme against **Bisley**, unlawfully acted to

prevent **Bisley** from engaging in conversations with a potential customer. **Bisley** has alleged each element of a claim for tortious interference with a prospective contract, and Ward and B4's motion should be denied on this claim.

I. Business Disparagement: Count XVII

Business disparagement is actionable when there is "publication of a disparaging statement concerning the product [or services] of another" and "(1) the statement is false, (2) published with malice, (3) with the intent that the publication cause pecuniary loss or the reasonable recognition that it will, and (4) pecuniary loss does in fact result." *Innovative Block of S. Tex., Ltd. v. Valley Builders Supply, Inc.*, 603 S.W.3d 409, 417 (Tex. 2020).

Ward and B4 argue that **Bisley** merely recites the elements of business disparagement and does not allege any false statements sufficient to plead a claim. ECF No. 41 at 16. Indeed, **Bisley** states that "**ASG** and Third-Party Defendants have made disparaging oral statements about **Bisley's** business to many vendors and customers" knowing that these statements would likely result in inducing others not to deal with **Bisley**. ECF No. 36 ¶¶ 361–62. **Bisley** also alleges that Ward and B4 were part of a concerted effort to direct potential business away from **Bisley**. *Id.* ¶ 83.

Bisley also alleges that "[i]n May 2022, Pryde informed **Bisley** that Eastern Wholesale Fence, **LLC** ("Eastern Fence"), a major **Bisley** account, would no longer be a customer of **Bisley's** due to its financial difficulties." *Id.* ¶ 88. Ward and B4 argue that this is not sufficient to allege that Ward made any disparaging statements about **Bisley** at all. ECF No. 41 at 16–17. The court agrees. Because **Bisley** has not alleged that Ward or B4 made untrue statements about **Bisley** with the intent to cause **Bisley** pecuniary loss, Ward and B4's motion should be granted for **Bisley's** business disparagement claim.

J. Unjust Enrichment: Count XVIII

***12** Unjust enrichment occurs when someone secures a benefit wrongfully or passively receives a benefit that would be unconscionable to retain. *Eun Bok Lee v. Ho Chang Lee*, 411 S.W.3d 95, 111 (Tex. App.—Houston [1st Dist.] 2013, no pet.). To successfully assert a claim for unjust enrichment, a party must allege that "one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992).

Ward and B4 argue that **Bisley's** unjust enrichment claim fails because **Bisley** has not plausibly alleged (1) how third-party defendants "obtained a benefit" from their acts or (2) that Ward or B4 committed any acts constituting fraud, duress, or taking undue advantage. ECF No. 41 at 17. Ward and B4 also argue that two of **Bisley's** theories to support its claim for unjust enrichment fail because they are restated breach of contract claims. *Id.*

As the court explained above, **Bisley** alleges that Ward and B4 earned inflated commissions for some sales to Riteks. ECF No. 36 ¶ 326. These commissions, **Bisley** alleges, were part

of a larger scheme to harm **Bisley**. *Id.* ¶¶ 349–50. These allegations plausibly state that Ward and B4 *obtained a benefit* by *taking advantage of* ***Bisley*** and as part of a larger scheme to harm **Bisley**. At this stage in the proceedings, the court cannot say that this is a restated breach of contract claim. Ward and B4's motion should be denied for **Bisley's** unjust enrichment claim.

K. Request for Injunctive Relief

Bisley requests injunctive relief against **ASG** and Third-Party Defendants. ECF No. 36 ¶¶ 460–66. Ward and B4 argue that the court should dismiss this request for relief because **Bisley** has not plausibly alleged a likelihood of success on the merits of any of its claims. ECF No. 41 at 23–24. Because the court found otherwise above, Ward and B4's motion to dismiss **Bisley's** claim for injunctive relief should be denied.

L. Leave to Amend

The parties engaged in significant briefing on this motion to dismiss. Yet, in the last sentence of its response, **Bisley** states, "[i]n the event the Court finds **Bisley's** Third-Party Complaint deficient, **Bisley** requests permission to amend." ECF No. 48 at 25.

"Dismissing an action after giving the plaintiff only one opportunity to state his case is ordinarily unjustified." *Davoodi v. Austin Indep. Sch. Dist.*, 755 F.3d 307, 310 (5th Cir. 2014) (quoting *Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986)). A party seeking leave to amend "must give the court at least some notice of what ... [his] amendments would be and how those amendments would cure the initial complaint's defects." *Scott v. U.S. Bank Nat'l Ass'n*, 16 F.4th 1204, 1209 (5th Cir. 2021) (citation omitted). The court may deny leave "[i]f the plaintiff does not provide a copy of the amended complaint [or] explain how the defects could be cured." *Id.* (citation omitted).

Here, **Bisley** has amended its third-party complaint once before, it has not provided a copy of its newest proposed amended third-party complaint, and it has not explained how any defects in its pleading might be cured. **Bisley** has not stated any arguments or provided any legal support for its cursory request. Thus, to the extent that **Bisley** asks for leave to amend, that motion should be denied.

4. Conclusion

For the foregoing reasons, the court recommends that Ward and B4's Motion to Dismiss, ECF No. 41, be **GRANTED** in part and **DENIED** in part.

***13** The parties have fourteen days from service of this Memorandum and Recommendation to file written objections. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72. Failure to timely file objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See Thomas v. Arn*, 474 U.S. 140, 147–49 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276–77 (5th Cir. 1988).

All Citations

Slip Copy, 2024 WL 5036568

Footnotes

1 The court advised the parties of Judge Lake's normal practice to "allow only one dispositive motion per party." ECF Nos. 68, 73, Ward and B4 provided the court with their intent to proceed with their motion to dismiss. ECF No. 70. Ward and B4 are therefore barred from later seeking summary judgment on any remaining third-party claims against them. ECF No. 68.

2 **ASG** also alleges that "Riteks was one of **ASG's** key clients." ECF No. 40-1 ¶¶ 46–47.

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CASE NO. 33

2024 WL 5108450
Only the Westlaw citation
is currently available.
United States District Court,
S.D. **Texas**, Houston Division.

ASG CHEMICAL HOLDINGS, LLC, Plaintiff,
v.
BISLEY INTERNATIONAL, **LLC**, Defendant.

Civil Action H
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4333
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Filed December 12, **2024**
|
Entered December **13**, **2024**

Attorneys and Law Firms

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Dorsey R. Carson, Jr., Kathryn Pickett Goff, Carson Law Group PLLC, Jackson, MS, for Defendant.

ORDER

Sim **Lake**, Senior United States District Judge

***1** On November 18, **2024**, Magistrate Judge Peter Bray recommended that the court grant in part and deny in part Third-Party Defendants Ward and B4 Arrow Consulting **LLC's** 12(b)(6) Motion to Dismiss **Bisley's** Amended Third-Party Complaint. ECF No. 98. On December 3, **2024**, Third-Party Defendants Ward and B4 Arrow Consulting **LLC** objected to the Memorandum and Recommendation. ECF No. 102. The objections are **DENIED.** The court **ADOPTS** the memorandum and recommendation as its memorandum and opinion.

All Citations

Slip Copy, 2024 WL 5108450

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CASE NO. 34

2010 WL 2488031
United States District Court,
S.D. **Texas**,
Laredo Division.

SPECIALTIES OF
MEXICO INC. et al, Plaintiffs
v.
MASTERFOODS USA.

Civil Action
No.
L
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09
–
88
.
|
June **14**, **2010**.

West KeySummary

1 **Sales** 🔑 By seller

Purchasers of candy failed to show an overarching agreement with candy sellers and thus failed to establish a breach of contract when seller ended the business relationship by refusing to fill purchaser's requests for product. Purchasers did not allege a specific offer, acceptance, consideration, or material terms such as the duration of the alleged contract, a quantity to be sold, or a price to be paid.

6 Cases that cite this headnote

Attorneys and Law Firms

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J.A. Tony Canales, Nancy M. Simonson, Canales Simonson PC, Corpus Christi, TX, Dane H. Butswinkas, David S. Blatt, John E. Clabby, Williams & Connolly LLP, Washington, DC, for **Masterfoods USA**.

ORDER

MICAELA **ALVAREZ**, District Judge.

***1** On January 26, **2010**, Defendant **Masterfoods USA** ("Defendant") filed the instant Motion to Dismiss Plaintiff **Specialties** of **Mexico**, Inc. ("SoM") and Plaintiff Distribuidora de Basicos Regiomontanos, S.A. de C.V.'s ("Dibaresa") (collectively "Plaintiffs") First Amended Complaint, in its entirety, under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted." [Dkt. Nos. 35, 36]. After careful consideration of Defendant's Motion, the contents of the complaint, and the applicable law, the Court GRANTS, in part, and DENIES, in part, Defendant's Motion.

I. BACKGROUND

The following facts are taken from Plaintiffs' First Amended Complaint, [Dkt. No. 32].

Plaintiff SoM is a Texas corporation, based out of Laredo, Texas. [*Id.* at 1]. Beginning in 2004, SoM bought chocolate candy from Defendant **Masterfoods USA** in the United States. [*Id.*]. **Masterfoods USA** is a Delaware corporation, doing business in Texas. [*Id.* at 1]. After purchasing the candy in the United States, SoM would transfer the candy to Co-plaintiff Dibaresa, a Mexican Corporation, who would then sell it to retail customers in **Mexico**. [*Id.*]. Both of the Plaintiff corporations, SoM and Dibaresa, are run by the same individual, Gerardo Cantu. [*Id.* at 3].

As SoM's Mexican counterpart is Dibaresa, Defendant **Masterfoods USA's** Mexican counterpart is **Masterfoods Mexico**. Plaintiffs allege that **Masterfoods USA** and **Masterfoods Mexico** are both "controlled and directed" by Mars, Inc., with **Masterfoods USA** handling candy sales in the United States and **Masterfoods Mexico**[1] handling candy sales in **Mexico**. [*Id.* at 12]. Importantly, neither **Masterfoods Mexico**, nor Mars, Inc., has been named as a defendant in this case; **Masterfoods USA** is the sole named defendant.

SoM would purchase the candy in Texas from **Masterfoods USA** through a third party, Sell–Thru Services, Inc. ("Sell–Thru").[2] [*Id.*]. SoM would place orders with Sell–Thru, and Defendant would fill them. [*Id.*]. "Dibaresa did not buy product in the United States or deal directly with Defendant [**Masterfoods USA**]." [*Id.* at 18].

When the relationship between SoM and **Masterfoods USA** began, **Masterfoods USA** was "aware that the products being ordered were for sale in **Mexico**." [*Id.* at 3]. With that knowledge, Plaintiffs allege that **Masterfoods USA** agreed to "sell product to [SoM][3] that [**Masterfoods Mexico**] did not have in its portfolio," in order to "maximize the sales of Mars, Inc." [*Id.* at 10, 5].

In December 2005, **Masterfoods Mexico**, aware of Dibaresa's sales in **Mexico** but unaware of where the imported candy was coming from, contacted Cantu to discuss the possibility of selling candy to Dibaresa in **Mexico**. [*Id.* at 5]. In April 2006, **Masterfoods Mexico** began contacting Dibaresa customers in **Mexico**, and offering to provide them with the same products as Dibaresa, at a lower price. [*Id.* at 6]. Dibaresa agreed to buy certain products from **Masterfoods Mexico**, but continue to handle the rest of its products through the United States. [*Id.* at 7]. "**Masterfoods** [**Mexico**][4] pressured Dibaresa concerning its source of supply and prices." [*Id.*].

***2** "In April 2007, Dibaresa became aware that **Masterfoods** [**Mexico**][5] was acting very differently from what it was representing to Dibaresa." [*Id.*]. Specifically, **Masterfoods Mexico** was instructing Dibaresa customers to stop buying from Dibaresa because "Dibaresa was doing a lot of damage to the market," and that if they did not stop buying from Dibaresa, **Masterfoods Mexico** would not sell them any other products. [*Id.*]. Dibaresa then wrote to "Daniel Gilbert[6] asking for an explanation because the information and plans that Dibaresa had disclosed were being used by **Masterfoods** [**Mexico**][7] against Dibarsea." [*Id.*].

During this time, SoM continued to buy products from **Masterfoods USA** in the United States, and the two continued their business relationship. [*Id.*]. In May 2007, Ken Fridey, an employee of **Masterfoods USA**, wrote Cantu saying "I spoke with [**Masterfoods**] **Mexico** yesterday and they advised me that they are still working on a proposal for you. For now, it is business as usual until they finalize their proposal." [*Id.*].

Through July 2007, SoM[8] continued to "[issue] purchase orders and [buy] Mars product [from **Masterfoods USA**] through Sell–Thru." [*Id.*]. "SoM and Dibaresa continue[d] to promote Defendant's products in **Mexico**, and introduce [Ken Fridey] to customers such as 7–Eleven **Mexico** at product expositions in **Mexico** in September 2007." [*Id.* at 8]. In October 2007, Sell–Thru informed Cantu that Ken Fridey had instructed Sell–Thru to stop supplying **Masterfoods USA's** product to SoM. [*Id.*]. Ken Fridey informed Cantu that any future products should be purchased from **Masterfoods Mexico**. [*Id.*]. Ultimately, in January 2008, Sell–Thru refused to sell Cantu any of **Masterfoods USA's** products, at the request of **Masterfoods USA**. [*Id.*].

Cantu then tried to purchase candy products through **Masterfoods Mexico**, but encountered problems, such as products with "short expiration dates," "mislabeling," and sometimes no response at all. [*Id.* at 10]. In the Spring of 2008, "Cantu learned that while **Masterfoods** [**Mexico**] was representing that it would supply product, **Masterfoods** [**Mexico**] was contacting Dibaresa's clients such as OXXO and 7–Eleven, and telling them that **Masterfoods** [**Mexico**] was going to be the ones (sic) supplying the products and at a price below Dibaresa's price." [*Id.* at 11]. Cantu confronted **Masterfoods Mexico** about this action in an email, and **Masterfoods Mexico** did not respond. [*Id.*]. In December 2008, **Masterfoods Mexico** disclosed that they "now wanted to decide what entered into **Mexico** and what would not enter according to its brand strategy." [*Id.* at 12]. Cantu tried to continue the relationship in early 2009, but **Masterfoods Mexico** "basically shut out SoM and Dibaresa through its operations in **Mexico**, [**Masterfoods USA's**] refusal to sell in the **USA** and Sell–Thru's refusal to sell without Defendant's approval." [*Id.*].

***3** On July 3, 2009, SoM and Dibaresa filed this action against **Masterfoods USA** in the 111th Judicial District Court, Webb County, Texas. [Dkt. No. 1]. On August **14**, 2009, **Masterfoods USA** removed the case to this Court, on the basis of diversity jurisdiction, 28 U .S.C. § 1332, as Plaintiff SoM is a Texas corporation, Plaintiff Dibaresa is a Mexican corporation, Defendant **Masterfoods USA** is a Delaware Corporation, and the amount in controversy exceeds $75,000. [*Id.*]. On January 5, **2010**, Plaintiffs filed their First Amended Complaint, alleging: (1) breach of contract; (2) breach of duty of good faith and fair dealing; (3) tortuous interference with contract and business relations; (4) common law fraud; (5) negligent misrepresentation; (6) three claims under Mexican Law; and (7) civil conspiracy. [Dkt. No. 32]. In the instant motion, **Masterfoods USA** asserts that each claim should be dismissed for failure to state a claim under Rule 12(b)(6), and each will be discussed in turn.

II. DISCUSSION

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must state "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). "The pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, —— U.S. ——, ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). For a complaint to withstand a Rule 12(b)(6) motion to dismiss, it "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* A complaint meets this requirement when it contains facts that allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* When evaluating a complaint against a 12(b)(6) motion, the Supreme Court in *Iqbal* further clarified:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.... Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show[n]"-"that the pleader is entitled to relief."

Id. at 1949–50 (citing FED. R. CIV. P. 8(a)(2)). After recognizing the applicable standards set out in Iqbal and Twombly, the Court now turns to the merits of Defendant's motion.

A. Choice of Law

In contract, Plaintiffs claim breach of contract and breach of the duty of good faith under Texas law. [Dkt. No. 32 at 12–14]. Neither Plaintiffs nor Defendant contend that any law other than Texas should govern theses claims. In addition to Texas contract claims, Plaintiffs plead tort claims under both Texas and Mexican law. [Dkt. No. 32 at 14–21]. Because a court must draw its own "legal conclusions" in addressing a Rule 12(b)(6) motion, the initial conclusion to be reached is whether Texas or Mexican law governs Plaintiffs' claims.

***4** A federal district court exercising diversity jurisdiction must apply the choice of law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). This Court, sitting in Texas, applies Texas choice of law principles. In making a choice-of-law determination, Texas courts apply the "most significant relationship test," as it is set forth in the Restatement (Second) of Conflict of Laws (1971). *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400, 403 (5th Cir.2004) (citing *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420–21 (Tex.1984)).

The Restatement applies a fact-based analysis, with § 6(2) laying out a list of factors relevant to a choice of law:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 6(2) (1971). Also applicable to the instant case, and helpful when applying the § 6 factors, are the later sections of the Restatement which lay out specific contacts to be taking into consideration for different types of claims. Section 188 governs contract disputes, and § 145 governs tort disputes. As Plaintiffs' amended complaint consists of both contract and tort claims, the Court will consider factors under both sections:

§ 188. [Contracts] Law Governing In Absence of Effective Choice By The Parties

...

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

...

§ 145. [Torts] The General Principle

...

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §§ 188, 145 (1971).

Plaintiffs' contract claims are based on the relationship between Plaintiff SoM and Defendant **Masterfoods USA**, and their dealings in Texas. Defendant **Masterfoods USA** is a Delaware corporation, doing business in Texas. [Dkt. No. 32 at 1–2]. Plaintiff SoM is a Texas corporation. Under § 188, Plaintiffs' Amended Complaint does not specify the place of contracting or the place of the negotiation of the contract, but as the parties' relationship is centered in Texas, both are most likely Texas. The place of performance was "the United States," again presumably Texas, as Plaintiffs would later transfer the products into **Mexico**.

[*Id.* at 3]. The subject matter of the contract is not as applicable in this case as in others, as the subject matter here is an obligation to sell, instead of a tangible item. The alleged breach, by refusing to sell, also occurred in Texas. The alleged damages arise from "lost sales and profits," which also presumably arose in Texas, as it is not alleged that Plaintiff SoM ever sold products directly in **Mexico**. [*Id.* at 13].

***5** Plaintiffs' tort claims are also based on dealings between Plaintiff SoM and Defendant **Masterfoods USA**, but in a slightly different manner. Plaintiffs allege that Defendant **Masterfoods USA** communicated misrepresentations to Plaintiff SoM about the intentions and actions of (non-party) **Masterfoods Mexico**. [*Id.* at 7]. The damages arising from the various torts alleged center around the loss of business and customers in **Mexico** by Plaintiff Dibaresa, due to (non-party) **Masterfoods Mexico's** actions. The interactions between Plaintiff Dibaresa and **Masterfoods Mexico**, both Mexican corporations, occurred in **Mexico** and thus would argue for the application of Mexican law. However, as a non-party, **Masterfoods Mexico's** nationality is irrelevant in a suit against only **Masterfoods USA**. Under § 145, the alleged misrepresentations by Defendant were made and received in Texas. Reliance allegedly occurred in both Texas and **Mexico**, with Plaintiff SoM relying on the representations in Texas and Plaintiff Dibaresa relying on the representations in **Mexico**.

Under the general factors of § 6, "the protection of justified expectations" would weigh in favor of the application of Texas law. SoM's relationship with **Masterfoods USA** was centered in Texas, so both would be justified in expecting Texas law to govern this relationship. Also, "ease in the determination and application of the law to be applied" would argue for Texas over Mexican law, as this Court sits in Texas. While **Mexico** certainly has an interest in protecting the rights of Dibaresa as a Mexican Corporation, Texas has the same interests in protecting the rights of SoM as a Texas corporation and **Masterfoods USA** as a corporation licensed to do business, and doing business, in Texas. Texas also has an interest in resolving disputes arising within its borders. The fact that any claim Plaintiff Dibaresa may have against non-party **Masterfoods Mexico** concerning dealings in **Mexico** can be adjudicated under Mexican law in a Mexican court, also argues for the corollary, the application of Texas law in a United States court to dealings between SoM and **Masterfoods USA**. It must also be noted that so far as an application of Texas law is adverse to Plaintiffs interests, it was Plaintiffs themselves who chose a Texas forum in which to bring suit.

Considering all of these factors, the Court finds that Texas law should govern all of Plaintiffs' claims against Defendant **Masterfoods USA** under the "most significant relationship" test. This determination "necessarily precludes the application of [Mexican] law." *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 680 (5th Cir.2003). Thus, Plaintiffs' claims under Mexican law are DISMISSED, and Texas law will govern the remainder of Plaintiffs' claims.

B. Breach of Contract

To prevail on a claim for breach of contract in Texas, a plaintiff must show: "(1) existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach of contract by the defendant, and (4) damages caused by the breach." *Royce Bane Invs., Inc. v. McGinn*, 2008 WL 4335115, *2 (Tex.App.-Tyler 2008) (citing *Roof Sys., Inc. v. Johns Manville Corp.*, 130 S.W.3d 430, 442 (Tex.App.-Houston [14th Dist.] 2004, no pet.)). To establish the first element, existence of a valid contract, the plaintiff must show "(1) an offer, (2) acceptance, (3) meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding." *Id.* (citing *Cessna Aircraft Co. v. Aircraft Network, L.L.C.*, 213 S.W.3d 455, 465 (Tex.App.-Dallas 2006, pet. denied)).

***6** Plaintiffs assert that an overarching agreement existed with Defendant, beyond individual purchase orders, which Defendant breached by ending the business relationship and refusing to fill Plaintiffs' further requests for product. However, Plaintiffs' depiction of the agreement in the Complaint does not go beyond vague assertions. Plaintiffs' *entire* discussion of the agreement and the factual assertions in support of the same are as follows:

> **14**. In January 2006, [Defendant] presented Cantu with a contract containing the terms of the relationship between [Defendant] and [Plaintiffs]. The contract confirmed the off-invoice allowance and requirements. [SoM] was required to exercise its best efforts to participate in [Defendant's] launches of product and pass through the off-invoice allowance to retailers.
>
> ...
>
> 40. [Defendant] agreed that it would sell product to Dibaresa that [**Masterfoods Mexico**] did not have in its portfolio....
>
> 41. [Ken] Fridey confirmed to Cantu that [Defendant] would supply [Plaintiffs] going forward. Fidey (sic) wrote on March 24, 2008:
>
> > Gerardo, it is encouraging that [**Masterfoods Mexico**] is working with you to create a long term solution for your business needs. I will confirm with [**Masterfoods Mexico**] the business agreement on how [Defendant] will supply you going forward....
>
> ....
>
> 44.... Fridey received purchase order (sic) from [SoM] and indicated that in accordance with the agreement with [**Masterfoods Mexico**], he could not supply [SoM]. This was in contradiction to the representation that [Defendant] would supply the product if [**Masterfoods Mexico**] would not.
>
> ...
>
> 53. [Defendant] breached the agreement with Plaintiff [SoM] by refusing to sell product it had agreed to sell. Fridey specifically agreed that [Defendant] would sell Products to [SoM] that **Masterfoods Mexico** would not sell. As a result of the breach, Plaintiff [SoM] suffered damages. [Defendant] refused to sell products after **Masterfoods Mexico** refused to sell products to Dibaresa. Such breach of contract by Defendant

> has proximately caused actual and special damages to Plaintiff, including lost sales and profits, out of pocket expenses to cover the customer's (sic) needs, lost investment opportunities and damage to Plaintiff's credit, business reputation and goodwill.

[Dkt No. 32 at 5–13]. Also, in response to the instant motion, Plaintiffs admit that this overarching agreement to continue to provide products was never reduced to writing. [Dkt. No. 40 at 5]. Paragraph **14** of the complaint must be read in the context of this admission, leading to the conclusion that the "off-invoice allowances and requirements" mentioned in the January 2006 writing did not include an agreement by Defendant to sell products to Plaintiffs in the future. Plaintiffs go on, in paragraph 40, to nakedly assert that "[Defendant] agreed that it would sell product to Dibaresa that [**Masterfoods Mexico**] did not have in its portfolio," but do not allege a specific offer, acceptance, consideration, or material terms such as the duration of the contract, a quantity to be sold, or a price to be paid. Paragraph 41, even in the light most favorable to Plaintiffs, is neither an offer nor an acceptance. Paragraph 44 alleges facts to show that at some point (no date is indicated) Defendant received a purchase order from Plaintiffs which it refused to fill. But, without previously pleading the specifics of Defendant's obligations under the agreement, Plaintiffs are unable to demonstrate how this refusal to sell was actually a breach of contract. Again, in paragraph 55, Plaintiffs simply assert that there was an agreement to sell that was breached.

***7** In sum, Plaintiffs continually refer to "the agreement," but never give any specifics of the agreement itself: offer, acceptance, consent to its terms, the terms themselves (such as duration), or consideration. Plaintiffs have pleaded sufficient facts to establish a business relationship between SoM and **Masterfoods USA**, that of buyer and seller over time. But Plaintiffs have failed to plead sufficient facts to establish the plausibility of an overarching, binding "contract" to sell between the two that would be breached when this relationship came to an end. While Rule 8 does not require a plaintiff to plead every detail of a contract in order to proceed on a claim for breach, it does require more than what Plaintiffs have provided in the Complaint. Plaintiffs have pleaded no facts that would suffice to move their claim for breach of contract from "possible" to "plausible," as required by *Twombly,* and therefore must be DISMISSED.

Additionally, given the admission that the contract was never reduced to writing, Plaintiffs claim for breach of contract may also be barred by the statute of frauds, under the Texas Business and Commerce Code § 2.201:

> (a) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party

> against whom enforcement is sought.

TEX. BUS. & COM.CODE § 2.201 (2009). Though Plaintiffs have not characterized the contract as a "requirements" contract, such contracts are also required to be in writing by § 2.201. *Royce Bane Invs., Inc. v. McGinn,* 2008 **WL** 4335115, n. 2 (Tex.App.-Tyler 2008). Also, if the duration of the contract was to be longer than one year, again, a writing would be required for enforcement. TEX. BUS. & COM.CODE § 26.01(b)(6) (2009). However, the factual insufficiencies in the Complaint which warrant dismissal under *Twombly* also prevent the Court from a complete analysis under the applicable statute of frauds.

C. Breach of Duty of Good Faith

Plaintiffs also allege that the "agreement by **Masterfoods** [**USA**] to sell to [SoM]" gave rise to a duty of good faith under the Texas Business and Commerce Code § 1.304, and that **Masterfoods USA** breached that duty. [Dkt. No. 32 at 13]. The statute provides that "[e]very contract or duty within this title imposes an obligation of good faith in its performance and enforcement." TEX. BUS. & COM.CODE § 1.304 (2009). However, as the comments to the Code make clear, and Texas courts have consistently held, "[t]his section does not support an independent cause of action for failure to perform or enforce in good faith." *Id.,* cmt. 1; *N. Nat. Gas Co. v. Conoco, Inc.,* 986 S.W.2d 603, 606–07 (Tex.1998). Without an underlying contract to which the duty of good faith can attach, this claim cannot stand on its own. Thus, as the claim for breach of the underlying contract has been dismissed above, this claim for breach of the accompanying duty of good faith cannot exist independently and must also be DISMISSED.

D. Common Law Fraud/Negligent Misrepresentation

***8** Plaintiffs also assert common law fraud and negligent misrepresentation against **Masterfoods USA**. [Dkt. No. 32 at 15–17]. Higher than the pleading standard of Rule 8 discussed in *Twombly/Iqbal,* Rule 9(b) requires that a fraud claimant "state with particularity the circumstances constituting the fraud." FED. R. CIV. P. 9(b). "Put simply, Rule 9(b) requires the who, what, when, where, and how to be laid out." *Shandong Yinguang Chem. Indus. Joint Stock Co., Ltd. v. Potter,* **2010 WL** 2106628, *2 (5th Cir.**2010**) (quoting *Benchmark Electronics, Inc. v. J.M. Huber Corp.,* 343 F.3d 719, 724 (5th Cir.2003)). Substantively, to establish fraud under Texas law, Plaintiffs must show:

> (1) that a material representation was made;
>
> (2) the representation was false;
>
> (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion;
>
> (4) the speaker made the representation with the intent that the other party should act upon it;
>
> (5) the party acted in reliance on the representation; and
>
> (6) the party thereby suffered injury.

Aquaplex, Inc. v. Rancho La Valencia, Inc., 297 S.W.3d 768, 774 (Tex.2009).

The only specific representation made by Defendant **Masterfoods USA** contained in the complaint is Ken Fridey's May 2007 email stating, "I spoke with [**Masterfoods Mexico**] yesterday and they advised me that they are still working on a proposal for you. For now it is business as usual until they finalize their proposal." [Dkt. No. 32 at 7]. Plaintiffs allege that this representation was false, that **Masterfoods USA** knew it was false, and that it was made with intention that Plaintiffs would rely upon it. [*Id.* at 16]. Plaintiffs also allege that they relied on the representation by continuing business as usual, by "spending significant time, and money" to market the products, "shar[ing] confidential information," and "introducing Fridey to [customers]." [*Id.*]. Finally, Plaintiffs allege that due to this fraud, they lost customers and profits to **Masterfoods Mexico**. [*Id.*]. While Plaintiffs' factual allegations are minimal, the Court finds that at this stage, with regards to the May 2007 email, Plaintiffs have sufficiently plead "the who, what, when, where, and how" required by Rule 9(b), providing Defendant with notice of the nature and specifics of the fraud claim against it. As such, Defendant's Motion to Dismiss this claim under Rule 12(b)(6) is DENIED.

Similar to a claim for fraud, a claim for negligent misrepresentation requires that:

> (1) a representation was made by a defendant in the course of business;
>
> (2) the defendant supplied false information for the guidance of others in their business;
>
> (3) the defendant failed to exercise reasonable care or competence in obtaining or communicating the information; and
>
> (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation.

***9** *Brown & Brown of Texas, Inc. v. Omni Metals, Inc.*, **2010 WL** 1240580, *16 (Tex.App.Houston [1st Dist.] **2010**). Comparing these elements to the above elements for fraud, the difference between the two torts lies primarily in the defendant's mind, whether they "knew the statement was false or made it recklessly" versus a failure "to exercise reasonable care." As Plaintiffs have met the minimum requirements to state a claim for fraud (discussed above), by alternatively alleging a failure to exercise reasonable care, Plaintiffs have also stated a claim for negligent misrepresentation based on the same May 2007 statement by Defendant. Thus, Defendant's motion to dismiss Plaintiffs' claim for negligent misrepresentation is also DENIED.

E. Tortious Interference with Contract/ Prospective Business Relations

Plaintiffs also claim "tortious interference with actual contract and business relationships and prospective contract and business relationships." [Dkt. No. 32 at **14**]. To be clear, this language translates into two separate torts under Texas law: "tortious interference with (actual/existing) contract" and "tortious interference with prospective business relations (prospective contract)." *See*

Texas Integrated Conveyor Systems, Inc. v. Innovative Conveyor Concepts, Inc., 300 S.W.3d 348, 367 (Tex.App.-Dallas 2009); *Plotkin v. Joekel*, 304 S.W.3d 455, 487 (Tex.App.-Houston [1st Dist.] 2009). While grouped together in the Complaint, each tort will be addressed separately by the Court.

Texas law protects existing contracts from interference by third parties. To establish a claim for tortious interference with existing contract, a Plaintiff must show:

> (1) the existence of a contract subject to interference,
>
> (2) willful and intentional interference,
>
> (3) that proximately causes damage, and
>
> (4) actual damage or loss.

All Am. Tel., Inc. v. USLD Commc'ns., Inc., 291 S.W.3d 518, 531 (Tex.App.-Fort Worth 2009). "For a plaintiff to maintain a tortious interference claim, it must produce some evidence that the defendant knowingly induced one of the contracting parties to breach its obligations under a contract." *Id.* at 532.

Plaintiffs allege that "**Masterfoods** [**USA**] interfered with [SoM's] agreement with SellThru by instructing Sell–Thru to not sell to [SoM]" and "**Masterfoods** [**Mexico**] interfered with Dibaresa's customer relationships and purchase orders by going to Dibaresa's customers and instructing them not to buy from Dibaresa." [Dkt. No. 32 at **14**]. However, as discussed earlier, **Masterfoods** **Mexico** is not a defendant in this action, and thus any interference by it is not relevant to a claim against Defendant **Masterfoods** **USA**. Thus, the only interference at issue is **Masterfoods** **USA's** alleged interference with Sell–Thru. While Plaintiffs imply that there was some "agreement" with Sell–Thru, they do not allege or designate a specific *contract* with SellThru that was the subject of interference. Similar to Plaintiffs' claim for breach of contract, it is clear that a business relationship existed between SoM and Sell–Thru, that of purchaser and middle-man. But Plaintiffs have not set forth sufficient facts to show the existence of a contract obligating Sell–Thru to fill SoM's orders. Without alleging an existing contract, only generally asserting an "agreement," Plaintiffs have failed to plead this claim with facts sufficient to move it from "possible" to "plausible," as required under Rule 8 and *Twombly*. Accordingly, Plaintiffs' 15 / 20 claim for tortious interference with existing contract by Defendant **Masterfoods** **USA** must be DISMISSED.

***10** Texas law also protects contracts that are not yet formed, but have a reasonable probability of being formed, from wrongful interference. For tortious interference with a prospective business relationship, the elements are:

> (1) a reasonable probability that the plaintiff would have entered into a business relationship;
>
> (2) an independently tortious or unlawful act by the defendant that prevented the relationship from occurring;
>
> (3) the defendant did such act with a conscious desire to prevent the relationship from occurring or the defendant knew the

interference was certain or substantially certain to occur as a result of the conduct; and

(4) the plaintiff suffered actual harm or damages as a result of the defendant's interference.

Smith v. Royal Seating, Ltd., 2009 **WL** 3682644, *3 (Tex.App.-Austin 2009) (citing *Wal–Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex.2001)). The Texas Supreme Court clarified:

> [T]o recover for tortious interference with a prospective business relation a plaintiff must prove that the defendant's conduct was independently tortious or wrongful. By independently tortious we do not mean that the plaintiff must be able to prove an independent tort. Rather, we mean only that the plaintiff must prove that the defendant's conduct would be actionable under a recognized tort.... Conduct that is merely "sharp" or unfair is not actionable and cannot be the basis for an action for tortious interference with prospective relations, and we disapprove of cases that suggest the contrary.

Wal–Mart Stores, 52 S.W.3d at 726.

To show interference with prospective business relations, Plaintiffs again allege that **Masterfoods Mexico** interfered with relationships between Dibaresa and its customers, but **Masterfoods Mexico** is not a defendant. With regard to **Masterfoods USA**, Plaintiffs allege that **Masterfoods USA's** action of instructing Sell–Thru to stop selling to SoM "eliminated any future business dealings between [SoM] and Dibaresa and Sell–Thru." [Dkt. No. 32 at **14**]. Supporting this claim, Plaintiffs have sufficiently plead a probability of future contracts, that Defendant 16 / 20 consciously prevented those contracts, and the harm that resulted from Sell–Thru's refusal to sell. However, Plaintiffs have failed to allege the key element to this cause of action, an act that is tortious or unlawful. Plaintiffs have not alleged how Defendant's instruction to Sell–Thru to stop selling their goods to Plaintiffs rises above the level of "sharp or unfair" conduct, and amounts to an independently actionable tort, as required by the Texas Supreme Court in *Wal–Mart Stores*. Without pleading the existence of an independent tort on which this claim can stand, this claim must also be DISMISSED.

F. Civil Conspiracy

Plaintiffs assert an agreement between **Masterfoods USA** and Sell–Thru rising to the level of civil conspiracy. [Dkt. No. 32 at 20]. A civil conspiracy is actionable when two or more persons agree to accomplish an unlawful purpose, or a lawful purpose by unlawful means, and damages proximately result. *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex.1983). The elements of a claim for civil conspiracy are:

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***11** (1) two or more persons;

(2) an object to be accomplished;

(3) a meeting of the minds on the object or course of action;

(4)one or more unlawful, overt acts; and

(5) damages as the proximate result.

Paschal v. Great W. Drilling, Ltd., 215 S.W.3d 437, 450 (Tex.App.-Eastland 2006) (citing *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex.1996)). Because "[i]t is not the agreement itself but an injury to the plaintiff ... that gives rise to a cause of action for civil conspiracy," recovery is premised on an underlying tort. *Paschal,* 215 S.W.3d at 250. Fraud has been held to support a derivative claim for civil conspiracy. *Id.*

Plaintiffs allege that "[**Masterfoods USA**] and Sell–Thru entered into an agreement with eachother (sic) ... to the furtherance of the common design to defraud Plaintiffs and interfere with their customers in **Mexico**." [Dkt. No. 32 at 20]. As support, Plaintiffs state that "[t]he email in Plaintiffs (sic) possession demonstrate (sic) Sell–Thru would not sell at the direction of **Masterfoods** [**USA**] and that Sell–Thru and **Masterfoods** [**USA**] communicated about the decision not to sell." [*Id.*]. Plaintiffs' problem in pleading this claim is similar to the problem with their claim for tortious interference with prospective business relations: that they do not show how a direction not to sell rises to the level of an independent tort. Plaintiffs characterize this action as a "common design to defraud," but have not plead sufficient facts to show that this action was plausibly fraud. To be clear, Plaintiffs have stated a claim for fraud, discussed above. However, that fraud involves a statement by **Masterfoods USA** as to the operations and intentions of **Masterfoods Mexico**. Plaintiffs have not stated a claim for fraud based on **Masterfoods USA's** direction that Sell–Thru not sell to Plaintiffs. Because this direction not to sell is the only "overt act" provided by Plaintiffs in support of this claim, and Plaintiffs have not shown how this act constitutes an independent tort, their claim for civil conspiracy is not "plausible" under the pleading standards of Rule 8 and *Twombly.* Accordingly, Plaintiffs' claim for civil conspiracy between Defendant **Masterfoods USA** and Sell–Thru must be DISMISSED.

G. Statute of Limitations

Defendant also moves for dismissal of some of Plaintiffs' claims based on a two-year statute of limitations. [Dkt. No. 26 at 36]. At this point, the only claim remaining where the statute of limitations may apply is Plaintiffs' claim for negligent misrepresentation. "A statute of limitations may support dismissal under Rule 12(b)(6) where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like." *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir.2003). Defendant correctly asserts that a two-year statute of limitations period applies to negligent misrepresentation claims. *Etan Indus., Inc. v. Lehmann*, 308 S.W.3d 489, 489 (Tex.App.-Austin **2010**) (citing *HECI Expl. Co. v. Neel*, 982 S.W.2d 881, 885 (Tex.1998)). The point of contention is the date on which Plaintiffs' claim accrued. Plaintiffs filed this action on July 3, 2009. [Dkt. No. 40 at 1]. Thus, for the claim to be barred by the statute of

limitations, it must have accrued before July 3, 2007.

***12** "Generally, a cause of action accrues and the statute of limitations begins to run when facts come into existence that authorize a party to seek a judicial remedy," and the date of accrual is a question of law to be determined by the court. *Etan Indus.*, 308 S.W.3d at 500 (citing *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex.2003)). Because it is unfair to run a limitations period before a plaintiff discovers wrongful conduct, the doctrine of fraudulent concealment defers the accrual period "until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the wrongful conduct ." *Id.* When the plaintiff discovered, or should have discovered, the wrongful conduct is a question of fact. *Id.*

As discussed above, Plaintiffs' claim for negligent misrepresentation hinges on a statement made by Defendant in May 2007. Plaintiffs contend that they did not learn that the May 2007 statement was false until some time in December 2008. [Dkt. No. 40 at 31–32]. The Complaint does include allegations of reliance well beyond the July 3, 2007 cutoff. [Dkt. No. 32 at 7–9]. Viewing the Complaint in the light most favorable to Plaintiffs, it is not "evident" that Plaintiffs learned that the statement was false, and therefore Plaintiffs' claim accrued, before July 3, 2007. Therefore, at this stage, Defendant's motion to dismiss this claim based on the statute of limitations is DENIED.

III. CONCLUSION

For the foregoing reasons, with respect to Plaintiffs' claims for breach of contract, breach of duty of good faith, tortious interference with contract, tortious interference with prospective business relations, civil conspiracy, as well as Plaintiffs' claims under Mexican law, Defendant's motion to dismiss for failure to state a claim under Rule 12(b)(6) is hereby **GRANTED,** and those claims are hereby **DISMISSED.**

With respect to Plaintiffs' claims for fraud and negligent misrepresentation, Defendant's motion to dismiss for failure to state a claim under Rule 12(b)(6) is hereby **DENIED,** and those claims remain.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 2488031, 72 UCC Rep.Serv.2d 240

Footnotes

1 Plaintiffs refer to **Masterfoods** **Mexico** by an array of names in the Complaint: **Masterfoods** **Mexico**, **Masterfoods** MX, **Masterfoods**, Mars **Mexico**, Effem, Effem **Mexico**, and simply Mars. [Dkt. No. 32]. Plaintiffs compound the difficulties in interpreting their pleadings by also seemingly using "**Specialties** of **Mexico**" and

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"Dibaresa" interchangeably, as well as simply "**Masterfoods**" to refer to either **Masterfoods USA** or **Masterfoods Mexico**. Despite these problems, for the purposes of ruling on Defendant's instant motion, the Court will attempt to decipher the Complaint.

2 The Court denied Plaintiffs' motion to add Sell–Thru as a defendant, finding that the primary purpose was to defeat diversity jurisdiction. [Dkt. No. 27].

3 The complaint states "Dibaresa" here, but this would contradict Plaintiffs' statement that Dibaresa never dealt directly with **Masterfoods USA**. *See* [Dkt. No. 32 at 18].

4 While not specific, Plaintiffs are seemingly referring to **Masterfoods Mexico**, as it would be illogical for **Masterfoods USA** to pressure Dibaresa for their own identity and prices.

5 Again, Plaintiffs are seemingly referring to **Masterfoods Mexico**.

6 It is not clear from the complaint who Daniel Gilbert is, whether he is an employee of **Masterfoods USA** or **Masterfoods Mexico**.

7 Again, presumptively **Masterfoods Mexico**.

8 In the complaint, it states that "Cantu continued to do business with **Masterfoods**," but in light of the fact that Dibaresa never dealt directly with **Masterfoods USA**, the Court reasons that Cantu was issuing these purchase orders on behalf of SoM.

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CASE NO. 35

2025 WL 871601
United States District Court, **E.D**. **Louisiana**.

ALBORES, et al.
v.
DIMITRI, et al.

CIVIL ACTION
NO.
18
-
6936
|
Signed March **20**, **2025**

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SECTION: "H"

ORDER AND REASONS

JANE TRICHE **MILAZZO**, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Defendants E.M. **Dimitri** D.O. PMC d/b/a **Dimitri** Dermatology; American Support Services, LLC; Dermatologic Centers of America, LLC; Mississippi Dermatology, LLC; Mississippi Support Solutions, LLC; Precision Billing Services, LLC; Regional Support Services, LLC; Shapiro **Dimitri** Medical, LLC; The **Dimitri** Clinics, LLC; Elizabeth **Dimitri**, D.O.; Karen Drake; Thomas Orgeron, M.D.; Joel Perdomo, M.D.; and Steven Shapiro, M.D.'s ("Defendants") Motion to Dismiss for Failure to State a Claim (Doc. 76). For the following reasons, Defendants' Motion is **GRANTED IN PART** and **DENIED IN PART**.

BACKGROUND

This *qui tam* action arises out of alleged fraudulent actions by Defendants that took

place from January 1, 2016 to September 5, 2024. Elizabeth **Dimitri**, D.O. is a Doctor of Osteopathy who operates thirteen clinics (the "Clinics") in Louisiana and Mississippi that provide dermatological services. Dr. **Dimitri** has operated her practice since 2007, and since that time has expanded to multiple locations employing numerous physicians, nurse practitioners, physician assistants, nurses, administrators, and other health care professionals throughout the Gulf South. Dr. **Dimitri** and her colleagues treat a variety of skin diseases as well as offer cosmetic procedures to their patients. The Clinics accept Medicare and Medicaid as well as private insurance.

On July 24, 2018, former independent contractors with the Clinics, Jessica **Albores**, Marie Ford, and Margaret Whiteman ("Relators"), initiated this action, alleging violations of the False Claims Act ("FCA")[1] and Louisiana's Medical Assistance Program Integrity Law ("MAPIL").[2] The United States of America and the State of Louisiana (together with Relators, "Plaintiffs") elected to intervene on September 3, 2024, and filed a Joint Complaint in Intervention (the "Complaint").[3] In their Complaint, Plaintiffs allege that Dr. **Dimitri**, her Clinics, several billing and administrative support organizations, Dr. **Dimitri's** office manager, and three other physicians conspired to submit false claims for payment for services that were not medically necessary, namely the provision of phototherapy and photochemotherapy at subtherapeutic doses and intervals, incision and drainage procedures on acne patients, and upcoding for evaluation and management ("E&M") visits.

Now before the Court is Defendants' Joint Motion to Dismiss for Failure to State a Claim. Defendants argue that the Complaint is deficient because it fails to identify the specific role that each Defendant played in the alleged fraudulent scheme, merely lumping the actions of multiple Defendants together. Plaintiffs oppose.[4] The Court held oral argument on Defendants' motion on February 27, **2025**.

LEGAL STANDARD

I. Motion to Dismiss Standard

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead enough facts "to state a claim to relief that is plausible on its face."[5] A claim is "plausible on its face" when the pleaded facts allow the court to "[d]raw the reasonable inference that the defendant is liable for the misconduct alleged."[6] A court must accept the complaint's factual allegations as true and must "draw all reasonable inferences in the plaintiff's favor."[7] The Court need not, however, accept as true legal conclusions couched as factual allegations.[8]

***2** To be legally sufficient, a complaint must establish more than a "sheer possibility" that the plaintiff's claims are true.[9] "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action' " will not suffice.[10] Rather, the complaint must contain enough factual allegations to raise a reasonable expectation that discovery will reveal evidence of each element of the plaintiff's claim.[11]

II. The False Claims Act and Rule 9(b)

The FCA prohibits, in relevant part, 1) the presentment of a false claim to the Government; 2) the use of a false record or statement to get a false claim paid, and 3) conspiracies to get a false claim paid.[12] Liability for violation includes a liquidated civil penalty and damages.[13] The act is remedial in nature and is "intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side."[14] To aid in the rooting out of fraud, the Act provides for civil suits brought by both the Attorney General and by private persons, termed relators, who serve as a "posse of ad hoc deputies to uncover and prosecute frauds against the government."[15] In order to prevail in its contention of violation of § 3729 (a)(1), Plaintiffs must show that Defendants presented (or caused to be presented) a claim to the Government, that the claim was false, and the action was undertaken knowingly.[16]

A complaint filed under the FCA must meet the heightened pleading standard of Rule 9(b) which requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."[17] Rule 9(b) is an exception to Rule 8(a)'s simplified pleading standard that calls for a "short and plain statement of the claims."[18] Fifth Circuit precedent "interprets Rule 9(b) strictly [when evaluating the pleading of a false claim under the FCA], requiring the plaintiff to 'specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent.' "[19] However, "the time, place, contents, and identity standard is not a straitjacket for Rule 9(b). Rather, the rule is context specific and flexible."[20] Further, if Plaintiffs cannot allege the details of an actually submitted false claim, the Complaint may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.[21] Additionally, fraud may be pleaded on information and belief when "the facts relating to the alleged fraud are peculiarly within the perpetrator's knowledge ... the complaint must set forth a factual basis for such belief."[22] "A dismissal for failure to plead fraud with particularity as required by Rule 9(b) is a dismissal on the pleadings for failure to state a claim under Rule 12(b)(6)."[23]

LEGAL ANALYSIS

***3** In the instant Motion, Defendants argue that, on the whole, the Complaint is impermissively vague, fails to identify the actions of Defendants with particularity, and fails to state a claim upon which relief can be granted due to its failure to meet the heightened pleading requirements for fraud claims. Plaintiffs oppose, arguing that the Complaint is as detailed as it can be based on the limited information it received from Dr. **Dimitri** in response to their Civil Investigative Demands ("CIDs") and that, regardless, the 9(b) standard should be relaxed here because that knowledge was located entirely with Dr. **Dimitri** and the fraudulent scheme was complicated.

Defendants made more particularized arguments for dismissal as related to each individual or entity named in the suit. Plaintiffs opposed each of these arguments. The Court will now consider the pleadings as they relate to each individual or entity in turn.

I. E.M. Dimitri D.O. PMC d/b/a Dimitri Dermatology; Elizabeth Dimitri, D.O.; and the Dimitri Clinics

In their Motion, Defendants assert that as written, the Complaint fails to provide notice to Defendants **Dimitri** or E.M. **Dimitri** D.O. PMC d/b/a **Dimitri** Dermatology ("**Dimitri** Dermatology") of their role in the alleged scheme because the actions of all fourteen Defendants are lumped together as accusations against Dr. **Dimitri** and her practice. Plaintiffs read Defendants' motion to concede that the Complaint was sufficiently plead as to Dr. **Dimitri** and **Dimitri** Dermatology. At oral argument, Defendants conceded that they are not arguing that Plaintiffs have failed to allege a scheme as to Defendants **Dimitri** and **Dimitri** Dermatology, but rather that they are used interchangeably by Plaintiffs, making the task of mounting an appropriate defense difficult. Plaintiffs then elaborated that Defendant **Dimitri** Dermatology is clearly defined in Paragraph 10 of their Complaint and is not used interchangeably with Defendant **Dimitri** herself.

The Court agrees that the Complaint sufficiently and distinctly alleges claims against Defendants **Dimitri** and **Dimitri** Dermatology. For example, Defendant **Dimitri** is accused of training midlevel providers how to perform and bill medically unnecessary procedures[24], while Defendant **Dimitri** Dermatology submitted the allegedly false claims regarding photochemotherapy procedures to Louisiana Medicaid.[25] "[W]hen the facts relating to the alleged fraud are peculiarly within the perpetrator's knowledge ... the fraud may be pled on information and belief, provided the plaintiff sets forth the factual basis for [their] belief."[26] While it is certainly alleged that Defendant **Dimitri** is involved at every stage of this alleged fraudulent scheme, the Court finds that there is adequate distinction between Defendant **Dimitri** and Defendant **Dimitri** Dermatology in the Complaint as written, and that 9(b) may be relaxed here because of the concentration of information held exclusively by Defendant **Dimitri**.

II. American Support Services, LLC; Dermatologic Centers of America, LLC; Mississippi Dermatology, LLC; Mississippi Support Solutions, LLC; Precision Billing Services, LLC; Regional Support Services, LLC; Shapiro Dimitri Medical, LLC

In their Motion, Defendants argue that regarding each of the individual entities named as Defendants, the Complaint fails to do more than state that they had contracts with a medical clinic without any mention of wrongdoing as required by the FCA. Plaintiffs respond that because Defendant **Dimitri** had dominion and control over the named companies, their pleadings were limited to the scant information shared by Defendant **Dimitri**. In so doing, Plaintiffs argue that a relaxed pleading standard applies when, as here, the knowledge of a

particular fraudulent scheme is known by a perpetrator.

***4** Defendant **Dimitri** was the sole member, manager, and officer of American Support Services, LLC; Dermatologic Centers of America, LLC; Mississippi Dermatology, LLC; Mississippi Support Solutions, LLC; Precision Billing Services, LLC; and Regional Support Services, LLC from 2016 to 2022. As such, the Court finds that Defendant **Dimitri** exclusively possesses the information that would allow Plaintiffs to plead with the accuracy that Defendants seek regarding these entities' participation in any alleged fraud. [27]

Further, when a complaint alleges "corporate or business fraud, such that Plaintiffs cannot be expected to have knowledge of all the details which undergird the alleged fraudulent scheme ... some relaxation of Rule 9(b)'s particularity requirement is appropriate in instances where such information is in the [D]efendant's hands or control." [28] Here, while it is not entirely clear from the Complaint what specific role each Defendant entity addressed in this section had in the alleged fraudulent scheme, the Court finds that any lack in the pleadings results from the complexity of the scheme and the interworking of organizations Defendant **Dimitri** had under her control over the relevant time. [29] As such, the Court finds that the Complaint is sufficiently plead under Rule 9(b) as to Defendants American Support Services, LLC; Dermatologic Centers of America, LLC; Mississippi Dermatology, LLC; Mississippi Support Solutions, LLC; Precision Billing Services, LLC; Regional Support Services, LLC; and Shapiro **Dimitri** Medical, LLC. [30]

III. Individuals Karen Drake; Thomas Orgeron, M.D.; Joel Perdomo, M.D.; and Steven Shapiro, M.D.

If a plaintiff sues more than one defendant for fraud, the plaintiff cannot 'lump together' several defendants and allege generally the defendants' participation in a fraud scheme." [31] Considering the individual named Defendants other than Dr. **Dimitri**, Defendants argue that the Complaint fails to allege with particularity their role in the alleged fraudulent scheme. Defendants state that the Complaint's assertions that Defendant Drake assisted Dr. **Dimitri** in intentionally hiring inexperienced medical professionals and staff is not sufficient under Rule 9(b). Plaintiffs oppose, arguing that because of her role as General Manger of E.M. **Dimitri**, D.O. PMC, Dermatologic Centers of America, LLC, American Support Services, LLC and Precision Billing Services, LLC, and Shapiro **Dimitri** Medical prior to its dissolution, Defendant Drake's involvement should be viewed in the same manner as Defendant **Dimitri** in that the knowledge of any wrongdoing is known only to her.

The Court does not agree that Defendant Drake should be afforded the same relaxed pleading standard as applied earlier to Defendant **Dimitri**, her practice, and the entities of which she was the sole member, manager, and officer. It is unclear what Defendant Drake's role as General Manager entailed or whether she was simply ill-equipped to perform her job, resulting in the hiring of underqualified medical providers which does not amount to

having intimate knowledge of a fraudulent scheme, let alone actively participating in it. As such, the Court cannot make the inferential leap that Defendant Drake engaged in the alleged fraudulent activities described in the Complaint without more about her specific allegations.

***5** Considering physician Defendants Drs. Orgeron, Perdomo, and Shapiro, Defendants assert that the Complaint fails to properly plead their commission of false acts beyond a statement that they were relied on by midlevel providers. Plaintiffs respond that the Complaint particularly alleges that the physician Defendants participated in the fraud through the direct administration of unnecessary medical services that they subsequently billed for and the training/guidance of less-experienced mid-level providers. Still, Plaintiffs conceded at oral argument that they did not elucidate specific false claims submitted by the physician Defendants in their Complaint. This, the Court finds, amounts to insufficient pleading under Rule 9(b) because it cannot discern which provider treated which patient and billed for what medically unnecessary procedure in perpetuation of the alleged fraud. [32]

Accordingly, the Court finds that Plaintiffs have failed to satisfy Rule 9(b) regarding its allegations against Defendants Drake, Orgeron, Perdomo, and Shapiro.

IV. Opportunity to Amend

Plaintiffs conclude their Opposition to Defendants' motion with a request for leave to amend their Complaint if the Court finds it wanting under the rigors of Rule 9(b) or 12(b)(6). At oral argument, counsel for Defendants Drake; Drs. Orgeron, Perdomo, Shapiro; and Dermatologic Centers of America, LLC opposed, arguing that Plaintiffs have had enough time to gather the information required to plead their case with enough particularity to survive a motion to dismiss and should therefore not be given the opportunity to amend.

Denial of leave to amend "may be warranted for undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, undue prejudice to the opposing party, or futility of a proposed amendment." [33] The policy of the federal rules, however, "is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading." [34] "Thus, unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." [35] As such, the Court finds that where it has found that the Complaint currently does not survive Rule 9(b), Plaintiffs may amend.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss for Failure to State a Claim is **GRANTED IN PART** and **DENIED IN PART**.

Plaintiffs' case against Defendants Karen Drake; Thomas Orgeron, M.D.; Joel Perdomo, M.D.; and Steven Shapiro, M.D. is **DISMISSED WITHOUT PREJUDICE** to

Plaintiffs' ability to move for leave to amend the Complaint within **twenty** (**20**) days of this Order.

All Citations

Slip Copy, 2025 WL 871601, Med & Med GD (CCH) P 308,490

Footnotes

1 31 U.S.C. § 3729, *et seq.*

2 LA. REV. STAT. §§ 6:438, *et seq.*

3 Doc. 38.

4 Doc. 80.

5 Ashcroft v. Iqbal, 556 U.S. 662, 667 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007)).

6 *Id.*

7 Lormand v. U.S. Unwired, Inc., 565 F.3d 228, 232 (5th Cir. 2009).

8 *Iqbal*, 556 U.S. at 667.

9 *Id.*

10 *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555).

11 *Lormand*, 565 F.3d at 255–57.

12 31 U.S.C. § 3729 (a).

13 *Id.*

14 U.S. *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 184 (5th Cir. 2009).

15 *Id.*

16 31 U.S.C. § 3729(a)(1).

17 Fed. R. Civ. P. 9(b); *see also* Tel–Phonic Servs., Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1139 (5th Cir. 1992).

18 *Grubbs*, 565 F.3d at 185.

19 Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp., 565 F.3d 200, 207 (5th Cir. 2009) (quoting Smallwood v. Pearl Brewing Co., 489 F.2d 579, 605 (5th Cir. 1974)).

20 *Grubbs*, 565 F.3d at 190.

21 *Id.*

22 U.S. *ex rel.* Willard v. Humana Health Plan of Tex., Inc., 336 F.3d 375, 385 (5th Cir. 2003).

23 Southland Sec. Corp. v. Inspire Ins. Solutions Inc., 365 F.3d 353, 361 (5th Cir. 2004) (citing Shushany v. Allwaste, Inc., 992 F.2d 517, 520 (5th Cir. 1993)).

24 Doc. 38 ¶¶73-76.

25 Doc. 38 ¶ 89.

26 U.S. *ex rel.* Thompson v. Columbia/HCA Healthcare, Inc., 125 F.3d 899, 903 (5th. Cir. 1997) *abrogated on other grounds,* U.S. *ex rel.* Eisenstein v. City of New York, New York, 556 U.S. 928, 129 (2009).

27 *See* Burford v. Cargill, Inc., No. CIV.A. 05-0283, 2011 **WL** 4382124, at *13 (W.D. La. Sept. **20**, 2011) (citing Giuliano v. Everything Yogurt, Inc., 819 F. Supp. 240, 244 (E.D.N.Y. 1993)).

28 *Id.* at *12 n.7.

29 *See U.S. ex rel. Thompson*, 125 F.3d at 193 (5th Cir. 1997).

30 Defendants **Dimitri** and Shapiro were both identified as Member/Managers until the company was voluntarily dissolved in 2020. Doc. 38 ¶17. While Dr. **Dimitri** and Dr. Shapiro may both have information regarding Shapiro **Dimitri** Medical LLC's operations, the Court finds that because of its status as another organization in this web, the relaxed 9(b) standard applies here.

31 U.S. *ex rel.* Schiff v. Norman, No. 15-1506, 2018 **WL** 264253 (M.D. Fla. Jan. 2, 2018).

32 *See* U.S. *ex rel.* Hebert v. Dizney, 295 Fed. Appx. 717, 723 (5th Cir. 2008) (stating that although Rule 9(b) "does not require a qui tam plaintiff alleging a long-running scheme involving many false claims to list every false claim, its dates, and the individuals responsible, the allegedly great extent and complexity of a fraudulent scheme does not excuse a failure to plead at least one false claim with the requisite specificity.")

33 *See* Rosenblatt v. United Way of Greater Houston, 607 F.3d 413, 419 (5th Cir. 2010) (citing Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)).

34 Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597-98 (5th Cir. 1981).

35 *Id.* (citing Lone Star Motor Import v. Citroen Cars, 288 F.2d 69, 75 (5th Cir. 1961)).

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CASE NO. 36

2014 WL 10751177
Only the Westlaw citation
is currently available.
United States District Court,
S.D. Texas, Houston Division.

FORUM SUBSEA RENTALS
f/k/a DPS, Inc., Plaintiff,
v.
Tarek A. ELSHARHAWY, Shelly L. Elsharhawy a/k/a Shelly L. Chilman, and Globaltech Offshore, Defendants.

Civil Action No. H–13–885
|
Signed September 17, 2014

Attorneys and Law Firms

George J. Fowler, III, Peter Thomson, Jon Wesley Wise, Fowler Rodriguez, New Orleans, LA, for Plaintiff.

Bryon A. Rice, Charles Randall Flores, Beck Redden LLP, Houston, TX, Richard Dale Brady, The Brady Firm, PC, Liberty, TX, for Defendants.

FINDINGS OF FACT & CONCLUSIONS OF LAW

DAVID HITTNER, United States District Judge

***1** On August 26, 2014, this Court commenced a non-jury trial in the above-entitled matter. During the course of the one-day proceeding, the Court received evidence and heard sworn testimony. Having considered the evidence, testimony, and oral argument presented during the trial, along with post-trial submissions and the applicable law, the Court now enters the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a). Any finding of fact that should be construed as a conclusion of law is hereby adopted as such. Any conclusion of law that should be construed as a finding of fact is hereby adopted as such.

I. FINDINGS OF FACT

The Contract

1. In December 2010, defendant Tarek Elsharhawy approached Plaintiff Forum Subsea Rental's ("Forum") predecessor in interest DPS Offshore, Inc. ("DPS") in order to lease equipment for use in Mexico by businesses owned and operated by himself and his wife, defendant Shelly Chilman. After initial soliciting by email and telephone, Tarek Elsharhawy traveled to Houston, Texas to solicit further equipment rentals directly from DPS at its offices. DPS ultimately agreed to rent equipment to Globaltech Offshore ("Globaltech"), a U.S. company registered in California, of which Tarek Elsharhawy was president/lead salesman and he and his wife were the owners.[1] Notably, DPS had rejected the credit application initially proposed for the Elsharhawys' other business, Global Subsea & Maritime Technologies Mexico S. De R.L. De C.V. ("Global Subsea"), because the credit references did not check out. The credit application by Globaltech contained

different references and representations as to the credit worthiness of Globaltech and listed Tarek Elsharhawy and Shelly Chilman as its principals. [2]

2. Beginning in late January 2011, Globaltech entered into a series of contracts of lease with DPS for the lease of certain subsea equipment owned by DPS. [3]

3. Each rental contract between Globaltech and DPS required Globaltech to pay a daily rental rate for equipment it leased from DPS and to comply with the Standard Terms and Conditions contained on the back of the Rental Quotation and Order Confirmation. [4]

4. The daily rental rates for the relevant equipment was as follows: [5]

Description	Day Rate
HiPAP 350P System	$350.00/day
Tritech System	$303.00/day
MS1000 System	$169.00/day
Geo Nav I-Compass	$85.00/day

5. All of the equipment leased by Globaltech was shipped to Mexico as a temporary import and under Mexican law could not stay in Mexico more than 6 months. Globaltech, as the importer into Mexico, was required to export the equipment back to DPS before the expiration of the 6–month window according to Mexican law. [6]

6. Globaltech was charged a daily rental rate by DPS for the equipment it leased based on its utilization of the equipment. The term of each lease was the six-month period of temporary import into Mexico. [7]

7. Globaltech was told and aware that the equipment was a temporary import and must be exported from Mexico within six months. [8]

The Breach of Contract

***2** 8. Globaltech failed to timely export the HiPap System, the Tritech System, the MS 1000 System and the Geo Nav I-Compass from Mexico. This represented a breach of each contract of lease as well as a violation of Mexican import law. [9]

9. The HiPAP 350P system was imported to Mexico pursuant to Declaration No. 3978 1000335, which expired on October 29, 2011. [10]

10. Because the equipment on Declaration No. 3978 1000335 was not exported by October 29, 2011, it was encumbered in violation of DPS' Standard Terms and Conditions. [11]

11. The Tritech System was imported pursuant to Declaration Nos. 3574

1003682 and 39781000976, which expired on November 30, 2011. [12]

12. Because the equipment on Declaration Nos. 3574 1003682 and 39781000976 was not exported by November 30, 2011, it was encumbered in violation of DPS' Standard Terms and Conditions. [13]

13. The MS 1000 System was imported pursuant to Declaration No. 3978 1000198, which expired on September 25, 2011. [14]

14. Because the equipment on Declaration No. 3978 1000198 was not exported by September 25, 2011, it was encumbered in violation of DPS' Standard Terms and Conditions. [15]

15. The Geo Nav I–Compass (gyrocompass) was imported pursuant to Declaration No. 3978810000414, which expired on November 30, 2011. [16]

16. Because the equipment on Declaration No. 3978810000414 was not exported by November 30, 2011, it was encumbered in violation of DPS' Standard Terms and Conditions. [17]

17. Beginning around June 2011 and continuing thereafter, DPS contacted Tarek Elsharhawy and Globaltech to request the return of the equipment. Despite repeated requests by DPS, the equipment was not returned by any of the defendants during the years 2011, 2012 or 2013. In June, 2014, a portion of the equipment was returned; however, the MS 1000 system was never returned.

18. In addition to failing to return the equipment, Globaltech failed to pay all of the outstanding invoices. [18] Those invoices which were paid were approved by defendant Shelly Chilman and paid with checks sent to DPS in Houston and signed by Shelly Chilman. [19]

The Fraud

19. On March 15, 2012, Defendant Tarek Elsharhawy represented to Forum that Globaltech was prepared to return the equipment leased from Forum's predecessor-in-interest DPS, but needed Certificates of Origin to "clear customs." [20]

20. Forum promptly sent the Certificates of Origin, and placed its freight forwarder on standby, with the expectation that the equipment was about to be shipped. [21]

21. On April 9, 2012, Forum asked for an updated regarding the return of its equipment. [22]

22. On or about April 11, 2012, Defendant Globaltech represented to the Mexican Taxing Authority that it intended to make the above equipment a permanent import. [23]

***3** 23. Defendant Globaltech's April 11, 2012, representation to the Mexican Taxing Authority was made without the knowledge or consent of Plaintiff. [24]

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24. On April 19, 2012, Defendants again represented that they were in the process of returning the equipment. Defendants at no time advised Forum of their attempt to have these items declared a permanent import. [25]

25. On July 20, 2012, Vice President and General Counsel of Forum, James McCulloch, sent an email to Tarek Elsharhawy demanding immediate return of all the equipment that had been retained by Globaltech. This demand came after McCulloch had contacted Elsharhawy on July 9, 2012, and received various excuses from Elsharhawy, including representations that he was trying to get another contract to use the equipment. In fact, Globaltech did not ship the equipment back and Elsharhawy did not respond to this formal demand. [26]

26. From September 2012 to June 2014, Defendants represented that they could not return the equipment to Plaintiff because it could not be exported from Mexico. [27] Forum, through its retained counsel, made repeated demands to Defendants to return the equipment and that it regarded the ongoing retention of the equipment without explanation as theft. Despite the fact that Defendants had retained counsel and received these emails, no offer to return the equipment ever occurred. [28]

27. Forum filed suit against Defendants on March 28, 2013. [29]

28. On May 28, 2014, the judgment denying Globaltech's Motion for Summary Judgment and Defendants Tarek Elsharhawy and Shelly Chilman's Motion to Dismiss for Lack of Personal Jurisdiction was entered into the record. [30]

29. Defendants subsequently returned some of the DPS/Forum equipment to their attorney's office in Houston, Texas without explanation in early June 2014. [31]

30. The boxes of returned equipment included a packing slip that showed Defendants exported the box from Mexico via DHL to their address in California on May 30, 2014—two days after Defendants motions were denied and it became clear that Elsharhawy and Chilman would remain in the case through trial. The packing slips had been removed from the other boxes. [32]

31. The packing slip indicated the equipment had been exported "for repair." In fact, Defendants tendered the equipment to Plaintiff for return, not for repair. [33]

32. The following equipment was shipped from Mexico to Defendants' office in California on or about May 30, 2014 and then to the office of their counsel in Houston in June 2014: [34]

a. HiPAP 350P System,

b. Tritech System, and

c. Gyro Compass.

The MS 1000 System was never returned.

33. An inspection of the returned equipment revealed signs of recent use, including new marine growth on components that are used underwater. This evidence established that Globaltech had been using the equipment during the period between October 2011 (when it was to be returned) and June 2014, when it was actually returned—in direct contradiction to its representations to DPS/Forum over the previous three years. Globaltech did not report this utilization of the equipment to Plaintiff and did not pay the daily rental rate for its use. [35]

Disregard of Corporate Formalities

***4** 34. On its January 18, 2011 credit application, Globaltech represented that it had annual sales of $800,000–$1,200,000. [36]

35. Globaltech's tax returns in fact showed that Globaltech's January 18, 2011 credit application overstates its annual sales in 2010 and that the company's net sales were under $300,000 and profits close to $100,000. [37]

36. Defendant Globaltech is a California corporation.

37. Defendant Shelly Chilman is the only shareholder of Defendant Globaltech. [38]

38. Defendants Tarek Elsharhawy and Shelly Chilman are the only officers of Defendant Globaltech. [39]

39. Defendants Tarek Elsharhawy and Shelly Chilman are the only members of Defendant Globaltech's Board of Directors. [40]

40. No formal meeting was held to elect Defendants Tarek Elsharhawy and Shelly Chilman to Defendant Globaltech's Board of Directors. [41]

41. Defendant Globaltech does not hold properly noticed annual shareholder meetings. [42]

42. Defendant Globaltech does not maintain written records or minutes of any shareholder meetings. [43]

43. Defendant Globaltech does not prepare an annual report to its shareholder(s). [44]

44. Defendant Globaltech does not maintain written records of shareholder resolutions. [45]

45. Defendant Globaltech is run as an informal family business by Tarek Elsharhawy and his wife Shelly Chilman. [46]

46. Defendant Globaltech has not paid California franchise taxes since 2010. [47]

47. Defendant Globaltech's corporate charter was suspended by the California Secretary of State beginning in 2011. [48]

48. Globaltech's corporate representative Tarek Elsharhawy could offer no testimony regarding Globaltech's

finances, and could offer no testimony to explain the company's financial records as reflected on Globaltech's tax returns. [49]

49. Despite showing significant assets on its corporate tax returns during 2011 and for the years following, Globaltech is in arrears to many creditors, and has been evasive about where the money shown on the company's corporate tax returns went. [50]

Damages

50. The HiPAP transducer was not working upon its return and needed to be recalibrated. This repair will cost $3,000. The Kongsberg MST charging system was damaged and will cost $460 to repair. [51]

51. It is industry custom for lessees and renters who lose or damage equipment beyond repair to pay the replacement cost of the equipment. [52]

52. Globaltech failed to return the following equipment: [53]

- MS 1000 System (Site Survey Sonar), valued at $31,165.00
- MS 1000 Site Survey Sonar System laptop, valued at $6,400.00
- Kongsberg HiPAP 350P Transducer cable (70 m), valued at $6,066.00

***5** • Power Module for TSS SG Brown Meridian Standard Gyro Compass, valued at $250.00

- Right angle to straight cable from the Tritech SeaKing SK704/20 Bathy, valued at $560.00
- 2 cables from the Tritech Super SeaKing, valued at $1,120.00
- 19" Flat Panel Monitor, valued at $120.00

53. The total replacement cost of the missing equipment is $45,581.00. [54]

54. Globaltech failed to pay the following invoices for equipment rental charges, lost and damaged equipment and service charges: [55]

- DPS Invoice # 18745–7420 in the amount of $3,016.34
- DPS Invoice # 18855–7555 in the amount of $341.17
- DPS Invoice # 18891–7394 in the amount of $1,183.00
- DPS Invoice # 18891–7428 in the amount of $54.94

55. The total amount of the unpaid invoices is $4,595.45.

56. Plaintiff made a demand on Globaltech for the return of the equipment and for payment of all amounts due, which demand was refused by Defendants. [56]

57. The evidence established that Plaintiff could have rented this equipment to other parties had it been returned to Plaintiff as

required and in fact lost work because the equipment was unavailable to rent out. [57]

58. The failure to return the equipment, as noted in Paragraph 8 above, resulted in a loss of use of the equipment by the Plaintiffs for the period beginning when each system should have been returned to the U.S. (in accordance with its temporary import status) until the date the equipment was returned. In the case of the MS 1000 system, the equipment was never returned and the return date testified to was the date of trial. The loss of use claim may be summarized as follows:

HiPap System	$350 Day Rate × 963 days	= $337,050.00
Tritech System	$303 Day Rate × 931 days	= $282,093.00
Geo Nav I–Compass	$85 Day Rate × 931 days	= $ 79,135.00
MS 100 System	$169 Day Rate × 1066 days	= $180,154.00
TOTAL		$878,432.00 [58]

Attorney's Fees

59. Plaintiff retained the law firm of Fowler Rodriguez to pursue its claim against Globaltech. [59]

60. Plaintiff has incurred attorney's fees of $198,929.50 in the prosecution of this case. [60]

61. Plaintiffs attorney's fees incurred in the prosecution of this case were reasonable and necessary. The fees charged are customarily charged in Harris County, Texas for the same or similar services for attorneys with the experience, reputation, and abilities of the attorneys who worked on this matter, considering the type of controversy, the time limitations imposed, the novelty and difficulty of the matter, and the results obtained. [61]

II. CONCLUSIONS OF LAW

1. The Court has diversity jurisdiction over the parties and the subject matter of this case. Complete diversity of citizenship exists and the amount in controversy exceeds $75,000.

Breach of Contract

***6** 2. To recover on a claim for breach of contract, a plaintiff must show: (1) the existence of a valid contract between itself and the defendant; (2) its performance or tender of performance; (3) the defendant's breach of the contract; and (4) its damage as a result of the breach. *Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636

(Tex. App.—Houston [1st Dist.] 2002, pet. denied). In this case, Defendants failed to return the subject equipment at the end of the rental term (for over two years in some cases and in other cases, not at all). Failure to return the leased property pursuant to a valid contract constituted an active breach of the contract.

3. "Generally, the proper measure of damages for a common-law breach of contract claim is just compensation for the loss or damage actually sustained, commonly referred to as the benefit of the bargain." *City of Houston v. Swinerton Builders, Inc.*, 233 S.W.3d 4, 10 n.7 (Tex.App.—Houston [1st Dist.] 2007, no pet.).

   Actual damages are either direct or consequential. Direct damages are those that flow naturally and necessarily from the breach. Direct damages compensate for the loss, damage, or injury that is conclusively presumed to have been foreseen or contemplated by the party as a consequence of his breach of contract or wrongful act. Consequential damages are those which result naturally, but not necessarily, from the breach. Consequential damages must be foreseeable and must be directly traceable to the wrongful act and result from it. A general measure of damages is subject to any agreement that the parties might have made with respect to damages because parties to a contract are free to limit or modify the remedies available in the event of a breach of contract.

   Term. Gas Pipeline Co. v. Technip USA Corp., 2008 WL 3876141, at *6 (Tex.App.—Houston [1st Dist.] 2007, pet. denied) (citations omitted) (internal quotation marks omitted).

4. In this case, the parties agreed to a day rate in the quotation and acceptance. While the day rate was owed when the equipment was being used during the term of the contract, once the Defendants failed to return the equipment when the term of the contract had expired and the contract was terminated, Forum was deprived of the daily rate on this equipment. Given the fact that the object of the contract was the rental of the equipment at a specified daily rate, the loss of use that followed from Defendants' ongoing breach of contract was a form of direct damage clearly contemplated by the parties in advance. Further, plaintiff's representative, Felix Pena, testified that the equipment was in demand and could have been rented consistently during the period it was not returned and was in the custody of Defendants. Vice President and General Counsel James McCulloch testified that it is customary in the industry to charge and receive a daily rate on rental equipment which is not returned at the end of the rental term, until the equipment is in fact returned.

5. Even if the loss of the daily rate on the non-returned equipment could be characterized as a consequential damage flowing from the breach, this type of damage was foreseeable and directly traceable to the Defendants' initial and

ongoing breach of the contract. Plaintiffs were an equipment rental company—the improper retention of its equipment would necessarily result in a loss of rental income of the equipment until possession was restored. [62]

6. The Standard Terms and Conditions together with the rental quotations and Purchase Orders submitted by the Defendants are valid, enforceable contracts (collectively, the "Agreements") for the lease of equipment.

*7 7. Plaintiff performed or tendered its obligations under the Agreements. By virtue of the numerous actions of Defendants evidenced herein, Defendants have violated the Agreements, and such breach has damaged Plaintiff.

8. As a result of Globaltech's breach of contract, Plaintiff suffered actual damages of $53,636.45 in the form of missing and damaged equipment and unpaid invoices. Plaintiff is also entitled to damages of $878,432.00 in the form of loss of use of the equipment from the date it was encumbered in violation of the Standard Terms and Conditions by Globaltech's failure to comply with Mexican law and timely export it from Mexico until the date the equipment was returned. Plaintiff is entitled to a daily rate of $350/day for 963 days for the HiPAP system. Plaintiff is entitled to a daily rate of $303.00/day for 931 days for the Tritech System. Plaintiff is entitled to a daily rate of $85.00/day for 931 days for the Geo Nav I–Compass.

9. The MS 1000 system has never been returned and Plaintiff is entitled to a daily rate from the date of encumbrance in violation of the Standard Terms and Conditions through the date of trial. Plaintiff is entitled to a daily rate of $169.00/day for 1066 days for the MS 1000 System.

Attorney's Fees

10. Section 38.001 of the Texas Civil Practice and Remedies Code provides, in relevant part:

> A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: ... an oral or written contract.

Tex. Civ. Prac. & Rem.Code § 38.001(8). [63] Section 38.001 is to be construed "liberally ... to promote its underlying purposes." *Id.* § 38.005.

11. The Texas Supreme Court has explained that

> [a]lthough Chapter 38 does not explain its underlying purposes, there are at least two reasons for allowing a claimant to recover attorney's fees on a contract suit. First, a wronged claimant may recover the full amount of its damages—including costs in having to litigate the suit—from the wrongdoer, so that [it] is made whole. And, second, a party with a small but valid contract claim is more likely to hazard bringing suit since the claimant may recover attorney's fees if successful,

even if the potential amount of attorney's fees is greater than the amount of the contract. Section 38.001's establishment of a one-way fee shift means that a claimant does not risk having to pay the defendant's attorney's fees if the suit is unsuccessful.

1/2 Price Checks Cashed v. United Auto. Ins. Co., 344 S.W.3d 378, 382–83 (Tex.2011). Both of these purposes are evident in the facts of this case, and the attorney's fees of $198,929.50 as proven are reasonable under the circumstances.

Fraud

***8** 12. The Texas Supreme Court has held that

[t]he elements of fraud are: (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

Aquaplex, Inc. v. Rancho la Valencia, Inc., 297 S.W.3d 768, 774 (Tex.2009) (internal quotation marks omitted).

13. Defendants made material misrepresentations that they knew were false at the time they made them with the intent that Plaintiff act on these misrepresentations. Plaintiff acted on Defendants' material misrepresentations and suffered damages as a result.

14. Here, the Defendants represented to Forum that they would initially return the property, but were instead negotiating with the Mexican government to declare the property a permanent import. Defendants failed to admit this to Forum for two years, during which time they retained the property under the false pretext that they could not get the property out of the country. Ironically, Defendants managed to extract the property in June 2014 from Mexico with no explanation as to how this was done or why it was possible in 2014 and not 2012. In addition, there is no question that the Defendants had been using the equipment for their own purposes, given the recent marine growth on some of the equipment.

15. Accordingly, the actions of the Defendants were fraudulent.

Piercing the Corporate Veil

16. "Th[e] Court looks to the law of the State of incorporation for each corporate [d]efendant to determine whether its corporate entity should be disregarded." *Amoco Chem. Co. v. Tex Tin Corp.*, 925 F.Supp. 1192, 1201 (S.D.Tex.1996) (Kent, J.); *Ace Am. Ins. Co. v. Huntsman Corp.*, 255 F.R.D. 179, 195 (S.D.Tex.2008) (Rosenthal, J.). Globaltech is a California corporation. While Texas law controls Forum's other claims, California law will govern whether Globaltech's corporate veil can be pierced.

17. Under California law,

> [t]here is no litmus test to determine when the corporate veil will be pierced; rather the result will depend on the circumstances of each particular case. There are, nevertheless, two general requirements: (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.

Mesler v. Bragg Mgmt. Co., 39 Cal.3d 290, 300 (Cal.1985) (citations omitted) (internal quotation marks omitted).

> Factors for the trial court to consider include the commingling of funds and assets of the two entities, identical equitable ownership in the two entities, use of the same offices and employees, disregard of corporate formalities,[64] identical directors and officers, and use of one as a mere shell or conduit for the affairs of the other. No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied.

***9** *Troyk v. Farmers Grp., Inc.*, 171 Cal.App. 4th 1305, 1342 (Cal.Ct.App.2009) (citations omitted) (internal quotation marks omitted). The corporate form may not be "used by an individual or individuals ... to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose[;] a court may disregard the corporate entity and treat the acts as if they were done by the individuals themselves or by the controlling corporation." *People v. Anderson*, 1 Cal.App. 4th 1084, 1092 (Cal.Ct.App.1991) (alterations in original) (emphasis omitted) (internal quotations marks omitted).

18. Globaltech was used by Defendants Tarek Elsharhawy and Shelly Chilman as a sham to perpetrate a fraud on Plaintiff and its predecessor in interest, DPS. Through the artifice of their corporate entity, Globaltech, Tarek Elsharhawy and Shelly Chilman acquired equipment from DPS for their own use by deliberately misrepresenting their intentions with respect to the equipment, as explained supra. Tarek Elsharhawy and Shelley Chilman attempted in this litigation to evade the consequences of their fraud by hiding behind the corporate formality of Globaltech—a company that did not follow corporate formalities and misrepresented its capitalization to Plaintiff. There was such unity of interest and ownership between Globaltech, Tarek Elsharhawy, and Shelly Chilman that the separate personalities of the corporation and the individuals no longer existed. If the acts of Globaltech are treated as those of the corporation alone, an inequitable result will follow for Forum/DPS, the victim of this fraudulent scheme.

19. For the foregoing reasons, this Court finds that Tarek Elsharhawy and Shelly Chilman are individually liable to the Plaintiff for the damages caused by their deliberate, fraudulent actions, including being individually liable for Globaltech's

breach of contract. It is appropriate to pierce the corporate veil and disregard the corporate entity, which it appears was used for the purposes of evading the law.

III. CONCLUSION

Based on the foregoing, the Court hereby

ORDERS that Plaintiff Forum Subsea Rentals *f/k/a* DPS, Inc. is **AWARDED** $932,068.45 in damages. The Court further

ORDERS that Plaintiff Forum Subsea Rentals *f/k/a* DPS, Inc. is **AWARDED** $198,929.50 in attorney's fees.

The Court will issue a separate Final Judgment.

SIGNED at Houston, Texas, on this 17 day of September, 2014.

All Citations

Not Reported in Fed. Supp., 2014 WL 10751177

Footnotes

1 Testimony of Felix Pena; Exhibits 1, 4, 7.

2 Exhibits 2,3

3 Exhibits 5, 6, 7, 8, 9, 10, 11 and 12.

4 Testimony of Felix Pena and Exhibits 5, 7 and 11.

5 Testimony of Felix Pena; Exhibit 43.

6 Testimony of Felix Pena; Exhibit 17 at Forum 00350.

7 Testimony of Felix Pena.

8 Testimony of Felix Pena and Exhibit 17 at Forum 00350.

9 Testimony of Felix Pena; Exhibit 17; Exhibit 21 and Exhibit 24.

10 Testimony of Felix Pena; Exhibit 17 at Forum 00358 and 00353.

11 Exhibit 17 at Forum 00358 and 00353.

12 Testimony of Felix Pena; Exhibit 17 at Forum 00358 and 00353.

13 Exhibit 17 at Forum 00358 and 00353.

14 Testimony of Felix Pena; Exhibit 17 at Forum 00358 and 00353.

15 Exhibit 17 at Forum 00358 and 00353.

16 Testimony of Felix Pena; Exhibit 17 at Forum 00358 and 00353.

17 Exhibit 17 at Forum 00358 and 00353.

18 Testimony of Felix Pena; Exhibits 14, 15, 16.

19 Exhibit 41, at Forum 00076–00079.

20 Exhibit 18.

21 Exhibit 18.

22 Exhibit 18.

23 Exhibit 17, at Forum 00349–00351.

24 Testimony of Felix Pena.

25 Exhibit 18.

26 Testimony of James McCulloch; Exhibits 21 and 20.

27 Testimony of Felix Pena and James McCulloch. Testimony of Tarek Elsharhawy, p. 95.

28 Exhibits 24–32; Testimony of James McCulloch.

29 Doc. 1.

30 Doc. 41.

31 Testimony of Felix Pena; Exhibit 40.

32 Exhibit 39; Testimony of Felix Pena.

33 Exhibit 39; Testimony of Felix Pena.

34 Testimony of Felix Pena; Exhibit 39, 23.

35 Testimony of Felix Pena.

36 Exhibit 3.

37 Exhibit 35.

38 Testimony of Tarek Elsharhawy, pp. 33–34.

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39 Testimony of Tarek Elsharhawy, p. 36

40 Testimony of Tarek Elsharhawy, p. 36.

41 Testimony of Tarek Elsharhawy, pp. 36–37.

42 Testimony of Tarek Elsharhawy, p. 37.

43 Testimony of Tarek Elsharhawy, p. 37.

44 Testimony of Tarek Elsharhawy, pp. 38–39.

45 Testimony of Tarek Elsharhawy, p. 37.

46 Testimony of Tarek Elsharhawy, pp. 34–39.

47 Testimony of Tarek Elsharhawy, p. 79.

48 Testimony of Tarek Elsharhawy, pp. 65–89.

49 Testimony of Tarek Elsharhawy, pp. 64–92.

50 Testimony of Tarek Elsharhawy, pp. 64–92.

51 Testimony of Felix Pena; Exhibit 43.

52 Testimony of Felix Pena.

53 Testimony of Felix Pena.

54 Testimony of Felix Pena and Exhibit 43. See also Exhibit 22.

55 Testimony of Felix Pena and Exhibit 43. See also Exhibits 13, 14, 15, 16, 41 at Forum 00201.

56 Testimony of Felix Pena and Jim McCulloch and Exhibits 13, 14, 15, 16, 21, 24, 28 and 41 at Forum 00201.

57 Testimony of Felix Pena.

58 Testimony of Felix Pena; Exhibit 43 (summary); Exhibits 5, 11

59 Testimony of Jim McCulloch.

60 Testimony of Jon Wise and Exhibit 44.

61 Testimony of Jon Wise.

62 As an independent basis for recovery of loss of use under the contract, the Standard Terms and Conditions of Equipment Rental which formed a part of the Forum

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contract provided in Paragraph 4 that the renter (i.e., Defendants) agreed to "pay rental charges for damaged equipment until such time that the damaged equipment is returned to DPS facility or other location as directed by DPS." Therefore, Defendants expressly bound themselves to pay rental charges (at the agreed daily rates) for the damaged equipment from the time the contract ended until the present.

63 "To recover attorney's fees under section 38.001, a claimant must meet several prerequisites. The claimant must: (1) plead and prevail on a claim for which attorney's fees are permitted under section 38.001, (2) be represented by an attorney, (3) present the claim to the opposing party or his agent, and (4) demonstrate that the opposing party did not tender payment within thirty days after the claim was presented." *1/2 Price Checks Cashed v. United Auto. Ins. Co.*, 344 S.W.3d 378, 383 (Tex.2011). Those prerequisites occurred in this case.

64 Under § 1500 of the California Corporations Code,

> Each corporation shall keep adequate and correct books and records of account and shall keep minutes of the proceedings of its shareholders, board and committees of the board and shall keep at its principal executive office, or at the office of its transfer agent or registrar, a record of its shareholders, giving the names and addresses of all shareholders and the number and class of shares held by each. Those minutes and other books and records shall be kept either in written form or in another form capable of being converted into clearly legible tangible form or in any combination of the foregoing. When minutes and other books and records are kept in a form capable of being converted into clearly legible paper form, the clearly legible paper form into which those minutes and other books and records are converted shall be admissible in evidence, and accepted for all other purposes, to the same extent as an original paper record of the same information would have been, provided that the paper form accurately portrays the record.

Cal. Corp.Code § 1500.

End of Document

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CASE NO. 37

2024 WL 5048964
Only the Westlaw citation
is currently available.
United States District Court,
S.D. Texas, Houston Division.

POINTEAST PHARMA CONSULTING, INC., Plaintiff,
v.
LENZING AKTIENGESELLSCHAFT, Palmers Textil Aktiengesellschaft, Hygiene Austria LP Gmbh, Stephan Trubrich, Tino Wieser, Defendants.

Civil Action
No.
4
:
21
-
CV
-
3654
|
Signed December 9, 2024

Attorneys and Law Firms

William J. Akins, FisherBroyles, LLP, Austin, TX, William Joel Akins, Pierson Ferdinand, LLP, Austin, TX, for Plaintiff.

ORDER GRANTING MOTION FOR DEFAULT JUDGMENT

Andrew S. Hanen, United States District Judge

***1** Pending before the Court is Plaintiff PointEast Pharma Consulting, Inc.'s ("Plaintiff" or "PointEast") Amended Motion for Default Judgment against Defendants Palmers Textil Aktiengesellschaft ("Palmers") and Tino Wieser ("Wieser"). (Doc. No. 121). The Court has considered the evidence, the pleadings on file, and the relevant authorities. (Doc. Nos. 121 and 122). Plaintiff dismissed its claims against Defendant Hygiene Austria LP GmbH ("HALP"), and has resolved its claims against Lenzing AG ("Lenzing") and Stephan Trubrich ("Trubrich"). As such, Plaintiff's only remaining claims are against Palmers and Wieser. Neither Defendant answered the Original Complaint nor filed any responsive pleadings or briefs. The Court concludes that PointEast has established that it is entitled to the requested judgment and GRANTS Plaintiff's Amended Motion for Default Judgment. (Doc. No. 121).

I. Background

PointEast is a United States-based pharmaceutical consulting company. (Doc. No. 121-1 at 3). PointEast is owned by Dr. Georg Fischer ("Dr. Fischer") and Mr. Leonard Fischer ("Mr. Fischer"). (*Id.*). Defendants Lenzing and Palmers, both textile manufacturers, are entities based in Austria. (*Id.*). In 2020, Lenzing and Palmers jointly created HALP, also an Austrian entity. (*Id.* at 5). Defendant Trubrich, a citizen of Austria, is a Vice President of Lenzing. (*Id.* at 3–4). Defendant Wieser is part-owner of Palmers. (*Id.* at 4).

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At issue in this case is an alleged contract whereby Plaintiff was to be the exclusive distributor of HALP's "Made in Austria" masks in the United States. Plaintiff alleges that amid the COVID-19 pandemic, **Lenzing** and Palmers created HALP to sell personal protective products, principally face masks. (*Id.* at 5). HALP allegedly undertook to produce "hundreds of millions of masks" for distribution outside of Austria. (*Id.* at 6). In July 2020, HALP contacted **PointEast**. (*Id.* at 5). Plaintiff claims that HALP inquired as to whether **PointEast** was interested in a long-term, exclusive distribution deal for the United States. Plaintiff responded that it was indeed interested. (*Id.* at 7).

HALP allegedly promised Plaintiff that it would create a joint venture in the United States that would be headquartered in Houston. Texas. (*Id.* at 6). Leonard Fischer was to act as lead manager of the United States venture. (*Id.*). Plaintiff claims that HALP told Mr. Fischer that he "could name [his] salary and title." (*Id.*). Over the next couple of months, the parties exchanged terms sheets and eventually agreed to finalize the term sheet during a meeting in Vienna, Austria. (*Id.* at 7). At this meeting. Dr. Fischer and Mr. Fischer, on behalf of **PointEast**, met with Trubrich, on behalf of **Lenzing** and HALP, and Wiser, on behalf of Palmers and HALP. (*Id.*). When Dr. Fischer inquired about finalizing the term sheet, Wieser assured him that no written contract was needed and that their verbal contract, accompanied by a handshake, is binding. (*Id.*). The parties then agreed to make **PointEast** HALP's exclusive distributor in the United States of HALP's "Made in Austria" face masks. (*Id.* at 8).

***2** **PointEast** applied for and obtained, on behalf of HALP, permission from the United States Food & Drug Administration ("FDA") to import and sell the masks within the United States. (*Id.* at 13). This application required **PointEast** to identify the masks' production location, which **PointEast** listed as Austria. (*Id.*). **PointEast** claims it spent hundreds of hours:

> advising HALP, conducting market, pricing and federal grant research, creating a logistics plan, distributing mask samples, conceptualizing and providing branding and design work, developing N95/FFP2 prototypes, registering internet domains, business names and bank accounts, building an online store, establishing federal and state supplier accounts, corresponding with testing laboratories and hospitals, collecting competitor masks and sending them to Hygiene Austria, corresponding with FDA regulators, submitting FDA Emergency Use Authorization ("EUA") paperwork, and serving as Hygiene Austria's FDA import agent, all in an effort to prepare for promised distribution of "Made in

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> Austria" masks in the United States.

(*Id.*). Plaintiff states that HALP, and thus Palmers and Wieser, benefited significantly from **PointEast's** work. (*Id.* at **9**). On August 18, 2020, **PointEast** recommended that HALP use a red nosepiece on its masks to create brand recognition and "confer strong product quality identification in the United States." (*Id.*). HALP agreed to, and in fact did, use a red nosepiece on its masks. (*Id.* at **9**, 11). **PointEast** alleges that, as a result of the "instantly recognizable" red nosepiece forged via "countless hours and considerable branding and design work," HALP earned over $609 million USD in sales. (*Id.* at 11–12).

Wieser, on behalf of HALP, allegedly made repeated statements claiming that the masks HALP sold were made in Austria. *See* (*Id.* at 12, 14–15). The masks, however, were actually made in China but labeled as "Made in Austria." (*Id.* at 15; Doc. No. 121-2 at 3). At the same time HALP offered to supply **PointEast** 500,000 of its "Made in Austria" masks, Austrian police were investigating HALP for the use of the false labels. (Doc. No. 121-1 at 15; Doc. No. 121-3). HALP allegedly never imported any masks to **PointEast**, nor did it create its United States venture or hire Mr. Fischer at his desired salary. (Doc. No. 121-1 at 16). HALP, instead, attempted to deflect the bad publicity from the police investigation by issuing a statement that it was correct in labeling its masks "Made in Austria" because the masks were "made *for* Austria." (*Id.*). Plaintiff argues that this deflection shows that HALP knowingly contracted for masks that it had no plans to produce. (*Id.*).

PointEast filed this lawsuit in the 333rd Judicial District of Harris County, Texas. **Lenzing** removed the case to the Southern District of Texas. (Doc. No. 1). Plaintiff brings claims for fraud, fraud in the inducement, negligent misrepresentation, breach of express or implied contract, unjust enrichment, and violations of the Texas Theft Liability Act. (Doc. No. 121-1 at 21–24). Plaintiff further alleges that liability amongst or between defendants should be shared through theories of joint venture or joint enterprise and civil conspiracy. (*Id.* at 24–26). Plaintiff alleges that the Defendants breached the parties' verbal contract by failing to import any masks at all (let alone masks actually made in Austria), failing to establish the United States venture as promised, and failing to pay Plaintiff for the work it put into their business arrangement. (*Id.* at 18–19). Most significantly, Plaintiff states that Defendants wrongfully profited from an idea they took from **PointEast**—the red nosepiece—while refusing to pay Plaintiff anything. (*Id.* at 19).

***3** As noted above, Plaintiff dismissed its claims against Defendant HALP, and has resolved its claims against **Lenzing** and Trubrich. Therefore, Plaintiff's only remaining claims are against Palmers and Wieser. Despite having been served with process, Defendants Wieser and Palmers have not appeared in the case or filed any responsive pleadings.[1] The Clerk entered default as to Palmers on April 16, **2024** (Doc. No. 115) and default as to Wieser on November 22, **2024** (Doc. No. 123) pursuant to Federal Rule of Civil Procedure 55(a). Plaintiff

subsequently filed its Amended Motion for Default Judgment pursuant to Federal Rule of Civil Procedure 55(b). (Doc. No. 121).

II. Legal Standard

After default is entered, a plaintiff may seek default judgment under Federal Rule of Civil Procedure 55(b). *See N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137, 141 (5th Cir. 1996). The plaintiff must submit evidence supporting that the defendant has been properly served with the summons, complaint, and the default judgment motion. *James Avery Craftsman, Inc. v. Sam Moon Trading Enters., Ltd.*, No. 16-CV-463, 2018 WL 4688778, at *3 (W.D. Tex. July 5, 2018) (citing *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind*, 841 F.2d 646, 649–51 (5th Cir. 1988)); *Hazim v. Schiel & Denver Book Grp.*, No. H-12-1286, 2013 WL 2152109, at *1 (S.D. Tex. May 16, 2013). Absent proper service, a district court does not have personal jurisdiction over the defendant, and any default judgment is void. *See Recreational Props., Inc. v. Sw. Mortg. Serv. Corp.*, 804 F.2d 311, 314 (5th Cir. 1986).

"A default judgment is unassailable on the merits but only so far as it is supported by the well-pleaded allegations, assumed to be true." *Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 496(5th Cir.2015)(quoting *Nishimatsu Constr. Co., Ltd. v. Hous. Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)). "There must be a sufficient basis in the pleadings for the judgment entered." Nishimatsu Constr. Co., 515 F.2d at 1206. For the court to enter default judgment, the complaint must satisfy Federal Rule of Civil Procedure 8. *See Wooten*, 788 F.3d at 497–98. "On appeal, the defendant, although he may not challenge the sufficiency of the evidence, is entitled to contest the sufficiency of the complaint and its allegations to support the judgment." *Nishimatsu Const. Co. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975).

Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 573 (2007). Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' hut it asks for more than a sheer possibility than a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556).

III. Analysis

***4** Courts in the Fifth Circuit have developed a three-part analysis to determine whether a default judgment should be entered. The Court must consider three questions: (1) if a default judgment is procedurally appropriate; (2) if the plaintiff has presented a colorable claim in its pleadings; and (3) how to calculate damages or

equitable relief. *Vela v. M&G USA Corp.*, 2020 WL 421188. at * 1 (S.D. Tex. Jan. 27, 2020). The Court finds that each of these requirements has been met.

A. PointEast has shown that default judgment is procedurally warranted.

As a matter of longstanding Fifth Circuit law, default judgments are generally disfavored. *See Sun Bank v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989) ("Default judgments are a drastic remedy, not favored by the Federal Rules and resorted by courts only in extreme situations."). The Court must consider relevant factors, including: (1) whether material issues of fact are at issue; (2) whether there has been substantial prejudice; (3) whether the grounds for default are clearly established; (4) whether the default was caused by a good faith mistake or excusable neglect; (5) the harshness of the default judgment based on the circumstances; and (6) whether the court would think itself obliged to set aside the default on the [defaulting party's] motion. *Lindsey v. Prive Corp.*, 161 F.3d 886, 893 (5th Cir. 1998). The Court finds that each of these considerations weigh in favor of default judgment in this case.

First, there are no material facts at issue. Defendants have not filed an answer or any responsive pleadings since being served in this case; consequently, there are no material facts in dispute. *See Nishimatsu Constr. Co.*, 515 F.2d at 1206 ("The defendant, by his default, admits the plaintiff's well-pleaded allegations of fact, is concluded on those facts by the judgment, and is barred from contesting on appeal the facts thus established.").

Second, there does not seem to be any threat of substantial prejudice to the Defendant. Moreover, Defendants' "failure to respond threatens to bring the adversary process to a halt, effectively prejudicing Plaintiff's interests." *Ins. Co. of the W. v. H & G Contractors, Inc.*, No. C–10–390, 2011 WL 4738197, at *3 (S.D. Tex. Oct. 5, 2011).

Third, the grounds for default are well established by Defendants failure to "plead or otherwise defend" against **PointEast's** claims, despite being properly served. Fed. R. Civ. Pro. 55(a). Further, none of the typical exceptions to default apply, reflected in the Clerk's entry of default. This factor weighs in favor of default judgment.

Fourth, the question of good faith mistake or excusable neglect is slightly more difficult. Defendant Wieser is a citizen of, and resides in, Austria. (Doc. No. 121-1 at 4). Defendant Palmers is an entity incorporated in Austria with its principal place of business in Vienna, Austria. (*Id.* at 3). The requisite documents have been mailed first class to Palmers's Austrian address. (Doc. No. 21). Wieser was served via both first-class mail and email after the Court permitted alternative service of process in its prior order. (Doc. No. 90). The service is deemed legally sound, even if the Plaintiff cannot show Defendants have *actual* notice of the suit. Thus, the Court finds that this factor is neutral.

Fifth, default judgment is not harsh under the circumstances. **PointEast** seeks only the relief to which it is entitled under the law, mitigating the harshness of a default judgment against Defendants. *See Lindsey*, 161 F.3d at 893.

***5** Sixth, and finally, absent a compelling reason the Court does not find itself likely to set aside the default upon Defendants' motion. Defendants have failed to answer or appear at any time during the pendency of this suit—now pending over three years—despite being served numerous ways over the course of several months. Further, based on the Defendants' lack of appearance or response, the likelihood of the Defendants making such a motion seems remarkably low. Thus, this factor also weighs in favor of default judgment.

All of the *Lindsey* factors weigh in Plaintiffs favor. Therefore, the Court concludes that default judgment is procedurally warranted.

B. PointEast has pled substantively meritorious claims.

Next, the Court must determine whether the pleadings provide a "sufficient basis" for entering default judgment. *Nasufi*, 2017 WL 6497762, at *2. Due to their default. Defendants are deemed to have admitted the well-pleaded facts alleged in the Complaint. *See United States v. Shipco Gen., Inc.*, 814 F.2d 1011, 1014 (5th Cir. 1987) (finding that the well-pleaded factual allegations are assumed to be true, except regarding damages). Nonetheless, the Court must review the pleadings to determine the substantive merits of **PointEast's** claims for relief. *Nishimatsu Constr. Co.*, 515 F.2d at 1206. As noted above, Plaintiff brings claims for fraud, fraud in the inducement, negligent misrepresentation, breach of express or implied contract, unjust enrichment, and violations of the Texas Theft Liability Act.

1. Fraud, fraud in the inducement, and negligent misrepresentation

PointEast asserted claims for common-law fraud against the Defendants. (Doc. No. 121-1, at 19–21). In Texas, the elements of fraud are:

> (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 337 (Tex. 2011) (quoting *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009) (per curiam)). In federal court, fraud claims must meet the heightened pleading standard of Rule **9**. FED. R. CIV. P. **9**(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). The Fifth Circuit "interprets Rule **9**(b) strictly, requiring the plaintiff to 'specify the statements contended to be fraudulent, identify the speaker, state when and where the statements

were made, and explain why the statements were fraudulent.' " *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 207 (5th Cir. 2009) (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997)).

PointEast's Complaint adequately alleges a cause of action for fraud under this heightened pleading standard. The complaint identifies a series of false statements made by Defendants concerning the purported HALP United States venture business opportunity. (Doc. No. 121-1 at 12, 14–15). **PointEast** alleges Defendants made these false intentionally and knowingly. (*Id.* at 16). Moreover, Plaintiff asserts reliance and causation, stating that "**PointEast** relied on their false representations to its detriment, including by dedicating countless hours and considerable branding and design work, causing [HALP's] masks to become instantly recognizable in the market as Hygiene Austria masks.... as a result of **PointEast's** work" (*Id.* at 20–21). Thus, Plaintiff has satisfied each element of a common law fraud claim. The Court finds that the pleadings provide a sufficient basis for entering default judgment on this cause of action.

2. Breach of contract

***6** **PointEast** has also asserted claims for breach of contract against the Defendants. (Doc. No. 1, at 10–11). Under Texas law, to prevail on a breach-of-contract claim a plaintiff must show "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach." *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 418 (5th Cir. 2009) (quoting *Aguiar v. Segal*, 167 S.W.3d 443, 450 (Tex. App.—Houston [14th Dist.] 2005, pet. denied)). The allegations set out in the Complaint satisfy these four elements. Specifically, the Complaint alleges: (1) the oral agreement between the parties constitutes a valid, enforceable contract (Doc. No. 121-1 at 7–8); (2) **PointEast** performed or was excused from performing its contractual obligations (*Id.* at 13); (3) Defendants have failed to pay the amounts owing under the contracts (*Id.* at 18–19); and (4) Defendants' breaches have caused significant financial injury to **PointEast**. (*Id.*). Given these well-pleaded factual allegations, default judgment is appropriate for Plaintiff's breach of contract cause of action.

Plaintiff also asserts an unjust enrichment cause of action. Texas law is not completely clear as to whether unjust enrichment constitutes an independent cause of action rather than a theory of restitution used when calculating damages. *Compare* *Pepi Corp. v. Galliford*, 254 S.W.3d 457, 460 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (finding that unjust enrichment is an independent cause of action), *with* *Davis v. OneWest Bank N.A.*, No. 02-14-00264-CV, 2015 **WL** 1623541, at *1 (Tex. App.—Fort Worth, Apr. **9**, 2015, pet. denied) (finding that unjust enrichment is not an independent cause of action); *see also* *Perales v. Bank of Am., N.A.*, No. CIV.A. H-14-1791, 2014 **WL** 3907793, at *3 (**S.D**. **Tex**. Aug. 11, 2014). Nevertheless, whether unjust enrichment is characterized as a cause of action or a theory of recovery, the elements are clear.

"A party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Digital Drilling Data Sys., L.L.C. v. Petrolink Servs., Inc.*, 965 F.3d 365, 384 (5th Cir. 2020) (citing *Heldenfels Bros. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)). Unjust enrichment claims are based on quasi-contract and are predicated on the absence of an express contract controlling the circumstances. *See Fortune Production Co. v. Conoco, Inc.*, 52 S.W.3d 671, 683 (Tex. 2000).

PointEast alleges Defendants benefited, either by fraud or by taking of an undue advantage, from **PointEast's** work on the branding and designs of the face masks. (Doc. No. 121 at 13). Plaintiff states that it explicitly recommended Defendants use a red nosepiece to build brand recognition. (Doc. No. 121-1 at **9**). The red nosepiece is claimed to be the cause of Defendants' earning hundreds of millions of Euros. (*Id.* at 22). Plaintiff alleges that Palmers and Wieser unjustly obtained the revenue generated from the design and wrongfully retained such benefits to the detriment of **PointEast**. (*Id.* at 22).

Still, the Court is uncertain whether Plaintiff, as pleaded, can recover under both a breach of contract cause of action and an unjust enrichment cause of action. *See Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 454 (5th Cir. 2001) (citing *Woodard v. Southwest States, Inc.*, 384 S.W.2d 674, 675 (Tex. 1964)) ("In Texas, unjust enrichment is based on quasi-contract and is unavailable when a valid, express contract governing the subject matter of the dispute exists."). Pursuant to Federal Rule of Civil Procedure 55(b), the Court "may conduct hearings when, to enter or effectuate judgment, it needs to: ... establish the truth of any allegation by evidence or investigate any other matter." FED. R. CIV. P. 55(b)(2). Thus, the Court will conduct a hearing to determine whether Plaintiff may recover under just one or both causes of action.

3. Texas Theft Liability Act

***7** Plaintiff also brings claims under the Texas Theft Liability Act ("TTLA"). Pursuant to the TTLA, a person who commits theft is liable for the damages resulting from the theft. TEX. CIV. PRAC. & REM. CODE ANN. § 134.003(a). "Theft" is defined as "unlawfully appropriating property or unlawfully obtaining services as described by sections 31.03-31.07, or 31.11-31.14 of the Texas Penal Code." *Id.* § 134.002(a). "A person commits theft of service if, with intent to avoid payment for service that the actor knows is provided only for compensation the actor intentionally or knowingly secures performance of the service by deception...." TEX. PEN. CODE § 31.04(1).

PointEast alleges Defendants promised to make Plaintiff the exclusive United States distributor of its products, and made this promise without the intent to pay for **PointEast's** work. (Doc. No. 121-1 at 16). **PointEast** claims the services would not have been provided but-for Defendants' promise of compensation. (*Id.* at 22). Plaintiff also states that, "[a]cting with the intent to avoid payment, Defendants intentionally and knowingly secured **PointEast's** performance of its services by deception." (*Id.*). Given

these well-pleaded factual allegations, default judgment is appropriate for Plaintiff's TTLA claim. While the statute entitles **PointEast** to recover reasonable and necessary attorney's fees, Plaintiffs do not provide evidence to support such a claim.

C. Damages

After a court determines default judgment can be entered, the court must determine what form of relief, if any, to which the plaintiff is entitled. *Nasufi*, 2017 **WL** 6497762, at *2. The plaintiff bears the burden of proving the amount of damages. *U.S. for Use of M-CO Constr., Inc. v. Shipco Gen., Inc.*, 814 F.2d 1011, 1014 (5th Cir. 1987). The plaintiff must establish the necessary facts, either through detailed affidavits or an evidentiary hearing, to show its damages are "capable of mathematical calculation." *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979). If a calculation can be made "with certainty by reference to the pleadings and supporting documents," a hearing to determine damages is unnecessary. *James v. Frame*, 6 F.3d 307, 311 (5th Cir. 1993) (quoting *Frame v. S–H, Inc.*, 967 F.2d 194, 204 (5th Cir. 1992)).

Federal Rule of Civil Procedure 55(b)(2) also allows the Court to conduct hearings when it needs to determine the amount of damages. The general rule is "unliquidated damages normally are not awarded without an evidentiary hearing." *Leedo Cabinetry v. James Sales & Distribution, Inc.*, 157 F.3d 410, 414 (5th Cir. 1998). While there is an exception when the amount claimed is "one capable of mathematical calculation," the Court finds that the exception is not applicable. *Id.* (citing *James v. Frame*, 6 F.3d 307, 309–10 (5th Cir. 1993)). Therefore, the Court will conduct a hearing to determine the amount of damages to which **PointEast** is entitled.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS PointEast's** Motion for Default Judgment on the issue of liability against the remaining Defendants. (Doc. No. 121). The Court will set a hearing to determine: (1) whether Plaintiff may recover on both its breach of contract and unjust enrichment claims; and (2) the amount of damages to which **PointEast** is entitled.

All Citations

Slip Copy, 2024 WL 5048964

Footnotes

1 As residents of Austria, Defendants were served in accordance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Nov. 15, 1965, 20 U.S.T. 361; *see* FED. R. CIV. P. 4(f)(1), (h)(2) (authorizing service under the Hague Convention); (Doc. Nos. 120 and 120-1).

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CASE NO. 38

2018 WL 4701566
Only the Westlaw citation
is currently available.
United States District Court,
S.D. Texas, Houston Division.

Terry KATZ, Plaintiff,
v.
INTEL PHARMA, LLC, a Texas limited liability company; Ntel Pharma, LLC, a Texas limited liability company; Ntel Nutra, Inc., a Texas corporation; and Landon Suggs, an individual. Defendants.

Civil Action
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Signed 10/01/2018

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OPINION AND ORDER

Lee H. Rosenthal, Chief United States District Judge

***1** Terry Katz brought this derivative action on behalf of the nominal defendant, Intel Pharma, LLC, against Ntel Pharma, LLC, Ntel Nutra, Inc., and Landon Suggs. (Docket Entry Nos. 1, 18). Katz asserts breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, violations of the Texas Uniform Fraudulent Transfer Act, and civil conspiracy. (*Id.*). The defendants moved to dismiss, and Katz responded and filed an amended complaint. (Docket Entry Nos. 11, 18, 20). This court denied the motion to dismiss as moot, the defendants moved to dismiss the amended complaint, and Katz responded. (Docket Entry Nos. 24–26). For the reasons explained below, the court denies the defendants' motion to dismiss.

I. Background

A. The Complaint's Allegations

Katz alleges that his relationship with Landon Suggs, then the sole owner of workout-supplement company Intel Pharma, LLC, began in January 2015. (Docket Entry No. 18 at 1–2). In February 2015, Suggs gave him a business proposal for a new supplement brand. (*Id.*). A month later, Suggs offered Katz a 25% interest in Intel in exchange for funding the initial inventory purchase, providing warehouse space, purchasing labels, and soliciting sales. (*Id.* at ¶ 14). Katz alleges that he orally accepted the proposal, creating an enforceable contract, and that he met the terms. (*Id.* at 15). The amended complaint alleges that Suggs confirmed Katz's 25% interest in

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writing. (*Id.* at ¶ 16). Angel Echevarria, **Intel**'s president, referred to **Katz** as a co-owner of the company in correspondence with an insurance broker. (*Id.* at ¶ 17–18). **Katz** received at least two income distributions from **Intel** in the summer of 2015. (*Id.* at ¶ 19).

Katz alleges that in August 2015, he wrote to Suggs and Echevarria offering them the opportunity to buy out his ownership interest in **Intel**. (*Id.* at ¶ 20). Neither responded. (*Id.*). In September 2015, **Katz** threatened Suggs and Echevarria with legal action if they did not pay him the income distributions he was owed. (*Id.* at ¶ 21).

The amended complaint alleges that Suggs and Echevarria formed Ntel **Pharma** a year later and transferred all or substantially all of **Intel**'s assets to Ntel **Pharma**. (*Id.* at ¶¶ 24–25). Ntel **Pharma** allegedly began selling and marketing the same workout supplements as **Intel**, including, for a time, through **Intel**'s website and Facebook page. (*Id.* at ¶¶ 31–32). Later, the **Intel** website redirected customers to Ntel **Pharma**'s websites. (*Id.*). **Intel** stopped selling its products or doing business, and, in January 2017, the Texas Secretary of State forfeited **Intel**'s certificate of formation. (*Id.* at ¶ 34).

Katz alleges that Suggs and Echevarria formed a third company, NTel Nutra, in January **2018**, and that they transferred substantially all of Ntel **Pharma**'s assets to NTel Nutra. **Katz** alleges that NTel Nutra described itself as a continuation of Ntel **Pharma** and sold the same supplements as Ntel **Pharma** and **Intel** had sold. (*Id.* at ¶¶ 46–50). **Katz** also alleges that NTel Nutra adopted the same hashtags and marketing features that **Intel** and Ntel **Pharma** had used. (*Id.* at ¶¶ 51–55). **Katz** contends that Suggs and Echevarria were the majority owners, if not the sole owners, of NTel Nutra. (*Id.* at ¶ 43).

***2** **Katz** asserts on **Intel**'s behalf claims for: (**1**) breach of fiduciary duty against Suggs; (2) aiding and abetting a breach of fiduciary duty, against Ntel **Pharma** and NTel Nutra; (3) violations of the Texas Uniform Fraudulent Transfer Act, against N-Tel and Nutra; and (4) civil conspiracy, against Suggs, Ntel **Pharma**, and NTel Nutra.

B. The Motion to Dismiss

The defendants argue that **Katz** bases his claims on his alleged oral agreement with Suggs to acquire a 25% interest in **Intel**, and, therefore, that his claims sound in contract. (Docket Entry No. 25 at 8–10). They argue that **Katz** has not pleaded sufficient facts to support an inference that **Katz** and Suggs had an enforceable contract. They urge the dismissal of **Katz**'s civil conspiracy claim because Texas law does not recognize a claim for civil conspiracy to breach a contract. (*Id.* at 10–12). They similarly argue that **Katz**'s aiding and abetting claims are not cognizable under Texas law. (*Id.* at 11). Finally, they argue that **Katz**'s amended complaint is deficient because many of its claims are based solely on "information and belief." (*Id.* at 10).

II. The Legal Standards under Rule 12(b)(6)

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Rule 12(b)

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(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a) (2). A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556).

To withstand a Rule 12(b)(6) motion, a "complaint must allege 'more than labels and conclusions,' " and "a formulaic recitation of the elements of a cause of action will not do." *Norris v. Hearst Tr.*, 500 F.3d 454, 464 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Iqbal*, 556 U.S. at 678 (alteration in original) (quoting *Twombly*, 550 U.S. at 557). "[A] complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief-including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.' " *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). But "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should...be exposed at the point of minimum expenditure of time and money by the parties and the court.' " *Twombly*, 550 U.S. at 558 (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 233-34 (3d ed. 2004)) (alteration in original).

***3** A plaintiff alleging fraud is held to the heightened pleading standard of Federal Rule of Civil Procedure 9(b). The Rule provides that a party alleging fraud "must state with particularity the circumstances constituting fraud....Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). "Put simply, Rule 9(b) requires 'the who, what, when, where, and how' to be laid out." *Benchmark Electronics, Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003). The plaintiff must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997). "A dismissal for failure to plead fraud with particularity under Rule 9(b) is treated as a dismissal for failure to state a claim under Rule 12(b)(6)." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185 n.8 (5th Cir. 2009) (citation and internal quotation marks omitted).

III. Analysis

A. The Nature of Katz's Claims

The defendants' central argument for dismissal is that the claims **Katz** presents as tort claims are contract claims because each is based on **Katz**'s alleged oral agreement with Suggs. (Docket Entry No. 25 at 5). The defendants' argument for why this requires dismissal is that **Katz** is seeking contract performance, but has not pleaded sufficient facts to show that the contract exists, much less that it was breached.

Katz responds that the allegations about his agreement with Suggs are only to show that he has standing to bring this derivative claim. See TEX. BUS. ORG. CODE § 101.452; *see also In re LoneStar Logo & Signs, **LLC***, 552 S.W.3d 342, 347 (Tex. App.—Austin **2018**, no pet.) ("From these rationales has followed the rule, recognized in Texas as elsewhere, that a corporate shareholder (and, by logical extension, an **LLC** member) must have and maintain that ownership status in order to have standing to prosecute derivative claims on the entity's behalf."). **Katz** argues that the defendants have mischaracterized his complaint by arguing that he bases his claims on Suggs's failure to give him distributions from his 25% interest in **Intel**. **Katz** clarifies that he does not seek relief for Suggs's failure to comply with an oral agreement to give **Katz** a 25% interest and to make distributions based on that interest. Instead, **Katz** argues he is pleading facts about the contract to show that, because he has a 25% ownership interest, he has standing to bring his derivative suit.

Katz's claims are properly considered under § 101.463 of the Texas Business Organizations Code, which provides special rules for closely held limited liability companies. *See* TEX. BUS. ORG. CODE § 101.463. Under § 101.463, a "closely held limited liability company" is a limited liability company with "(**1**) fewer than 35 members; and (2) no membership interests listed on a national securities exchange or regularly quoted in an over-the-counter market by **one** or more members of a national securities association." § 101.463(a). **Katz** alleges that Suggs was the sole owner of **Intel** before he offered **Katz** a 25% interest, meaning that **Intel** had fewer than 35 members and that its membership interests are not listed on a national exchange.

"Sections 101.452–101.459 do not apply to a closely held limited liability company." § 101.463(b); *see also Lonestar Logo*, 552 S.W.3d at 348–49. "The import and effect of this exemption, as the Texas Supreme Court has observed in regard to the parallel provisions that govern shareholder-derivative suits, are that 'the Legislature has enacted special rules to allow its shareholders to more easily bring a derivative suit on behalf of the corporation,' including 'without having to prove that they "fairly and adequately represent[ ] the interests of" the corporation, without having to make a "demand" upon the corporation, as in other derivative actions, and without fear of a stay or dismissal based on actions of other corporate actors in response to a demand.' " *Id.* at 349 (quoting *Ritchie v. Rupe*, 443 S.W.3d 856, 880–81 (Tex. 2014) (citations omitted)). Section 101.463 also provides:

> ***4** [i]f justice requires:
>
> (**1**) a derivative proceeding brought by a member of a closely held limited liability company may be treated by a court as a direct action brought by the member for the member's own benefit; and

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> (2) a recovery in a direct or derivative proceeding by a member may be paid directly to the plaintiff or to the limited liability company if necessary to protect the interests of creditors or other members of the limited liability company.

§ 101.463(c).

Even if **Intel** is a closely held corporation, **Katz** must establish himself as a member of the **LLC** to bring a derivative suit. The complaint alleges that **Katz** had a 25% ownership interest in **Intel** and that both Suggs and Echevarria corroborated **Katz**'s interest in writing. (Docket Entry No. 18 at 16–17). A membership interest is a bundle of economic rights in the **LLC**, including the right to receive distributions. See TEX. BUS. ORG. CODE § 1.002(54). The complaint alleges that **Katz** received the right to income distributions from **Intel** based on his ownership interest and that he received at least two distributions. (Docket Entry No. 18 at ¶ 19). Viewing the complaint in the light most favorable to **Katz**, the factual allegations are sufficient to permit **Katz**'s derivative claims. The fact that **Katz** repeatedly alleges the existence of a contract with Suggs to receive the ownership interest in **Intel** does not support dismissal.

B. The Claims Based on "Information and Belief"

The defendants argue that, to the extent **Katz**'s claims are not based on contract, the amended complaint should be dismissed because its claims "are predicated solely on allegations of a fraudulent transfer of corporate assets 'on information and belief.' " (Docket Entry No. 25 at 10). The defendants challenge the allegations based "on information and belief" as failing to set forth a sufficient factual basis. *See, e.g.*, *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) ("Although we have held that fraud may be pled on information and belief...we have also warned that this exception 'must not be mistaken for license to base claims of fraud on speculation and conclusory allegations.'...In addition, even where allegations are based on information and belief, the complaint must set forth a factual basis for such belief." (citations omitted)).

Katz agrees that some of his allegations are based on information and belief, and that Rule 9's heightened pleading standards likely apply to his claim for violations of the Texas Uniform Fraudulent Transfer Act. (Docket Entry No. 26 at 8–10). He argues, however, that the complaint pleads sufficient facts to support those allegations. The complaint "sufficiently pleads the who, what, when, where, and how of the fraudulent acts," and pleading on information and belief is necessary because only the defendants know, and have access to the information about, the specifics of the allegedly fraudulent transfers. (*Id.* at 10).

That some of the claims are made on "information and belief" is not a basis for dismissal. Rule 9(b) requires the plaintiff to identify "the 'who, what, when, where, and how' of the alleged fraud." *United States ex rel. Thompson.*, 125 F.3d at 903 (quoting *Williams*, 112 F.3d at 179). The complaint pleads essential facts making out the Texas Uniform Fraudulent Transfer Act claim. The complaint identifies which conveyances and transfers that

allegedly lacked adequate consideration are based on information and belief. (Docket Entry No. 18 at ¶¶ 26, 40). The complaint also states with particularity the facts on which the allegations of inadequate consideration are based. For example, the complaint alleges that Suggs was the managing member and CEO of **Intel** as well as the co-managing member and CEO of Ntel **Pharma**. The complaint alleges that Echevarria served as a member and president of **Intel**, while also serving as the co-managing member and president of Ntel **Pharma**. The complaint alleges that when **Intel**'s assets were conveyed to Ntel **Pharma**, Suggs and Echevarria were the majority owners of **Intel** and held at least a majority ownership interest in Ntel **Pharma**. The complaint sets out a general timeline for these transactions and alleges with specificity the marketing strategies and official statements of Ntel **Pharma** and NTel Nutra that tied the transactions to **Intel**. These allegations are not the type of vague, conclusory pleadings that *Iqbal* and *Twombly* instruct the courts to dismiss.

C. The Aiding and Abetting Claim

***5** The defendants argue that the court should dismiss the claim for aiding and abetting a breach of fiduciary duty because Texas law does not recognize liability on this basis. (Docket Entry No. 25 at 11). **Katz** responds that Texas does recognize a claim for aiding and abetting in this context. *See, e.g.,* *Floyd v. Hefner*, 556 F. Supp. 2d 617, 654 (**S.D**. **Tex**. 2008) (citing *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942); *Cox Tex. Newspapers, L.P. v. Wootten*, 59 S.W.3d 717, 721 (Tex. App.—Austin 2001, pet. denied)) ("Texas recognizes a cause of action for aiding and abetting a breach of fiduciary duty.").

The cases the defendants cite concluded that Texas law does not recognize a cause of action for aiding and abetting fraud; those cases do not discuss breach of fiduciary duty. *See, e.g., In re Enron Corp. Sec.*, No. H-**01**-3624, 2006 **WL** 3716669, at *8 (**S.D**. **Tex**. Dec. 12, 2006). As the Texas cases recognize a common-law claim for aiding and abetting a breach of fiduciary duty. *Kinzbach Tool Co.*, 160 S.W.2d at 574 ("It is settled as the law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such."); *Kastner v. Jenkens & Gilchrist, P.C.*, 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.); *Kline v. O'Quinn,* 874 S.W.2d 776, 786 (Tex.App.—Houston [14th Dist.] 1994, writ denied); *Horton v. Robinson*, 776 S.W.2d 260, 266 (Tex. App.—El Paso 1989, no writ).

Stating a claim for aiding and abetting a breach of fiduciary duty requires pleading: "(**1**) the existence of a fiduciary relationship; (2) that the third party knew of the fiduciary relationship; and (3) that the third party was aware that it was participating in the breach of that fiduciary relationship." *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007). The amended complaint adequately pleads the existence of a fiduciary duty by alleging that Suggs was the CEO of **Intel** and by alleging facts about his relationship with, and statements to, **Katz** about **Intel**. The complaint alleges that Ntel **Pharma** and NTel Nutra, through their officers, Suggs and Echevarria, knew of the fiduciary duties that these men owed **Intel** and participated in the breach. (Docket

Entry No. 18 at ¶¶ 68-69). **Katz**'s supporting factual allegations—that Ntel **Pharma** used the same marketing strategies, website, and mission statement as well as sold the same products as **Intel**—make these claims more than "threadbare recitals of a cause of action's elements" that merit dismissal. *Iqbal*, 556 U.S. at 678.

D. The Civil Conspiracy Claim

The defendants also move to dismiss the civil conspiracy claim, arguing that Texas law does not recognize a claim for a civil conspiracy to breach a contract. (Docket Entry No. 25 at 12). **Katz** argues that his action does not sound in contract but is a derivative action on behalf of **Intel**. (Docket Entry No. 26 at 11–12).

Because this is a derivative claim and not a breach of contract claim, **Katz**'s cause of action for civil conspiracy can proceed. Under Texas law, "[a] civil conspiracy involves a combination of two or more persons with an unlawful purpose or a lawful purpose to be accomplished by unlawful means." *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 583 (Tex. 2001). "That is, a defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least **one** of the named defendants liable." *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). **Katz**'s amended complaint alleges as the underlying tort the breach of fiduciary duty for his derivative claims. (Docket Entry No. 18 at ¶¶ 89–94). Again, dismissal at this stage is not required.

IV. Conclusion

***6** The motion to dismiss is denied.

All Citations

Not Reported in Fed. Supp., 2018 WL 4701566

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CASE NO. 39

2022 WL 3084480
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United States District Court,
S.D. Texas, Galveston Division.

KAFI, INC. Plaintiff.
v.
SAND CANYON CORPORATION
F/k/a Option One Mortgage
Corporation, et al. Defendants.

Civil
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Signed August 3, 2022

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MEMORANDUM AND RECOMMENDATION

ANDREW M. EDISON, UNITED STATES MAGISTRATE JUDGE

***1** Pending before me is Defendants' Joint Motion to Dismiss Fourth Amended Complaint. Dkt. 66. Having reviewed the briefing, the record, and the applicable law, and for the reasons explained below, I recommend the Court **GRANT in part** and **DENY in part** the motion.

I. FACTUAL BACKGROUND

In this lawsuit, Kafi, Inc. ("Kafi") seeks to avoid foreclosure of a property it owns at 810 Almond Pointe in League City, Texas (the "Property"). In June 2006, non-parties Joe and Kelly Richardson (the "Richardsons") purchased the Property. The transfer was memorialized by general warranty deed with a vendor's lien. The Richardsons financed their purchase with a loan from Sand Canyon Corporation f/k/a Option One Mortgage Corporation ("Sand Canyon"). The loan was secured by a deed of trust in favor of Sand Canyon. The deed of trust contains an optional acceleration clause, allowing Sand Canyon to "invoke the power of sale and/or any other

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remedies" should the Richardsons default. Dkt. 63-1 at 6.

In January 2012, **Sand Canyon** purported to assign the deed of trust, along with "all interests secured thereby, all liens, and any rights due or to become due thereon" (the "Assignment"), to Wells Fargo Bank, N.A. ("Wells Fargo"). Dkt. 63-9. The Assignment was prepared by Nationwide Title Clearing, Inc. ("NTC"), notarized by Miranda Avila ("Avila"), and purportedly executed on behalf of **Sand Canyon** by Derrick White ("White") in his professed capacity as **Sand Canyon's** Vice President.[1] It is undisputed that, at the time of the Assignment, White and Avila were employees of NTC. *See* Dkt. 66 at **3**. As discussed in greater detail in the following sections, the central issue in this case is **Kafi's** allegation that White's and Avila's signatures are forgeries.

By September 2012, the Richardsons were in default. Although the Property was noticed for sale multiple times, for reasons not explained, it was never sold at foreclosure. **Kafi** has attached to its pleadings four notices of trustee's sales:

Date of Notice	Date of Sale
September 5, 2012	October 2, 2012
November 6, 2012	December 4, 2012
June 19, 2017[2]	August 1, 2017
February 24, 2020	May 5, 2020

Kafi alleges that two of the notices—dated September 5 and November 6, 2012—were mailed to the Richardsons and filed in the real property records, thereby "unequivocally accelerat[ing]" the loan. Dkt. 63 at 14.

***2** In September 2020, **Kafi** purchased the Property "as-is" from the Richardsons by general warranty deed, which provides, in relevant part:

> This conveyance is made subject-to any outstanding liens of record. Grantors understand that Grantee is in no way assuming or promising to pay any outstanding liens of record.

Dkt. 63-**3** at 1–2. There is no allegation that Defendants have attempted to foreclose on the Property.

II. PROCEDURAL HISTORY

In October 2020, **Kafi** sued Defendants in Texas state court, seeking, among other things, a declaration that Defendants lack standing to foreclose and a judgment quieting title to the Property. Defendants timely removed the case to this Court on the basis of diversity jurisdiction.

Kafi has since amended its complaint multiple times. In its live pleadings, **Kafi** requests a bevy of declaratory relief concerning its alleged title to the Property,[3] the most relevant of which are its requests for declaratory judgments that: (1) the Assignment is a forgery and, therefore, void; and (2) the four-year limitations period to foreclose on the Property has expired. **Kafi** also brings claims to quiet title or, in the alternative, for the equitable right of redemption. *See* Dkt. 63 at 10–11, 16–17. Finally, against **Sand Canyon** and NTC, **Kafi** asserts common-law claims for "forgery." *See id.* at 12–13.

In December 2021, I granted **Kafi's** request to conduct limited, targeted discovery to develop facts supporting its forgery allegation. Specifically, I allowed **Kafi** to depose Avila and send written discovery to **Sand Canyon** and NTC. *See* Dkt. 57. In January **2022**, I denied **Kafi's** request to depose White. *See* Dkt. 60. After completing its court-approved discovery, **Kafi** amended its complaint for a fourth time in February **2022**. In support of the allegations mentioned above, **Kafi's** Fourth Amended Complaint includes over a dozen exhibits, most of which pertain to its claim that the Assignment is a forgery. I discuss the relevant exhibits later in the opinion, but it is worth mentioning upfront that one of the exhibits is a "Forensic Document Examination Preliminary Report," prepared by two forensic document examiners who analyzed dozens of White's and Avila's known signatures and compared them to the supposed forgeries. *See* Dkt. 63-14.

Defendants have jointly moved for dismissal under Federal Rule of Civil Procedure 12(b)(6), arguing that **Kafi's** forgery claim is time-barred, as are **Kafi's** claims for declaratory relief based on the alleged forgery. *See* Dkt. 66 at 6–11. Even if the statute of limitations does not torpedo **Kafi's** claims, Defendants aver that **Kafi** has failed to sufficiently plead a claim for any of the relief sought. **Sand Canyon** and NTC further argue that they must be dismissed from the case, irrespective of whether **Kafi** has adequately pleaded a claim for relief, because they claim no interest in the underlying loan or Property. *See id.* at 29–30.

***3** **Kafi** advances a handful of interrelated arguments in response, the most relevant of which are: (1) the Assignment is a forgery and, therefore, void *ab initio*—meaning Defendants lack standing to enforce the underlying deed of trust; (2) foreclosure is time-barred under Texas' four-year statute of limitations for real-property actions, *see* TEX. CIV. PRAC. & REM. CODE § 16.035(d); and (**3**) even if the Assignment was valid and foreclosure not time-barred, **Kafi** is entitled to equitably redeem the Property by paying off the loan's balance to the current mortgagee, Wells Fargo, or the current loan servicer, PHH.

III. LEGAL STANDARD

A. RULE 12(b)(6) MOTION TO DISMISS

Rule 12(b)(6) provides that a district court must dismiss a complaint that fails to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6). This rule is read in conjunction with the pleading standard set forth in Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P.

8(a)(2). To survive dismissal at this early stage, the complaint must state enough facts such that the claim to relief is plausible on its face. *See Bell Atl. **Corp**. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads enough facts to allow the district court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although a complaint "does not need detailed factual allegations" to survive Rule 12(b)(6), a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

In deciding a Rule 12(b)(6) motion, I must accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. *See Alexander v. AmeriPro Funding, Inc.*, 848 F.3d 698, 701 (5th Cir. 2017). I also must limit my inquiry "to the facts stated in the complaint and the documents either attached to or incorporated in the complaint." *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996). Here, all documents discussed in this opinion are both attached to and incorporated in **Kafi's** Fourth Amended Complaint.

The Fifth Circuit has repeatedly held that "[m]otions to dismiss are viewed with disfavor and are rarely granted." *Test Masters Educ. Servs. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005). Given my charge to liberally construe the complaint in the light most favorable to the plaintiff, with every doubt resolved in the plaintiff's favor, dismissal is proper only if it "appear[s] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quotation omitted).

B. RULE 9(b)'S HEIGHTENED PLEADING STANDARD

Rule 9(b) imposes a heightened pleading standard for claims of fraud. Forgery is a type of fraud, and, therefore, Rule 9(b)'s heightened pleading standard applies. *See Bynane v. Bank of N.Y. Mellon*, 866 F.3d 351, 360 (5th Cir. 2017) (analyzing forgery allegations under Rule 9(b)'s heightened pleading standard). *See also Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001) ("Rule 9(b) applies by its plain language to all averments of fraud, whether they are part of a claim of fraud or not.").

Rule 9(b) requires that a party "state with particularity the circumstances constituting fraud." FED. R. CIV. P. 9(b). "What constitutes 'particularity' will necessarily differ with the facts of each case." *Benchmark Elecs. v. J.M. Huber **Corp**.*, 343 F.3d 719, 724 (5th Cir. 2003) (cleaned up). Generally, Rule 9(b) requires that a complaint detail "the who, what, when, and where before access to the discovery process is granted." *Hart v. Bayer **Corp**.*, 199 F.3d 239, 247 n.6 (5th Cir. 2000) (cleaned up). However, the Fifth Circuit has acknowledged that there is "no single construction of Rule 9(b) that applies in all contexts," *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 188 (5th Cir. 2009), and that "Rule 9(b)'s ultimate meaning is context-specific." *Williams v. WMX Techs.*, 112 F.3d 175, 178 (5th Cir. 1997).

***4** Relatedly, "[i]f the facts pleaded in a complaint are peculiarly within the opposing party's knowledge, fraud pleadings may be

based on information and belief." *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994). *See Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1051 (7th Cir. 1998) ("Rule 9(b) must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim."). But the Fifth Circuit has cautioned that "this exception must not be mistaken for license to base claims of fraud on speculation and conclusory allegations." *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) (quotation omitted). That is, "even where allegations are based on information and belief, the complaint must set forth a factual basis for such belief." *Id.*

C. DIVERSITY JURISDICTION

Because jurisdiction is based on diversity of citizenship, Texas substantive law and federal procedural law apply to **Kafi's** claims. *See Ferguson v. Bank of N.Y. Mellon Corp.*, 802 F.3d 777, 780 (5th Cir. 2015).

IV. ANALYSIS

A. BECAUSE A FORGED SIGNATURE IS THE TYPE OF INJURY THAT IS INHERENTLY UNDISCOVERABLE, THE DISCOVERY RULE APPLIES

It is undisputed that the Assignment was filed in the real property records of Galveston County on January 18, 2012. Defendants insist that subsequent purchasers of real property, like **Kafi**, are charged with constructive notice of any title defects that could have been discovered through a reasonably diligent inspection of the public record. Defendants thus contend that **Kafi's** forgery claim accrued on January 18, 2012. Because **Kafi** did not file the underlying lawsuit until October 2020, Defendants argue that **Kafi's** forgery claim is time-barred under Texas's four-year statute of limitations for real-property actions. *See* TEX. CIV. PRAC. & REM. CODE §§ 16.004(a)(4), 16.051. **Kafi** counters that any claim based on the purportedly forged Assignment did not accrue until it acquired an interest in the Property or, alternatively, the discovery rule deferred accrual of its claim because its injury is the type of injury that is inherently undiscoverable.

A cause of action generally accrues when a wrongful act causes some legal injury, regardless of when the plaintiff learns of such injury. *See Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990). "The discovery rule represents an exception to this general rule of accrual." *Id.* It applies when "the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." *Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996). "This legal question is decided on a categorical rather than case-specific basis; the focus is on whether a *type* of injury rather than a *particular* injury was discoverable." *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006). When the discovery rule applies, the cause of action does not accrue, and, consequently, the limitations period does not begin to run until the plaintiff knows or, through the exercise of reasonable diligence, should know of the facts giving rise to the cause of action. *See Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734 (Tex. 2001).

In Defendants' minds, "had **Kafi** owned the Property in 2012, *before* the supposedly fraudulent assignment was filed," the discovery rule would save **Kafi's** claim because property owners do not have a duty to continuously search the public record to ensure that no fraudulent instruments are subsequently recorded against their property. Dkt. 66 at 8. However, because "**Kafi** purchased the Property from the borrowers nearly nine (9) years *after* the allegedly forged assignment was executed and recorded," Defendants argue that **Kafi** is charged with "constructive notice [of the allegedly forged Assignment] for limitations purposes." *Id.* (quotation omitted).

***5** Although Texas law may charge a buyer "with constructive notice of the actual knowledge that could have been acquired by examining the public records," *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981), this includes only "knowledge of all facts that reasonable inquiry would have disclosed." *Holmes v. P.K. Pipe & Tubing, Inc.*, 856 S.W.2d 530, 542 (Tex. App.—Houston [1st Dist.] 1993, no writ). At the time of its purchase, **Kafi** was placed on notice of the Assignment itself. Nothing on the face of the Assignment—nor anything else in the public record—should have alerted **Kafi** that White's or Avila's signatures are possible forgeries. To hold otherwise would be nothing short of demanding **Kafi** exercise clairvoyance. This far exceeds the concept of "reasonable diligence" required under Texas law. *See Hooks v. Samson Lone Star, Ltd. P'ship*, 457 S.W.3d 52, 60–61 (Tex. 2015) (holding where fraudulent information "taints the public record," the question of whether a property owner exercised "reasonable diligence remains a fact question" for the jury to decide);[4] *Mooney*, 622 S.W.2d at 85 ("When evidence of fraud may be disclosed by examination of public records ... limitations will begin to run from the time the fraud could have been discovered by the exercise of ordinary diligence.").

At this point in the litigation, one can only speculate on when **Kafi** learned of the supposed forgery. Under Texas law, where a plaintiff pleads the discovery rule, the defendant bears the burden of conclusively negating its application before dismissal is appropriate. *See KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. **Corp***., 988 S.W.2d 746, 748 (Tex. 1999) ("the defendant must ... negate the discovery rule, if it applies and has been pleaded or otherwise raised"); *Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex. 1996) ("If the nonmovant asserts that a tolling provision applies, the movant must conclusively negate the tolling provision's application to show his entitlement to summary judgment.").

Right now, any theory that **Kafi** knew or should have known of the forgery more than four years before filing suit is just that—a theory without factual support. For Rule 12(b)(6) purposes, I conclude that **Kafi** has sufficiently invoked the discovery rule, permitting it to proceed for the time being. However, at trial, **Kafi**, as "[t]he party seeking to benefit from the discovery rule must also bear the burden of proving and securing favorable findings thereon." *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988).

B. FORGERY

1. Pleading Requirements for Kafi's Forgery Allegation

Although the parties agree that Rule 9(b)'s heightened pleading standard controls **Kafi's** forgery claim, they differ over how stringently it must be applied.

Rule 11(b)(3) of the Federal Rules of Civil Procedure allows a party to plead factual allegations that lack evidentiary support if it appears that they are "likely [to] have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(b)(3). **Kafi** contends that Rule 9(b)'s heightened pleading standard should be relaxed in this case because the facts in question are peculiarly within Defendants' knowledge. Regardless, **Kafi** insists that its Fourth Amended Complaint demonstrates its belief that White's signature is a forgery is well-grounded. Understandably, Defendants disagree. They argue, "**Kafi's** forgery allegations are purely speculative and fail to meet [Rule 9(b)'s] stringent pleading requirements." Dkt. 66 at 16.

Rule 9(b) does not require omniscience. As mentioned, the Fifth Circuit has held that "[i]f the facts pleaded in a complaint are peculiarly within the opposing party's knowledge, fraud pleadings may be based on information and belief." *Tuchman*, 14 F.3d at 1068. *Cf.*, *ABC Arbitrage v. Tchuruk*, 291 F.3d 336, 354 (5th Cir. 2002) ("[T]he plaintiffs need not allege all facts that may be related to their claims, since such a requirement is impossible at the pleading stage because, in nearly every securities fraud case, only the defendants know all the facts related to the alleged fraud." (quotations omitted)).

***6** That said, the Fifth Circuit warned that relaxation of Rule 9(b)'s requirements "must not be mistaken for license to base claims of fraud on speculation and conclusory allegations." *Tuchman*, 14 F.3d at 1068. That is, "while Rule 11(b)(3) may relax Rule 9(b)'s particularity requirement, it cannot be construed to eviscerate that requirement in its entirety by permitting rank speculation." *Moon v. Harrison Piping Supply*, 375 F. Supp. 2d 577, 593 (E.D. Mich. 2005), *rev'd in part on other grounds*, 465 F.3d 719 (6th Cir. 2006). So, even under a non-restrictive application of the rule where allegations are based on information and belief, "the complaint must set forth a factual basis for such belief." *U.S. ex rel. Thompson*, 125 F.3d at 903. *See also Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990) ("[A] complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard.").

As one leading authority explains:

> Allegations of the circumstances of a fraud based on information and belief, which are commonplace and often a necessity in many litigation contexts, usually do not satisfy the particularity requirement of Rule 9(b), *unless accompanied by a statement of the facts upon which the pleader's belief is founded or*

> *by allegations that the necessary information lies within the defendant's control.*

5A CHARLES A. WRIGHT & ARTHUR R. MILLER, *Federal Practice and Procedure* § 1298 (4th ed.) (emphasis added).

The prima facie elements of the claim will assist in determining whether the plaintiff has satisfied a relaxed application of Rule 9(b)'s "time, place, contents, and identity" standard. *See* *Wagemann v. Dr.'s Hosp. of Slidell, LLC*, No. CIV.A. 09-3506, 2010 **WL** 3168087, at *3 (E.D. La. **Aug**. 6, 2010). Put differently, the degree of particularity required is guided by the nature of the claim. *See* *U.S. ex rel. Foster v. Bristol-Myers Squibb Co.*, 587 F. Supp. 2d 805, 819 (E.D. Tex. 2008) ("Just as the particularity requirements of Rule 9(b) are depend[e]nt on the facts of the case, they are also depend[e]nt on Rule 8.").

In sum, to satisfy Rule 9(b)'s heightened pleading requirement, **Kafi** must convince me that there is a reasonable basis for its belief that White's and Avila's signatures are forgeries and that evidentiary support will be forthcoming should the case proceed.

2. Kafi's Forgery Allegations

Keeping in mind that a plaintiff must plead specific facts and not mere conclusory allegations, but accepting as true the well-pleaded factual allegations of the complaint and reasonable inferences to be drawn from them, I turn to **Kafi's** Fourth Amended Complaint.

Below are the allegations that **Kafi** has "allege[d] upon information [are] reasonably likely to be discovered," *see* Dkt. 63 at 6, 12–13:

- "[T]he signature of Derrick White was not signed or affixed by Derrick White nor was the signature signed or affixed by someone else" with White's knowledge and authority. *Id.* at 6.
- "[T]he signature [of] Miranda Avila was not signed or affixed by Miranda Avila nor was the signature signed or affixed by someone else" with Avila's knowledge or authority. *Id.*
- "**Sand Canyon** and NTC altered, made, completed, executed, and authenticated the 2012 Assignment so that it purported to be signed by Derrick White and [notarized by] Miranda Avila when in fact Derrick White and Miranda Avila did not sign and did not authorize anyone else to sign for them." *Id.* at 12.
- "**Sand Canyon** and NTC issued, transferred, [possessed], registered, passed off, and published the 2012 assignment when it purported to be signed by Derrick White and Miranda Avila." *Id.* at 12–13.

3. The Basis for Kafi's Belief That White's Signature Is a Forgery

*7 **Kafi's** Fourth Amended Complaint includes a handful of exhibits that it claims demonstrate a reasonable basis for its belief that the Assignment is a forgery. I will address the relevant exhibits, in turn.

i. Osceola County, Florida Records Audit

The first is a 2014 property records audit performed in Osceola County, Florida,[5] which identifies four property transactions where White, as an "alleged NTC employee," executed unrelated assignments in which he misrepresented his capacity to do so "as Assistant Secretary of MERS" on behalf of several now-defunct **corporations**. Dkt. 63-10 at 121–22.

Kafi relies on the Osceola County records audit to cast general aspersions on NTC's business practices. *See* Dkt. 63 at 6–7. Buried within the 332-page document are allegations brought by the Illinois Attorney General that implicate NTC in a "robosigning" scheme. *See* Dkt. 63-10 at 111. Ostensibly relevant here is an allegation that "[d]ocuments generated by NTC were ... signed by NTC employees who had no personal knowledge of the facts they were attesting to." *Id.* The records audit also describes NTC as "a known document manufacturing plant," engaged in a pattern of recording documents that were prepared but not executed by NTC employees. *Id.* at 109–12.

The report itself is replete with conclusory allegations. United States District Judge Gray Miller found the same records audit less than useful when considering a similar forgery allegation. *See* *Reed v. Bank of Am., N.A.*, No. CV H-15-2005, 2016 **WL** 3058303, at *4 (**S.D**. **Tex**. May 31, 2016) ("Even considering the report, it simply makes the conclusory statement that Martha Munoz is a 'known Bank of America robosigner.' The report offers no support for this allegation. Moreover, the report is no evidence that the assignments at issue in this case were forged." (internal citation omitted)).

But even if I were to accept the allegations contained within the records audit as the gospel truth, they are not the silver bullet **Kafi** believes them to be. That is, the records audit does not lend support to **Kafi's** theory that White's signature is a forgery. If anything, it tilts the scales in the opposite direction, suggesting that White personally signed the Assignment but misrepresented his capacity to do so as **Sand Canyon's** Vice President.

Under Texas law, "a contract executed on behalf of a **corporation** by a person fraudulently purporting to be a **corporate** officer is, like any other unauthorized contract, not void, but merely voidable." *Reinagel v. Deutsche Bank Nat'l Tr. Co.*, 735 F.3d 220, 226 (5th Cir. 2013). This is significant because, under Texas law, a non-party to a mortgage assignment (i.e., homeowner) may only challenge the assignment on grounds that would render it void, not merely voidable. *See* *EverBank, N.A. v. Seedergy Ventures, Inc.*, 499 S.W.3d 534, 542 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("When the homeowner is just a third party to an assignment, the homeowner lacks standing to challenge the assignment on grounds that would merely render the assignment voidable."). Here, **Kafi's** standing to challenge the Assignment hinges on the fact that "[a] forged deed is void" under Texas law. *Vazquez v. Deutsche Bank Nat'l Tr. Co., N.A.*, 441 S.W.3d 783, 787 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

***8** Said differently, allegations of White's supposed nefarious conduct found in the records audit are not comparable to the allegations made by **Kafi** in this case and do not provide a reasonable basis for its forgery allegations.

ii. AOL.com News Article

The second exhibit is an online news article similarly discussing NTC's "problematic" business practice of robosigning mortgage-related documents. Dkt. 63-11. In its briefing, **Kafi** specifically references an NTC employee mentioned in the article who, according to the article, testified at deposition that he notarized hundreds of documents at a time and, on occasion, signed documents as a vice president of various financial institutions. *See id.* at **3**. That same employee, however, also apparently testified that he was unaware whether other NTC employees did the same. *See id.*

Cutting to the chase, the article makes no mention of White, Avila, or the Assignment at issue. Like the records audit, the article's general allegations regarding NTC's supposed business practices do nothing to demonstrate a reasonable basis for **Kafi's** forgery allegations in this case.

iii. Forensic Document Examination Preliminary Report

The third exhibit is the aforementioned "Forensic Document Examination Preliminary Report," prepared by forensic document examiners Dale Stobaugh ("Stobaugh") and Kenneth Crawford ("Crawford"), both of whom analyzed dozens of White's and Avila's "known signatures" and compared them to the supposed forgeries. *See* Dkt. 63-14. The report begins with the caveat, "[d]ue to the lack of detail and possible misinterpretation of foreign matter reflected in copies [of signatures], it is usually our policy not to base definite identification or elimination by handwriting comparison on any type of reproduction," and includes a disclaimer that ink originals of the known signatures "could provide a basis for a more definite determination." *Id.* at 1–2. Nonetheless, the report cites "consistent differences" between the known signatures and supposed forgeries before concluding that these inconsistencies "indicat[e]" White and Avila did not author their respective signatures on the Assignment. *Id.* at 2.

iv. Avila's Deposition Testimony

Avila testified her signature on the Assignment is authentic and that White signed the Assignment in front of her. *See* Dkt. 66-1 at 5–6. However, upon cross-examination, Avila conceded that she did not specifically remember White signing "this particular assignment" but could not recall an instance where she notarized a document where the signer was not in her presence. *Id.* at 6–7.

Predictably, the parties' view of Avila's testimony is considerably different. Defendants would have me look at Avila's seemingly unequivocal statement that White "signed [the Assignment] in front of [her]." *Id.* at 6. While **Kafi** emphasizes that Avila walked back her testimony, admitting she did not recall White signing the Assignment in question. *See id.* at 6–7 (Q: [A]re you saying that you specifically recall that this particular assignment from January 5, 2012, that you have specific recollection that [White] signed this in front of

you?" A: "I don't remember specifically that day, but we sign in front of each other all the time.").

4. Kafi Has Pleaded Forgery with Sufficient Particularity

***9** Defendants' flagship argument is that "the Fifth Circuit has repeatedly held that these types of signature comparison are insufficient to state a [forgery] claim." *Id.* at 14 (citing *Bynane v. Bank of N.Y. Mellon*, 866 F.3d 351, 360 (5th Cir. 2017) and *Kreway v. Countrywide Bank*, 647 F. App'x 437, 437–38 (5th Cir. 2016)).

The short of it is that the Fifth Circuit has never decided a case like this. In both *Bynane* and *Kreway*, the plaintiff's forgery allegations were premised solely on the plaintiff's own deduction that the assignment was a forgery because, according to the plaintiff, the signature on the assignment in question differed from the signer's signature on other unrelated assignments, which the plaintiff had attached to the complaint for the court to compare. *See Bynane*, 866 F.3d at 361; *Kreway*, 647 F. App'x at 438.

This case might have started out as a *Bynane* or *Kreway*-type signature-comparison case, but **Kafi** amended its pleadings and dropped the signature-comparison argument altogether. Now, **Kafi's** allegations chiefly rely on the preliminary forensic document examination report. Stobaugh and Crawford —professional forensic document examiners —compared dozens of versions of White's and Avila's "known signatures" that were produced by NTC with the supposed forgeries and found "consistent differences," which they concluded "indicat[e]" that White and Avila "did not write the signature in that name on the [Assignment]." Dkt. 63-14 at 2. While the Fifth Circuit has constructed an admittedly rigorous test for successfully pleading forgery allegations of this type, the preliminary report distinguishes **Kafi's** allegations from those made in *Bynane* and *Kreway.* Viewed in the light most favorable to **Kafi**, I find that the preliminary report demonstrates a reasonable basis for its allegation that the Assignment is a forgery. *See* Dkt. 63 at 6 (alleging that "[t]he forgery allegations ... in this complaint have evidentiary support and will likely have even more evidentiary support after a reasonable opportunity for further investigation or discovery").

Moreover, if I were to adopt the position Defendants would have me take, it is difficult to envision how a plaintiff in **Kafi's** shoes could ever surmount Rule 9(b)'s heightened pleading standard. Admittedly, **Kafi** does not allege who forged the signatures, when the signatures were forged, where the signatures were forged, or how the signatures were forged. However, there is no question that this information is "peculiarly within the opposing party's knowledge." *Tuchman*, 14 F.3d at 1068. To hold otherwise would essentially require **Kafi** first figure out who (allegedly) forged the signatures (without the benefit of discovery) and then drag them into court to explain when, where, and how they did so. This would be a draconian application of Rule 9(b) where, as here, **Kafi** has demonstrated a reasonable basis for its belief that the signatures are forgeries. *See U.S. ex rel. Foster*, 587 F. Supp. 2d at 819 ("the particularity requirements of Rule 9(b) are depend[e]nt on the facts of the case");

5A CHARLES A. WRIGHT & ARTHUR R. MILLER, *Federal Practice and Procedure* § 1291 (4th ed.) ("[T]hose portions of Rule 9 that require specific or detailed allegations should not be construed in an unduly strict fashion.").

***10** Courts are intended as places of redress. For this reason, motions to dismiss are generally viewed with disfavor, as they tend to undermine the overarching public policy favoring merits-based disposition. *See Test Masters*, 428 F.3d at 570 ("Motions to dismiss are viewed with disfavor and are rarely granted."); 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *Federal Practice and Procedure* § 1356 (3d ed.) ("[A] motion under Federal Rule 12(b)(6) ... is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case."). Because I find that *Bynane* and *Kreway* are not binding on the facts of this case, I recommend the Court deny Defendants' motion to dismiss **Kafi's** claims for declaratory relief based on the supposed forgery and decide the merits of **Kafi's** forgery allegations at summary judgment or at trial. *See Foley v. Wells Fargo Bank, N.A.*, 772 F.3d 63, 72 (1st Cir. 2014) ("[A] primary purpose of a Rule 12(b)(6) motion is to weed out cases that do not warrant reaching the (oftentimes) laborious and expensive discovery process because, based on the factual scenario on which the case rests, *the plaintiff could never win.*" (emphasis added)).

C. TEXAS LAW DOES NOT RECOGNIZE FORGERY AS AN INDEPENDENT CIVIL CAUSE OF ACTION

In addition to seeking a declaratory judgment that the Assignment is a forgery, **Kafi** has pleaded an independent "forgery" cause of action against **Sand Canyon** and NTC. Thus, I must address whether "forgery" is a recognized civil claim under Texas law and, if so, whether **Kafi** has sufficiently pleaded such a claim. *See Breitling v. LNV Corp.*, No. CV 3:15-CV-0703-B, 2015 WL 5896131, at *8 (N.D. Tex. Oct. 5, 2015) (observing that whether forgery qualifies as a tort under Texas "is unclear" and collecting conflicting authority).

Kafi's Fourth Amended Complaint cites a single state-court decision in support of its position that a common-law claim of forgery exists under Texas law, *Saxer v. Nash Phillips-Corpus Co. Real Estate*, 678 S.W.2d 736 (Tex. App.—Tyler 1984, writ ref'd n.r.e.). In that case, the court of appeals wrote as follows: "Forgery is an unlawful and unconscionable act for which a common law court may provide a civil remedy independent of the remedies provided by [the Deceptive Trade Practices Act]." *Id.* at 739 (footnote omitted). Critically, following the phrase "unconscionable act," the court included a footnote citation to Texas Penal Code § 32.21, which codifies forgery as a criminal offense. *See id.* at 739 n.2.

As United States District Judge Sim Lake aptly pointed out, "in order for a private right of action to exist under a criminal statute, there must be a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." *Van Duzer v. U.S. Bank Nat'l Ass'n*, 995 F. Supp. 2d 673, 699 (S.D. Tex.) (cleaned up), *aff'd*, 582 F. App'x 279 (5th Cir. 2014). What's more, *Van Duzer* considered the very question before me now—whether a private cause of action for "forgery" exists under Texas law. *See id.* In deciding that no such civil claim

exists, Judge Lake explained: "Plaintiffs have not provided any statutory basis for inferring that they are entitled to bring a private cause of action on the basis of any criminal statute. Thus, any attempt by Plaintiffs to assert a cause of action under a criminal statute fails as a matter of law." *Id.*

Much like the plaintiff in *Van Duzer*, **Kafi's** forgery allegations track the language found in the Texas Penal Code—though **Kafi** does not cite to the Penal Code itself. *Compare* Dkt. 63 at 12–13, *with* Tex. Penal Code § 32.21(a)–(b). **Kafi** cannot create a civil cause of action simply by parroting the Texas Penal Code. Because there is no statutory basis for me to infer that Texas law recognizes a civil cause of action for violating the criminal forgery statute, I find that forgery is not a cognizable, stand-alone civil claim under Texas law. *See Mathis v. DCR Mortg. III Sub, I, LLC*, 952 F. Supp. 2d 828, 836 (W.D. Tex. 2013) (dismissing a forgery claim "to the extent it was asserted as any kind of freestanding cause of action"). Accordingly, I recommend the Court dismiss **Kafi's** forgery claims against **Sand Canyon** and NTC with prejudice.

D. STATUTE OF LIMITATIONS

***11** Defendants label **Kafi's** claim for declaratory relief based on the expiration of the statute of limitations to foreclose on the Property as "nothing more than speculation," arguing that **Kafi** has pleaded no facts to support its allegations that the notices of trustee's sale[6] were ever mailed to the Richardsons or that the notices were proceeded by a notice of intent to accelerate. Dkt. 66 at 25–26.

Under Texas law, a suit for the foreclosure of a real property lien must be brought within four years of the maturity date of the last installment of an obligation payable in installments. TEX. CIV. PRAC. & REM. CODE §§ 16.035(a), (e). However, default alone does not automatically start the limitations clock. If a note or deed of trust secured by real property contains an optional acceleration clause—as in this case—"the action accrues only when the holder actually exercises its option to accelerate." *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001).

Effective acceleration requires two acts: (1) notice of intent to accelerate; and (2) notice of acceleration. *See id.* Both notices must be "clear and unequivocal," *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991), and notice of acceleration is ineffective unless preceded by proper notice of intent to accelerate. *See Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 234 (Tex. 1982).

Kafi has sufficiently pleaded facts to assert a plausible claim that the statute of limitations to foreclose on the Property has expired. **Kafi** alleges that the debt was accelerated—and, therefore, the limitations period to bring a foreclosure action began—on September 5, 2012, when "notice of foreclosure sale was filed in the real property records and mailed to the Richardsons," or, in the alternative, "on November 6, 2012, when another notice of foreclosure sale was filed in the real property records and mailed to the Richardsons." Dkt. 63 at 14. **Kafi** further alleges the notices were "preceded by an unequivocal notice of intent to accelerate," though **Kafi** cabins this allegation

by pleading it "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." *Id.* at 15. Accepting these facts as true for the purposes of the motion to dismiss, I find that **Kafi** has sufficiently pleaded the expiration of the statute of limitations to foreclose.

Accordingly, I recommend the Court deny Defendants' motion to dismiss **Kafi's** claim for declaratory relief based on the expiration of the statute of limitations to foreclose on the Property. *See e.g.*, ***Kafi**, Inc. v. Deutsche Bank Nat'l Tr. Co.*, No. CV H-20-3247, 2021 **WL** 5143309, at *4 (**S.D**. **Tex**. Oct. 5, 2021) (recommending the same result under near-identical circumstances).

E. QUIET TITLE

***12** Under Texas law, an action to quiet title—also known as a suit to remove cloud from title—is one in which a superior title holder seeks to remove a challenge to that title. *See Brumley v. McDuff*, 616 S.W.3d 826, 835 (Tex. 2021). "A cloud on title exists when an outstanding claim or encumbrance is shown, which on its face, if valid, would affect or impair the title of the owner of the property." *Gordon v. W. Houston Trees, Ltd.*, 352 S.W.3d 32, 42 (Tex. App.—Houston [1st Dist.] 2011, no pet.). "An action to remove a cloud from title exists to enable the holder of the feeblest equity to remove from his way to legal title any unlawful hindrance having the appearance of a better right." *Hahn v. Love*, 321 S.W.3d 517, 531 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (quotation omitted). In a suit to remove a cloud from his title, the plaintiff has the burden of supplying the proof necessary to establish his superior equity and right to relief. *See Lance v. Robinson*, 543 S.W.3d 723, 739 (Tex. 2018). "That is, the plaintiff must prove, as a matter of law, right, title, or ownership in himself with sufficient certainty to enable the court to see that he has a right of ownership and that the alleged adverse claim is a cloud on the title that equity will remove." *Hahn*, 321 S.W.3d at 531. "The effect of a suit to quiet title is to declare invalid or ineffective the defendant's claim to title." *Essex Crane Rental **Corp**. v. Carter*, 371 S.W.3d 366, 388 (Tex. App.–Houston [1st Dist.] 2012, pet. denied).

The elements of a claim for relief to quiet title are: (1) a valid equitable interest in a specific property, (2) title to the property is affected by a claim by the defendant, and (**3**) although facially valid, the defendant's claim is invalid or unenforceable. *See id.* To prevail, the plaintiff must demonstrate that she has superior title to the property at issue. *See id.*

Here, there is no question that **Kafi** has an interest in the Property. Moreover, Wells Fargo's claim of a right to foreclose and thereby transfer legal title to the Property constitutes a cloud on **Kafi's** title. *E.g.*, *Morales v. Wells Fargo Bank, N.A.*, No. SA-13-CV-410-XR, 2013 **WL** 6057853, at *6 (W.D. Tex. Nov. 14, 2013). *See Lighthouse Church of Cloverleaf v. Tex. Bank*, 889 S.W.2d 595, 603 (Tex. App.—Houston [14th Dist.] 1994, writ denied) ("Foreclosure transfers title ... to another party"). As for the third element, either of **Kafi's** two principal arguments—forgery [7] or limitations [8]—if proven, would demonstrate Wells Fargo's claimed interest in the Property is invalid or unenforceable, and that **Kafi** has a superior title.

For these reasons, I find that **Kafi** has alleged facts that, if true, would permit it to recover on the strength of its own title and has demonstrated the existence of a potentially invalid charge against that title. Accordingly, I recommend the Court deny Defendants' motion to dismiss **Kafi's** claim to quiet title to the Property without prejudice to re-urging the issue at summary judgment.

F. EQUITABLE RIGHT OF REDEMPTION

***13** In the alternative, **Kafi** has also pleaded a claim for equitable redemption. A right of redemption is the right to redeem the property subject to foreclosure within a reasonable time of default by paying off the full amount owed on the mortgage. *See* *Scott v. Dorothy B. Schneider Estate Tr.*, 783 S.W.2d 26, 28 (Tex. App.—Austin, 1990 no writ). In order to state a claim for equitable redemption, a plaintiff must allege: (1) it has a legal or equitable interest in the property subject to the mortgage; (2) it is ready, able, or willing to redeem the property in question by paying off the amount of the liens to which the property is subject; and (**3**) that the equity of redemption was asserted before a foreclosure sale occurred. *See id.*

Kafi's alleged right to equitable redemption is based on its allegations that: (1) it is the "legal owner of the Property"; (2) it "would suffer a loss of ownership and the right to possession and control of the Property if Wells Fargo and PHH are allowed to foreclose"; and (**3**) it "is ready, able or willing to redeem the Property ... by paying off the amount of any *valid and subsisting* liens to which the Property is subject." Dkt. 63 at 17. Regarding the latter, **Kafi** pleads that it has a net worth of $7 million, which dwarfs the loan's principal amount ($260,248), and would "pay any *valid and subsisting* liens in cash." *Id.* Finally, **Kafi** represents that the current amount owed under the loan agreement is unknown and subject to discovery. *See id.*

Defendants maintain that **Kafi** has failed to sufficiently plead a claim for equitable redemption because it has not tendered all amounts due on the underlying note. *See* *Owens v. Bank of Am., NA*, No. CIV.A. H-11-2552, 2012 **WL** 912721, at ***3** (**S.D**. **Tex**. Mar. 16, 2012) ("Thus, within the context of the plaintiffs' equitable redemption claim, the plaintiffs must tender the redemption amount (including the full amount of the defendant's lien) either to the defendant or the Court.").

Simply pleading willingness and the ability to pay the amount owed has been rejected by just about every court to consider the issue. Nonetheless, some courts have decided that alleging facts that adequately explain the plaintiff's ability to pay off the amount owed on the subject property is sufficient to survive a motion to dismiss. *Compare*, *DBDFW **3** LLC v. JPMorgan Chase Bank, N.A.*, No. **3**:18-CV-3148-C-BN, 2019 **WL** 823810, at *8 (N.D. Tex. Feb. 6, 2019) ("Stating that the plaintiff is willing to satisfy the lien is insufficient to state a claim for equitable redemption. The plaintiff must provide additional details such as the value of the lien, how it would pay, its own net worth or assets, or any other information from which the court could infer that plaintiff's right to relief is plausible."), *with* *330 Cedron Tr. v. Citimortgage, Inc.*, No. SA-14-CV-933-XR, 2015 **WL** 1566058, at ***3** (W.D. Tex. Apr. 8, 2015) ("Cedron offers no facts in its complaint

that demonstrate it is [ ] 'ready, willing, and able' to pay off the amount of the existing liens to which the Property is subject .... Cedron offers no facts about the value of such lien, how it would pay, its own net worth or assets, etc. The conclusory statement that merely recites an element of the cause of action is not enough to raise the right to relief above a purely speculative level.").

Here, **Kafi** has pleaded that it is ready, willing, and able to pay off "any *valid and subsisting* liens to which the Property is subject." Dkt. 63 at 17. Standing alone, this would be insufficient. But **Kafi** has also pleaded that "it has a net worth of $7 million and would pay any *valid and subsisting* liens in cash." *Id.* Moreover, although **Kafi** offers no facts about the amount due, it does include the loan's principal amount: $260,248. Given that **Kafi** claims a net worth of $7 million, **Kafi** has sufficiently alleged that it has the assets to pay off whatever remains on the loan.

***14** In my mind, these extra allegations nudge **Kafi's** equitable redemption claim above a purely speculative level. *See* *Green for 2016 Wolf Tr. v. Bank of Am., N.A.*, No. CV H-17-0772, 2017 **WL** 1424332, at *2 (**S.D**. **Tex**. Apr. 20, 2017) ("Plaintiff has plead sufficient facts to state a claim for its equitable right of redemption that is plausible on its face."); *id.* ("Although the cases on which Defendant relies correctly identify tender of the amount owed as a condition precedent to recovery of title, tender is not required in order to state a legally cognizable claim." (quotation omitted)).

G. KAFI CANNOT OBTAIN ANY RELIEF FROM NTC OR SAND CANYON BECAUSE NEITHER PARTY CLAIMS A CURRENT INTEREST IN THE MORTGAGE

It is undisputed that PHH is the current loan servicer, and, since 2012, Wells Fargo has been the assignee of record of the deed of trust. There are no allegations that **Sand Canyon** has a current interest in the loan or deed of trust, nor are there any allegations that NTC has ever claimed such an interest. Moreover, there are no allegations that **Sand Canyon** or NTC is attempting to foreclose on the Property. Thus, even if **Kafi** ultimately succeeds on any of its claims for declaratory relief, it could not obtain any of the requested relief from NTC or **Sand Canyon**. Accordingly, I recommend the Court dismiss **Kafi's** claims against **Sand Canyon** and NTC.

H. KAFI'S CLAIMS FOR EXEMPLARY DAMAGES

Kafi alleges that Defendants' conduct in making, presenting, or using the Assignment and the post-2008 notices of sale constitute fraud, malice, or gross negligence, entitling **Kafi** to exemplary and punitive damages. *See* Dkt. 63 at 18 (citing TEX. CIV. PRAC. & REM. CODE § 41.003(a)).

An independent tort must be separately pleaded and proved to recover exemplary damages. *See* *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981) (holding that exemplary damages were "not recoverable because the [Appellees] failed to plead and prove a tort allowing recovery of exemplary damages"); *Sharpe v. Kilcoyne*, 962 S.W.2d 697, 703

n.5 (Tex. App.—Fort Worth 1998, no pet.) ("To support an award of exemplary damages, the plaintiff must prove a 'distinct' tortious injury with actual damages arising from that injury."). Because **Kafi's** forgery allegations live on only through its requests for declaratory relief, it is unable to obtain exemplary damages. Accordingly, I recommend the Court dismiss **Kafi's** request for exemplary damages.

CONCLUSION

For the above reasons, I recommend that the Court **GRANT in part** and **DENY in part** Defendants' Joint Motion to Dismiss (Dkt. 66). Specifically, I recommend the Court dismiss (1) **Kafi's** civil forgery claim against all Defendants; (2) **Kafi's** claim for exemplary damages; and (**3**) all claims against NTC and **Sand Canyon**. All other requested relief is denied without prejudice to re-urging at summary judgment.

The Clerk shall provide copies of this Memorandum and Recommendation to the respective parties who have 14 days from receipt to file written objections pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002–13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

All Citations

Not Reported in Fed. Supp., 2022 WL 3084480

Footnotes

1 **Kafi's** Fourth Amended Complaint alleges that White executed the Assignment as "an 'Assistant Secretary' for" Mortgage Electronic Registration Systems, Inc. Dkt. 63 at 5–6. However, the Assignment identifies White as **Sand Canyon's** Vice President. *See* Dkt. 63-9. Whatever the case may be, the capacity in which White executed the Assignment has no bearing on my decision.

2 The June 2017 notice of sale identifies Ocwen Loan Servicing, LLC ("Ocwen") as the Richardsons loan servicer. Dkt. 63-7 at 2. **Kafi** alleges Ocwen merged with PHH Mortgage **Corporation** in 2019, and that "PHH now claims to be the [loan's] mortgage servicer." Dkt. 63 at 9.

3 Specifically, **Kafi** seeks the following declarations that: (1) Defendants lack "legal or contractual" standing to conduct a foreclosure sale; (2) the Assignment is void as a forgery; (**3**) the Assignment is void because **Sand Canyon** had no right, title, or interest in the mortgage on the date of the Assignment; (4) the Assignment is void because it violates the public policy favoring identification of lienholders and avoidance of "secret liens"; (5) there is no complete and unbroken chain of

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assignments and transfers of the deed of trust or mortgage documents from **Sand Canyon** to any of the other Defendants; (6) not all assignments and transfers of the mortgage were properly recorded in the public record, in violation of TEX. LOC. GOV'T CODE § 192.007; (7) the deed of trust is null and void; and (8) the limitations period to foreclose has expired. Dkt. 63 at 10, 13–15.

4 *Hooks* concerned the fraudulent-concealment doctrine. Although the discovery rule and fraudulent-concealment doctrine are separate tolling doctrines that are "characterized by different substantive and procedural rules," *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996), "cases discussing fraudulent concealment are relevant to the meaning of reasonable diligence" under the discovery rule. *Hooks*, 457 S.W.3d at 58 n.9.

5 The 332-page records audit is part one of a two-part forensic examination of Osceola County, Florida's real property and circuit court records.

6 Defendants cite a decision out of the Houston Division for the proposition that I should dismiss **Kafi's** limitations claim because nothing in the record indicates the Richardsons actually received the notices of trustee's sale. *See* Dkt. 66 at 25–26 (citing *Ther & Co. v. U.S. Bank, N.A.*, No. CV H-18-2916, 2019 **WL** 5684226, at *3 n.1 (**S.D**. **Tex**. Oct. 31, 2019)). Critically, *Ther* was decided at summary judgment. In contrast, Rule 8's liberal pleading standard does not require that a plaintiff produce evidence supporting the facts alleged; "it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" to support what is alleged. *Twombly*, 550 U.S. at 556.

7 "A void contract of assignment confers no right to foreclose under the deed on the purported assignee[.]" *Puente v. CitiMortgage, Inc.*, No. **3**:11-CV-2509-N, 2012 **WL** 4335997, at *6 n.14 (N.D. Tex. **Aug**. 29, 2012) (applying Texas law). *See Wright v. Matthews*, 26 S.W.3d 575, 578 (Tex. App.—Beaumont 2000, pet. denied) ("Any deed, contract, judgment or other instrument not void on its face that purports to convey any interest in or make any charge upon the land of a true owner, the invalidity of which would require proof, is a cloud upon the legal title of the owner.").

8 "It is established law in Texas that, when a debt is barred, an action to foreclose a lien or mortgage given as security for it is barred also." *Dupree v. Mansur*, 214 U.S. 161, 166 (1909). *See Wolf*, 44 S.W.3d at 567 ("Under state law, a sale of real property under a power of sale in a mortgage or deed of trust that creates a real-property lien must be made not later than four years after the day the cause of action accrues. When this four-year period expires, the real-property lien and the power of sale to enforce the lien become void." (internal citations omitted)).

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CASE NO. 40

2022 WL 4454395
Only the Westlaw citation
is currently available.
United States District Court,
S.D. Texas, Galveston Division.

KAFI, INC., Plaintiff.
v.
SAND CANYON CORPORATION
f/k/a Option One Mortgage
Corporation, et al., Defendants.

No. 3:20-cv-00354
|
Signed September 23, 2022

Attorneys and Law Firms

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Brett W. Schouest, Dykema Gossett PLLC, San Antonio, TX, Stephen Andrew Walsh, Weinberg Wheeler et al, Birmingham, AL, for Defendant Sand Canyon Corporation.

Kurt Lance Krolikowski, Ryan Benner Burns, Locke Lord LLP, Houston, TX, for Defendant Nationwide Title Clearing, Inc.

Neyma Edelyn Figueroa, Brett W. Schouest, Dykema Gossett PLLC, San Antonio, TX, for Defendants Wells Fargo Bank, N.A. as Trustee for ABFC 2006-OPT3 Trust, Asset Backed Funding Corporation Asset-Backed Certificates, Series 2006-OPT3, PHH Mortgage Corporation.

ORDER ADOPTING MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

JEFFREY VINCENT BROWN, UNITED STATES DISTRICT JUDGE

***1** On February 24, 2021, all dispositive and non-dispositive pretrial matters in this case were referred to United States Magistrate Judge Andrew M. Edison under 28 U.S.C. § 636(b)(1)(A) and (B). *See* Dkt. 38. Judge Edison filed a memorandum and recommendation on August 3, 2022, recommending that the court grant in part and deny in part the defendants' joint motion to dismiss claims brought against them by Kafi, Inc. ("Kafi") for failure to state a claim. *See* Dkt. 72. Specifically, Judge Edison recommended the court dismiss: (1) Kafi's forgery claim against all defendants; (2) Kafi's claim for exemplary damages; and (3) Kafi's claims against Nationwide Title Clearing ("NTC") and Sand Canyon Corporation f/k/a Option One Mortgage Corporation ("Sand Canyon"). In all other respects, Judge Edison recommended the court deny the relief sought by the defendants in their joint motion to dismiss without prejudice to re-urging at summary judgment.

On August 17, 2022, the defendants timely filed their objections to the memorandum and recommendation. *See* Dkt. 73. In accordance with 28 U.S.C. § 636(b)(1)(C), this court is required to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection [has

been] made." 28 U.S.C. § 636(b)(1)(C). After conducting this de novo review, the court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.*; *see also* Fed. R. Civ. P. 72(b)(3).

The court has carefully considered the objections, the memorandum and recommendation, the pleadings, and the record. The court accepts Judge Edison's memorandum and recommendation and adopts it as the opinion of the court. It is therefore ordered that:

(1) Judge Edison's memorandum and recommendation (Dkt. 72) is approved and adopted in its entirety as the holding of the court;

(2) The defendants' joint motion to dismiss (Dkt. 66) is granted in part and denied in part.

(3) Kafi's forgery claim against all defendants is dismissed with prejudice;

(4) Kafi's claim for exemplary damages is dismissed is dismissed with prejudice;

(5) Kafi's claims against NTC and Sand Canyon are dismissed with prejudice, and those parties are dismissed from the case; and

(6) All other relief sought by the defendants in their joint motion to dismiss is denied without prejudice to re-urging at summary judgment.

All Citations

Not Reported in Fed. Supp., 2022 WL 4454395

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CASE NO. 41

2020 WL 13240060
Only the Westlaw citation
is currently available.
United States District Court,
S.D. Texas, Houston Division.

LOUISIANA OILFIELD LOGISTICS, LLC, Plaintiff,
v.
FLOTEK CHEMISTRY, LLC, Defendant.

Civil Action No. H-19-1272
|
Signed 06/29/2020

Attorneys and Law Firms

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Tyler G. Doyle, Smyser Kaplan et al, Houston, TX, for Defendant.

MEMORANDUM AND OPINION

Lee H. Rosenthal, Chief United States District Judge

***1** The plaintiff, Louisiana Oilfield Logistics, LLC, contracted with Flotek Chemistry, LLC, for transportation services in August 2018. (Docket Entry No. 11 at 2; Docket Entry No. 47 ¶ 6). In April 2019, Louisiana Oilfield sued Flotek for breach of that contract, anticipatory breach, promissory estoppel, and quantum meruit, and later amended its complaint. (Docket Entry Nos. 1, 11). Flotek's answer to the amended complaint included four counterclaims, fraudulent inducement among them. (Docket Entry No. 14 at ¶¶ 81–82, 148–185).

Louisiana Oilfield moved to dismiss the fraudulent inducement counterclaim under Federal Rule of Civil Procedure 12(b)(6). (Docket Entry Nos. 24, 24-1). Louisiana Oilfield renewed the motion after Flotek filed its first amended counterclaim. (Docket Entry Nos. 30, 31, 31-1). Months later, Flotek filed a second amended counterclaim, which addresses issues unrelated to the fraudulent inducement counterclaim and does not moot Louisiana Oilfield's dismissal motion. (Docket Entry No. 44 at 6; Docket Entry No. 47).

Based on a careful review of the parties' arguments, the record, and the applicable law, the court denies the motion to dismiss the fraudulent inducement counterclaim. The reasons are set out in detail below.

I. Background

In August 2018, Louisiana Oilfield contracted to "provide tractor-trailers for use by Flotek in its chemical operation in the State of Texas" for an initial one-year term. (Docket Entry No. 47 at ¶¶ 6–9). This contract resulted from negotiations between Louisiana Oilfield president, Kenneth Begovich, and former Flotek employee Eric Klumb. (*Id.* at ¶ 92). The contract required Flotek to pay a fixed amount to Louisiana Oilfield in exchange for access to ten "units"—each unit being a tractor, trailer, and driver—regardless of whether Flotek actually used those units. (*Id.* at ¶ 9; Docket Entry No. 11 at ¶ 9).

In February 2019, Flotek emailed Louisiana Oilfield about contract termination. (Docket Entry No. 11 at ¶ 12; Docket Entry No. 47 at ¶ 12). While Flotek described this correspondence as "confirm[ation] that the contract had been terminated" already, after Louisiana Oilfield's "repeated breaches and failure to cure such breaches," Louisiana Oilfield viewed the correspondence as a first notice of termination. (Docket Entry No. 11 at ¶¶ 12–16; Docket Entry No. 47 at ¶¶ 12–17). Despite these different understandings, Flotek kept paying Louisiana Oilfield's invoices. (Docket Entry No. 11 at ¶ 16; Docket Entry No. 47 at ¶¶ 13–16).

In March 2019, Louisiana Oilfield received a letter from Flotek confirming Flotek's position that the February 2019 email terminated the agreement and describing the circumstances surrounding the purported termination. (Docket Entry No. 11 at ¶¶ 15–16; Docket Entry No. 47 at ¶¶ 15–16). Louisiana Oilfield responded to Flotek's letter, stating that the contract "remained in force and effect" because there was no breach; any possible breaches "vaguely identified in the Letter had been cured"; and "Flotek could not terminate the Contract without first putting [Louisiana Oilfield] in default by written notice describing the alleged breach with detail and affording it an opportunity to cure [the breach]." (Docket Entry No. 11 at ¶¶ 17–18).

***2** After March 7, 2019, Flotek made no further payments to Louisiana Oilfield. Louisiana Oilfield alleges that it continued to provide Flotek with access to tractor-trailers and drivers and interpreted Flotek's non-payment as repudiation of the contract. (Docket Entry No. 11 at ¶¶ 26–27). In April 2019, Louisiana Oilfield filed this suit against Flotek, which asserted a fraudulent inducement counterclaim against Louisiana Oilfield. (Docket Entry Nos. 1, 14, 30, 47).

Flotek's counterclaim alleges that Louisiana Oilfield "knowingly and intentionally represented to Flotek that it would be able to meet Flotek's demands for the dedicated use of tractor trucks, trailers, and drivers" during the time period of the parties' July and August correspondence and contractual negotiations. (Docket Entry No. 47 at ¶¶ 161–162). Flotek alleges that Louisiana Oilfield, beset with financial difficulties and a shortage of capital, made this representation knowing that "[Louisiana Oilfield] could not provide the ten [units] but represented otherwise" to secure a valuable contract. (Docket Entry No. 47 ¶¶ 161–165; *see also* Docket Entry No. 34 at 19).

Louisiana Oilfield moved to dismiss the counterclaim under Rule 12(b)(6) and Rule 9(b), arguing that "there are no facts pleaded supporting a conclusion that [Louisiana Oilfield] knew that it could not provide the dedicated units." (Docket Entry No. 31-1 at 6). The court considers the parties' arguments against the applicable legal standards.

II. The Legal Standards

a. Rule 12(b)(6)

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled

to relief." FED. R. CIV. P. 8(a)(2). A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955).

To withstand a Rule 12(b)(6) motion, a complaint must include "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Lincoln v. Turner*, 874 F.3d 833, 839 (5th Cir. 2017) (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (alteration in original) (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955). "A complaint 'does not need detailed factual allegations,' but the facts alleged 'must be enough to raise a right to relief above the speculative level.' " *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019) (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). "Conversely, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (alterations omitted) (quoting *Twombly*, 550 U.S. at 558, 127 S.Ct. 1955).

***3** A court reviewing a motion to dismiss under Rule 12(b)(6) may consider "(1) the facts set forth in the complaint, (2) documents attached to the complaint, and (3) matters of which judicial notice may be taken under Federal Rule of Evidence 201." *Inclusive Cmtys Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 900 (5th Cir. 2019).

b. The Rule 9(b) Standard for Claims of Fraud

Rule 9(b) of the Federal Rules of Civil Procedure states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b). "A dismissal for failure to plead fraud with particularity under Rule 9(b) is treated as a dismissal for failure to state a claim under Rule 12(b)(6)." *Musket Corp. v. Suncor Energy (U.S.A.) Mktg. Inc.*, 759 F. App'x 280, 286–87 (5th Cir. 2019) (quoting *United States ex rel. Stephenson v. Archer W. Contractors, L.L.C.*, 548 F. App'x 135, 138 (5th Cir. 2013)); *see also United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185 n.8 (5th Cir. 2009) (citing *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 901 (5th Cir. 1997)).

In the Fifth Circuit, Rule 9(b) requires that a plaintiff state the who, what, when, where, and how of the alleged fraud. *Musket Corp.*, 759 F. App'x at 287 (citing *United States ex rel. Stephenson v. Archer W. Contractors, L.L.C.*, 548 F. App'x 135, 138 (5th Cir. 2013)). "The frequently stated, judicially-created standard for a sufficient fraud complaint ... instructs a plaintiff to plead the time, place and contents of the false representation, as well as the identity of the person making the misrepresentation and what that person obtained thereby." *Id.* (quoting *Grubbs*, 565 F.3d at 186).

c. Fraudulent Inducement

"To state a claim of fraud by misrepresentation under Texas law, a plaintiff must sufficiently allege (1) a [material] misrepresentation that (2) the speaker knew to be false or made recklessly (3) with the intention to induce the plaintiff's reliance, followed by (4) actual and justifiable reliance (5) causing injury." *Brush v. Wells Fargo Bank, N.A.*, 911 F. Supp. 2d 445, 485 (S.D. Tex. 2013) (quoting *Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.*, 620 F.3d 465, 468 (5th Cir. 2010)). "A contract is subject to avoidance on the ground that it was induced by fraud." *Id.* (quoting *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 331 (Tex. 2011)); *see also Formosa Plastics Corp. U.S.A. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1998) ("As a rule, a party is not bound by a contract procured by fraud."). Counterclaims alleging fraud must comply with the particularity requirements of Rule 9(b). *Brush*, 911 F. Supp. 2d at 486 (citing *Castillo v. Hernandez*, EP-10-CV-247-KC, 2011 WL 2489910, at *——, 2011 U.S. Dist. LEXIS 65796, at *3 (W.D. Tex. June 17, 2011) (applying Rule 9(b) to a fraud counterclaim)).

III. Analysis

Flotek describes the alleged fraud with sufficient particularity. As to the "who, what, when, and how," Flotek has alleged that Begovich made the "false representation that [Louisiana Oilfield] would provide ten [units] for Flotek's dedicated use," during the time period of the parties' correspondence and negotiations prior to signing the contract. (Docket Entry No. 34 at 2). This representation was a term material to the contractual agreement between the parties. (*Id.* at 2–3). According to Flotek, Louisiana Oilfield failed "to provide the dedicated use of ten tractor trucks, trailers, and drivers," that Louisiana Oilfield had promised, "allow[ed] its equipment to become subject to seizure," and "fail[ed] to provide skilled, knowledgeable, and safe drivers." (Docket Entry No. 47 at ¶ 66). Flotek alleges that "[t]he trucks that [Louisiana Oilfield] actually provided frequently arrive[d] late, causing transportation of Flotek's chemical products to be late to Flotek's customers and threatening their operations." (Docket Entry No. 47 at ¶¶ 131, 190–191).

***4** Flotek has alleged the "where": Flotek's facility—where Louisiana Oilfield President Begovich and Flotek employee Klumb met in person for negotiations—located at 2790 Wilma St., Monahans, Texas 79756. (*Id.* at ¶ 92). Additional correspondence and negotiations occurred via email. (*Id.* at ¶¶ 95–97).

Louisiana Oilfield does not dispute that Flotek alleged a material representation, that

Flotek actually and justifiably relied on that representation, or that Flotek's reliance caused the injury. (Docket Entry No. 31-1; Docket Entry No. 34 at 3–4; Docket Entry No. 36). The parties dispute whether Flotek's pleading satisfies the second and third fraud factors relating to Louisiana Oilfield's knowledge and intent to induce reliance. (Docket Entry Nos. 31-1, 34, 36).

Louisiana Oilfield argues that Flotek made "bare bones intent allegations" that are "not sufficient to meet the heightened pleading standards under Rule 9(b)." (Docket Entry No. 31-1 at 7). Louisiana Oilfield contends that "general statements about a party's intent to perform the very obligations that are later recorded in the contract can constitute a fraud-in-the inducement claim only if the Plaintiff offers evidence that [the] Defendant had no such intent when these pre-contractual negotiations took place." *Gimme The Best, L.L.C. v. Sungard Vericenter, Inc.*, No. 08-CV-2873, 2010 WL 1388993 at *4, 2010 U.S. Dist. LEXIS 32979 at *13 (S.D. Tex. Apr. 1, 2010); *see also Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W. 3d 768, 774 (Tex. 2009) ("A promise of future performance constitutes an actionable misrepresentation if the promise was made with no intention of performing at the time it was made." (quoting *Formosa Plastics Corp. U.S.A. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998))).

Flotek alleges that Louisiana Oilfield sought the transportation agreement because it was valuable, and Louisiana Oilfield was cash poor and simply needed the money. "Flotek was willing to pay [Louisiana Oilfield] a flat rate of $8,600 per Unit per week for ten Units—representing $86,000 per week and more than $340,000 a month—just to have ten Units on standby for Flotek's dedicated use." (Docket Entry No. 34 at 8; Docket Entry No. 47 at ¶ 102). Flotek alleges that Louisiana Oilfield's president, Begovich, owned "companies [that] were already experiencing significant financial problems in 2018 and had been for several years beforehand going as far back as 2011." (Docket Entry No. 34 at 12).

Flotek alleges that "at least two trucks (i.e., [trucks] ST09 and ST11) provided by [Louisiana Oilfield] and invoiced to Flotek were at risk of being sold," because they were subject to an earlier security interest. (Docket Entry No. 34 at 13). Begovich "previously had put up trucks ST09 and ST11 as collateral to secure a loan" to BriCor, LLC ("BriCor"), a company that, according to Flotek, is solely owned and managed by Begovich. (*Id.* at 8, 13). According to Flotek, Begovich knew at the time of contract negotiations that the two trucks, ST09 and ST11, which the contract reserved for Flotek's use, might be subject to seizure due to BriCor's loan default. (*Id.* at 13–14). Louisiana Oilfield disputes the "false contention that BriCor is owned by Begovich" but the court takes Flotek's sufficiently pleaded factual allegations as true at this stage. (Docket Entry No. 36 at 3). Flotek pleads in sufficient detail that BriCor defaulted on its loan and in November 2018, knew that the trucks were subject to foreclosure proceedings. (Docket Entry No. 34 at 13).

***5** According to Louisiana Oilfield, Flotek "fails to allege that BriCor's trucks were ever actually seized." (Docket Entry No. 36

at 3). Actual seizure is irrelevant because Flotek is using these facts to demonstrate Louisiana Oilfield's knowledge, at the time of contract negotiations, of financial difficulties and the trucks' potential unavailability as well as a motive for fraudulent inducement. Louisiana Oilfield emphasizes that "BriCor became involved in litigation months after the Contract was signed" and argues the timeline of events defeats Flotek's counterclaim. (*Id.*). This argument is unpersuasive, at least at this stage of the litigation. Although litigation over the trucks began in November 2018, after the parties signed the contract, the facts set out in Flotek's timeline make it plausible that BriCor was delinquent in loan payments before the August 2018 negotiation date. Given that Louisiana Oilfield promised to dedicate to Flotek's use two trucks that were at risk of being unavailable, there is a plausible claim that Louisiana Oilfield made this representation knowing it could not perform.

Flotek points to a May 2018 factoring agreement between Begovich, on behalf of Louisiana Oilfield, and Advance Business Capital, LLC d/b/a Triumph Business Capital ("Triumph"), the terms of which "entitled [Triumph] to purchase [Louisiana Oilfield]'s current and future accounts receivable." (Docket Entry No. 34 at 13). Flotek argues that the nature and terms of the factoring agreement support "the inference that [Louisiana Oilfield] was desperately short on working capital in 2018 and looking for ways to quickly generate funds months before meeting with Flotek." (*Id.*).

Louisiana Oilfield responds that "factoring is a common arrangement in which funding is secured using accounts receivable and ... no different than other types of financing." (Docket Entry No. 36 at 4). While this may be true, the court draws factual inferences in Flotek's favor at the motion-to-dismiss stage. *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955.

Louisiana Oilfield argues that the financial status of BriCor should not factor into the analysis of Louisiana Oilfield's motives and knowledge. (Docket Entry No. 36 at 4). However, in the context of securities fraud, the Fifth Circuit has stated that "[a]lleged facts are sufficient to support such an inference if they either (1) show a defendant's motive to commit securities fraud, or (2) identify circumstances that indicate conscious behavior on the part of the defendant." *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1018–19 (5th Cir. 1996) (quoting *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1068 (5th Cir.1994)). As Flotek argues, the court "reasonably can infer that the financial state of Begovich's companies was so dire" prior to contract negotiations that "Begovich was motivated to commit fraud in order to secure the lucrative Contract with Flotek." (Docket Entry No. 34 at 15–16). Even though BriCor and Louisiana Oilfield are different companies, Flotek states a plausible claim that they are financially linked through Begovich.

Louisiana Oilfield contends that there is no evidence of fraudulent intent at the time the parties entered into the transportation agreement. A party's intent at the time of entering into a contract "may be inferred from the party's subsequent acts after the representation is made." *Aquaplex*, 297 S.W.3d

at 775 (quoting *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986)). To avoid dismissal, Flotek need not plead facts in support of its counterclaim allegations with contemporaneous evidence of Louisiana Oilfield's intent during the negotiations or contract signing.

Louisiana Oilfield asserts that the facts of this case "are on all fours" with *Legendary Lightning Grp. v. Optigenex*, in which the court granted a Rule 12(b)(6) motion to dismiss for failure to meet the Rule 9(b) pleading requirements. *Legendary Lightning Grp., Inc. v. Optigenex, Inc.*, No. 4:15CV53-LG-CMC, 2015 WL 3942946, 2015 U.S. Dist. LEXIS 83074 (E.D. Tex. June 26, 2015) ("There are no facts pled in support of Legendary's assertion that it believes Optigenex knew it would not perform under the contract when it promised that its stock would be tradable after it received Legendary's funds."); (Docket Entry No. 31-1 at 7). *Legendary Lightning* is both unpublished and distinguishable. In *Legendary Lightning*, the plaintiff did not allege facts suggesting knowledge of inability to perform. That is not the case here. Flotek specifically alleges that Begovich was aware of "BriCor's massive, delinquent debt" and "[Louisiana Oilfield]'s limited working capital." (Docket Entry No. 34 at 20). Flotek argues that Begovich knew or "lacked sufficient information to know" whether Louisiana Oilfield could honor its contract promise to provide "ten Units for Flotek's dedicated use." (*Id.* at 17, 20). Flotek's factual allegations are sufficient.

***6** Louisiana Oilfield argues that Flotek has made an "about-face" by admitting "no knowledge of how many trucks [Louisiana Oilfield] actually had," noting that "[Flotek] "currently lacks information regarding the total number of trucks in [Louisiana Oilfield]'s fleet." (Docket Entry No. 34 at 13; Docket Entry No. 36 at 5). Louisiana Oilfield mischaracterizes this as an "admi[ssion] that [Flotek's] belief is based on nothing." (Docket Entry No. 36 at 5). Flotek acknowledges its present lack of information and suggests that Louisiana Oilfield would not have dedicated encumbered trucks to Flotek if Louisiana Oilfield's resources were sufficient to meet the contract requirements. (Docket Entry No. 34 at 13).

Louisiana Oilfield cites *Aquaplex*, 297 S.W.3d at 775, and argues that Flotek has not alleged enough circumstantial evidence because "no facts pleaded support[ ] a conclusion that [the] Plaintiff knew that it could not provide the dedicated units by a given date." (Docket Entry No. 31-1 at 6). According to the same authority Louisiana Oilfield relies on, "[w]hile breach of the contract alone is not evidence that a party did not intend to perform, 'breach combined with slight circumstantial evidence of fraud' is some evidence of fraudulent intent, enough to support a verdict." *Aquaplex*, 297 S.W.3d at 775 (quoting *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2006)). That standard is met here.

Louisiana Oilfield challenges Flotek's inclusion of "matters outside of its pleadings" in responding to the dismissal motion and argues that "consider[ing] public court records from other cases ... would be contrary to case law dealing with the issue and should not be allowed by the Court." (Docket Entry No. 36 at 2). Louisiana Oilfield challenges

Flotek's inclusion of the records concerning BriCor's debts and bankruptcy proceedings. (*Id.* at 2–4). Louisiana Oilfield argues that it would be improper for the court to consider public records, because Flotek relies on this information "for the truth of the matters asserted therein, namely that BriCor ... owed the alleged debts referenced therein." (*Id.* at 2); *see* *Burns v. Mayes*, 369 F. App'x. 526, 527 (5th Cir. 2010) (taking judicial notice of record of court proceedings from another district court in reviewing a 12(b)(6) dismissal); *see also* *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998) ("A court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.' ") (citing *Liberty Mutual Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992)).

It is unnecessary to consider the public records because, in the context of a Rule 12(b)(6) motion, this court takes as true Flotek's allegation that BriCor owed debts. Courts regardless may take judicial notice of matters of public record at this stage of the proceedings, particularly in the case of a dismissal motion. *Burns*, 369 F. App'x. at 527; *Davis v. Bayless*, 70 F.3d 367, 372 n.3 (5th Cir. 1995) ("Federal courts are permitted to refer to matters of public record when deciding a 12(b)(6) motion to dismiss.") (citing *Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994)).

At this stage of the litigation, when evaluating a motion to dismiss for failure to state a claim, the court takes the sufficiently pleaded factual allegations as true. *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable ...."). Flotek alleged enough facts to proceed with its fraudulent inducement counterclaim. The allegations provide sufficient information to answer the who, what, when, where, and how of the alleged fraud. The counterclaim adequately alleges Louisiana Oilfield's knowledge and intent at the time it made material representations to Flotek about the availability of tractor-trailers.

IV. Conclusion

***7** Louisiana Oilfield's motions to dismiss, (Docket Entry Nos. 24, 31), are denied.

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CASE NO. 42

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United States District Court,
S.D. Texas, Houston Division.

CLAIMHUB, INC., Plaintiff,
v.
UNIVERSAL RISK INSURANCE SERVICES, INC., et al., Defendants.

CIVIL ACTION NO. H-10-2841
|
Signed 07/25/2011

Attorneys and Law Firms

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Scott Rothenberg, Attorney at Law, Houston, TX, for Defendants.

MEMORANDUM AND ORDER

Lee H. Rosenthal, United States District Judge

***1** Claimhub, formerly known as N'Site Solutions, sued Universal Risk Insurance Services, Inc. ("URIS"), Universal Risk Holdings, Inc. ("URH"), Cybernex, Inc., Wiley Joe LeBrun, Jr., ("Wiley LeBrun"), Wiley Joe LeBrun, III, ("Joe LeBrun"), and Edwin E. LeBrun, Jr., alleging fraudulent transfer under the Texas Uniform Fraudulent Transfer Act ("TUFTA"), TEX. BUS. & COM. CODE § 24.005, *et seq.*; common law and statutory fraud, TEX. BUS. & COM. CODE § 27.01; and civil conspiracy. (Docket Entry No. 1). Claimhub alleges that its predecessor, N'Site, obtained an arbitration award against Omega Claims Solutions, Inc., a company that the LeBruns owned and served as corporate officers. Omega refused to pay the award, which N'Site reduced to judgment. Omega filed for bankruptcy protection under chapter 7 shortly after the judgment was entered. In this lawsuit, Claimhub alleges that assets that were or should have been Omega's property were fraudulently transferred to the defendants in this case. Claimhub alleges that it is entitled to recover more than $623,214.07, the judgment amount plus pre- and post-judgment interest, and seeks to avoid the transfers and recover their value up to the judgment amount, plus attorneys' fees and punitive damages.

The defendants have filed a motion to dismiss the complaint. (Docket Entry No. 10). Claimhub has responded. (Docket Entry No. 12).[1] Based on the motion and response, the pleadings, the record, and the applicable law, this court finds that Claimhub's allegations of fraud and conspiracy to commit fraud are sufficient and denies the motion to dismiss those allegations. This court grants the motion dismiss as to Claimhub's allegations of fraudulent transfer under TUFTA and conspiracy to commit fraudulent transfers, without prejudice and with leave to amend. Claimhub must file an amended complaint by **August 19, 2011**. A status conference is set for **Friday, August 5, 2011 at 8:30 a.m.**

The reasons for these rulings are explained in detail below.

I. Background

In 2006, Omega agreed to sell N'Site a call center it owned and operated for processing insurance claims. On November 12, 2006, the parties signed an Asset Purchase Agreement and Licensing Agreement (the "Agreement") providing that part of the purchase price would be paid after closing. Joe LeBrun and Wiley LeBrun, directors of Omega, negotiated the transaction with N'Site. The LeBruns also served as directors of URIS, URH, and Cybernex.

During the negotiations, N'Site asked Omega to provide financial information. In the complaint, N'Site alleges that Omega, through Joe and Wiley LeBrun, represented that the financial information for URIS was the "same" as the financial information for Omega and that Omega and URIS were the same entity. In a November 7, 2006 e-mail, Joe LeBrun gave N'Site the financial information of URIS and stated: "In January 06 we started closing down Universal Risk and moving all claims dollars over to Omega Claims Solutions Inc. Omega Claims Solutions Inc. and Universal Risk are one, an[d] the same." LeBrun continued, "Effective January 06 our other companies have their own financials. The P&L that is attached is for claims only and does not take into consideration our other entities. Since the claims entity is the one purchasing the Nsite service center this is the P&L supplied." (Docket Entry No. 1, ¶¶ 11–16).

***2** Shortly after the call center was transferred to Omega, N'Site and Omega had a dispute. They submitted the dispute to arbitration under the Agreement. The arbitrator issued an award in favor of N'Site in November 2008. After Omega refused to pay, N'Site filed a motion to confirm the award in federal district court in the Southern District of Texas. Omega opposed the motion and asserted a number of grounds for vacatur. On December 17, 2009, the court rejected Omega's vacatur arguments in forceful terms and entered judgment enforcing the award. Shortly after that judgment, Omega filed for chapter 7 bankruptcy protection. During the bankruptcy proceedings, Wiley LeBrun filed documents stating that the representations he had made to N'Site that Omega and URIS were the same entity were false. (*Id.*, ¶¶ 22–23).

N'Site's successor, Claimhub, filed this lawsuit, alleging that "assets that were or should have been the property of Omega, were improperly transferred to or left with URIS, URH, Cybernex, Joe LeBrun, Wiley LeBrun and Edwin LeBrun in contravention of law." (*Id.*, ¶ 24). Claimhub claims that "the transfers of assets to defendants" were made with fraudulent intent, while Omega was insolvent, and "without receipt of reasonably equivalent value by Omega." Claimhub seeks to avoid these transfers and recover the value of the assets up to the amount of the judgment. (*Id.*, ¶¶ 25–44). Claimhub also alleges that Joe LeBrun engaged in fraud when he represented the status of Omega and URIS to N'Site, and that Wiley LeBrun participated in that fraud. (*Id.*, ¶ 46). Claimhub alleges that the LeBruns knew of the falsity of the statements and made them with the intent that N'Site rely on them, and that N'Site did in fact detrimentally rely on the statements. (*Id.*, ¶¶ 47–49). Finally, Claimhub asserts a civil conspiracy claim. (*Id.*, ¶ 60).

The defendants moved to dismiss for failure to state a claim based on the insufficiency of

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the factual allegations. (Docket Entry No. 10). In response, Claimhub argues that this court should take judicial notice of court filings in the suit to confirm the arbitration award and in the bankruptcy proceeding. Claimhub argues that considering those filings with the complaint filed in this case shows sufficient facts to make the claims for relief under each cause of action sufficient. (Docket Entry No. 12).

The arguments and responses are analyzed below.

II. Rule 12(b)(6)

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b) (6). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), the Supreme Court confirmed that Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). *Twombly* rejected the Supreme Court's prior statement in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Twombly*, 550 U.S. at 562–63. To withstand a Rule 12(b)(6) motion, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *see also Elsensohn v. St. Tammany Parish Sheriff's Office*, 530 F.3d 368, 372 (5th Cir. 2008). Under Rule 8(a)(2), plaintiffs are not required to include " 'detailed factual allegations,' but more than 'an unadorned, the-defendant-unlawfully-harmed-me accusation' is needed." *Id.* (quoting *Twombly*, 550 U.S. at 555). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556).

***3** When considering the sufficiency of pleadings, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b) (6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The court may take judicial notice of matters in the public record, including prior proceedings between the parties, without converting the motion to dismiss into a motion for summary judgment. *Wilson v. Barcella*, CIV.A.K-05-3646, 2007 WL 963977 (S.D. Tex. Mar. 29, 2007) (citing cases), *aff'd*, 284 Fed.Appx. 210 (5th Cir. 2008) (per curiam) (unpublished).

When a plaintiff's complaint fails to state a claim, the court should generally give the plaintiff at least one chance to amend the complaint under Rule 15(a) before dismissing the action with prejudice. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) ("[D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies

before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal."); *see also* United States ex rel. Adrian v. Regents of the Univ. of Cal., 363 F.3d 398, 403 (5th Cir. 2004) ("Leave to amend should be freely given, and outright refusal to grant leave to amend without a justification ... is considered an abuse of discretion." (internal citation omitted)). However, a plaintiff should be denied leave to amend a complaint if the court determines that "the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face...." 6 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1487 (2d ed. 1990); *see also* Ayers v. Johnson, 247 Fed.Appx. 534, 535 (5th Cir. 2007) (unpublished) (per curiam) (" '[A] district court acts within its discretion when dismissing a motion to amend that is frivolous or futile.' " (quoting Martin's Herend Imports, Inc. v. Diamond & Gem Trading U.S. of Am. Co., 195 F.3d 765, 771 (5th Cir. 1999))).

III. Analysis

A. Fraud

Fraud allegations are subject to the Rule 9(b) heightened pleading standard. United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 186 n.8 (5th Cir. 2009); United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 901 (5th Cir. 1997); Lovelace v. Software Spectrum, Inc., 78 F.3d 1015, 1017 (5th Cir. 1996). Rule 9(b) states:

> In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

FED. R. CIV. P. 9(b). "At a minimum, Rule 9(b) requires that a plaintiff set forth the 'who, what, when, where, and how' of the alleged fraud." *Thompson*, 125 F.3d at 903 (quoting Williams v. WMX Techs., Inc., 112 F.3d 175, 179 (5th Cir. 1997)). The pleader must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Williams*, 112 F.3d at 177.

The elements of common-law fraud in Texas are: (1) the defendant made a representation to the plaintiff; (2) the representation was material; (3) the representation was false; (4) when the defendant made the representation the defendant knew it was false or made the representation recklessly and without knowledge of its truth; (5) the defendant made the representation with the intent that the plaintiff act on it; (6) the plaintiff relied on the representation; and (7) the representation caused the plaintiff injury. Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter, 607 F.3d 1029, 1032–33 (5th Cir. 2010) (citing Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co., 51 S.W.3d 573, 577 (Tex. 2001)). The plaintiff

need not plead or prove that "each and every defendant made a material representation"; it is sufficient that "a defendant had knowledge of the material misrepresentations and profited thereby." *In re NE 40 Partners, Ltd.*, 411 B.R. 352, 360–361 (Bankr. S.D. Tex. 2009).

***4** The elements of statutory fraud are:

> (a) Fraud in a transaction involving real estate or stock in a corporation or joint stock company consists of a
>
> (1) false representation of a past or existing material fact, when the false representation is
>
> (A) made to a person for the purpose of inducing that person to enter into a contract; and
>
> (B) relied on by that person in entering into that contract

TEX. BUS. & COM. CODE § 27.01. With respect to third persons, section 27.01 provides:

> (d) A person who (1) has actual awareness of the falsity of a representation or promise made by another person and (2) fails to disclose the falsity of the representation or promise to the person defrauded, and (3) benefits from the false representation or promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

TEX. BUS. & COM. CODE § 27.01.

The defendants fault the complaint for failing to allege facts that meet the Rule 9(b) requirements. But Claimhub has alleged in its complaint a specific statement that it asserts meet the statutory and common-law elements for fraud. Claimhub alleges that the representations about the status of Omega and URIS made in the November 7, 2006 e-mail by Joe LeBrun were false and were made with the knowledge that they were false and the intent that N'Site rely upon them. Claimhub alleges that during July through November of 2006 (and specifically on November 7, 2006), Omega, J. LeBrun, and W. LeBrun made representations orally and in the e-mail identified in the complaint that the financial information for URIS was the "same" as the information for Omega and that Omega and URIS were "one and the same" entity. (Docket Entry No. 1, ¶ 14–15.). Claimhub alleges that in reliance on these representations, N'Site moved forward with its sale of the call center and entered into the Agreement, "convinced that Omega was financially capable of performing its obligations incurred as part of the Transaction." (*Id.*, ¶ 16),

In addition, Claimhub alleges that specific statements made in the later bankruptcy proceeding showed that the earlier statements

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made by the defendants were false. Claimhub alleges that "[i]n its bankruptcy schedules, Omega revealed that it is not one and the same with URIS or URH." (*Id.*, ¶ 22). Claimhub alleges that the bankruptcy filings also revealed that Omega had $1,000.00 in assets and over $1,000,000.00 in liabilities, and revealed that Omega did not own subsidiaries, as had been previously represented to Claimhub. (*Id.*, ¶ 15). Claimhub alleges that in the bankruptcy proceeding, Wiley LeBrun admitted that the representations made to N'Site—that URIS was one and the same with Omega, that URIS would be shut down, and that all of the URIS assets would belong to Omega—were not true. (*Id.*, ¶ 23.).

The complaint and related documents properly considered on this motion to dismiss under judicial notice satisfy the Rule 9(b) pleading requirements for fraud. The fraud claims against Wiley LeBrun are also sufficient on the basis of his alleged status as an insider and the fact that he was copied on the specific e-mail quoted as a critical misrepresentation. (*Id.*, ¶¶ 15, 41). Because Claimhub has alleged that the individual defendants were also acting as agents for the corporations they owned and operated and which they served as directors, the fraud claims against the remaining defendants are also sufficient. *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 432 (Tex. 1997) ("Generally, a corporate officer's acts on the corporation's behalf are deemed corporate acts.").

***5** The allegations of conspiracy to commit fraud are also sufficient. Texas law defines a civil conspiracy as: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result." *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005) (citing *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996)) (additional citations omitted). "It is not the agreement itself, but an injury to the plaintiff resulting from an act done pursuant to the common purpose that gives rise to the cause of action." *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925 (Tex. 1980) (citing *Great Nat'l Life Ins. Co. v. Chapa*, 377 S.W.2d 632, 635 (Tex. 1964)). Conspiracy to commit a tort requires that the parties conspire to commit an intentional tort. *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 617 (Tex. 1996). A claim of conspiracy to commit a tort that sounds in fraud is also subject to the heightened pleading requirements of Rule 9(b). *See Castillo v. First City Bancorporation of Texas, Inc.*, 43 F.3d 953, 961 (5th Cir. 1994). Rule 9(b) does not, however, require a plaintiff to plead all the details of a defendant's mental state in a claim of conspiracy to defraud. "[E]ven though Rule 9(b) applies ... '[it] does not work to penalize a plaintiff merely because he was not privy to, and therefore, cannot plead the details of, the inner workings of a group of defendants who allegedly acted in concert to defraud him.' " *NE 40 Partners*, 411 B.R. at 367 (quoting *Kravetz v. Brukenfeld*, No. 83 Civ. 5357(GLG), 1984 WL 2443, at *3 n.9 (S.D.N.Y. June 29, 1984)). Status as an "insider" can support an inference of knowledge. *See, e.g.*, *id.*

Claimhub has alleged that each individual defendant, acting as an insider, conspired with the other defendants to commit fraud. The allegations of insider status are sufficient

and provide a factual basis for alleging each individual defendant's mental state. The assertions that the individual defendants were acting as agents for the corporations they served as officers are also factually sufficient. *See* *Askanase v. Fatjo*, 130 F.3d 657, 668 (5th Cir. 1997) ("If the directors had the requisite knowledge and intent for the fraud and conspiracy claims, then that knowledge is imputed to the corporation unless the Appellant makes a showing of adverse interest.").

The motion to dismiss the fraud claims in Counts V and VI and related conspiracy to commit fraud claim is denied.

B. Fraudulent Transfers

Fraudulent transfers are divided into two categories: actually fraudulent transfers, TEX. BUS. & COM. CODE § 24.005(a)(1); and constructively fraudulent transfers, TEX. BUS. & COM. CODE §§ 24.005(a)(2) & 24.006. Claimhub asserts claims based on both sections.

Section 24.005(a) provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation under any of the following:
>
> (1) With actual intent to hinder, delay or defraud any creditor of the debtor.
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:
>
> (a) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
>
> (b) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

TEX. BUS. & COM. CODE § 24.005(a). Section 24.006 provides:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.
>
> (b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

***6** TEX. BUS. & COM. CODE § 24.006. Claimhub alleges violations under each theory. [2]

Some courts have required claims under § 24.005(a) to be pleaded with particularity under Rule 9(b). *Alexander v. Holden Bus. Forms, Inc.*, No. 4:08-cv-614Y, 2009 WL 2176582, at *2 (N.D. Tex. July 20, 2009); *E. Poultry Distrib., Inc. v. Yarto Puez*, No. 3:00-cv-1578, 2001 WL 34664163, at *2 (N.D. Tex. Dec. 3, 2001). Claimhub's fraudulent-transfer allegations are insufficient even under Rule 8. The premise for Claimhub's claim is that Omega must have had substantial assets to fund its legal work fighting the arbitration. Noting that Omega had filed for bankruptcy only 33 days after the arbitration award was confirmed, claiming $1,000 in assets and $1,000,000 in liabilities, Claimhub contends that it is "entitled to an inference that the directors and/or the corporate entities that shared its space, employees, assets and management had some knowledge of, and played some role in, Omega's fast liquidation. Moreover, it's reasonable for this Court to infer that, given the close relationship between Omega and the Defendants, that each, no doubt, benefit[t]ed." (Docket Entry No. 12, at 8).

To state a claim against an individual under TUFTA, the defendant must receive property belonging to the debtor. *See Alexander*, 2009 WL 2176582, at *6; *Wohlstein v. Aliezer*, 321 S.W.2d 756, 776–77 (Tex. App.—Houston, 2010). TUFTA does not create personal liability for individuals who facilitate fraudulent transfers. *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1272 (5th Cir. 1983) (noting that TUFTA "entails no personal liability on the part of those responsible for the transfer"); *Sherman v. Main Event, Inc.*, No. Civ. A. 3:02-CV-1314, 2003 WL 251653, at *5 (N.D. Tex. Feb. 3, 2003); *FDIC v. White*, No. 3:96-CV-0560-P, 1998 WL 120298, at *2 (N.D. Tex. Mar. 5, 1998) (holding that TUFTA does "not create personal liability on the part of a co-conspirator for fraudulent conveyances to an extent or in an amount beyond property which a co-conspirator actually receives or in which he acquires an interest"). Nor is a transfer to a third party for the defendant's benefit sufficient to create personal liability. *Alexander*, 2009 WL 2176582, at *6.

The allegation that the defendants must have spent funds on the "costly" arbitration proceedings shortly before Omega declared bankruptcy does not plead a cause of action for fraudulent transfer under the statutes. Claimhub's argument, in essence, is that Omega had money before the arbitration—at least enough to pay lawyers' fees—and was insolvent afterward, so some of that money improperly went to the defendants. But the complaint and Claimhub's subsequent briefing do not show why this scenario is any more plausible than the scenario that the money was paid to other recipients, including those who presented its "costly" defense relating to the arbitration. Nor do the complaint and the related, properly considered, documents allege facts showing that there were transfers to the defendants made with the intent to frustrate collection of the judgment or transfers for which no reasonably equivalent value was received. The allegations in Claimhub's complaint are, at most, "merely consistent with [the defendants'] liability, [stopping] short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 129 S. Ct. at 1949 (citations and quotations omitted); *see also Twombly*, 550 U.S. at 555 ("Factual allegations

must be enough to raise a right to relief above the speculative level....").

***7** Claimhub's allegations of conspiracy to commit a fraudulent transfer are derivative of the TUFTA claims. *See* *Highland Crusader Offshore Partners, LP v. LifeCare Holdings Inc.*, 377 Fed.Appx. 422, 428 (5th Cir. 2010) (unpublished) (per curiam) (citing *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996)). Because Claimhub has not stated a claim for fraudulent transfer, it cannot state a claim for conspiracy to commit a fraudulent transfer. Claimhub's fraudulent transfer claims in Counts I, II, III, and IV and related conspiracy claim are dismissed, with leave to amend.

IV. Conclusion

Claimhub's allegations of fraud and conspiracy to commit fraud are sufficient. Its allegations of fraudulent transfers under TUFTA and conspiracy to commit fraudulent transfers are dismissed without prejudice and with leave to amend. Claimhub must file an amended complaint by **August 19, 2011**.

All Citations

Not Reported in Fed. Supp., 2011 WL 13247456

Footnotes

1 In their motion to dismiss, the defendants allege that Edwin LeBrun does not exist. Claimhub has requested an affidavit affirming that Edwin LeBrun has no involvement in Omega or any defendant. (Docket Entry No. 12). The request is granted. The affidavit requested must be produced by **August 19, 2011**.

2 Count IV alleges a violation of TEX. BUS. & COM. CODE § 24.005(b). As the defendants point out, Count IV tracks the language of TEX. BUS. & COM. CODE § 24.006(b). These claims are properly treated as arising under the latter section. *See* *Armstrong v. Capshaw, Goss & Bowers, LLP*, 404 F.3d 933. 936 (5th Cir. 2005) (requiring that courts "determine the true nature of a pleading by its substance, not its labels"); *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) ("[W]e have oft stated that 'the relief sought, that to be granted, or within the power of the Court to grant, should be determined by substance, not a label.' ") (quoting *Bros. Inc. v. W.R. Grace Mfg. Co.*, 320 F.2d 594, 606 (5th Cir. 1963)).

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CASE NO. 43

2010 WL 4702303
Only the Westlaw citation
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United States District Court,
S.D. Texas,
Houston Division.

ZYTAX, INC., Plaintiff,
v.
GREEN PLAINS RENEWABLE ENERGY, INC., Defendant.

Civil Action
No.
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2582
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|
Nov. 10, 2010.

Attorneys and Law Firms

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Michael Degan, Husch Blackwell LLP, Omaha, NE, Michael E. Norton, Husch Blackwell Sanders, Kansas City, MO, for Defendant.

MEMORANDUM AND ORDER

LEE H. **ROSENTHAL**, District Judge.

***1** **Zytax**, Inc. sued **Green Plains Renewable Energy**, Inc. for breach of contract. **Zytax** alleged that **Green Plains** failed to pay for software and consulting services relating to compliance with **energy** regulations in various states. **Green Plains** has admitted that it did not pay **Zytax** for its products and services. In its initial answer, **Green Plains** alleged that the parties' contract is unenforceable because of mutual mistake and misrepresentations by **Zytax**. **Green Plains** also counterclaimed for fraud, misrepresentation, and breach of contract. **Zytax** moved to dismiss the counterclaims under Rule 12(b)(6) and to strike several of **Green Plains's** affirmative defenses under Rule 12(f). This court granted **Zytax's** motion, without prejudice, and granted **Green Plains** leave to amend its answer and counterclaims. (Docket Entry No. 24). **Green Plains** amended, again asserting fraud and mutual mistake as affirmative defenses and fraud, misrepresentation, and breach of contract as counterclaims. (Docket Entry No. 25). **Zytax** has moved to dismiss the fraud- and mistake-based affirmative defenses and the counterclaims. (Docket Entry No. 26). **Green Plains** responded, (Docket Entry No. 29), and **Zytax** replied, (Docket Entry No. 30).

Based on the motion, response, and reply; the pleadings; and the applicable law, this court denies the motion to dismiss. The reasons are explained in detail below.

I. Background

Green Plains produces, markets, and sells ethanol products throughout the United States. This business is subject to federal and state regulation, licensing requirements, and taxation. The states impose varying

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requirements. In its amended answer, **Green Plains** alleged that its failure to comply with applicable regulatory, licensing, and tax requirements could result in "fines, penalties and sanctions, as well as the potential cessation of business in those jurisdictions." (Docket Entry No. 25, ¶ 27). **Green Plains** alleged that it sought consulting services from **Zytax** because of the risks of noncompliance.

In the fall of 2008, **Green Plains** began discussions with **Zytax** about buying software to help achieve regulatory compliance in state and local jurisdictions. **Green Plains** alleged that **Zytax** "holds itself out as a provider of 'strategic software automation solutions for indirect tax determination and excise motor fuels compliance for the **energy** industry, minimizing the effort required to maintain compliance and ensure determination accuracy" and also as " 'the only proven commercial solution for **energy** tax complexities.' " (*Id.,* ¶ 29). During the parties' initial discussions, **Zytax** submitted a written proposal to **Green Plains** for its software and consulting services. **Green Plains** alleged that **Zytax** made the following representations:

- " '**Zytax** is quite simply the industry and government agency standard for automating the determination, compliance, and filing of indirect taxes with proven expertise in Motor Fuels and Commodities Taxation' ";

***2** - "**Zytax** would 'monitor the changing regulatory environment on [**Green Plains's**] behalf, including 'Rules and Rates Maintenance & Regulatory Compliance Monitoring' and 'compliance filing requirement updates, tax authority rule and rate monitoring for supported jurisdiction' ' "; and

- "**Zytax** would '[m]aintain representation for required tax authority agencies including State & Federal supported jurisdiction.' "

(*Id.,* ¶¶ 32, 34).

Green Plains alleged that **Zytax** representatives highlighted the risks of noncompliance, stating that " '[c]ompliance regulations are in a constant state of change and regulations vary between local jurisdictions, states and sometimes within counties .... Commodities tax liability is exponentially greater than standard tax liability. Determination inefficiencies and Compliance disputes impact cost to company through fines/fees/penalties, audit cost and cash flow organization.' " (*Id.,* ¶ 33). **Green Plains** alleged that **Zytax** represented that its software could eliminate these risks. **Zytax** allegedly stated that its "Enterprise Compliance Express software would enable [**Green Plains**] to mitigate these risk and allow [**Green Plains**] to become fully compliant with all fuel reporting regulatory requirements through its fully automated software." (*Id.,* ¶ 35). **Zytax** allegedly "represented that [it] would tailor its software and services to ensure compliance with all relevant taxing jurisdiction." (*Id.*). **Green Plains** also alleged that **Zytax** represented that most jurisdictions require tax reports to be filed electronically. (*Id.,* ¶ 37). **Green Plains** alleged that **Zytax** identified specific steps needed to ensure compliance in 17 different jurisdictions. (*Id.,* ¶ 36).

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On November 17, 2008, **Green Plains** reached an agreement with **Zytax**. **Green Plains** would purchase **Zytax** software to use in meeting compliance obligations in 17 specified jurisdictions. (*Id.,* ¶ 38). The initial agreement incorporated a Statement of Work (SOW) under which **Zytax** agreed to install and configure its **Zytax** Express with Import Compliance Software for each of the 17 jurisdictions. (*Id.,* ¶ 39). After this initial agreement, **Zytax** told **Green Plains** that it was subject to ethanol fuel excise tax reporting obligations in six additional jurisdictions. (*Id.,* ¶ 42). On December 29, 2008, **Green Plains** agreed to an amendment to the SOW, adding these six jurisdictions. Under the agreement and amended agreement, **Green Plains** agreed to pay **Zytax** a software license fee of $7,000 per jurisdiction and an annual maintenance fee of $2,100 per jurisdiction. (*Id.,* ¶¶ 44–45).

Green Plains identified a number of **Zytax** employees who made representations about the problems in achieving regulatory compliance and **Zytax's** abilities to do so. **Green Plains** named eight **Zytax** representatives who made these representations orally. **Green Plains** also claimed that **Zytax's** representations were reflected in the following written documents: (1) the initial written proposal identifying the 17 jurisdictions where **Zytax** software and services were needed to help **Green Plains** achieve regulatory compliance; (2) the initial SOW; (3) the initial agreement; (4) a November 18, 2008, invoice from **Zytax** for license and maintenance fees related to compliance software for the initial 17 jurisdictions; (5) the amended SOW, which identified 6 additional jurisdictions where **Zytax** software and services would help **Green Plains** achieve regulatory compliance; (6) a December 31, 2008, invoice for license and maintenance fees related to compliance software for the 6 additional jurisdictions; (7) "[a]n email from Doug Burdick to Allen Pham dated February 9, 2009"; (8) "[a]n email from Ray Naab to Keith Gilbour dated February 11, 2009;" (9) "[a] spreadsheet prepared by Ray Naab and forwarded by email on February 12, 2009"; and (**10**) "[a]n email from John Beatty to Keith Gilbour dated May 28, 2009." (*Id.,* ¶ 54).

***3** **Green Plains** alleged that shortly after entering into the **Zytax** agreement, it "began to question **Zytax's** purported 'expertise' as it related to alternative fuels." (*Id.,* ¶ 45). One reason was **Zytax's** allegedly improper preparation and late filing of tax documents that **Green Plains** had hired it to file with the State of Tennessee. This late filing subjected **Green Plains** to $90,000 in fines, which **Green Plains** was ultimately able to have waived. Concerned about the other jurisdictions, **Green Plains** began contacting them to verify the information **Zytax** had provided. As a result of these communications, **Green Plains** allegedly learned that **Zytax** had falsely represented **Green Plains's** regulatory reporting obligations in these jurisdictions. **Green Plains** allegedly learned that "it was required to file reports in less than half of the twenty-three jurisdictions." (*Id.,* ¶¶ 46–48). And according to the allegations, "**Zytax** acknowledged that [**Green Plains**] was in fact, not required to file ethanol fuel excise tax reports in [11] jurisdictions for which **Zytax** had sold software licenses." **Zytax**, however, "refused to reduce and revise its invoices to remove the misrepresented jurisdictions."[1] (*Id.,* ¶ 50). **Green Plains** alleged that **Zytax**

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billed it over $100,000 "for software license and maintenance fees ... for those [11] jurisdictions." (*Id.,* ¶ 48). **Green Plains** has not paid these invoices. **Green Plains** also alleged that "many of the jurisdictions did not require electronic ... reporting, but in fact, allowed manual or simplified reporting, using state provided Excel spreadsheet template." (*Id.,* ¶ 49).

Green Plains also alleged that **Zytax** has not performed its duties under the agreement because **Zytax** installed the software on only one laptop computer, provided none of the passwords that would allow **Green Plains** to access the software, and provided no instructions on using the software. **Green Plains** alleged that it never used the software. (*Id.,* ¶ 52).

Based on these allegations, **Green Plains** asserted the following six affirmative defenses:

- **Zytax's** claims are barred because it did not substantially perform its contractual obligations;
- the agreement is unenforceable for lack of consideration;
- the agreement is subject to rescission because of the negligent or fraudulent representations of facts "relating to the number and identity of jurisdictions in which [**Green Plains**] allegedly had to file ethanol fuel excise tax reports, and relating to the quality, competency, accuracy, and utility of its products and services";
- the agreement "is subject to reformation or rescission due to mutual mistake of fact regarding the number and identity of jurisdictions in which [**Green Plains**] was obligated to file ethanol fuel excise tax reports";
- **Zytax's** lawsuit is barred by unclean hands; and
- the agreement is unenforceable because **Zytax** fraudulently induced **Green Plains** to sign.

***4** (*Id.,* ¶¶ 19–24).

Green Plains also asserted counterclaims for fraudulent misrepresentation, negligent misrepresentation, and breach of contract. **Green Plains** sought rescission of the agreement because of **Zytax's** alleged material breach and fraudulent or negligent representation of material facts; reformation of the agreement to eliminate **Green Plains's** obligation to pay licensing and maintenance fees for jurisdictions that do not require reporting; damages, including consequential damages, for **Zytax's** "fraudulent or negligent misrepresentations of fact"; damages, including consequential damages, for **Zytax's** breach of contract; attorneys' fees and costs; and any "other relief by law or equity deemed just and proper by this court." (*Id.,* ¶ 84).

To support its counterclaim for fraudulent misrepresentation, **Green Plains** alleged that **Zytax** held "itself out as having special knowledge and expertise concerning ethanol fuel excise tax reports" and fraudulently misrepresented "the number of jurisdictions

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in which [Green Plains] was required to file ethanol fuel excise tax reports," specifically that Green Plains "was obligated to file ethanol fuel excise tax reports in [23] jurisdictions, when [Green Plains] was in fact only obligated to filed ethanol fuel tax reports in [11] of those jurisdictions." (*Id.,* ¶ 61). Green Plains also alleged that Zytax misrepresented that tax reports would have to be filed electronically. Green Plains alleged that Zytax made all these representations to induce Green Plains to enter into the agreement and intended that Green Plains would rely on these representations. Green Plains also alleged that Zytax knew or should have known that the statements were false when made and knew or should have known that Green Plains would rely on the statements. Green Plans alleged that it did reasonably rely on Zytax's representations in signing the agreement. (*Id.,* ¶ ¶ 65–68). Green Plains alleged that as a result of Zytax's misrepresentations, it "was induced to purportedly agree to pay over $100,000 for useless software and computing services." (*Id.,* ¶ 70).

To support the counterclaim for negligent misrepresentation, Green Plains alleged that Zytax "knew or should have known, that [Green Plains] was not obligated to file ethanol fuel excise tax reports in [11] of the [23] jurisdictions" and that a "reasonably prudent consultant or contractor holding itself out as an expert in the area of fuel excise tax reporting would either have known or determined the extent of [Green Plains's] actual reporting requirements." (*Id.,* ¶ 73). Green Plains alleged that Zytax made these statements "negligently with a reckless disregard of the truth," (*Id.,* ¶ 72), inducing Green Plains "to enter into the Agreement." (*Id.,* ¶ 77).

In support of the third counterclaim, breach of contract, Green Plains alleged that if an enforceable contract existed, Zytax breached it by "failing to accurately determine the jurisdictions in which [Green Plains] was obligated to file ethanol fuel excise tax reports," filing erroneous tax reports with the State of Tennessee, failing to timely deliver and install the Zytax Express Software, and failing to provide the promised expertise. (*Id,* ¶¶ 79–84).

***5** Zytax moved to dismiss the counterclaims as well as the affirmative defenses based on fraud and mistake. (Docket Entry No. 26). Zytax argued that the fraud and mistake allegations were not pleaded with the particularity required by Rule 9 of the Federal Rules of Civil Procedure and did not "address the deficiencies identified" previously by this court. (*Id.* at 1). Green Plains has responded, (Docket Entry No. 29), and Zytax has replied, (Docket Entry No. 30). The arguments are discussed below.

II. The Applicable Legal Standards

A. Rule 8 and Rule 12(b)(6)

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b) (6). In *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Supreme Court confirmed that Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). *Twombly*

abrogated the Supreme Court's prior statement in *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Twombly,* 550 U.S. at 562–63 *("Conley's* 'no set of facts' language ... is best forgotten as an incomplete, negative gloss on an accepted pleading standard...."). To withstand a Rule 12(b)(6) motion, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570; *see also Elsensohn v. St. Tammany Parish Sheriff's Office,* 530 F.3d 368, 372 (5th Cir.2008) (quoting *Twombly,* 550 U.S. 544, 127 S.Ct. at 1974, 167 L.Ed.2d 929).

In *Ashcroft v. Iqbal,* —— U.S. ——, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), the Supreme Court elaborated on the pleading standards discussed in *Twombly.* The Court explained that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal,* 129 S.Ct. at 1949 (citing *Twombly,* 550 U.S. at 555). With respect to the "plausibility" standard described in *Twombly, Iqbal* explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly,* 550 U.S. at 556). The *Iqbal* Court noted that "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly,* 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.* (quoting *Twombly,* 550 U.S. at 557). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.' " *Cuvillier v. Taylor,* 503 F.3d 397, 401 (5th Cir.2007) (footnote omitted) (quoting *Twombly,* 550 U.S. 544, 127 S.Ct. at 1964–65, 167 L.Ed.2d 929); *see also S. Scrap Material Co. v. ABC Ins. Co. (In re S. Scrap Material Co.),* 541 F.3d 584, 587 (5th Cir.2008) (quoting *Twombly,* 550 U.S. 544, 127 S.Ct. at 1965, 167 L.Ed.2d 929), *cert. denied,* 129 S.Ct. 1669 (2009). "Conversely, 'when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court.' " *Cuvillier,* 503 F.3d at 401 (quoting *Twombly,* 550 U.S. 544, 127 S.Ct. at 1966, 167 L.Ed.2d 929).

6** When a plaintiff's complaint fails to state a claim, the court should generally give the plaintiff at least one chance to amend the complaint under Rule 15(a) before dismissing the action with prejudice. *See Great* ***Plains *Trust Co. v. Morgan Stanley Dean Witter & Co.,* 313 F.3d 305, 329 (5th Cir.2002) ("[D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or

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unable to amend in a manner that will avoid dismissal."); *see also United States ex rel. Adrian v. Regents of the Univ. of Cal.*, 363 F.3d 398, 403 (5th Cir.2004) ("Leave to amend should be freely given, and outright refusal to grant leave to amend without a justification ... is considered an abuse of discretion." (internal citation omitted)). However, a plaintiff should be denied leave to amend a complaint if the court determines that "the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face...." 6 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1487 (2d ed.1990); *see also Ayers v. Johnson*, 247 F. App'x 534, 535 (5th Cir.2007) (unpublished) (per curiam) (" '[A] district court acts within its discretion when dismissing a motion to amend that is frivolous or futile.' " (quoting *Martin's Herend Imports, Inc. v. Diamond & Gem Trading United States of Am. Co.*, 195 F.3d 765, 771 (5th Cir.1999))).

B. Rule 9 and Rule 12(b)(6)

Rule 9(b) states:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

FED. R. CIV. P. 9(b). "At a minimum, Rule 9(b) requires that a plaintiff set forth the 'who, what, when, where, and how' of the alleged fraud." *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir.1997) (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 179 (5th Cir.1997)). The pleader must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent ." *Williams*, 112 F.3d at 177. In *Iqbal,* the Court acknowledged that while Rule 9 requires pleading with particularity "when pleading 'fraud or mistake,' " it allows " '[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally.' " *Iqbal*, —— U.S. ——, 129 S.Ct. at 1954, 173 L.Ed.2d 868 (alterations in original) (quoting FED. R. CIV. P. 9(b)); *see also, Tel–Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1139 (5th Cir.1992) ("Allegations about conditions of the mind, such as defendant's knowledge of the truth and intent to deceive, however, may be pleaded generally.").

***7** "To plead scienter adequately, a plaintiff must set forth specific facts that support an inference of fraud." *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1068 (5th Cir.1994). In *Iqbal,* 129 S.Ct. at 1954, the Court explained that term "generally," as used in Rule 9, "is a relative term." The Court stated that "[i]n the context of Rule 9, ['generally'] is to be compared to the particularity requirement applicable to fraud or mistake," that "Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard," and that Rule 9 "does not give [a party] license to evade the

less rigid—though still operative—strictures of Rule 8." *Iqbal,* 129 S.Ct. at 1954 (citing 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1301, at 291 (3d ed.2004)). "Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss ." *Id.*

III. Analysis

A. The Affirmative Defense of Mutual Mistake

Zytax argues that **Green Plains** has not pleaded mistake with the particularity required by Rule 9. Under Texas law, the affirmative defense of mutual mistake allows parties to avoid an agreement formed under a misconception or mistake of a material fact. *Nichols v. YJ USA Corp.*, Civ. Act. No. 3:06–CV–02366–L, 2009 **WL** 722997, at *17 (N.D.Tex. Mar.18, 2009) (citing *Williams v. Glash,* 789 S.W.2d 261, 264 (Tex.1990)). The defense applies only when the parties "were acting under the same misunderstanding of the same material fact." *Grayson v. Grayson Armature Large Motor Div., Inc.*, No. 14–09–00748–CV, **2010 WL** 2361432, at *5 (Tex.App.-Houston [14th Dist.] June 15, **2010**, pet. denied) (citing *Walden v. Affiliated Computer Servs., Inc.*, 97 S.W.3d 303, 324 (Tex.App.-Houston [14th Dist.] 2003, pet. denied)). The elements of mutual mistake are (1) a mistake of fact, (2) held mutually by the parties, (3) that materially affects the exchange. *City of the Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 735 (Tex.App.-Ft. Worth 2008) (citing *Barker v. Roelke,* 105 S.W.3d 75, 84 (Tex.App.-Eastland 2003, pet. denied)). The doctrine of mutual mistake is not available to avoid an unhappy bargain. *Williams,* 789 S.W.2d at 265.

"Few federal courts have addressed the requirements for pleading mistake with particularity." *PYR **Energy** Corp. v. Samson Resources Co.*, No. 1:05–CV–530, 2007 **WL** 858804, at *2 (E.D.Tex. Mar.19, 2007). "A well-pleaded claim grounded on mistake should include averments of what was intended, what was done, and how the mistake came to be made." 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1299 (3d. ed.); *see also PYR **Energy***, 2007 **WL** 858804, at *2. "Inasmuch as the second sentence of Rule 9(b) provides that intent and other conditions of mind may be averred generally, and since the particularity requirement is liberally construed when information as to the causative factors of the error is peculiarly within the knowledge of the opposing party, the pleading requirement set out in Rule 9(b) is not overly difficult to meet." WRIGHT & MILLER, *supra,* § 1299.

***8 Green Plains** has alleged with sufficient particularity the affirmative defense of mistake. **Green Plains** alleged that it agreed to purchase software and services from **Zytax** for 23 jurisdictions because both parties mistakenly believed that **Green Plains** had reporting obligations in all those jurisdictions. **Green Plains** allegedly discovered later that it did not have reporting requirements in 11 of those jurisdictions. **Green Plains** alleged that it relied on **Zytax's** expertise and opinion that **Green Plains** had reporting obligations in 23 jurisdictions. To the extent that **Zytax** argues

that **Green Plains** has not identified the "who, what, when, where, and how" of the mistake, this level of particularity is not required under the applicable precedents. WRIGHT & MILLER, § 1299. The motion to dismiss the affirmative defense of mistake is denied.

B. The Affirmative Defense and Counterclaim of Fraud

Zytax moves to dismiss **Green Plains's** affirmative defense and counterclaim based on fraud for failing to plead with the particularity required by Rule 9(b). **Green Plains** alleged that **Zytax** misrepresented that **Green Plains** faced reporting regulations in 23 jurisdictions. **Green Plains** alleged that **Zytax** represented that most jurisdictions required tax reports to be filed electronically through **Zytax** or a similar electronic filer. In its amended complaint, **Green Plains** identified **Zytax** employees who orally made such representations. **Green Plains** also identified documents in which the representations were allegedly made. **Green Plains** alleged that it learned that these representations were false after it contacted the individual jurisdictions and discovered that 11 out of the 23 did not have any reporting requirements. **Green Plains** alleged that it also discovered that "many of the jurisdictions did not require electronic ... reporting, but in fact, allowed manual or simplified reporting using state provided Excel spreadsheet templates." (Docket Entry No. 25, ¶ 49).

Green Plains has identified specific allegedly false statements, the individuals who made those statements, documents allegedly containing the statements, and a factual basis showing that the statements were false. **Green Plains** has also alleged that the representations are of specific facts within the very areas **Zytax** identified as the areas of its expertise, supporting that **Zytax** representatives either knew that the specific statements were false or that the statements about the extent of **Zytax's** expertise were false. The motion to dismiss the affirmative defense and counterclaim based on fraud is denied.

C. The Negligent Misrepresentation and Breach of Contract Counterclaims

The amended complaint asserts negligent misrepresentation as an alternative to its fraud counterclaim. Texas law recognizes the tort of negligent misrepresentation as defined by the RESTATEMENT (SECOND) OF TORTS § 552. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests,* 991 S.W.2d 787, 791 (Tex.1999). The elements of a negligent misrepresentation claim are: (1) the representation was made by a defendant in the course of his business, or in a transaction in which it has a pecuniary interest; (2) the defendant supplied false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation. *Roof Sys., Inc. v. Johns Manville Corp.,* 130 S.W.3d 430, 438 (Tex.App.-Houston [14th Dist.] 2004, no pet.) (citing *Fed. Land Bank Ass'n v. Sloane,* 825 S.W.2d 439, 442 (Tex.1991)).

***9 Green Plains** alleged that **Zytax** negligently represented that **Green Plains** was obligated to file ethanol-fuel-excise-tax reports in 23 jurisdictions. **Green Plains** alleges that

"a reasonably prudent consultant or contractor holding itself out as an expert in the area of fuel excise tax reporting either would have known or determined the extent of **Green Plains's** reporting requirements." (Docket Entry No. 25, ¶ 73). **Green Plains** alleged that as a result of these representations, it suffered damages, including employee time and labor spent correcting **Zytax's** mistakes and verifying compliance requirements, (*id.,* ¶¶ 45–47); "delays," (*id.,* ¶ 51); and "recovery of consulting fees [**Green Plains**] paid to [**Zytax**]." (Docket Entry No. 29, at 5). These allegations are not conclusory and the factual allegations, taken as true, state a plausible claim for relief.

The breach of contract claim is also sufficiently pleaded. To prevail on a breach of contract claim, a party must establish the following elements: (1) a valid contract existed between the plaintiff and the defendant; (2) the plaintiff tendered performance or was excused from doing so; (3) the defendant breached the terms of the contract; and (4) the plaintiff sustained damages as a result of the defendant's breach. *See* *Valero Mktg. & Supply Co. v. Kalama Int'l,* 51 S.W.3d 345, 351 (Tex.App.-Houston [1st Dist.] 2001, no pet.). A breach occurs when a party fails or refuses to do something promised. *Townewest Homeowners Ass'n, Inc. v. Warner Commc'n Inc.,* 826 S.W.2d 638, 640 (Tex.App.-Houston [14th Dist.] 1992, no writ). When one party to a contract commits a material breach of that contract, the other party is excused from further performance under the contract. *See* *Hernandez v. Gulf Group Lloyds,* 875 S.W.2d 691, 692 (Tex.1994); *West v. Triple B Servs., LLP,* 264 S.W.3d 440, 446 (Tex.App.-Houston [14th Dist.] 2008, no pet.). **Green Plains** has presented nonconclusory allegations that satisfy these elements. **Green Plains** alleged that **Zytax** breached the agreement by failing to determine the jurisdictions in which **Green Plains** was obligated to file ethanol-fuel-excise-tax reports, filing erroneous reports with the State of Tennessee, failing to timely deliver and install the **Zytax** Express software, and failing to provide promised expertise. **Green Plains** acknowledges that it has refused to pay **Zytax**, but alleged that it failed to do so because of **Zytax's** breach. *See* *Hernandez,* 875 S.W.2d at 692.

Zytax argues that the pleadings are deficient because they do not allege damages. **Green Plains** alleged that **Zytax's** breach of its contract caused the same damages as **Zytax's** negligent misrepresentation: consequential damages, including loss of employee time and labor spent correcting **Zytax's** mistakes and verifying compliance requirements, (*id.,* ¶¶ 45–47); "delays," (*id.,* ¶ 51); and "recovery of consulting fees [**Green Plains**] paid to [**Zytax**]," (Docket Entry No. 29, at 5). These allegations are not conclusory. The factual allegations, taken as true, state a plausible claim for relief.

IV. Conclusion

***10** **Zytax's** motion to dismiss is denied.

All Citations

Not Reported in F.Supp.2d, 2010 WL 4702303

Footnotes

1 It is unclear from the amended answer the precise number of jurisdictions in which **Green Plains** alleges that it was not required to file excise fuel tax reports. In one section of the amended answer, **Green Plains** identifies the number as 11, (Docket Entry No. 25, ¶ 54), but **Green Plains** also alleged that it was required to file in "less than half of the twenty-three jurisdictions." (*Id .,* ¶ 48). Also, it is unclear from the complaint that **Green Plains** was not required to file in 11 jurisdictions. **Green Plains** alleges that "on or before November 17, 2008," the date of the initial agreement, "representatives of **Zytax** misrepresented that [**Green Plains**] was obligated to file ethanol fuel excise tax reports in each of the following jurisdictions: Illinois, Indiana, New Jersey, Oregon, and Cook County, Illinois. And it alleged that "on or before December 29, 2008," the date of the amended agreement, "representatives of **Zytax** repeatedly misrepresented that **Zytax** was obligated to file ethanol fuel excise tax reports in each of the following jurisdictions: California, Florida, Pennsylvania, and Missouri. Finally, **Greens Plains** alleged that it unnecessarily filed "federal Form 720 or xSTARS forms." (*Id.,* ¶ 53). This is eight state jurisdictions, one county jurisdiction, and the federal jurisdiction, for a total of **ten**. Perhaps "Cook County, Illinois" describes two jurisdictions: Cook County and the State of Illinois.

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CASE NO. 44

2022 WL 214101
Only the Westlaw citation
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United States District Court, S.D.
Texas, Corpus Christi Division.

DIAGNOSTIC AFFILIATES OF NORTHEAST HOU, LLC, Plaintiff,
v.
UNITED HEALTHCARE SERVICES, INC., et al., Defendants.

Civil Action
No.
2
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21
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CV
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00131

Signed 01/**18**/**2022**
Entered 01/19/**2022**
Filed on 01/**18**/**2022**

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ORDER ON MOTIONS TO DISMISS FILED BY PLANS AND PLAN ADMINISTRATORS (D.E. 67, 105, 112, 119, 130, 141, 145)

NELVA **GONZALES RAMOS**, **UNITED** STATES DISTRICT JUDGE

***1** Plaintiff **Diagnostic Affiliates** of **Northeast** Hou, **LLC** d/b/a 24 Hour Covid RT-PCR Laboratory (**Diagnostic Affiliates**) filed this action to recover payments for COVID-19 testing and related **services** against three categories of Defendants: (1) UnitedHealth Group, Inc. (UHG),[1] the parent company of subsidiaries that administer health insurance plans; (2) health insurance plan administrators, collectively referred to as **United**;[2] and (3) employer **healthcare** plans.[3] Before the Court are seven motions to dismiss directed at **Diagnostic Affiliates**' amended complaint (D.E. 2).

***2** The amended complaint alleges nine counts as follows:

Count I: Violation of the FFCRA[4] and the CARES Act[5] (the Act(s)) – against all Defendants;

Count II: Violation of ERISA[6] for failure to pay provider charges with or without an assignment of benefits – against all Defendants;

Count III: Violation of ERISA for failure to provide a full and fair review of the claims – against all Defendants;

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Count IV: Violation of RICO[7] – against **United**;

Count V: Request for a declaratory judgment[8] – against **United**;

Count VI: Claim for unjust enrichment and quantum meruit – against **United**:

Count VII: Claim for promissory estoppel – against **United**;

Count IX:[9] Violation of the Texas Prompt Payment of Claims Act[10] – against **United**; and

Count X: Claim for injunctive relief – against **United**.

D.E. 2, pp. 72-86.

The first motion to dismiss (D.E. 67), filed by **United**, challenges each of the nine counts. Plaintiff responded (D.E. 99) and **United** replied (D.E. 121). Envision Physician **Services**, **LLC** Health and Welfare Benefit and Cafeteria Plan (Envision) and Swissport North American Holding, Inc. Health & Welfare Plan's (Swissport's) motions to dismiss (D.E. 105 and 145) adopt **United's** arguments and reinforce the challenges. Plaintiff responded to Envision's motion (D.E. 125) and Envision replied (D.E. 128). Delta Account Based Health Plan, H&E Equipment **Services** Inc. Benefit Plan, Hudson Group, Inc. Employee Benefits Plan, and Geospace Technologies Welfare Benefit Plan filed their motions, simply adopting **United's** motion. D.E. 112, 119, 130, 141. The briefing on **United's** motion will be applied to those motions accordingly. *See* D.E. 133, 140, 144. For the reasons set out below, the motions are **GRANTED IN PART** and **DENIED IN PART** and the following counts are **DISMISSED:** III, V, VI, and IX. All other counts are **RETAINED**.

STANDARD OF REVIEW

The test of pleadings under Rule 12(b)(6) is devised to balance a party's right to redress against the interests of all parties and the court in minimizing expenditure of time, money, and resources devoted to meritless claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Furthermore, "Pleadings must be construed so as to do justice." Fed. R. Civ. P. 8(e). The requirement that the pleader show that he is entitled to relief requires "more than labels and conclusions[;] a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

***3** Factual allegations are required, sufficient to raise the entitlement to relief above the level of mere speculation. *Twombly*, 550 U.S. at 555. Those factual allegations must then be taken as true, even if doubtful. *Id.* In other words, the pleader must make allegations that take the claim from conclusory to factual and beyond possible to plausible. *Id.* at 557. The Court stated, "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

The Supreme Court, elaborating on *Twombly*, stated, "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* In dismissing the claim in *Iqbal*, the Court stated, "It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." *Id.* at 681.

FACTUAL CONTEXT

To address the public health emergency presented by the COVID-19 pandemic, Congress passed the FFCRA and the CARES Act. In relevant part, these statutes require group health insurance plans to cover COVID-19 **diagnostic** testing by qualified providers at no cost to their patients. In the absence of a negotiated rate, insurance carriers are required to pay for the testing administered to their insureds at the cash rate the provider publishes on its website (and the providers are required to post a public cash price).

The relevant terms of the FFCRA are:

> SEC. 6001. COVERAGE OF TESTING FOR COVID–19.
>
> (a) IN GENERAL.—A group health plan and a health insurance issuer offering group or individual health insurance coverage ... ***shall provide coverage, and shall not impose any cost sharing (including deductibles, copayments, and coinsurance) requirements or prior authorization or other medical management requirements***, for the following items and **services** furnished during any portion of the emergency period ... beginning on or after the date of the enactment of this Act:
>
> (1) In vitro **diagnostic** products... for the detection of SARS–CoV–2 or the diagnosis of the virus that causes COVID–19 that are approved, cleared, or authorized ... and the administration of such in vitro **diagnostic** products.

(emphasis added). The CARES Act then states:

> SEC. 3202. PRICING OF **DIAGNOSTIC** TESTING.
>
> (a) REIMBURSEMENT RATES.—A group health plan or a health insurance issuer providing coverage of items and **services** described in section 6001(a) of division F of the Families First Coronavirus Response Act (Public Law 116–127) with respect to an enrollee ***shall reimburse the provider*** of the **diagnostic** testing ***as follows***:
>
> (1) If the health plan or issuer has a negotiated rate with such provider in effect before the public health emergency declared under section 319 of the Public Health **Service** Act (42 U.S.C. 247d), such negotiated rate shall apply throughout the period of such declaration.
>
> (2) If the health plan or issuer does not have a negotiated rate with such provider, such plan or issuer ***shall reimburse the provider in an amount that equals the cash price for such***

> ***service*** ***as listed by the provider on a public internet website,*** or such plan or issuer may negotiate a rate with such provider for less than such cash price.
>
> (b) REQUIREMENT TO PUBLICIZE CASH PRICE FOR **DIAGNOSTIC** TESTING FOR COVID–19.—
>
> ***4** (1) IN GENERAL.—During the emergency period declared under section 319 of the Public Health **Service** Act (42 U.S.C. 247d), each provider of a **diagnostic** test for COVID–19 shall make public the cash price for such test on a public internet website of such provider.

(emphasis added).

Diagnostic **Affiliates** alleges that it was qualified and provided COVID-19 testing to Defendants' insureds at its public cash price of $900 per test, as permitted by law, for which it has presented claims to Defendant **United** as insurer or as insurance administrator for the Defendant employer health care plans. In response, Defendants have engaged in a number of improper tactics and have delayed, denied, or reduced payment of the claims in a manner that violates the dictates of the FFCRA and CARES Act.

DISCUSSION

COUNT I:

VIOLATION OF THE FFCRA AND THE CARES ACT

Rubric. Defendants challenge Count I on the basis that there is no private right of action to enforce the FFCRA or CARES Act. "[T]he plaintiff has the relatively heavy burden to show Congress intended private enforcement, and must overcome the presumption that Congress did not intend to create a private cause of action." *Acara v. Banks*, 470 F.3d 569, 571 (5th Cir. 2006) (per curiam).

By proceeding directly to the question of an implied right of action, **Diagnostic** **Affiliates** concedes that the Acts do not create an express private right of action to enforce their provisions. D.E. 99, p. 10. So the question is whether the terms of the legislation support the conclusion that there is an implied private right of action. This is a question of law. *San Juan Cable* ***LLC*** *v. P. R. Tel. Co., Inc.*, 612 F.3d 25, 29 (1st Cir. 2010); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-88 (1982) (describing the analysis of whether a statute includes an implied private right of action as a matter of the legal context in which the statute was passed); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (statutory construction and legislative intent are matters of law).

The Supreme Court identified four factors to consider in answering this question:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy

> or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78 (1975) (citations omitted). The Court later modified the rubric as follows:

> It is true that in *Cort v. Ash*, the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort* —the language and focus of the statute, its legislative history, and its purpose—are ones traditionally relied upon in determining legislative intent.

***5** *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575–76 (1979) (citations omitted). This Court considers the four factors and weighs them consistent with *Touche Ross*.

Precedent. As a preliminary matter, the Court considers Defendants' assertion that other courts have already done this work for us, finding that there is no implied private right of action in the FFCRA or CARES Act. After examining each of the cases, discussed below, the Court concludes that they do not address the claim advanced here and are not based on reasoning that applies to this particular case.

In *American Video Duplicating, Inc. v. City National Bank*, 220CV04036JFWJPR, 2020 WL 6882735, at *2 (C.D. Cal. Nov. 20, 2020), the court found no private right of action for agent fees for producing Payment Protection Program (PPP) loans in the CARES Act because the Act did not require payment of any such fees. It only provided for a cap on them, if they were contracted. *See also Daniel T.A. Cotts PLLC v. Am. Bank, N.A.*, 2:20-CV-185, 2021 WL 2196636, at *4 (S.D. Tex. Feb. 9, 2021) (same); *Juan Antonio Sanchez, PC v. Bank of S. Tex.*, 494 F. Supp. 3d 421, 434 (S.D. Tex. 2020) (same). Here, however, payment is required regardless of a contract. And the amount is determinable using the provisions of the CARES Act.

The remaining cases offered by Defendants are even further removed from a mandatory payment scheme. In *Profiles, Inc. v. Bank of America Corp.*, 453 F. Supp. 3d 742, 752 (D. Md. 2020), the court found no private right of action to obtain a PPP loan from the lender of the borrower's choice. The CARES Act did not address the matter of choice and it contains no mandatory language to support

such a private right of action. Likewise, in *Shehan v. **United** States Department of Justice*, 1:20-CV-00500, 2020 **WL** 7711635, at *11 (S.D. Ohio Dec. 29, 2020), the court declined to find an implied right of action where the plaintiff complained of having been rejected for a PPP loan for fraudulent reasons. "Nothing in the statute indicates that a would-be borrower, even an eligible one, has a right to receive a PPP loan, let alone to receive one from a particular lender." *Id.* In contrast, COVID-19 testing providers are given the right to payment and the method for determining the amount.

In *Puckett v. **United** States Department of Treasury Internal Revenue **Service***, 1:21 CV 425, 2021 **WL** 2550995, at *2 (N.D. Ohio June 22, 2021), the court rejected a private right of action against the Internal Revenue **Service** for an economic impact payment (stimulus check). The pro se prisoner filing the case had not articulated a cause of action, had not shown that he could overcome a sovereign immunity defense, had not addressed the conditions precedent to entitlement to the payment, and filed his case after the deadline expired for issuance of checks—leaving a credit on taxes as his only remedy. Because the right to a check was qualified and time-sensitive, no private right of action was supported. And sovereign immunity would have barred the claim.

In *Mescall v. **United** States Department of Justice*, 2:20-CV-13364, 2021 **WL** 199277, at *2 (E.D. Mich. **Jan**. 19, 2021), a pro se federal prisoner complained that he was improperly disciplined in retaliation for having filed a complaint under the CARES Act because the prison was not doing enough to prevent the spread of COVID-19. The court found no private right of action under the CARES Act as there was no language indicating congressional intent to create such a claim. This case has no application here.

6** In *Autumn Court Operating Co. **LLC** v. **Healthcare** Ventures of Ohio*, 2:20-CV-4901, 2021 **WL** 325887, at *5 (S.D. Ohio Feb. 1, 2021), CARES Act funds had been paid into an account. The dispute was over ownership of the funds because of private agreements between the parties regarding ownership and operation of nursing homes that triggered the CARES Act payment and ownership of the relevant account. No private right of action under the CARES Act was articulated or found, but the case proceeded on the basis of numerous other causes of action arising out of the private agreements. *See also **Healthcare** Ventures of Ohio, **LLC** v. HVO Operations Windup **LLC, 20-CV-04991, 2020 **WL** 6688994, at *7 (S.D. Ohio Nov. 13, 2020) (on motion for remand, finding that the dispute over the ownership of the account into which CARES Act funds had been deposited did not pose a federal question to support jurisdiction). In both of these cases, any money due under the CARES Act had been paid and thus the Act had only tangential relevance to the case. Nothing in that analysis translates here.

In *Matava v. CTPPS, **LLC***, 3:20-CV-01709 (KAD), 2020 **WL** 6784263, at *2 (D. Conn. Nov. **18**, 2020), the pro se plaintiff sought to enjoin a state court from taking action to evict him from his residence. He did not join his landlord as a defendant, but sought only to interfere with the state court's jurisdiction by invoking the CARES Act. The court held that the plaintiff had failed to articulate a cause of action, a basis for federal jurisdiction, or

a reason that any provision of the CARES Act, if relevant, could not be enforced by a state court. More specifically, there was no express cause of action identified under the CARES Act and no attempt to show an implied private right of action. The court further noted that the requested relief would violate the Anti-Injunction Act. The court dismissed the complaint, which sought only injunctive relief. Like the others, the *Matava* case has no application here.

Defendants' cases fail to address whether the FFCRA or CARES Act contains an implied right of action in favor of a COVID-19 testing provider seeking statutorily-mandated reimbursements. Neither do the cases contain any analogous fact patterns that would make their conclusions persuasive. Thus, the Court considers the matter on a clean slate, using the Supreme Court's rubric.

1. Is Plaintiff in a Class the Statutes Intended to Benefit?

Diagnostic Affiliates argues that the mandatory nature of the obligation to pay for testing indicates that it was an intended beneficiary of the statutes. It is clear that the legislative objective was to ensure that COVID-19 testing was widely available to the entire population. This required that providers be willing to supply and administer the tests, which in turn required a reliable method of payment for that **service**. Payment of providers was sufficiently essential for the legislature to create a mandatory scheme, using the term "shall," for determining the amount to be paid and protecting patients from any burden associated with the cost or other administrative requirements.

On this point, **Diagnostic Affiliates**' claim is fully distinguishable from the FFCRA and CARES Act cases that Defendants cited. Defendants also rely on one case that does not address the FFCRA or CARES Act: *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 772 (1981). In *Coutu*, workers sought back pay for the minimum wage required for the type of work they performed. But the federal statute that included the minimum wage requirement did not apply to the contract under which they worked. Because the federal statute was not properly invoked, it could not provide a private right of action. In contrast, the FFCRA and CARES Act directly apply to **Diagnostic Affiliates**' **services**.

While the parties have not identified any other case that addresses—positively or negatively—a private right of action for the cost of COVID-19 testing, the cases finding no private right of action under the FFCRA and CARES Act address very different provisions and are not persuasive. The mandatory reimbursement language in favor of testing providers supports finding an implied private right of action for the claims.[11] *See Maine Cmty. Health Options v. **United** States*, 140 S. Ct. 1308, 1320 (2020). The plain language of the statutes indicates that **Diagnostic Affiliates** is among the class of providers for whose benefit the payment provisions were included.

***7** In the reply, Defendants assert that the FFCRA and the CARES Act were intended to benefit patients only. And an out-of-network provider may routinely assert its claim through an insured patient's rights under the applicable group health plan. D.E. 121, p. 6. But this

construction of the rights and remedies in the statutes fails to account for the fact that patients were to be spared any cost or administrative burden in obtaining COVID-19 testing. No plan coverage decision is necessary because the FFCRA requires coverage. No rate decision is necessary because the CARES Act prescribes the method for determining the rate. Therefore, there is no reason to involve the patient in the enforcement of the claim.

In short, Defendants have not supplied any authority for the argument that a statute may intend to benefit only one class of persons. The FFCRA and CARES Act do intend to benefit patients. But to effectuate that, it also intends to benefit testing providers. These are not mutually exclusive concepts.

2. Is There Evidence of Legislative Intent to Create or Deny a Private Right of Action?

Envision argues that **Diagnostic Affiliates** pretermitted the issue of an intent to create a private right of action by admitting that "there appears to be limited extrinsic evidence of legislative intent one way or the other on the issue of a private cause of action with respect to the particular provisions at issue here." D.E. 128, p. 2 (quoting D.E. 125 at 5). But **Diagnostic Affiliates** did not say that there was no evidence, just limited "extrinsic" evidence. The terms of the statutes, themselves, evidence legislative intent as addressed more fully below.

The mandatory nature of the reimbursement right supports recognition of an implied private right of action. *See* *Maine Cmty. Health Options*, 140 S. Ct. at 1320. Envision argues against that proposition, citing *Hawaii Motor Sports Center v. Babbitt*, 125 F. Supp. 2d 1041, 1047 (D. Haw. 2000) as stating that mandatory language does not automatically imply a private right of action. But the Court does not treat the mandatory language as dispositive. Consistent with the analysis in *Hawaii Motor Sports*, the mandatory language is one aspect to consider when doing the four-part *Cort* review. *Id.* n.3. In *Hawaii Motor Sports*, the mandatory language was unavailing because the claimant was not the intended beneficiary of the statute at issue. Here, **Diagnostic Affiliates** is an intended beneficiary and the mandatory language works in its favor.

Envision also cites *Kogan v. Robinson*, 432 F. Supp. 2d 1075, 1076 (S.D. Cal. 2006) as holding that a provision that a party "shall reimburse" did not create a private right of action or any specific remedy. D.E. 128, p. 3. That conclusion was based on the structure of the statute and the fact that the requirement of reimbursement was accompanied by an opportunity for exemption from the requirement as determined by the administrative agency. The conflict in enforcement powers between those claimed by the private claimant to be implied in his favor and those expressly delegated to the administrative agency prevented treatment of that particular reimbursement requirement as creating a private right of action. No such conflict exists in the FFCRA or CARES Act.

Defendants argue that that there are enforcement provisions in the FFCRA and CARES Act that demonstrate that the legislature intended administrative enforcement to the exclusion of

private enforcement. These administrative enforcement provisions have different purposes and fall short of providing any avenue for a COVID-19 testing provider to recover the reimbursements required by the statutes. And Defendants have not suggested what recourse, other than this action, **Diagnostics Affiliates** might have for its claims.

***8** The Secretaries of Health and Human **Services**, Labor, and Treasury are empowered to implement the relevant FFCRA provisions through sub-regulatory guidance, program instruction or otherwise. FFCRA § 6001(c). And the same Secretaries are directed to enforce them through ERISA and the regulation and taxation of group health plans. FFCRA § 6001(b).[12] But FFCRA § 6001 is relevant here because it requires insurers to cover COVID-19 testing through their health insurance plans. This provision indicates who is responsible for payment, not how payment is to be made. Its enforcement scheme is appropriately designed for the purpose of ensuring coverage for insureds. Nothing in the amended complaint indicates Defendants have denied or reduced claims because the **service** is not covered or that it was provided to a person who was not an insured.

The direct requirement for reimbursement to COVID-19 testing providers is, instead, in the CARES Act § 3202(a).[13] The only enforcement provision related to that requirement is for a civil fine against providers who do not publish their cash price—the premise on which their payment is to be calculated. CARES Act § 3202(b). There is no dispute that **Diagnostic Affiliates** properly published its cash price. Thus, the CARES Act has no express enforcement provision—administrative or otherwise—that is relevant here for claims against insurance companies responsible for reimbursements.

Defendants rely on the concept that, "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001). But the administrative enforcement provisions address other provisions and do not address the manner in which a COVID-19 testing provider can obtain its reimbursements (which are no less mandatory). Therefore, the administrative enforcement scheme cannot be said to evidence an intent to deny a private right of action.

Defendants also contend that the express creation of private enforcement rights for other provisions of the statutes indicates that the legislature would have likewise created a private enforcement right for reimbursement, had one been intended. D.E. 67, p. 7 ("Sections 3102, 5102, and 5105 of the FFCRA expressly incorporate the private enforcement provisions of Fair Labor Standards Act and Family and Medical Leave Act to remedy improper denials of emergency paid employee leave."). **Diagnostic Affiliates** responds that the lack of specificity in creating a private right of action for reimbursement was likely the result of the speed with which Congress had to act in response to the pandemic emergency.

These statutes broadly address multifaceted aspects of the pandemic. Under the circumstances, seeking consistency in the treatment of remedies elevates form over substance where clear rights to reimbursement

were created and no other enforcement mechanism exists. An implied private right of action is a more appropriate construction of the statute than the creation of a right without any remedy.

The terms of the FFCRA and CARES Act support finding an implied private right of action to enforce the right to reimbursement for COVID-19 testing against insurance plans and administrators.

3. Is a Private Right of Action in Favor of Plaintiff Consistent with the Legislative Scheme?

***9** Defendants do not directly address this question. As discussed, Congress wanted widespread COVID-19 testing, which could only be accomplished by private entities quickly incurring the cost of establishing testing sites across the country and procuring the necessary supplies to administer tests. Legislative impatience with the finer points of the relationship between providers and insurance companies to properly allocate those costs or to determine appropriate pricing is evidenced by the inclusion of a mandatory methodology for determining the rate to be paid, if the parties did not have the time or cooperation to negotiate rates. A private right of action to recover the mandated reimbursement is fully consistent with the legislative scheme.

4. Would It Be Inappropriate to Create a Federal Right, Given the Context of State Concerns?

Defendants did not address this issue, except insofar as Envision footnoted the observation that this factor is not relevant in this case. D.E. 128, p. 4 n.1. **Diagnostic Affiliates** argues that the regulation of group health care plans, including ERISA, already contemplates federal litigation for enforcement. D.E. 99, pp. 14-15. And the federal response to the COVID-19 pandemic is consistent with, not contrary to, state interests. Therefore, no state concerns counsel against recognizing an implied private right of action as a remedy to redress a federally-created right.

In conclusion, considering the four factors set out in *Cort*, and giving the greatest weight to the first three as most indicative of Congress's intent, the Court concludes that there is an implied private right of action to enforce the provisions of the FFCRA and CARES Act reimbursement requirement. Therefore, the motions are **DENIED IN PART** to the extent that they challenge the claims made under Count I.

COUNT II:

VIOLATION OF ERISA – FAILURE TO PAY

Defendants raise two challenges to **Diagnostic Affiliates**' claims for failure to pay under ERISA: (a) **Diagnostic Affiliates** does not have standing to advance the patients' claims; and (b) it failed to exhaust administrative remedies (and it does not escape that requirement because the exceptions for futility and deemed-exhausted claims are not properly pled). The Court considers each argument below.

Standing. With respect to standing, **Diagnostic Affiliates** pled that it obtained appropriate assignments of benefits from many of the patients. The fact that it may also be making claims for patients who did not execute assignments is an insufficient reason to dismiss the claim in its entirety. And this is not the stage of proceedings to evaluate the facts surrounding individual claims.

Swissport has its own variation on this argument. It contends that **Diagnostic Affiliates** had to specifically allege that its claims against Swissport are based entirely on Swissport's patient's assignments. D.E. 145, pp. 5-6. Given the nature of this case and the purposes of *Twombly/Iqbal* specificity, along with the Court's decision on the private right of action under the FCRA and CARES Act, the Court declines to require **Diagnostic Affiliates** to name in its pleading each plan whose patients assigned their rights for enforcement purposes.

The defense that the plans may include anti-assignment provisions negating the existing assignments and requiring notarized powers of attorney is a matter not properly before the Court on these motions to dismiss. According to the standard of review, the Court is to make its Rule 12(b) decision on the basis of the allegations on the face of the complaint, accepted as true. A defense can require dismissal at this stage only if all of the elements necessary to support the defense are apparent in the complaint. *See* *Jones v. Bock*, 549 U.S. 199, 215 (2007). Even if the plan terms were to be considered incorporated into the complaint and contain anti-assignment provisions, Defendants have not submitted any Rule 12(b)(6) evidence of their contents.

***10** While **Diagnostic Affiliates** also pleads standing on the basis of Defendants' failure to furnish information, the Court does not rely on that argument and thus need not address Defendants' argument that a provider, as assignee, is not entitled to those documents. *See* D.E. 121, p. 8 (citing *Mem'l Hermann Health Sys. v. Sw. LTC, Ltd.*, No. 4:14-CV-02572, 2016 **WL** 3526137, at *8 (**S.D**. **Tex**. June 7, 2016), *adopted*, No. 4:14-CV-2572, 2016 **WL** 3552281 (**S.D**. **Tex**. June 23, 2016), *aff'd*, 683 Fed. App'x 274 (5th Cir. 2017). Neither does the Court opine at this time on **Diagnostic Affiliates**' argument that the FFCRA and CARES Act altered the ERISA standing requirements.

Diagnostic Affiliates has pled sufficient factual allegations to support its standing to assert ERISA claims on behalf of the patients it served by pleading that it has obtained many assignments from patient members of the plans.

Deemed Exhaustion and Futility. **Diagnostic Affiliates** does not deny failing to exhaust some of the claims. And Defendants do not deny that there are exceptions to the exhaustion requirements based on inadequate claims procedures and futility. *See* 29 C.F.R. § 2560.503-1(l)(1) (ERISA claim processing requirements); 45 C.F.R. § 147.136(b)(2)(ii)(F) (regulations for group health plans and health insurance issuers in group and individual markets incorporating ERISA requirements); *Bourgeois v. Pension Plan for Emps. of Santa Fe Int'l Corps.*, 215 F.3d 475, 479-80 (5th Cir. 2000) (recognizing the futility exception). They only deny that the exceptions are sufficiently pled.

Diagnostic Affiliates' amended complaint is replete with detailed factual allegations—including documentary evidence—describing the claim processing and review procedures that they have invoked with Defendants and the allegedly improper, inconsistent, insufficient, and overwhelmingly negative results they have obtained, even where all procedures are exhausted. Included are allegations of Defendants' voluminous and repetitive record requests and hostility to the claims across-the-board. These factual allegations suggest systemic issues implicating bias and conflicts of interest. And they are consistent with violations of the itemized minimum requirements for claim processing procedures set out in 29 C.F.R. § 2560.503-1. *See also* 45 C.F.R. § 147.136(b)(3)(1).

With respect to futility, Defendants argue that the allegations are insufficient unless they show that an adverse result was certain. D.E. 67, p. 10. Cases on which Defendants rely that reject the futility argument have involved a single patient and a single claim. *See McGowin v. ManPower Intern., Inc.*, 363 F.3d 556, 559 (5th Cir. 2004) (citing *Bourgeois*, 215 F.3d 475, 480 (5th Cir. 2000)). In these cases, the claimants were complaining that results or representations made in preliminary reviews indicated that higher level reviews would be futile because the preliminary results would likely be affirmed. That was held insufficient because the lower reviews were not necessarily predictive of the possible results of a final review.

In contrast, **Diagnostic Affiliates** is complaining of futility because all but one or a very small fraction of the hundreds of claims submitted to final review were rejected. This reflects actual results from actual submissions at the final level, not just prognostications from preliminary results. Futility would not represent an exception to exhaustion if every single claim had to be exhausted in order to show the certainty of an adverse result. It is sufficient under *McGowin* and *Bourgeois* that the allegations reflect bias or hostility at the highest level. These allegations meet that requirement.

***11** In conclusion, **Diagnostic Affiliates**' amended complaint contains allegations sufficient to support its standing to raise ERISA claims and the plausibility that the claims review process of those claims still pending should be deemed exhausted or futile. Therefore, the motions are **DENIED IN PART** to the extent they challenge Count II.

COUNT III:

VIOLATION OF ERISA – FULL AND FAIR REVIEW

Defendants challenge Count III on the basis that a complaint for declaratory and equitable relief for failure to provide a full and fair review under 29 U.S.C. § 1132(a)(3) does not apply when the claimant has a cause of action for failure to pay under 29 U.S.C. § 1132(a)(1)(B). **Diagnostic Affiliates** responds simply that it has adequately pled claims under each subsection. This response does not join issue with the basis of Defendants' challenge.

Defendants cite binding Supreme Court and Fifth Circuit precedent holding that a § 1132(a)(3) claim for declaratory and equitable relief is not appropriate when the claimant also has a claim for payment of benefits under § 1132(a)(1)(b)—whether or not the claimant prevails on its claim for payment. *Manuel v. Turner Indus. Group, **L.L.C**.*, 905 F.3d 859, 867 (5th Cir. 2018); *Rhorer v. Raytheon Eng'rs & Constructors, Inc.*, 181 F.3d 634, 639 (5th Cir. 1999), *abrogated on other grounds by CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *Tolson v. Avondale Indus., Inc.*, 141 F.3d 604, 610 (5th Cir. 1998) (citing *Varity Corp. v. Howe*, 516 U.S. 489 (1996)). This construction of the availability of the ERISA remedies is based on the different goals and standards of review applicable to each. *Varity*, 516 U.S. at 512.

This Court is bound by these cases and **Diagnostic Affiliates** has failed to demonstrate that this case poses an exception to the rules they announce. Consequently, the motions to dismiss are **GRANTED IN PART** and the Court **DISMISSES** Count III.

COUNT IV:

RICO

United makes two challenges to the RICO claim. First, it argues that the conduct complained of was nothing more than ordinary claims processing. This argument reads the amended complaint too narrowly, in violation of the standard of review. **Diagnostic Affiliates** clearly alleges that the actions **United** took—requesting excessive and repetitious documentation, misrepresenting the coverage or reimbursable amount for the **service**, and diverting claims to its CRS Benchmark Program to pocket unearned funds—went beyond ordinary claims processing and revealed a calculated and coordinated effort to delay, deny, or reduce the recovery **Diagnostic Affiliates** could make for its COVID-19 testing **services** and to profit by doing so. The Court rejects **United's** challenge on this basis.

Second, **United** complains that **Diagnostic Affiliates** has not pled sufficient facts to show that any such predicate acts proximately caused its alleged injury—the failure to pay its claims in whole or in part. *See generally Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006). By way of example, **United** cites *Anza* and *Shannon v. Ham*, 639 Fed. App'x 1001, 1004 (5th Cir. 2016) as cases in which the defendant's activities or communications may have been wrongful, but did not directly cause the plaintiff's injury.

In *Anza*, the fraud was perpetrated directly on a state taxing authority, which provided a tax savings to the fraudster, making the business more competitive. The plaintiff, a competing business, thus lost sales. But the Supreme Court held that the injured party was the defrauded state and that the related injury was lost tax revenue. While this provided the defendant with a competitive edge, the loss of sales by the competing plaintiff were too attenuated to maintain a RICO claim.

***12** In *Shannon*, the RICO conduct was the defendant's misrepresentation of his licensure to sell crop insurance. The injury was mishandled insurance. The Fifth Circuit found

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that the misrepresentation of licensure had been ongoing for several years with no injury. And the link between any misrepresentations and the mishandling of insurance was too attenuated to support proximate causation for a RICO claim.

Here, as it details more fully in its response, **Diagnostic Affiliates** complains of communications in the claims handling process that were designed to, among other purposes, misrepresent plan coverage of the COVID-19 testing charges and create unreasonable obstacles to payment of claims so as to deny full payment and discourage efforts to enforce the payment requirements of the FFCRA, CARES Act, and plan documents in a coordinated effort among all **United**-related Defendants. The link between at least some of the conduct complained of and some of the injuries sustained is sufficiently direct to support proximate causation and survive Rule 12(b)(6) review.

The motion is **DENIED IN PART** to the extent that it challenges Count IV.

COUNT V:

DECLARATORY JUDGMENT

United has combined its challenges to Count V and Count X. D.E. 67, pp. 19-20. With respect to Count V, it makes two arguments. First, it contends that declaratory relief is improper because **Diagnostic Affiliates** is not entitled to relief under any of the causes of action set out in its pleadings, thus negating any entitlement to relief on the merits, declaratory or otherwise. This argument fails because **United** has failed to defeat all of **Diagnostic Affiliates**' other causes of action.

Second, **United** argues that even if meritorious, the causes of action for damages adequately address the claims so invocation of declaratory relief under 28 U.S.C. § 2201 is impermissibly redundant. *See Am. Equip. Co., Inc. v. Turner Bros. Crane & Rigging, **LLC***, 4:13-CV-2011, 2014 **WL** 3543720, at *3 (**S.D**. **Tex**. July 14, 2014). The *American Equipment* opinion cites *Collin County, Texas v. Homeowners Ass'n for Values Essential to Neighborhoods*, 915 F.2d 167, 170 (5th Cir. 1990) for the proposition that the federal declaratory judgment statute was created as a procedural vehicle by which to obtain a remedy only if no other satisfactory remedy is available.

Diagnostic Affiliates' response is simply that it seeks declaratory relief in addition to other remedies. D.E. 99, p. 34. This does not address the issue of why damages and/or injunctive relief are not a satisfactory remedy available through the other causes of action, thus negating the need for declaratory relief. In its amended complaint, **Diagnostic Affiliates** prays for declaration of statutory violations in the same breath as awarding damages and injunctive relief for those violations.

United has demonstrated that **Diagnostic Affiliates**' request for declaratory relief is redundant. Its motion is **GRANTED IN PART** and the Court **DISMISSES** Count V seeking a declaratory judgment.

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COUNT VI:

UNJUST ENRICHMENT AND QUANTUM MERUIT

United first argues that the theories of unjust enrichment and quantum meruit must fail because those theories require that the plaintiff provide a benefit to the defendant. *See* *Pepi Corp. v. Galliford*, 254 S.W.3d 457, 460 (Tex. App.—**Houston** [1st Dist.] 2007, pet. denied) (quantum meruit); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied) (unjust enrichment). According to **United**, any **services** rendered by **Diagnostic Affiliates** were rendered to and for the benefit of the patient insureds, not to **United** or to the employer health plans. *See* *ACS Primary Care Physicians Sw., P.A. v. UnitedHealthcare Ins. Co.*, 514 F. Supp. 3d 927, 935 (**S.D**. **Tex**. 2021); *Encompass Office Sols., Inc. v. Ingenix, Inc.*, 775 F. Supp. 2d 938, 966 (E.D. Tex. 2011).

13** **Diagnostic Affiliates** responds, citing *El Paso **Healthcare** System, Ltd. v. Molina **Healthcare** of New Mexico, Inc.*, 683 F. Supp. 2d 454, 461 (W.D. Tex. 2010) as holding that a **service** provided to an insured has the effect of benefiting the insurer by fulfilling the obligation to provide health care **services**. That proposition was rejected by *ACS Primary Care* because the insurance company's responsibility is not to provide **healthcare** but to provide payment for health care if, as, and when provided by others to its insureds. *ACS Primary Care*, 514 F. Supp. 3d at 935 (citing *El Paso **Healthcare). In other words, any benefit of the COVID-19 testing was received by the insured. The insurance company only incurs a liability to pay for the **service**.

Diagnostic Affiliates invites this Court to align itself with the holding in *El Paso **Healthcare*** and the Third Circuit's decision in *Plastic Surgery Center, P.A. v. Aetna Life Insurance Co.*, 967 F.3d 218, 242 (3d Cir. 2020). The Court declines the invitation, agreeing with *ACS Primary Care* and finding that the *Plastic Surgery* decision was more about three things not at issue here—New Jersey law, a specific plan provision imposing special duties on Aetna for referring the insured to a specific provider under its plan, and ERISA preemption —than about whether an ordinary health care plan is benefitted by the provision of health care to its insureds.

United also argues that the quantum meruit claim is defeated by the fact that the parties' relationship is controlled by a written contract —the health care plans. "As a general rule, the presence of an express contract bars recovery under quantum meruit." *Pepi Corp*, 254 S.W.3d at 462 (citing *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005)). **Diagnostic Affiliates** responds that its claim is controlled by the FFCRA and CARES Act and not the health care plans. The Court disagrees.

In this action, **Diagnostic Affiliates** has presented its claims to Defendants because they are responsible for payment for the **services** rendered to their insured patients. As **United** points out in its reply, the import of the FFCRA and CARES Act is to impose upon those health care plans the obligation to include COVID-19

testing as a covered **service** under their plans. The terms of the plans are effectively modified to prevent the imposition of cost sharing and other charges or administrative procedures on the insureds. The requirement to pay is imposed on Defendants because they have a contractual obligation to pay for the insured's health care —not because of some independent equitable purpose.

For these reasons, **United's** motion is **GRANTED IN PART** and the Court **DISMISSES** Count VI with respect to both quantum meruit and unjust enrichment theories.

COUNT VII:

PROMISSORY ESTOPPEL

United challenges the claim for promissory estoppel, complaining of **Diagnostic Affiliates**' pleading: "None of these allegations show that **United** made a sufficiently specific and definite promise to the Plaintiff that it would pay COVID testing claims such that Plaintiff's purported reliance on any statements would be reasonable." D.E. 67, p. 17 (citing *Walker v. Walker*, 631 S.W.3d 259 (Tex. App.—**Houston** [14th Dist.] 2020, no pet.)). Moreover, **United** notes that nothing in the FFCRA or CARES Act prevents **United** from reviewing claims for fraud and abuse. *Id.*

The *Walker* case was a summary judgment case. And **United's** arguments do not comport with the Rule 12(b)(6) standard of review in which the Court takes the allegations of the complaint and all reasonable inferences in favor of the plaintiff as true. Contrary to **United's** reading of the complaint, the allegations do provide factual support for finding that **United** made specific and definite representations as a commitment to future action on which **Diagnostic Affiliates** could reasonably rely. Anything to the contrary can be investigated in discovery and proven at trial.

***14** **United's** motion is **DENIED IN PART** with respect to its challenge to Count VII.

COUNT IX:

TEXAS PROMPT PAYMENT OF CLAIMS ACT

Under the Texas Insurance Code's Prompt Payment of Claims Act (PPCA), insurance companies must pay (or deny) properly documented claims within 30 or 45 days of receipt, depending on whether the claim was submitted electronically. Tex. Ins. Code §§ 843.338 (HMO plans), 1301.103 (PPO plans). Failure to do so requires payment of a significant penalty. §§ 843.342, 1301.137.

However, those provisions require payment "in accordance with the contract" between the provider and the insurance company. §§ 843.338(1), 1301.103(1). The Texas Supreme Court has declared unequivocally that this means that contractual privity is required for a PPCA cause of action. *Christus Health Gulf Coast v. Aetna, Inc.*, 397 S.W.3d 651, 656 (Tex. 2013). **Diagnostic Affiliates** does not dispute

this general rule for interpreting the statute. However, there is an exception.

The terms of the PPCA apply to an out-of-network provider for providing "care related to an emergency or its attendant episode of care as required by state or federal law." §§ 843.351, 1301.069. Without reference to the particular reasons or contexts in which patients sought COVID-19 testing, **Diagnostic Affiliates** claims that its **services** were related to a federally-declared pandemic emergency. The Court need not decide whether testing in a pandemic is the type of emergency contemplated by the PPCA.

As **United** argues, whether or not the exception makes other parts of the PPCA applicable to **Diagnostic Affiliates** as an out-of-network provider, it is not eligible for the penalty because the penalty must be calculated on the basis of a contracted rate, which **Diagnostic Affiliates** does not have. *See Tex. Med. Res., LLP v. Molina **Healthcare** of Tex., Inc.*, 620 S.W.3d 458, 469 (Tex. App.—Dallas 2021, pet. filed); *see also Windmill Wellness Ranch, **L.L.C**. v. Blue Cross & Blue Shield of Tex.*, SA-19-CV-01211-OLG, 2020 **WL** 7017739, at *13 (W.D. Tex. Apr. 22, 2020). **Diagnostic Affiliates** responds, without benefit of authority, that this case is distinguishable because the statutory reimbursement provisions of the FFCRA and CARES Act supply an easily quantifiable payment rate, which it impliedly argues is the equivalent of a contracted rate.

Diagnostic Affiliates' argument fails by its own terms. While the FFCRA and CARES Act impose a statutory method of determining the rate of reimbursement, the method provides for either a negotiated rate or a unilaterally-declared publicly posted rate. And **Diagnostic Affiliates** relies solely on a publicly posted rate. This Court sees no reason to consider these methods as contractual rates. While **Diagnostic Affiliates** argues that the publicly posted rate, by virtue of the statutes, is more readily ascertainable than a "usual, customary, and reasonable" rate, the question is not about how easily determinable the rate is. Rather, the question is whether it was set by agreement.

United's motion to dismiss is **GRANTED IN PART** and the Court **DISMISSES** Count IX.

COUNT X:

INJUNCTIVE RELIEF

***15** **United's** remaining challenge to **Diagnostic Affiliates**' request for injunctive relief is that it cannot show a likelihood of success on the merits. *See Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005) (likelihood of success on the merits is the first of four elements that must be shown to obtain injunctive relief). This argument is predicated on the success of **United's** motion to dismiss as to every one of the causes of action. Because this Court has retained a number of the causes of action, **United** has not demonstrated, and cannot show at the Rule 12(b)(6) stage, that **Diagnostic Affiliates** does not have a likelihood of success on the merits and this challenge fails. **United's** motion is **DENIED IN PART** with respect to Count X.

reconsideration. No disposition at this point is final or prejudicial.

PREJUDICIAL DISMISSALS

Diagnostic Affiliates has asked that any dismissal be without prejudice. Absent a full or partial final judgment,

> any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed. R. Civ. P. 54(b). The Court is aware that many of these issues are in rapidly developing areas of the law and that the COVID-19 pandemic presents an unusual context for these claims. Should any party have appropriate new grounds on which to resubmit these matters to the Court, Rule 54(b) allows

CONCLUSION

For the reasons set out above, the motions to dismiss (D.E. 67, 105, 112, 119, 130, 141, and 145) are **GRANTED IN PART** and **DENIED IN PART**. The Court **DISMISSES** the following claims:

Count III: Violation of ERISA for failure to provide a full and fair review of the claims – against all Defendants;

Count V: Request for a declaratory judgment – against **United**;

Count VI: Claim for unjust enrichment and quantum meruit – against **United**: and

Count IX: Violation of the Texas Prompt Pay Act – against **United**.

All other claims are **RETAINED**.

ORDERED on January **18**, **2022**.

All Citations

Not Reported in Fed. Supp., 2022 WL 214101

Footnotes

1 UHG filed its own motion to dismiss, which is addressed by separate order.

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2 "**United**" refers to: **United Healthcare Services**, Inc., **United Healthcare** Benefits of Texas, Inc., **United Healthcare** of Texas, Inc., UMR, Inc., and OptumHealth Care Solutions, **LLC** (sued as OptumHealth Care Solutions, Inc.).

3 "Employer **healthcare** plans" refers to: American International Group, Inc. Medical Plan; Anadarko Petroleum Corp. Health Benefit Plan; Apple Inc. Health And Welfare Benefit Plan; Group Health And Welfare Plans (Aramark Uniform **Services**); AT&T Umbrella Benefit Plan No. 1; AT&T Umbrella Benefit Plan No. 3; Baker Hughes, A GE Company Welfare Benefits Plan; Baylor College Of Medicine Health And Welfare Benefits Plan; Brookdale Senior Living, Inc. Welfare Plan; C.H Robinson Company Group Health Major Medical Plan; Calpine Corporation Employee Benefit Plan; Caterpillar Inc. Group Insurance Master Trust; Celanese Health And Welfare Benefits Program; Centerpoint Energy Group Welfare Benefits Plan For Retirees; Citgo Petroleum Corporation Defined Contribution Master Trust; Delta Account Based **Healthcare** Plan; Envision **Healthcare** Corporation Welfare Benefits Plan; H&E Equipment **Services** Inc. Benefit Plan; Flour Employee Benefit Trust Plan; Fresenius Medical Care Travelling Nurses Health And Welfare Benefits Plan; Geico Corp. Consolidated Welfare Benefits Program; Geospace Technologies Welfare Benefit Plan; Hudson Group (HG) Inc. Employee Benefits Plan; IQOR Health And Welfare Plan; Jones Lang Lasalle Group Benefits Plan; Kellogg Brown & Root, Inc, Welfare Benefits Plan; Kinder Morgan, Inc. Master Employee Welfare Plan; Lexicon Pharmaceuticals Inc. Comprehensive Welfare Benefits Plan; Lineage Logistics **LLC** Benefits Plan; Lockton, Inc. Welfare Benefits Plan; M/I Homes, Inc. Health, Life And Dental Welfare Plan; Maersk Inc. Active Nonunion Health And Welfare Plan; The Mallinckrodt Pharmaceuticals Welfare Benefit Plan; Motiva Enterprises **LLC** Health and Wellness Benefit Plan; Novo Nordisk Inc. Welfare Benefit Plan Petsmart Smartchoices Benefit Plan; Procter And Gamble Retiree Welfare Benefits Plan; Railroad Employees National Health Flexible Spending Account Plan; Raising Canes USA Health And Welfare Benefits Wrap Plan; Republic **Services** Inc. Employee Benefit Plan; Republic National Distributing Company, **LLC** Welfare Benefits Plan; Saia Motor Freight Line **LLC** Employee Preferred Provider Plan; Siemens Corporation Group Insurance And Flexible Benefits Program; Skadden, Arps, Slate, Meagher & Flom Partners' Welfare Benefits Plan; Skywest Inc. Cafeteria Plan; Southwest Airlines Co. Welfare Benefit Plan; Spirit Airlines Inc. Health And Welfare Benefits Plan; Swissport North America Holdings, Inc. Health & Welfare Plan; Targa Resources **LLC** Welfare Benefits Plan; Texas Capital Bancshares Inc. Employee Benefit Plan; Textron Non-Bargained Welfare Benefits Plan; Adecco, Inc Welfare Benefits Plan; T-Mobile USA, Inc. Employee Benefit Plan; Transocean Group Welfare Benefit Plan; UHS Welfare Benefits Plan; UnitedHealth Group Ventures, **LLC** Health And Welfare Benefit Plan; Valero Energy Corporation Retiree Benefits Plan; Valmont Industries Inc. Welfare Benefit Plan; Walgreens

Health And Welfare Plan; WCA Management Company, LP Welfare Benefit Plan; Webber, **LLC** Welfare Benefit Plan; Winstead PC Flexible Benefit Plan; Group Benefits Plan For Employees Of Worleyparsons Corporation.

4 Families First Coronavirus Response Act, Pub. L. No. 116-127, § 6001(a), 134 Stat. 178 (2020) (relating to 42 U.S.C. § 1320b–5 NOTE, authority to waive peer review and administrative requirements during national emergencies).

5 Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3202(a) 134 Stat. 281 (relating to 42 U.S.C. § 256b, primary health care drug pricing agreements).

6 Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*

7 Racketeer Influenced and Corrupt Organizations Act, **18** U.S.C. §§ 1961-1968.

8 28 U.S.C. § 2201.

9 The amended complaint does not include a Count VIII.

10 Texas Insurance Code §§ 843.351 and 1301.069.

11 The Court is aware that Defendants complain that the price **Diagnostic Affiliates** has charged is unreasonably high. The Court's view of the mandatory language of the statutes for purposes of creating a private right of action should not be read to foreclose any defense or counterclaim challenging the propriety of **Diagnostic Affiliates**' pricing. That issue is not presently before the Court.

12 Referring to "part A of title XXVII of the Public Health **Service** Act, part 7 of the Employee Retirement Income Security Act of 1974, and subchapter B of chapter 100 of the Internal Revenue Code of 1986."

13 When challenging the methodology for enforcing the CARES Act, **United** refers to § 3201, which amends the FFCRA to provide the administrative qualifications for making particular COVID-19 testing appropriate under the statutes. The parties have not raised any issue at this juncture regarding whether **Diagnostic Affiliates** was using approved testing materials and methods. The issue is the right to reimbursement, which appears in § 3202. **United's** motion thus technically fails to challenge a private right of action for reimbursement under § 3202.

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CASE NO. 45

2016 WL 3223313
Only the Westlaw citation
is currently available.
United States District Court,
S.D. Texas, Houston Division.

WILLIAM MARSH RICE UNIVERSITY, Plaintiff,
v.
ARROWHEAD RESEARCH CORPORATION, et al. Defendants.

Civil Action
No.
14
-
03496
|
Signed 03/**08/2016**

Attorneys and Law Firms

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ORDER

VANESSA D. GILMORE, UNITED STATES DISTRICT JUDGE

***1** Pending before the Court are Defendant Mark Tilley ("Tilley")'s and Defendant John Miller ("Miller")'s (collectively "Individual Defendants")'s Motion to Dismiss (**Instrument No. 61**) and Defendant **Arrowhead Research Corporation** ("**Arrowhead**" or "**Corporate** Defendant")'s Motion to Dismiss (**Instrument No. 63**).

I.

A.

This is a suit for breach of contract, fraud, fraudulent inducement, vicarious liability and tortious interference brought by a patent-holder against a patent licensee and related entities. Plaintiff **William Marsh Rice University** ("**Rice**" or "Plaintiff") claims that Tilley, Miller, and **Arrowhead** (collectively "Defendants") induced it to modify its license agreement with Defendant Unidym, Inc. ("Unidym"), to allow Unidym to sublicense certain patents to a third party, Samsung. Plaintiff claims that Defendants prevented Plaintiff from licensing the patents directly to Samsung, and that as a result of **Rice's** agreement with Unidym, **Rice** became unable to monetize its patents due to confusion in the marketplace and Samsung's retention of a royalty free option to license **Rice's** patents. Defendants Tilley, Miller, and **Arrowhead** move to dismiss Plaintiff's fraud-based claims and Plaintiff's vicarious liability claim, arguing

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primarily that the claims are breach of contract claims improperly pleaded as tort claims, and that Plaintiff cannot prove that Defendants' conduct caused **Rice** harm.

B.

According to Plaintiff, on or about April 18, 2007, it entered into a license agreement ("the 2007 License") with Carbon Nanotechnologies, Inc. for approximately ninety patents covering various aspects of carbon nanotubes technology ("CNT"). (Instrument No. 60 at 5). Plaintiff claims that the licensed patents were the product of **research** by **Rice** faculty. (Instrument No. 60 at 5). Carbon Nanotechnologies was subsequently acquired by Defendant Unidym, which was a subsidiary of Defendant **Arrowhead**. (Instrument No. 60 at 5).

According to Plaintiff, in the Spring of 2010, **Arrowhead** began negotiating with Samsung for Unidym to sublicense and monetize **Rice's** technology. (Instrument No. 60 at 7). Plaintiff claims, however, that in order for those deals to be finalized, **Arrowhead** had to obtain **Rice's** written consent for the sublicense, and also remedy Unidym's failures under an existing 2007 License. (Instrument No. 60 at 6-**8**).

In the Spring of 2010, **Rice** began negotiating new agreements with Unidym. (Instrument No. 60 at 10). Plaintiff claims that Tilley and Miller negotiated on behalf of Unidym. (Instrument No. 60 at 10). Plaintiff claims that Tilley and Miller were also Vice Presidents of **Arrowhead**. (Instrument No. 60 at 10). According to Plaintiff, Tilley and Miller represented that the pending deal with Samsung would be lucrative for all parties, and that without the deal, the technology would not be able to be commercialized. (Instrument No. 60 at 11). Plaintiff also claims that on August 31, 2010, Tilley attempted to convince **Rice** that the deal needed to be completed "right away" and that there was "no time for discussions." (Instrument No. 60 at 12). Plaintiff claims that substantial documentation demonstrates that Tilley, Miller, and **Arrowhead** attempted to persuade **Rice** leadership to enter into the agreement with Unidym. (Instrument No. 60 at 12-14).

***2** On November 1, 2010, **Rice** entered into an amendment to the 2007 License with Unidym (the "Amended Agreement"). (Instrument No. 60 at 14). According to **Rice**, the Amended Agreement provided that Unidym would: 1) pay **Rice** 35% of all non-sale based sublicense consideration; 2) pay **Rice** a royalty rate of 4% on adjusted gross sales; 3) pay **Rice** annual minimum royalties of $250,000 beginning January 1, 2011; and 4) reimburse **Rice** for patent costs. (Instrument No. 60 at 15).

In December 2010, Unidym and Samsung entered into an agreement to sublicense **Rice's** technology, for which Samsung paid $4.5 million upfront. (Instrument No. 60 at 16). In January 2011, **Arrowhead** announced that it was selling Unidym to Wisepower Co., Ltd. ("Wisepower") for $5 million plus $140 million in potential future royalties over 10 years. (Instrument No. 60 at 16).

According to **Rice**, it was never paid in accordance with the Amended Agreement, and on March 25, 2011 it terminated the Amended

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Agreement with Unidym. (Instrument No. 60 at 17). Plaintiff also claims that Tilley informed **Rice** in May 2011 that Unidym and **Arrowhead** had never intended to honor the terms of the Amended Agreement. (Instrument No. 60 at 18). According to Plaintiff, **Arrowhead**, Tilley, and Miller defrauded **Rice** to ensure that **Arrowhead** would receive the entire benefit of these agreements. (Instrument No. 60 at 18). Plaintiff specifically alleges that Defendants' fraud prevented **Rice** from monetizing its technology, because Defendants induced **Rice** to forego opportunities to license its CNT, and greatly diminished the value of that technology in the market following the Unidym agreement. (Instrument No. 67 at 5-6).

C.

On November 11, 2014, Plaintiffs filed an original petition and request for temporary and permanent injunction against Unidym and **Arrowhead** in the 113th Judicial District Court of Harris County, Texas. (Instrument No. 1-3). Plaintiff brought claims for breach of contract and tortious interference with prospective business relations against Unidym and a claim for fraudulent inducement against Unidym and **Arrowhead**. (Instrument No. 1-3). On December 7, 2014, Unidym and **Arrowhead** removed this case to the United States District Court for the Southern District of Texas pursuant to this Court's diversity jurisdiction under 28 U.S.C. § 1332(a). (Instrument No. 1).

On December 31, 2014, Plaintiff filed a First Amended Complaint, including Tilley and Miller as Defendants and adding a claim for fraud against **Arrowhead**, Tilley, and Miller. (Instrument No. 10).

On February 28, 2015, **Arrowhead** filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Instrument No. 23). **Arrowhead** argued that Plaintiff's fraud claim failed to allege causation and violated the statute of frauds and independent injury doctrine, and that a fraudulent inducement claim is only actionable against a party to the contract. (*Id.*). On March 30, 2015, Plaintiff filed a response and on April 6, 2015, **Arrowhead** filed a reply. (Instruments No. 32; No. 38).

On March 26, 2015, Tilley filed a motion to dismiss pursuant to Rule 12(b)(6), asserting the same arguments as **Arrowhead**. (Instrument No. 28). On April 16, 2015, Plaintiff filed a response and on April 23, 2015, Tilley filed a reply. (Instruments No. 42; No. 45).

On June 1, 2015, Miller filed a motion to dismiss, asserting the same arguments under Rule 12(b)(6) as **Arrowhead** and Tilley. (Instrument No. 52). Miller also argued that Plaintiff's claims should be dismissed pursuant to Rule 12(b)(5) for defective service of process. (*Id.*). On June 22, 2015, Plaintiff filed a response and on July 15, 2015, Miller filed a reply. (Instruments No. 56; No. 58).

***3** To date, Defendant Unidym has failed to file an answer to Plaintiffs complaint. Accordingly, on April 23, 2015, the Court entered default against Unidym. (Instrument No. 47). On July 23, 2015, the Court denied **Arrowhead's** motion to dismiss, Miller's motion to dismiss, and Tilley's motion to

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dismiss, and ordered Plaintiff to file an amended complaint within 10 days of the Order. (Instrument No. 59). The Court found that Plaintiff's fraud and fraudulent inducement claims as plead were barred by the statute of frauds and the independent injury doctrine, however, the Court granted Plaintiff's request for leave of the Court to amend its pleadings to correct deficiencies with respect to its fraud and fraudulent inducement claims. (Instrument No. 59 at 16, 19-20). On August 2, 2015, Plaintiff filed its Second Amended Complaint, repleading the previous causes of action, and adding a claim for vicarious liability against Defendant **Arrowhead**. (Instrument No. 60). On August 17, 2015, Defendants Tilley and Miller filed a motion to dismiss Plaintiff's Second Amended Complaint, presenting essentially the same arguments contained in its previous motions to dismiss. *See* (Instrument No. 61). On August 17, 2015, Defendant **Arrowhead** also filed a motion to dismiss, presenting nearly the same arguments as the Individual Defendants' motion. (Instrument No. 63). On September 15, 2015, Plaintiff filed a Response to Individual Defendants' motion and a Response to Defendant **Arrowhead's** motion. (Instruments No. 67; No. 69). On September 21, 2015, Defendant **Arrowhead** filed a reply in support of its motion to dismiss. (Instrument No. 72). On September 28, 2015, the Individual Defendants filed a reply in support of its motion to dismiss. (Instrument No. 75). On February 4, **2016**, the Court held a hearing on the Motions to Dismiss.

II.

Defendants **Arrowhead**, Tilley, and Miller move to dismiss Plaintiffs fraud and fraudulent inducement claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

Under Rule **8** of the Federal Rules of Civil Procedure, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. **8**(a)(2). The complaint need not contain "detailed factual allegations," but it must include "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not suffice. *Bell Atlantic **Corp**. v. Twombly*, 550 U.S. 544, 555 (2007). Likewise, a complaint that articulates "naked assertions devoid of further factual enhancement" is similarly insufficient to satisfy the pleading requirements of Rule **8**. *Iqbal*, 556 U.S. at 678 (internal punctuation omitted).

When a complaint does not meet the pleading requirements of Rule **8**, Rule 12(b)(6) authorizes dismissal of a **civil action** for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the complaint must articulate "the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true raise a right to relief above the speculative level." *Cuvillier v. Sullivan*, 503 F.3d 397, 401 (5th Cir. 2007). Stated otherwise, in order to withstand a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Iqbal*, 556 U.S. at 678 (quoting

Twombly, 550 U.S. at 570); *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011). A claim for relief is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *Montoya v. FedEx Ground Package System, Inc.*, 614 F.3d 145, 148 (5th Cir. 2010). A claim for relief is implausible on its face when "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 678. This "plausibility standard is not akin to a probability requirement, but asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (internal quotations omitted). Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Twombly*, 550 U.S. at 557.

Under this rubric, dismissal is proper only if the plaintiff's complaint: (1) does not include a cognizable legal theory, *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), or (2) includes a cognizable legal theory but fails to plead enough facts to state a claim to relief that is plausible on its face, *Pleasant*, 663 F.3d at 775; *see also Frith v. Guardian Life Ins. Co.*, 9 F. Supp. 2d 734, 737-38 (**S.D**. **Tex**. 1998) (Gilmore, J.) (holding that dismissal pursuant to Rule 12(b)(6) "can be based either on a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory").

***4** When ruling on a 12(b)(6) motion, the Court may consider "the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."[1] *Wolcott v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (internal citations and quotations omitted); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The Court does not resolve any disputed fact issues. *Davis v. Monroe City Bd. of Educ.*, 526 U.S. 629, 633 (1999). Instead, the Court assumes all well-pleaded facts contained in the complaint are true. *Wolcott*, 635 F.3d at 763. The Court will not, however "accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Great Lakes Dredge & Dock Co. LLC v. La. State*, 624 F.3d 201, 210 (5th Cir. 2010). Similarly, legal conclusions masquerading as factual conclusions need not be treated as true. *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995); *see also Iqbal*, 556 U.S. at 678. Although all well-pleaded facts are viewed in the light most favorable to the plaintiff, *Turner*, 663 F.3d at 775; *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009), the Court "will not strain to find inferences favorable to the plaintiff." *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (internal citations and quotations omitted). Therefore, "to avoid a dismissal for failure to state a claim, a plaintiff must plead specific facts." *Dorsey*, 540 F.3d at 338.

That said, "motions to dismiss under Rule 12(b)(6) are viewed with disfavor and are rarely granted." *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009) (citation omitted). Given the harshness of dismissal, the Court will generally "afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that

the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002); *see also United States ex rel. Adrian v. Regents of the Univ. of Cal.*, 363 F.3d 398, 403 (5th Cir. 2004) ("Leave to amend should be freely given.") (internal citations omitted).

Claims alleging fraud are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). "A dismissal for failure to plead fraud with particularity under Rule 9(b) is treated as a dismissal for failure to state a claim under Rule 12(b)(6)." *U.S. ex rel. Grubbs v. Kenneganti*, 565 F.3d 180, 186 n.8 (5th Cir. 2009)(quoting *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 901 (5th Cir. 1997)). Rule 9(b) states:

> In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Fed. R. Civ. P. 9(b). What constitutes "particularity" differs from case to case, but at "a minimum Rule 9(b) requires allegations of the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby. Put simply Rule 9(b) requires the who, what, when, where, and how to be laid out." *Benchmark Elec., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003). Rule 9's heightened pleading standard applies to "all averments of fraud, including those in which fraud is not an element of the claim." *Lone Star Ladies Inv. Club v. Schlotzky's, Inc.*, 238 F.3d 363, 368 (5th Cir. 2001).

III.

Defendants **Arrowhead**, Tilley, and Miller move to dismiss Plaintiff's fraud, fraudulent inducement, and vicarious liability claims. (Instruments No. 61; No. 63).

***5** The elements for fraud and fraudulent inducement are the same, namely (1) a material misrepresentation; (2) that is false; (3) made with knowledge of its falsity or recklessness as to its truth; (4) made with the intention that it should be acted upon by another party; (5) relied upon by the other party; and (6) causing injury. *DeSantis v. Wackenhut*, 793 S.W.2d 670, 688 (Tex. 1990). To show reliance for a fraudulent inducement claim, a plaintiff must prove that it actually entered into a binding agreement based on the misrepresentation. *Haase v. Glazner*, 62 S.W.3d 795, 799-800 (Tex. 2001). "A promise of future performance constitutes an actionable misrepresentation if the promise was made with no intention of performing at the time it was made." *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998). Entering into a contract with no intention to perform can be actionable as fraud, while deciding later not to perform merely constitutes a breach of contract. *Tony Gullo*

Motors I, L.P. v. Chapa, 212 S.W.3d 299, 304 (Tex. 2006).

A.

The Court's July 23, 2015 Order found that Plaintiff had not adequately pleaded causation in support of its fraud and fraudulent inducement claims, but allowed Plaintiff leave to file a Second Amended Complaint to replead its claims. (Instrument No. 59). Defendants argue that Plaintiff's Second Amended Complaint has still failed to allege causation of an injury to **Rice**. (Instrument No. 63 at 9).

To establish the element of causation in a fraud or fraudulent inducement claim, a plaintiff must show that the defendant's misrepresentations were a cause-in-fact of foreseeable losses. *Hartford Fire Ins. Co. v. C. Springs 300, Ltd.*, 287 S.W.3d 771, 781 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) "The test for cause in fact, or 'but for causation,' is whether the act or omission was a substantial factor in causing the injury without which the harm would not have occurred." *Marathon **Corp**. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003) (citations omitted). A plaintiff must also plead detrimental reliance, by showing that the defendant's representations induced it to act or refrain from acting to its detriment. *TCA Bldg. Co. v. Entech, Inc.*, 86 S.W.3d 667, 674 (Tex. App.—Austin 2002, no pet.). A court may consider the causation issue by removing the misconduct from the plaintiff's narrative, and evaluating the effect on the plaintiff's purported harm. *In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526, 547 (N.D. Tex. 2014).

The Court's July 23, 2015 Order found that Plaintiff had not sufficiently alleged that there was any potential for a deal with Samsung prior to the Amended Agreement. (Instrument No. 59 at 13-14). As a result, the Court found that Plaintiff had not adequately pleaded the required element of causation in order to establish claims of fraud or fraudulent inducement against Defendants. (Instrument No. 59 at 14). Defendants' Motions to Dismiss the Second Amended Complaint again assert that Plaintiff has failed to establish the requisite element of causation, despite **Rice's** elaborations on the nature of the lost opportunity allegedly caused by Defendants' actions. (Instrument No. 72 at **8**-9).

In response to the Court's July 23, 2015 Order, Plaintiff's Second Amended Complaint modifies its claims from the First Amended Complaint. (Instrument No. 60). Plaintiff has extensively repleaded the causation element of its fraud and fraudulent inducement claims, pinpointing the precise opportunities that **Rice** forewent on the basis of Defendants' actions, and the effect of Defendants' actions on the market for **Rice's** CNT. (Instrument No. 60).

Plaintiff's Second Amended Complaint explains in detail how **Rice** was placed in a worse position after Defendants' alleged fraud. (Instruments No. 60 at 17-21; No. 67 at 5-6). Plaintiff alleges sufficient facts regarding **Rice's** opportunities, absent Defendants' fraud, to license the technology at issue to other members of the relevant market, including companies such as Wisepower and Toray,

in addition to the opportunity to license to Samsung independent of any Amended Agreement with Unidym. (Instrument No. 60 at 19). Defendants argue that the addition of more companies that **Rice** could have licensed to prior to the 2010 Amended Agreement, does not demonstrate that **Rice** could have licensed the CNT absent Unidym's involvement, without more facts to suggest that **Rice** in fact took concrete steps to pursue such alternative licensing deals. (Instrument No. 75 at 2-3).

***6** Viewing the pleadings in the light most favorable to Plaintiff, Defendants' alleged actions induced **Rice** to pursue an Amended Agreement, instead of pursuing damages for breach of its original 2007 Agreement. (Instrument No. 60 at 18-19); *see* *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (finding that all well-pleaded facts are viewed in the light most favorable to the plaintiff). Plaintiff further alleges that it forewent opportunities to license its technology to Samsung, Wisepower, Toray, and other companies on the basis of fraudulent information provided by Defendants. (Instrument No. 60 at 19). The Court's July 23, 2015 Order previously found that **Rice** would not have entered into the Amended Agreement if a true market existed to license **Rice's** technology to Samsung or others, because the Amended Agreement offered "demonstrably less favorable terms." (Instrument No. 59 at 13). However, Plaintiff's Second Amended Complaint specifically alleges that Defendants' fraudulent representations about the nature of the Amended Agreement induced **Rice** to accept detrimental terms. (Instrument No. 60 at 19). In light of these repleaded facts, **Rice's** acceptance of an agreement with less favorable terms than its 2007 Agreement actually supports its fraud claims. Moreover, Plaintiff's assertion that Samsung, Wisepower, and Toray were interested in its technology is plausible based on the facts as repleaded, as evidenced by the rapid monetization by Unidym of that technology after the Amended Agreement was executed. (Instrument No. 19-20).

Plaintiff further alleges that after the Amended Agreement with Unidym, and the subsequent termination of that agreement in 2011, **Rice's** technology suffered from "ongoing difficulty of overcoming the confusion in the marketplace related to the Unidym license." (Instrument No. 60 at 21). **Rice's** Second Amended Complaint offers further support for its argument that, but for Defendants' actions, **Rice** would have been in a better position to monetize its technology. (Instrument 60 at 20-21). Defendants' respond by arguing that any suggestion of a subsequent cloud over **Rice's** CNT fails to account for other market forces, such as a simple lack of interest in **Rice's** technology. (Instrument No. 75 at 3).

Defendants assertion that Samsung's sublicense on **Rice's** CNT would not have an effect on the value of that technology is not logical in light of the claims raised in Plaintiff's Second Amended Complaint. *See* (Instrument No. 63 at 16-17). Plaintiff plausibly alleges in its Opposition to Defendant **Arrowhead's** Motion to Dismiss that Samsung did not pursue a deal with **Rice** after the termination of the Amended Agreement with Unidym because Samsung "already had the rights to

license the technology for free." (Instrument No. 69 at 13). In addition, Plaintiff plausibly asserts that other companies were not willing to take a license, or were only willing to take a license at significantly reduced rates, because Samsung retained an option to take a license at any time. (Instrument No. 69 at 13). Defendants' alleged actions, outlined in detail in the Second Amended Complaint, were a plausible proximate cause of Samsung's acquisition of a royalty free option to use **Rice's** technology. (Instrument No. 60 at 11-14). Plaintiff's allegation regarding a cloud on its technology subsequent to the Unidym deal is further supported by Plaintiff's inability to monetize the technology even in a much later license deal with IPXnano, LLC. *See* (Instrument No. 60 at 21). Viewing the alleged facts in the light most favorable to Plaintiff, Samsung's retention of a royalty free option on **Rice's** technology plausibly could have caused a cloud on the market for that technology. *See* (Instrument No. 67 at 6).

Accordingly, the Court finds that Plaintiff has adequately repleaded the element of causation in its fraud and fraudulent inducement claims against Defendants. *See* *Benchmark*, 343 F.3d at 724; *Marathon*, 106 S.W.3d at 727.

B.

Defendant **Arrowhead** claims that Plaintiff has failed to specifically plead consequential damages as required by Rule 9(g) of the Federal Rules of Civil Procedure. (Instrument No. 63 at 21). In order to support the premise that consequential damages must be specifically plead, Defendant **Arrowhead** cites *Great Am. Indemnity Co. v. Brown*, 307 F.2d 306, 308 (5th Cir. 1962). Applying the Fifth's Circuit rubric from Brown, Plaintiff argues that the Second Amended Complaint sufficiently pleads consequential damages. (Instrument No. 69 at 14).

***7** In *Brown*, the Fifth Circuit held that Rule 9(g) of the Federal Rules of Civil Procedure is "designed to inform defending parties as to the nature of the damages claimed in order to avoid surprise; and to inform the court of the substance of the complaint." *Brown*, 307 F.2d at 308; (Instrument No. 69 at 14). Plaintiff's Second Amended Complaint pleads that **Rice** was damaged in its ability to license to other parties, and if not for Defendant's actions, **Rice** would have avoided subsequent damages by terminating its 2007 Agreement with Unidym. (Instrument No. 60 at 23, 25). Therefore, Plaintiff's allegations sufficiently allege consequential damages such as to place Defendants on notice of the nature of the damages claimed, and to meet the Rule 9(g) pleading standard. *See* *Brown*, 307 F.2d at 308.

Accordingly, the Court finds that Plaintiff has adequately pleaded consequential damages for fraud against Defendants.

C.

The Court's July 23, 2015 Order found that **Rice's** fraud and fraudulent inducement claims as pleaded against **Arrowhead** were barred by the statute of frauds. (Instrument No. 59 at 16). The Court found that **Arrowhead's** assurances that Unidym would perform the Amended Agreement, were not actionable because the

statute of frauds prevents pleading breach of contract claims disguised as fraud claims. *See* (Instrument No. 59 at 15-16). Plaintiff's Second Amended Complaint repleads its fraud and fraudulent inducement against **Arrowhead**, Tilley and Miller as torts *independent* of Unidym's breach, and therefore, outside the purview of the statute of frauds. (Instrument No. 60 at 22-25). Defendants again argue that Plaintiff's fraud and fraudulent inducement claims are barred by the statute of frauds. (Instrument No. 61 at 13; No. 63 at 9).

A "promise by one person to answer for the debt, default, or miscarriage of another person" is "not enforceable unless the promise or agreement, or a memorandum of it is (1) in writing; and (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him." Tex. Bus. & Com. Code § 26.01(b)(2). This rule applies to sureties and guaranties. *See* *Charles E. Beard, Inc. v. Cameronics Tech. **Corp**.*, 729 F. Supp. 528, 531 (E.D. Tex. 1989) *aff'd sub nom. Charles E. Beard, Inc. v. McDonnell Douglas **Corp**.*, 939 F.2d 280 (5th Cir. 1991). Furthermore, plaintiffs cannot rely on fraud claims to circumvent the statute of frauds and recover the benefit of an unenforceable bargain. *Haase v. Glazner*, 62 S.W.3d 795, 799 (Tex. 2001). Where a plaintiff seeks "to recover what he would have gained had the promise been performed, it is apparent that his action, while cast in language sounding in tort, is an indirect attempt to recover for the breach of the unenforceable promise and is, therefore, barred by the statute of frauds." *Webber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 129 (Tex. App.—Houston 1986, write ref'd n.r.e.) (citations omitted).

Plaintiff's Second Amended Complaint seeks to hold Defendants liable for harm allegedly caused by Defendants' fraud. (Instruments No. 60 at 24-26; No. 67 at 21; No. 69 at 15). Plaintiff claims that Defendants' alleged fraud prevented a direct deal between Plaintiff and Samsung, rather than money lost by Unidym's breach of contract. (Instrument No. 60 at 24-26). Plaintiff claims "out-of-pocket" damages as opposed to "benefit of the bargain" damages, which it argues are not barred by the statute of frauds. *See* *Haase*, 62 S.W.3d at 799-800.

The statute of frauds may not be used as a shield to execute a fraud. *United States v. Henderson*, 19 F.3d 917, 923 (5th Cir. 1994). Plaintiff's Second Amended Complaint pinpoints the consequences of the alleged fraud by **Arrowhead**, Tilley and Miller such as to avoid the issue of the statute of frauds. (Instruments No. 60 at 24-26; No. 67 at 21; No. 69 at 15). **Rice** now focuses its fraud and fraudulent inducement claims on the foregone licensing opportunities prior to the signing of the Amended Agreement, as well as the subsequent "cloud" on its CNT, hindering monetization of its technology even after the Amended Agreement termination. Since Plaintiff has now pleaded fraud claims apart from the contract, the statute of frauds does not apply. *See* *Lam v. Phuong Nguyen*, 335 S.W.3d 786, 790 (Tex. App. 2011) (finding that statute of frauds does not apply to reliance damages that are not part of the benefit of the alleged bargain between the parties).

***8** Accordingly, the Court finds that Plaintiff's fraud and fraudulent inducement claims against Defendants, as repleaded in the Second

Amended Complaint, are not barred by the statute of frauds. *See* Tex. Bus. & Com. Code § 26.01(b)(2); *Nguyen*, 335 S.W.3d at 790.

D.

i.

Arrowhead argues that Plaintiff's fraudulent inducement claim can only be brought against a party to the Amended Agreement. (Instruments No. 61 at 15; No. 63 at 14). Plaintiff argues that by partaking in the benefits of the fraud, **Arrowhead** should be directly liable for fraudulent inducement, regardless of its relationship to the contract at issue. (Instrument No. 69 at 16-17).

As discussed extensively in the Court's July 23, 2015 Order, asserting a fraudulent inducement claim against a third party to the contract is inconsistent with Texas case law. In "a fraudulent inducement claim, the elements of fraud must be established as they relate to an agreement between the parties." *Haase*, 62 S.W.3d at 798-99. Fraudulent inducement is "a species of fraud that requires the plaintiff and defendant to have entered into an enforceable contract." *Bohnsack v. Varco, L.P.*, 668 F.3d 262, 272-73 (5th Cir. 2012). While a fraudulent inducement claim may be brought against the agent of a contracting party, absent such an agency relationship, such claims against third parties fail. *See River Capital Advisors of N. Carolina, Inc. v. FCS Advisors, Inc.*, No. 4:10-CV-471, 2011 **WL** 831282, at *6 (E.D. Tex. Feb. 7, 2011), *see also Kingston v. Helm*, 82 S.W.3d 755 (Tex. App.—Corpus Christi 2002, pet. denied).

"An agent is one who is authorized by a person or entity to transact business or manage some affair for the person or entity." *Townsend v. Univ. Hosp.-Univ. of Colorado*, 83 S.W.3d 913, 921 (Tex. App.—Texarkana 2002, pet. denied). The existence of an agency relationship is a question of law based on the established facts. *Ross v. Texas One Partnership*, 796 S.W.2d 206, 210 (Tex. App.—Dallas 1990, writ denied, *per curiam*, 806 S.W.2d 222 (1991)). The party alleging agency has the burden to prove such a relationship. *Buchoz v. Klein*, 184 S.W.2d 271, 271 (Tex.1944).

In its Second Amended Complaint, **Rice** has still not alleged that **Arrowhead** was acting in an agency capacity for Unidym. Plaintiff has alleged that Unidym was a subsidiary of **Arrowhead**. (Instrument No. 60 at 5). The fact that **Arrowhead** was Unidym's parent company does not establish agency. *See McFee v. Chevron Int'l Oil Co.*, 753 S.W.2d 469, 471 (Tex. App.—Houston [1st Dist.] 1988, no writ). Plaintiff continues to allege that **Arrowhead** had its own interests in the Amended Agreement separate and apart from those of Unidym. (Instrument No. 60 at 7). According to Plaintiff, **Arrowhead** wanted Plaintiff and Unidym to amend the 2007 License, so that **Arrowhead** could later sell Unidym to Wisepower. (Instrument No. 60 at 16).

Accordingly, the Court finds that Plaintiff has failed to plead a cognizable fraudulent inducement claim directly against **Arrowhead**. **Arrowhead's** motion to dismiss as to

Plaintiff's fraudulent inducement claim against **Arrowhead** is GRANTED. (Instrument No. 63 at 21-22).

ii.

The existence of an agency relationship is a question of law based on the established facts. *Ross v. Texas One Partnership*, 796 S.W.2d 206, 210 (Tex. App.—Dallas 1990, writ denied, *per curiam*, 806 S.W.2d 222 (1991)). The party alleging agency has the burden to prove such a relationship. *Buchoz v. Klein*, 184 S.W.2d 271, 271 (Tex.1944).

***9** Here, Plaintiff has alleged that Tilley and Miller acted as dual agents of **Arrowhead** and Unidym, and made a series of representations that induced **Rice** to enter into the Amended Agreement with Unidym. (Instrument No. 60 at 22). Defendants Tilley and Miller do not contest that they acted as agents of Unidym in the period leading up to the execution of the 2010 Amended Agreement. (Instrument No. 61 at 15). However, Defendants Tilley and Miller argue, as they did regarding Plaintiff's fraud claim, that **Rice** did not suffer an injury through entering into the 2010 Amended Agreement. (Instrument No. 61 at 15). As discussed extensively above, Plaintiff's Second Amended Complaint has repleaded its fraud and fraudulent inducement claims to stand independently of a contract action, emphasizing that **Rice** seeks redress for injuries for failure to terminate its 2007 Agreement with Unidym, and for subsequent tarnishment of its CNT patents following the termination of the Amended Agreement. (Instruments No. 60 at 17-21; No. 67 at 5-6).

Moreover, Plaintiff has repleaded with particularity the circumstances constituting fraudulent inducement by Tilley and Miller. Plaintiff's Second Amended Complaint details specific meetings or conversations between Tilley and Miller, and Nila Bhakuni, Director of the Office of Technology Transfer, in June through September of 2010. (Instrument No. 60 at 13-14). The Second Amended Complaint alleges Tilley and Miller made statements that induced **Rice** to enter into the Amended Agreement, with knowledge that the benefits they were offering would not be realized by **Rice**. (Instrument No. 60 at 11-14).

Defendants Tilley and Miller's Motion to Dismiss also argues that **Rice** has failed to establish its fraud claims specifically against Miller. (Instrument No. 61 at 7-**8**). However, as **Rice's** pleadings point out, the Second Amended Complaint specifies with sufficient particularity the type of assertions made by Tilley and Miller in its meetings with **Rice** to induce its entry into the Amended Agreement, and the specific dates, times, and persons present at those meetings. (Instruments No. 60 at 4, 7, **8**-9, 9-15, 22; No. 67 at 23).

Accordingly, the Court finds that Plaintiff has adequately pleaded a fraudulent inducement claim against Tilley and Miller. *Benchmark Elec., Inc. v. J.M. Huber **Corp***., 343 F.3d 719, 724 (5th Cir. 2003).

E.

The Court's July 23, 2015 Order found that **Rice's** fraud claims as pleaded

against **Arrowhead** were barred by the "independent injury doctrine" and "economic loss rule." (Instrument No. 59 at 19-20). Defendants now argue that Plaintiff's Second Amended Complaint does not remedy the previously identified pleading deficiencies, and that Plaintiff's fraud claims remain barred by the independent injury doctrine. (Instruments No. 61 at 10; No. 63 at 10).

The "independent injury doctrine" and "economic loss rule" essentially refer to the same principle under Texas law. *LVI Facility Servs., Inc. v. Watson Rd. Holding **Corp***., No. A-12-CV-672-LY, 2013 **WL** 5519588, at *11 (W.D. Tex. Oct. 1, 2013). Texas courts have consistently recognized that "mere nonfeasance under a contract creates liability only for breach of contract." *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 13 (Tex. 1996). "Thus, tort damages are generally not recoverable unless the plaintiff suffered an injury that is independent and separate from the economic losses recoverable under a breach of contract claim." *Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280, 301 (Tex. App.—Dallas 2009, no pet.). This rule does not apply to fraudulent inducement claims, and "tort damages are recoverable for a fraudulent inducement claim irrespective of whether the fraudulent representations are later subsumed in a contract or whether the plaintiff only suffers an economic loss related to the subject matter of the contract." *Formosa Plastics **Corp**. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998) The independent injury rule, however, does apply to claims for negligent misrepresentation and to claims for fraud. *Esty*, 298 S.W.3d at 301.

***10** The parties dispute whether the independent injury doctrine, or economic loss rule, precludes recovery for tort claims brought by non-contracting parties. The economic loss rule can apply where there is no privity of contract, but the rule "does not swallow all claims between contractual and commercial strangers." *Sharyland Water Supply **Corp**. v. City of Alton*, 354 S.W.3d 407, 419 (Tex. 2011). "In deciding whether the economic loss rule applies [courts] examine the source of the defendant's duty and the nature of the claimed injury." *Clark v. PFPP Ltd. P'ship*, 455 S.W.3d 283, 288 (Tex. App.—Dallas 2015, no pet.). "To determine whether the claim sounds in tort or contract, the focus is on the substance of the cause of action and not simply the manner in which it was pleaded." *Id.* "[A] party states a tort claim when the duty allegedly breached is independent of the contractual undertaking and the harm suffered is not merely the economic loss of a contractual benefit." *Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*, 445 S.W.3d 716, 718 (Tex. 2014).

Plaintiff's Second Amended Complaint repleads beyond Plaintiff's prior contract-based loss theory. (Instrument No. 60 at 13-16). Plaintiff now alleges that its injuries encompass more than the failure of Unidym to satisfy its obligations under the Amended Agreement. (Instrument No. 60 at 13-16). As discussed with respect to causation, the Court has already established that Plaintiff has adequately repleaded causation with respect to injuries beyond those emanating from the Amended Agreement itself. Plaintiff now alleges more than merely the economic loss of a contractual benefit. Plaintiff repleaded distinct injuries arising from Defendants' alleged

fraud, including market harm that would not have occurred but for the Defendants' alleged misrepresentations. Plaintiff now seeks damages distinct from simply the benefit of the bargain between **Rice** and Unidym, and to that extent, **Rice** has adequately pleaded an injury independent from the contract.

Furthermore, the Court finds that the independent injury doctrine does not apply to fraudulent inducement claims. *See* *Esty*, 298 S.W.3d at 301. Accordingly, the independent injury doctrine has no bearing as against Plaintiff's surviving claim against Tilley and Miller for fraudulent inducement.

Accordingly, the Court finds that Plaintiff's fraud claims against Defendants, as repleaded in the Second Amended Complaint, are not barred by the independent injury doctrine.

F.

Rice's Second Amended Complaint adds a new cause of action asserting that **Arrowhead** is vicariously liable "for the fraudulent inducement and fraud committed by Unidym, Tilley, and Miller." (Instrument No. 60 at 26). "[A]gency [and] vicarious liability...are not, in and of themselves, independent causes of action." *Crooks v. Moses*, 138 S.W.3d 629, 637 (Tex. App.— Dallas 2004, no pet.). Instead, "[f]or these doctrines to be applicable in this context, the alleged tortfeasor must, in fact, be liable for damages. In other words, if the alleged tortfeasor is not liable as a matter of law, then determination of agency and vicarious liability issues are never reached." *Id.*

Defendant **Arrowhead** argues that it is not vicariously liable for the actions of Tilley and Miller because **Rice** has not adequately pleaded fraud or fraudulent inducement by Tilley and Miller. (Instrument No. 63 at 23). Defendant **Arrowhead** further argues that it cannot be held vicariously liable for the actions of Unidym as a matter of law, because Unidym was a subsidiary company. (Instrument No. 63 at 23-24).

Under Texas law it is well established that an "employer may be vicariously liable for an employee's misrepresentations committed within the scope of employment even though the employer had no knowledge of the fraud or misrepresentations and received no benefit from them." *Bank of Texas, NA. v. Glenny*, 405 S.W.3d 310, 317 (Tex. App. 2013). Plaintiff has pleaded that **Arrowhead** is vicariously liable for fraud and fraudulent inducement on the basis of the actions of its agents, Tilley and Miller. (Instrument No. 63 at 23-24). This Court has found that fraudulent inducement claims has been adequately pleaded as against Tilley and Miller. The allegations in the Second Amended Complaint establish that Tilley and Miller were acting as agents of **Arrowhead** at the time they acted to induce **Rice** to enter into the Amended Agreement. (Instrument No. 60 at 10). The Complaint alleges that Tilley was acting as "Vice President, Advanced Materials for **Arrowhead**," and Miller was acting as "Vice President, Business Development for **Arrowhead**." (Instrument No. 60 at 10).

***11** Accordingly, Plaintiff has adequately pleaded that **Arrowhead** is vicariously liable for the fraudulent inducement committed by Tilley and Miller.

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To the extent **Rice** alleges that **Arrowhead** is vicariously liable for torts committed by Unidym, that theory fails as a matter of law. The Fifth Circuit has explained that, "[g]enerally, there is no vicarious liability under Texas law if the parent and the subsidiary **corporations** are entirely separate legal entities," as **Arrowhead** and Unidym are here. *Am. Eagle Ins. Co. v. United Technologies* ***Corp***., 48 F.3d 142, 147 (5th Cir. 1995). *See also* Dkt. 59, at 18 ("the fact that **Arrowhead** is Unidym's parent company does not establish agency"). Instead, the parent can be vicariously liable for its subsidiary only where the **corporate** form can be disregarded, which is allowed only in narrow and exceptional circumstances. *Town Hall Estates-Whitney, Inc. v Winters*, 220 S.W.3d 71, 86 (Tex. App.—Waco 2007, no pet.). **Rice** has simply not pled that it can pierce the **corporate** veil so as to implicate **Arrowhead** for Unidym's torts. (Instrument No. 60).

Accordingly, **Rice's** allegation that **Arrowhead** is vicariously liable for the actions of Unidym fails as a matter of law.

IV.

Based on the foregoing, IT IS HEREBY ORDERED THAT **Arrowhead's** motion to dismiss is GRANTED in part and DENIED in part. (**Instrument No. 61**). IT IS FURTHER ORDERED THAT Tilley and Miller's motion to dismiss is DENIED. (**Instrument No. 63**).

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 8th day of March, **2016**, at Houston, Texas.

All Citations

Not Reported in Fed. Supp., 2016 WL 3223313

Footnotes

1 Matter which a court may take judicial notice includes, for example, matters of public record. *See Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006).

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CASE NO. 46

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United States District Court,
S.D. **Texas**, Houston Division.

Adam **LEE**, et al., Plaintiffs,
v.
SAMSUNG ELECTRONICS AMERICA, INC., Defendant.

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cv
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Signed June **28**, **2023**

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MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED THIRD AMENDED COMPLAINT

Dena Hanovice **Palermo**, United States Magistrate Judge

***1** Before the Court is **Samsung Electronics America**, Inc.'s ("Defendant") motion to dismiss Plaintiffs' Consolidated Third Amended Complaint. Def.'s Mot. Dismiss Consol. Third Am. Compl., ECF No. 91.[1] Plaintiffs Adam **Lee**, Kimberly Einiger, Howard Roscoe, Anastasia Danilova, Keith Covington, Myra Mendez, Paula Murray, and Gregory Elliot (collectively "Plaintiffs") filed the instant case based on their purchases of Defendant's black stainless steel appliances, and after numerous opportunities to amend, asserted claims for violations of various state consumer protection laws and common law unjust enrichment. Pls.' Consol. Third Am. Compl., ECF No. 87 ("complaint").[2] Defendant moves to dismiss all Plaintiffs' claims, arguing that they are time-barred and fail to sufficiently allege violations of the consumer protection statutes and claims for unjust enrichment. ECF No. 91 at 11–12.

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In response, Plaintiffs argue that pursuant to each state's discovery rule, their claims are timely, and that their complaint sufficiently puts Defendant on notice of their claims. Pls.' Resp., ECF No. 101 at 7–29.

Based on a careful review of the complaint, the Court recommends that the motion to dismiss be granted in part and denied in part.[3] Specifically, the Court finds that aside from Myra Mendez's claims which are not tolled, Plaintiffs' claims are timely under each state's discovery rule. The Court further finds that Plaintiffs have adequately pled each of their claims, except for Adam **Lee's** unconscionability claim under the TDPTA.

I. BACKGROUND.

***2** Plaintiffs bring this action on behalf of themselves, and all others similarly situated, who purchased **Samsung** appliances with a "black stainless steel" finish. ECF No. 87 ¶¶ 1–4, 25. The gravamen of Plaintiffs' complaint is that they paid an additional cost for the finish of their appliances based on Defendant's representation that their appliances' finish is a durable "black stainless steel." *Id.* ¶¶ 5, 17, 20, 23, 24. Plaintiffs claim that the appliances do not have a black stainless steel finish, but instead are coated with a thin plastic, which is prone to peel, chip, flake, discolor, and prematurely degrade. *Id.* ¶¶ 5, 21. Plaintiffs also allege that "Defendant heavily promotes its Black Stainless Steel Appliances as a premium kitchen product with a superior aesthetic," specifically referencing advertising these appliances "as a premium, durable, luxury metal finish." *Id.* ¶¶ 2–3, 16–17, 20–21.

In its motion to dismiss, Defendant makes four arguments. First, Defendant contends that Plaintiffs' consumer protection claims fail because they do not sufficiently allege: (1) a misrepresentation or omission; (2) a duty to disclose; (3) materiality; and (4) reliance or causation. ECF No. 91 at 16–25, 25–27, 27–29, 29–31. Second, Defendant argues that Plaintiffs' conclusory allegations of unfair or unconscionable practices fail to state a claim. *Id.* at 31–32. Third, Defendant contends that Plaintiffs cannot raise a claim for unjust enrichment due to adequate remedies available by statute. *Id.* at 32–33. Finally, Defendant asserts that Murray's unjust enrichment claim, and all the claims asserted by **Lee**, Danilova, Covington, and Mendez are time-barred. *Id.* at 33–35.

II. UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6), THE COURT MAY DISMISS A COMPLAINT FOR FAILING TO STATE A CLAIM.

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). "Motions to dismiss under Rule 12(b)(6) are viewed with disfavor and are rarely granted." *ADR Int'l Ltd. v. Inst. for Supply Mgmt. Inc.*, No. 4:22-CV-01914, **2023 WL** 2719446, at *2 (**S.D**. **Tex**. Mar. 30, **2023**) (quoting *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009)).

"Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief." *Pierce v. Hous. Cmty. Coll. Sys.*, No. 4:21-CV-00346, 2022 **WL** 4292337, at *2 (**S.D**. **Tex**. Sept. 15, 2022), *appeal dismissed*, No. 22-20527,

2022 WL 19401688 (5th Cir. Oct. 21, 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009)) (cleaned up). The complaint must include "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Lincoln v. Turner*, 874 F.3d 833, 839 (5th Cir. 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (cleaned up).

"[A] complaint must contain sufficient factual matter ... to state a claim to relief that is plausible on its face." *Gross v. United States*, No. 22-40230, 2023 WL 2401585, at *2 (5th Cir. Mar. 8, 2023) (quoting *Iqbal*, 556 U.S. at 678). "A claim is plausible when the [pled] factual contents allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *ADR*, 2023 WL 2719446, at *2 (quoting *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 219 (5th Cir. 2012)). "[A] complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.' " *Id.* (quoting *Culliver v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007)).

"Ultimately, the question for the court to decide is whether the complaint states a valid claim when viewed in the light most favorable to the plaintiff." *Oliveria v. City of Jersey Vill.*, No. 4:21-CV-03564, 2023 WL 2652252, at *3 (S.D. Tex. Mar. 27, 2023). The court should not "strain to find inferences favorable to the plaintiffs." *Stringer v. Town of Jonesboro*, 986 F.3d 502, 512 (5th Cir. 2021) (quoting *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005)). Importantly, the court should not evaluate the merits of the allegation but must satisfy itself only that the plaintiff has adequately pled a legally cognizable claim. *Bright v. City of Killeen, Tex.*, 532 F. Supp. 3d 389, 396 (W.D. Tex. 2021) (citing *U. S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir. 2004)).

***3** The court must accept well-pled facts as true, but legal conclusions are not entitled to the same assumption of truth. *Oliveria*, 2023 WL 2652252, at *3 (citing *Iqbal*, 556 U.S. at 678–79). A court may consider "the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *ADR*, 2023 WL 2719446, at *6 (quoting *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010)).

III. PLAINTIFFS' TDTPA, UCL, FAL, CLRA, CHAPTER 93A, TEXAS, CALIFORNIA, AND MASSACHUSETTS UNJUST ENRICHMENT CLAIMS ARE TIMELY.

"A statute of limitations may support dismissal under Rule 12(b)(6) where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling ...." *Click v. Gen. Motors LLC*, No. 2:18-CV-455, 2020 WL 3118577, at *13–14 (S.D. Tex. Mar. 27, 2020) (citing *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003)). Under Rule 12(b)(6), Defendant bears the burden to demonstrate that the factual allegations in the complaint show that the action is time-barred and fail to raise a basis for tolling. *Simon v. Roche Diagnostics Corp.*, No. 4:20-CV-3625,

2020 WL 9457065, at *1 (S.D. Tex. Dec. 4, 2020), *aff'd*, 851 F. App'x 533 (5th Cir. 2021). "The Fifth Circuit has indicated that pleading a factual basis for tolling limitations is enough to preclude dismissal on the basis of limitations in the context of a Rule 12(b)(6) motion." *Click*, 2020 WL 3118577, at *13 (citing *Wellborn v. Sears, Roebuck & Co.*, 970 F.2d 1420, 1425 (5th Cir. 1992)).

Defendant argues that Murray's unjust enrichment claim and all claims brought by Lee, Danilova, Covington, and Mendez are time-barred based on their respective purchase dates and that the complaint fails to identify circumstances that give rise to applying the discovery rule. ECF No. 91 at 33. Plaintiffs do not contest that limitations have run, but instead respond that the discovery rule tolled limitations. ECF No. 101 at 29–31.

The Court finds that Mendez's claim for unjust enrichment under New York law and claim under GBL § 349 are time-barred. Plaintiffs other objected-to claims are timely filed.

A. Mendez's claims are time-barred.

GBL § 349 claims are subject to a three-year statute of limitations. *Malek v. AXA Equitable Life Ins. Co.*, No. 20-CV-04885, 2023 WL 2682408, at *8 (E.D.N.Y. Mar. 29, 2023). The statute of limitations "runs from the time when the plaintiff was injured." *Id.* (cleaned up). "[I]n a case involving alleged omissions or misrepresentations, the injury occurs when the omission or misrepresentation was made." *Id.* Mendez purchased her appliances in 2017, and therefore, the three-year limitations period expired in 2020, well before she filed suit on November 7, 2022. *See* Pls. Second Am. Compl., ECF No. 61; ECF No. 87 ¶ 105.

The New York Court of Appeals has rejected the argument that a GBL § 349 claim's statute of limitations may be determined to run from the time the plaintiff learns or reasonably should have learned that she was deceived. *Malek*, 2023 WL 2682408, at *8 (citing *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 789 (2012); *Wender v. Gilberg Agency*, 276 A.D.2d 311, 312 (1st Dep't 2000) (GBL § 349 claims were "time-barred as the three-year limitations period ... the date of discovery rule is not applicable and cannot serve to extend that limitations period")). Accordingly, Mendez's contention that her GBL § 349 claim was tolled pursuant to the discovery rule is unavailing. [4]

***4** Unjust enrichment claims seeking monetary damages are also subject to a three-year limitations period. *Carter v. CIOX Health, LLC*, 260 F. Supp. 3d 277, 289 (W.D.N.Y. 2017). "[A]n unjust enrichment claim accrues 'upon occurrence of the wrongful act giving rise to the duty of restitution.' " *Lim v. Radish Media Inc.*, No. 22-1610, 2023 WL 2440160, at *1 (2d Cir. Mar. 10, 2023) (quoting *Golden Pac. Bancorp v. F.D.I.C.*, 273 F.3d 509, 520 (2d Cir. 2001)). As above, Mendez's unjust enrichment claim expired in July 2020, before she filed suit. ECF No. 87 ¶ 105.

The discovery rule also does not toll unjust enrichment claims under New York law. *See Malek*, 2023 WL 2682408, at *12; *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 364 (2d Cir. 2013) (citing *Coombs v. Jervier*, 906 N.Y.S.2d 267 (2d Dep't 2010)). Therefore, Mendez's GBL § 349 and unjust

enrichment claims are time-barred and should be dismissed. [5]

B. Plaintiffs have sufficiently alleged facts demonstrating that their remaining claims are tolled by the discovery rule.

The discovery rule is a limited exception to the statute of limitations that applies " 'when it is difficult for the injured party to learn of the negligent act or omission' with due diligence." ***Lee*** *v.* ***Samsung*** *Elecs. Am., Inc.*, No. **4**:**21**-**CV**-**1321**, 2022 **WL** 4243957, at *20 (**S.D**. **Tex**. Sept. 13, 2022) (quoting *Maroney v. Chip Buerger Custom Homes, Inc.*, No. 03-17-00355-CV, 2018 **WL** 3041087, at *2 (Tex. App.—Austin 2018, pet. denied) (mem. op., not designated for publication)). Under the discovery rule, the statute of limitations does not begin to run until the date the plaintiff knew or exercising reasonable diligence, should have known, of the facts giving rise to the cause of action. *Id.* (citing *Computer Associates Intern., Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996); and *J.M. Krupar Constr. Co. v. Rosenberg*, 95 S.W.3d 322, 329 (Tex. App.—Houston [1st Dist.] 2002, no pet.)). A plaintiff need not know the full extent of the injury before limitations begin to run. *Id.*

Defendant argues that the discovery rule is inapplicable because: (1) Plaintiffs disavowed any "defect-related allegations" related to the peeling or chipping of the coating; and (2) Plaintiffs identify Defendant's website and certain periodicals which "disclosed that the appliances had a non-steel coating," thereby discrediting Plaintiffs' argument that peeling had to occur for Plaintiffs to discover the misrepresentation. ECF No. 91 at 34–35. Plaintiffs respond that the discovery rule applies because they could not have known at the time of purchase that their appliances were coated in black plastic, rather than black stainless steel; thus, the misrepresentation was not discoverable until the plastic coating flaked, peeled, or chipped. ECF No. 101 at 29–31.

Plaintiffs do not readopt a defect-related view of their claims, but instead allege that the coating is not what Defendant represented the coating to be. ECF No. 87 ¶¶ 51–53, 55, 56. Plaintiffs would not have known of Defendant's misrepresentation and omission until the plastic coating began to peel, something that steel does not typically do. As the Court previously ruled, "[v]iewing the pleadings in the light most favorable to Plaintiffs, the fact that their appliances were coated in black plastic and not made of black stainless steel could not have been easily discovered at the time of purchase." ***Lee***, 2022 **WL** 4243957, at *21. Taking their allegations as true, Plaintiffs discovered that their appliances were made with a plastic coating when the finish started to peel, flake, or bubble. *See id.* The facts alleged do not suggest that Plaintiffs knew or should have known through reasonable diligence about the issue any earlier. *See id.* (determining the same as to Danilova and **Lee**). As a result, the Court finds it plausible that the fact that their appliances were coated in black plastic and not made of black stainless steel could not have been easily discovered at the time of purchase. [6] *See id.*

1. Murray and Covington's unjust enrichment, CLRA, FAL, and UCL claims are not time-barred.

***5** Under California law, unjust enrichment claims are subject to a three-year limitations period, which "is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.". CAL. CODE CIV. P. § 338(d); *see also Corbrus, LLC v. 8th Bridge Cap., Inc.*, No. 2:19-CV-10182, 2020 **WL** 4287586, at *11 (C.D. Cal. July 27, 2020) (unjust enrichment claims sounding in fraud are subject to a three-year statute of limitations period).[7] "CLRA and FAL claims are subject to a three-year statute of limitations; UCL claims to a four-year statute [of limitations]." *Brown v. Madison Reed, Inc.*, 622 F. Supp. 3d 786, 799 (N.D. Cal. 2022). "Because the[ ] three [California] statutes 'proscribe misleading, false, or otherwise deceptive practices or statements in transactions for the sale or lease of goods to consumers,' a cause of action under each 'accrues when a defendant misrepresents or omits material information regarding a product or service and a consumer makes a purchase as a result of such deceptive practices.' " *Id.* The discovery rule applies to claims under the CLRA, FAL, and UCL and unjust enrichment claims under California law. *See id.*; *Beasley v. Conagra Brands, Inc.*, 374 F. Supp. 3d 869 (N.D. Cal. 2019).

Covington purchased his appliance in August 2018, but alleged that "in September 2022, [he] discovered that the 'black stainless steel' finish on his refrigerator was peeling off, flaking, and prematurely degrading." ECF No. 87 ¶¶ 97, 101. Because his discovery did not take place until September 2022, Covington timely filed his CLRA, UCL, FAL, and unjust enrichment claims on November 7, 2022, less than three years after discovery. *See* ECF No. 61.

Murray purchased her black stainless steel appliances on May 1, 2019, but "a few months after purchasing, ... [Murray] discovered that the ... finish on her oven and refrigerator was peeling off, flaking, and prematurely degrading." ECF No. 87 ¶¶ 111, 114. Murray timely filed her CLRA, UCL, FAL and unjust enrichment claims on October 22, 2021 because she filed her claims less than three years after discovery. *See Murray v.* ***Samsung Electronics America****, Inc.*, Cause No. 4:22-cv-00037, Pl.'s Compl., ECF No. 1.

2. Lee's TDTPA and Texas unjust enrichment claims are timely.

Under the TDTPA, actions "must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice." TEX. BUS. & COM. CODE § 17.565. Under Texas law, unjust enrichment claims are subject to a two-year limitations period. ***Lee***, 2022 **WL** 4243957, at *19. The discovery rule applies to unjust enrichment claims. *Janvey v. Suarez*, 978 F. Supp. 2d 685, 708 (N.D. Tex. 2013); *Clark v. Dillard's, Inc.*, 460 S.W.3d 714, 721–23 (Tex. App.—Dallas 2015, no pet.).

***6** **Lee** purchased his appliances throughout 2016 and 2017 but alleged that he did not discover the "black stainless steel" finish was in fact a plastic coating until mid-2020 when the coating began peeling, flaking, and degrading.

ECF No. 87 ¶¶ 61, 65. Plaintiff timely filed his TDTPA and unjust enrichment claims on April 21, 2021 because he filed suit less than two years after his discovery. *See* Pl.'s Compl., ECF No.1.

3. Danilova's Chapter 93A and unjust enrichment claims are timely.

Chapter 93A claims are governed by a four-year statute of limitations and unjust enrichment claims are subject to a three-year statute of limitations. MASS. GEN. LAWS ANN. ch. 260, § 5A; *Monteferrante v. Williams-Sonoma, Inc.*, 241 F. Supp. 3d 264, 270 (D. Mass. 2017). Under the discovery rule, which applies to both unjust enrichment and Chapter 93A claims, the "limitations period is subject to tolling until the plaintiff knew or should have known of the alleged injury." *Lambert v. Fleet Nat. Bank*, 449 Mass. 119, 126 (2007) (citing *Albrecht v. Clifford*, 436 Mass. 706, 714–715 (2002); *Schwartz v. Travelers Indem. Co.*, 50 Mass.App.Ct. 672, 678 (2001)); *Monteferrante*, 241 F. Supp. 3d at 274.

Danilova purchased her appliances in August 2016, but alleged that "in mid-2021, [she] discovered that the 'black stainless steel' finish on her appliances was peeling off, flaking, and prematurely degrading." ECF No. 87 ¶¶ 91, 95. Danilova timely filed her Chapter 93A and unjust enrichment claims on July 19, 2021, within three years of her discovery. *See* Pls.' First Amend. Compl., ECF No. 13.

Defendant's motion to dismiss based on the statute of limitations should be granted as to Mendez's claims, but denied as to **Lee**, Danilova, Murray, and Covington's claims.

IV. PLAINTIFFS ADEQUATELY STATED CLAIMS FOR CONSUMER FRAUD.

Plaintiffs' complaint asserts claims under the consumer protection statutes of seven different states, alleging that: (1) Defendant misrepresented its appliances' finish by representing the finish as "black stainless steel" and not a thin plastic coating; and (2) unlawfully failed to disclose the thin, plastic coating to consumers. Plaintiffs pursue their consumer claims on both an affirmative misrepresentation and an omission or duty to disclose theories of liability. Defendant argues that Plaintiffs insufficiently pled the following four elements: (1) a misrepresentation or omission; (2) a duty to disclose; (3) materiality; and (4) reliance or causation. ECF Nos. 91 at 17–31; 101 at 7–22; 103 at 6–12.

A. The consumer protection claims share common elements.

"[T]o state a claim under the [T]DTPA, a plaintiff must allege that (1) she 'is a consumer under the DTPA;' (2) that defendant 'committed a false, misleading, or deceptive act under section 17.46(b) of the DTPA, breached an express or implied warranty, or engaged in an unconscionable action or course of action;' and (3) that this act '[was] the producing cause of [plaintiff's] actual damages.' " *Hopkins v. Green Dot Corporation*, No. 5:16-CV-365-DAE, 2016 **WL** 4468272, at *4 (W.D. Tex. Aug. 24, 2016) (quoting *Brown v. Bank of Galveston, N.A.*, 963 S.W.2d 511, 513 (Tex. 1998)).

To state a claim under the NDTPA, a plaintiff must allege: (1) "an act of consumer fraud by the defendant;" (2) plaintiff relied on the misrepresentation which caused the harm; and (3) plaintiff suffered damages. *Motogolf.com, LLC v. Top Shelf Golf, LLC*, 528 F. Supp. 3d 1168, 1178 (D. Nev. 2021), *reconsideration denied*, No. 220CV00674APGEJY, 2022 WL 834790 (D. Nev. Mar. 21, 2022) (citing *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev. 2009)).

7** To state a claim under Chapter 93A, "a complaint must allege that 'a defendant's unfair or deceptive conduct cause[d] customers to receive a product or service worth less than the one for which the customers paid.' " ***Lee *v. Conagra Brands, Inc.*, 958 F.3d 70, 80 (1st Cir. 2020) (quoting *Bellermann v. Fitchburg Gas & Elec. Light Co.*, 470 Mass. 43, 18 N.E.3d 1050, 1060 n.10 (2014)).

To state a CLRA claim, "a plaintiff must allege: (1) a misrepresentation; (2) reliance on that misrepresentation; and (3) damages caused by that misrepresentation." *Rojas-Lozano v. Google, Inc.*, 159 F. Supp. 3d 1101, 1112 (N.D. Cal. 2016) (citing *In re Sony PS3 Other OS Litig.*, 551 F. App'x 916, 920 (9th Cir.2014); *Moore v. Apple, Inc.*, 73 F. Supp. 3d 1191, 1200 (N.D. Cal. 2014)).

"To state a claim under the UCL, a plaintiff must establish that the practice is either unlawful (i.e., is forbidden by law), unfair (i.e., harm to victim outweighs any benefit) or fraudulent (i.e., is likely to deceive members of the public)." *Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075, 1084 (N.D. Cal. 2017), *aff'd*, 731 F. App'x 719 (9th Cir. 2018) (cleaned up). Additionally, a plaintiff must "plead that the alleged misrepresentation was directly related to the plaintiff's injurious conduct, and that the plaintiff actually relied on the alleged misrepresentation." *In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1092 (S.D. Cal. 2010) (citing *In re Tobacco II Cases*, 46 Cal.4th 298, 326–27, 93 Cal.Rptr.3d 559, 207 P.3d 20 (2009)).

"The FAL makes it unlawful for any person to make or disseminate ... before the public ... any statement ... which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 668 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 460 (9th Cir. 2018) (citing CAL. BUS. & PROF. CODE § 17500). [8] Further, the FAL requires that a plaintiff demonstrate that he "suffered injury in fact" and "lost money or property as a result of the [false advertising]." *See McCoy v. Nestle USA, Inc*, 173 F. Supp. 3d 954, 963 (N.D. Cal. 2016), *aff'd sub nom. McCoy v. Nestle USA, Inc.*, 730 F. App'x 462 (9th Cir. 2018) (quoting *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1103 (9th Cir. 2013)).

"[U]nder GBL § 349, a plaintiff must sufficiently allege: '(1) the act or practice was consumer-oriented; (2) the act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result.' " *Borenkoff v. Buffalo Wild Wings, Inc.*, No. 16-CV-8532 (KBF), 2018 WL 502680, at *3 (S.D.N.Y. Jan. 19, 2018) (quoting *Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 (2d Cir. 2009)).

"To state a claim under FDUTPA, a plaintiff must allege three elements: '(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.' " *Gov't Employees Ins. Co. v. Sosa*, No. 8:21-CV-2556-VMC-JSS, 2022 WL 18661398, at *4–6 (M.D. Fla. Dec. 29, 2022), *report and recommendation adopted sub nom. Gov't Employees Ins. Co. v. Kalin*, No. 8:21-CV-2556-VMC-JSS, 2023 WL 240000 (M.D. Fla. Jan. 18, 2023) (quoting *Marrache v. Bacardi U.S.A., Inc.*, 17 F.4th 1084, 1097–98 (11th Cir. 2021)).

***8** "To state a claim under SCUTPA, the plaintiff must show '(1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest.' " *PTA-FLA, Inc. v. ZTE Corp.*, 715 F. App'x 237, 242 (4th Cir. 2017) (quoting *Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283, 291 (4th Cir. 1998)).

The Court agrees that there are similar core elements within each of these state claims and follows the parties' lead by addressing each of the four raised issues: misrepresentation or omission, duty to disclose, materiality, and reliance or causation.

B. Plaintiffs sufficiently allege misrepresentation and omission.

Defendant contends that Plaintiff's allegations fail to meet: (1) Rule 9(b)'s standard for fraud; [9] (2) each state's "reasonable consumer" standard; and (3) each state's threshold giving rise to Defendant's duty to disclose. The Court finds that Plaintiffs' complaint contains sufficient allegations to meet both Rule 9(b)'s heightened standard and the "reasonable consumer" standard, and suitably alleges that Defendant had a duty to disclose.

1. Plaintiffs' misrepresentation allegations meet Rule 9(b)'s heightened pleading standard.

Rule 9(b) requires that "a party must state with particularity the circumstances constituting fraud or mistake.' " FED. R. CIV. P. 9(b). "The Fifth Circuit has held that '[a]t a minimum,' the Rule 9(b) standard requires 'that the plaintiff specify the particulars of time, place, and contents of the false representations.' " *Apex Transit, LLC v. Bridgestone Americas, Inc.*, No. 5:21-CV-00053, 2022 WL 10713065, at *3 (S.D. Tex. Mar. 4, 2022) (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997)). "Stated simply, 'Rule 9(b) requires "the who, what, when, where, and how" to be laid out.' " *Canidae, LLC v. Cooper*, No. 6:21-CV-0019-H-BU, 2022 WL 3588936, at *13 (N.D. Tex. Aug. 4, 2022), *report and recommendation adopted*, No. 6:21-CV-019-H-BU, 2022 WL 3588046 (N.D. Tex. Aug. 22, 2022) (quoting *Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 723 (5th Cir. 2003)).

In their complaint, Plaintiffs allege that Defendant's advertising on Lowe's, Best Buy's, Home Depot's, and their own websites represented the "black stainless steel" finish option was a "black stainless steel" and not a thin, plastic coating. ECF No. 87

¶¶ 40–42. Plaintiffs allege that at the time of their purchases, Defendant advertised and marketed their "black stainless steel" finish as a "premium, durable, luxury metal finish, while simultaneously concealing the truth that it is merely a temporary, thin, black plastic coating easily capable of flaking, peeling, chipping, discoloring, and degrading." *Id.* ¶ 40. Plaintiffs also allege that on Defendant's website, it advertised that "[t]he premium stainless steel exterior has a special coating to help eliminate fingerprints and smudges – so your fridge always looks its best." *Id.* ¶ 43. [10]

***9** Clearly these allegations establish the who, what, when, where, and how of Plaintiffs' fraudulent misrepresentation claims: Defendant misrepresented that the appliances' finish was "black stainless steel" and not a thin, plastic coating in advertisements and interviews published on its website and on other sellers' websites at the time of Plaintiffs' purchases. The Court finds that Plaintiffs' misrepresentation claims meet Rule 9(b)'s heightened pleading standing.

Defendant also argues that Plaintiffs' alleged misrepresentation that the "black stainless steel" finish was a premium, durable luxury constitutes "non-actionable puffery." ECF No. 91 at 24. "Puffery is defined as 'statements that are generalized, vague and unspecific' such that a reasonable consumer could not rely." ***Lee***, 2022 **WL** 4243957, at *5 (citing *Walters v. Pella Corp.*, No. 2:14-CV-00544, 2015 **WL** 2381335, at *5 (D.S.C. May 19, 2015)). "Misrepresentations are not merely puffery or opinion if they are of a material fact." *Id.* (quoting *Click*, 2020 **WL** 3118577, at *4). However, "[a] defendant's superior knowledge of the facts supports treating contrary representations and praise as actionable." *Berry v. FCA US, LLC*, No. 2:19-CV-00023, 2022 **WL** 18671067, at *7–8 (**S.D. Tex**. Mar. 25, 2022).

Here, reading the complaint as a whole, Plaintiff's alleged misrepresentation is that Defendant represented that the finish was "black stainless steel," a material known to be durable and not prone to chipping, peeling, and degrading. The complaint's inclusion of Defendant's other statements that the finish was durable, premium, and luxurious further supports Plaintiffs' allegation that they reasonably assumed that the finish was made of "black stainless steel," not plastic. *See Izquierdo v. Panera Bread Co.*, 450 F. Supp. 3d 453, 461 (S.D.N.Y. 2020) (court considered other representations, such as the defendant's commitment to "clean food" and "menu transparency" in determining whether a reasonable consumer would be misled into thinking the defendant's blueberry bagel was made with real blueberries, instead of imitation blueberries). But, insofar as Plaintiffs seek to raise misrepresentation claims based on Defendant's use of the terms "premium," "practical," "luxury", and "durable", such terms would constitute non-actionable puffery. *See* ***Lee***, 2022 **WL** 4243957, at *5.

2. Plaintiffs' omission allegations also meet Rule 9(b)'s heightened pleading standard.

In claims involving omission of facts, "Rule 9(b) typically requires the claimant to plead the type of facts omitted, the place in which the omissions should have appeared, and the

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way in which the omitted facts made the representations misleading.' " *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1174 (5th Cir. 2006) (quoting *Riley*, 355 F.3d at 381).

Plaintiffs' omission allegations satisfy Rule 9(b). Plaintiffs allege that:

> Defendant sells the Black Stainless Steel Appliances with a "black stainless steel" finish that it advertises as premium, durable, luxury metal finish, while concealing and omitting that the Black Stainless Steel Appliances are, in fact, not black stainless steel at all, but simply stainless steel coated with a temporary, thin, black plastic material that (unbeknownst to consumers) is prone to peeling, chipping, flaking, discoloring, or prematurely degrading—conditions which stainless steel are not typically subject to.

ECF No. 87 ¶ 5. Plaintiffs also allege that Defendant "was obligated to disclose the true nature of the 'black stainless steel' finish ... because Defendant had exclusive knowledge of the material facts not known to Plaintiffs, since only Defendant had exclusive access to its design calling for the application of a temporary, thin, plastic coating as opposed to the promised premium, durable, luxury metal finish.' " *Id.* ¶ 52.

***10** As alleged, the fact omitted is that the appliances' finish is a thin plastic coating, the place is in the product description, and the omitted facts that make the representations misleading are that the "black stainless steel" option misleads consumers into believing they are purchasing appliances with a black stainless steel finish, rather than appliances coated with thin plastic.

3. Plaintiffs' misrepresentation and omission allegations meet the "reasonable consumer" standard.

Plaintiffs' alleged misrepresentation and omission must also satisfy the "reasonable consumer" standard.[11] *See Sharifan v. NeoGenis Labs, Inc.*, 622 F. Supp. 3d 478, 490 (S.D. Tex. 2022) (TDPTA); *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc.*, 777 S.E.2d 176, 193 (S.C. 2015) (SCUTPA); *Tomasella v. Nestle USA, Inc.*, 962 F.3d 60, 71 (1st Cir. 2020) (Chapter 93A); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 409–10 (S.D.N.Y. 2015) (GBL § 349); *Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1228 (9th Cir. 2019) (CLRA, UCL, FAL); *Kurimski v. Shell Oil Co.*, 570 F. Supp. 3d 1228, 1243 (S.D. Fla. 2021) (FDUTPA).

The "reasonable consumer" standard is generally similar in these states: Plaintiffs must "show that members of the public are likely to be deceived" by the alleged misrepresentation or omission. *Becerra*, 945 F.3d at 1228 (quoting *Williams v. Gerber Prods. Co.*, 552 F.3d 934,

938 (9th Cir. 2008)); *Tomasella*, 962 F.3d at 71; *Suero*, 2022 WL 17985657, at *9; *Kurimski*, 570 F. Supp. 3d at 1243. This means that there is "a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Becerra*, 945 F.3d at 1228–29 (cleaned up).

Here, Plaintiffs allege that "they, like all ordinary, reasonable consumers, would not have purchased the Black Stainless Steel Appliances or paid a premium price for the 'black stainless steel' finish if they had known that it was simply a temporary, thin, black plastic coating capable of peeling, flaking, and discoloration." ECF No. 87 ¶ 22. Plaintiffs point to Defendant's advertising and marketing of a special, premium, luxury "black stainless steel" finish that, because it is an upgrade, costs more than other finishes. *Id.* ¶¶ 41–45, 55, 57, 59.

Defendant argues that the reasonable consumer allegations are implausible because: (1) a "black stainless steel" finish does not imply any manufacturing technique; (2) the appliance's plastic coating is fully disclosed on Defendant's website; (3) Defendant publicly disclosed its use of a plastic coating; (4) Defendant's description of "black stainless steel" finish is consistent with widespread industry practice; and (5) the plain meaning of "finish" indicates to consumers that the stainless steel appliance is coated with another material at the completion of manufacturing. ECF No. 91 at 19–25. Defendant's arguments are without merit.

***11** Defendant first argues that the phrase "black stainless steel" does not represent anything about the black stainless steel manufacturing process, and so it is unbelievable that reasonable consumers would understand "black stainless steel" to mean that "the stainless steel became black during manufacturing, rather than via application of a coating at the end." ECF No. 91 at 19. This argument is unconvincing. The selection of a "black stainless steel" finish, as opposed to the other available options on Defendant's appliances, conveys that a reasonable consumer could expect a finish made of black stainless steel. Because of this, it would be misleading to a reasonable consumer that their selection of "black stainless steel" finish actually led to production of a stainless steel appliance with a thin, plastic finish.

One case that Defendant relies on is *Bizco v. Ferrara Candy Co.*, No. 22-CV-01967, 2023 WL 2572384, at *2 (N.D. Ill. Mar. 20, 2023). In *Bizco*, the court determined that a candymaker's use of the phrase "Made with Real Milk" was not misleading to consumers because although the product's fat came from vegetable oil and not milk, milk was still an ingredient—therefore, a reasonable consumer would not equate "Made with Real Milk" to "Made with Real Milk Fat." 2023 WL 2572384, at *2. Here, Plaintiffs alleged that Defendant represented a "black stainless steel" finish to their appliances, but actually finished appliances with a plastic coating. Nothing in the complaint alleges any steel was involved in the finish. A reasonable consumer would assume that a "black stainless steel" finish should consist of stainless steel and not plastic. *See* *Izquierdo*, 450 F. Supp. 3d at 461 (reasonable consumer was likely to be misled that the defendant's "blueberry

bagel" label indicated the bagel consisted of real blueberries and not imitation blueberries).

Next, Defendant argues that its own website disclosed that the appliance featured a "premium stainless steel exterior" with "a special coating to help eliminate fingerprints and smudges," which indicates to a reasonable consumer that the option of "black stainless steel" finish would come with a coating. ECF No. 91 at 19–20. But, Plaintiffs do not allege that a reasonable consumer (and they, themselves) did not expect any coating at all. Instead, Plaintiffs allege that they expected the finish of their appliance to be made of "black stainless steel," as selected, and not a thin plastic. ECF No. 87 ¶¶ 5, 16, 17, 20, 21, 40, 41, 52, 55. Nothing in the purported disclosure communicates to consumers that the coating is made of plastic and not steel or that the coating is what contains the coloring. *See id.* ¶ 43. Accordingly, Plaintiffs' allegation that Defendant's website discloses a coating to eliminate fingerprints and smudges does not undermine the plausibility that "black stainless steel" could mislead reasonable consumers.

Along the same vein, Defendant argues that the *Consumer Reports* article referenced in the complaint publicly disclosed that the "black stainless steel" finish was actually "stainless with an acrylic coating." ECF No. 91 at 23. None of the cases that Defendant cites support the proposition that a single article is sufficient to establish public disclosure. *See* ECF No. 91 at 23–24.[12] Here, unlike those cases, nothing demonstrates that the "disclosure"—that the black stainless steel appliances were actually stainless steel finished with an acrylic coating—was contained in a record filed in a criminal or civil case, clarified with an asterisk on the appliances' packaging, disclosed in an explanatory video on Defendant's website, or disclosed in *numerous* publications. *See* ECF Nos. 87, 91, 101, 103. A statement in one publication does not undermine Plaintiffs' allegation that a reasonable consumer would be misled into thinking "black stainless steel" finish did not mean a plastic coating.

***12** Defendant next argues that the term "finish" does not communicate that the appliance's finish is made of stainless steel, but instead means that "a different material is applied to the surface at the completion of manufacturing," in line with the Merriam-Webster[13] definition of "finish." ECF No. 91 at 20 (citing ECF No. 87 ¶¶ 5, 7–13, 16–23). Again, the cases Defendant cited do not support this finding. For example, in *In re Ford Motor Co. DPS6 Powershift Transmission Prod. Liab. Litig.*, the court concluded that the dictionary definition of "automatic" made it implausible that a reasonable consumer would expect that an automatic transmission did not mean a transmission that changed gears on its own, but instead meant that when prompted by the driver's gear change, the transmission's components would "automatically" act. 483 F. Supp. 3d 838, 845 (C.D. Cal. 2020).

Here, Defendant provides a "black stainless steel" option for the finish of its appliances, in addition to "black," "white," and "stainless steel." ECF No. 87 ¶¶ 57, 58. The plain meaning of "finish" as a final treatment or coating of a surface" does not exclude "black stainless steel" as a material that could be used. Furthermore, there is nothing different about this case's context that leads

to a different interpretation of "finish." Accordingly, Plaintiffs' allegations that include the term "finish" do not undermine the plausibility that "black stainless steel" could mislead a significant portion of reasonable consumers.

Finally, Defendant argues that "until recently, every manufacturer shared the same basic 'technique for creating' a 'black stainless steel' appliance: 'the black finish is applied over the stainless steel base as a type of foil.' " ECF No. 91 at 21. Defendant asserts that "[t]he fact that [Defendant's] use of 'black stainless steel' was consistent with the 'prevalent understanding of the term' in the 'marketplace' thus undermines any allegation that reasonable consumers would be confused." *Id.* at 22.

This argument lacks merit. As an initial matter, even the use of the word "foil" denotes a metal coating, as opposed to a plastic coating. *See* https://www.merriam-webster.com/dictionary/foil (last visited May 30, **2023**) (foil means a "very thin sheet metal"). Furthermore, there is no indication that "black stainless steel" is generally understood, in the marketplace or elsewhere, to indicate only a color choice and not the material used to make the finish or coating. And there is nothing before the Court to show that Defendant clearly expressed to Plaintiffs, either within the websites' item description or on a product label, that the "black stainless steel" finish represented a black plastic coating over a stainless steel appliance. Plaintiffs did not jump to an illogical conclusion in assuming that "black stainless steel" as a finish option represented that the finish was made of stainless steel—and nothing indicates that Plaintiffs ignored any other representations on packaging or item descriptions that clearly indicated that the "black stainless steel" finish consisted of a black, plastic coating over a stainless steel appliance. [14]

***13** The Court finds that Defendant's misrepresentation and omission would have misled a reasonable consumer, as the Plaintiffs were misled.

4. Plaintiffs sufficiently allege that Defendant had a duty to disclose.

Defendant contends that Plaintiffs' complaint fails to plead that Defendant had exclusive knowledge of the undisclosed information, which is required to establish a duty to disclose. ECF No. 91 at 25–26 (citing cases)). [15]

Plaintiffs allege that "Defendant was obligated to disclose the true nature of the 'black stainless steel' finish used on its Black Stainless Steel Appliances because Defendant had exclusive knowledge of the material facts not known to Plaintiffs, since only Defendant had exclusive access to its design calling for the application of a temporary, thin, plastic coating as opposed to the promised premium, durable, luxury metal finish." ECF No. 87 at 21, ¶ 52. The complaint also specifically addresses California, New York, and Florida law. Plaintiffs allege under California law, Defendant had a duty to disclose because: (1) Defendant was in a superior position to know the truth about the plastic coating; (2) Plaintiffs could not reasonably have been expected to learn that the finish was made of

plastic and not stainless steel; (3) Defendant knew Plaintiffs could not reasonably have been expected to learn of the plastic coating; and (4) Defendant actively concealed the plastic coating as a "black stainless steel" finish "by knowingly and continually selling, advertising, marketing, and refusing to recall its Black Stainless Steel Appliances from the market." ECF No. 87 ¶ 234. Under New York and Florida law, Plaintiffs allege that Defendant had a duty to disclose because Defendant possessed exclusive knowledge that it was manufacturing, selling, and distributing products that were not as advertised, which it intentionally concealed from Plaintiffs, and Defendant made incomplete representations about the "black stainless steel" finish, while "purposefully withholding material facts from [Plaintiffs] that contradicted these representations." *Id.* ¶ ¶ 52, 235, 299, 335.

Defendant argues that it lacked exclusive knowledge of the plastic finish because this information "was publicized and available for all to see." ECF No. 91 at 26. In support, Defendant relies on cases where allegedly omitted information was either widely known or distributed. For example, in *Hauck*, the court found that the defendant could not be held liable for failing to disclose information that was already public prior to the plaintiff's purchase and where the plaintiff conceded that the information alleged to be in the defendant's exclusive knowledge "was made public and discussed extensively in the press." 2019 WL 1493356, at *13.

***14** Here, Plaintiffs allege that Defendant had "exclusive access" to the design of the "black stainless steel" finish, which it decided and designed to be a thin, plastic coating. ECF No. 87 at 21, ¶ 52. The existence of one article and Defendant's use of "coating" on its website does not undermine these allegations or otherwise establish that the public knew or should have known that the "black stainless steel" finish consisted of a plastic coating prone to peeling, chipping, and degrading. *See Weeks v. Google LLC*, No. 18-CV-00801 NC, 2018 WL 3933398, at *11 (N.D. Cal. Aug. 16, 2018) (finding plaintiffs' allegations sufficient to establish defendant's exclusive knowledge even despite allegations that the omission was found in a few consumer complaints and reviews online). Accordingly, the Court finds that Plaintiffs sufficiently pled a duty to disclose based on Defendant's exclusive knowledge that the "black stainless steel" finish was merely a thin, plastic coating. [16]

C. Plaintiffs sufficiently pled materiality.

Defendant argues that Plaintiffs failed to sufficiently plead materiality because there are no allegations in the complaint that the "precise nature of the manufacturing process used to give the products their 'finish' was somehow important to a reasonable consumer's choice of the product" and nothing in the complaint suggests "that a reasonable consumer would perceive a different manufacturing technique as superior to [Defendant's] fingerprint-resistant acrylic coating." ECF No. 91 at 27–29.

To establish a cause of action under each of the consumer protection statutes, a plaintiff must show that the misrepresentation or omission was likely to affect consumers' conduct or decision regarding a product, or put another way, the misrepresentation or omission was of

a fact reasonably relevant to the transaction and of which a reasonable person would attach importance. *See* *Tomasella*, 962 F.3d at 72 (under Chapter 93A, "the misleading effects must be 'material,' that is likely to affect consumers' conduct or decision with regard to a product"); *Woods v. Maytag Co.*, No. 10-CV-0559 ADS WDW, 2010 **WL** 4314313, at *16 (E.D.N.Y. Nov. 2, 2010) (GBL § 349 requires a plaintiff to plead that defendant engaged in a materially misleading "deceptive act or practice" so as to induce purchase of the product); *Poole*, 135 Nev. at 287 (a material fact is one that is reasonably relevant to the transaction and one to which a reasonable person would attach importance); *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 862 (9th Cir. 2018) (under the UCL, materiality depends on whether a "reasonable consumer would deem it important in determining how to act in the transaction at issue") (quoting *Collins v. eMachines, Inc.*, 202 Cal.App.4th 249, 134 Cal.Rptr.3d 588, 593 (2011)); *Rino-K&K Compression, Inc. v. Hilco Indus., LLC*, No. MO:21-CV-00036-DC, 2022 **WL** 2903120, at *6 (W.D. Tex. May 4, 2022) (Materiality under the TDTPA depends on "whether a reasonable person would attach importance to and would be induced to act on the information in determining his choice of actions in the transaction in question.") (quoting *Hannon, Inc. v. Scott*, No. 02-10-00012-CV, 2011 **WL** 1833106, at *6 (Tex. App.—Fort Worth May 12, 2011, pet. denied)); *Morchem Indus., Inc. v. Rockin Essentials LLC*, No. 1:20-CV-24735-KMM, 2021 **WL** 5014105, at *8 (S.D. Fla. June 16, 2021) (Under FDUTPA, "deception occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.") (quoting *Lombardo v. Johnson & Johnson Consumer Companies, Inc.*, 124 F. Supp. 3d 1283, 1287 (S.D. Fla. 2015));[17] *Bracken v. Simmons First Nat. Bank*, No. CIV.A. 6:13-1377-TMC, 2014 **WL** 2613175, at *6 (D.S.C. June 9, 2014) ("Under South Carolina law, unfair or deceptive trade practices have an adverse impact on the public interest if those acts have the potential for repetition.") (citing *Haley Nursery Co. v. Forrest*, 298 S.C. 520, 381 S.E.2d 906, 908 (S.C.1989)).

***15** In their complaint, Plaintiffs allege that "Defendant withheld material information from Plaintiffs and similarly situated purchasers of Black Stainless Steel Appliances." ECF No. 87 ¶ 19. Plaintiffs also allege that "[they], like all ordinary, reasonable consumers, would not have purchased the Black Stainless Steel Appliances or paid a premium purchase price for the 'black stainless steel' finish if they had known that it was simply a temporary, thin, black plastic coating capable of peeling, flaking, and discoloration." *Id.* ¶ 22.

Defendant's argument that Plaintiffs did not allege that the appliance's manufacturing process or technique was important to a reasonable consumer is beside the point. Here, Plaintiffs selected and paid an extra cost for a "black stainless steel" finish because they expected to receive an appliance with a stainless steel finish. Plaintiffs have demonstrated that Defendant's misrepresentation that the finish was "black stainless steel" and not a thin, plastic coating was likely to affect a consumer's decision as to whether to select and pay more

for the black stainless steel finish. Nothing about that allegation depends on Defendant's manufacturing process or technique—it instead relies entirely on Defendant's utilized materials. *See* *Izquierdo*, 450 F. Supp. 3d at 462 (it is materially misleading to "suggest a product contains a greater proportion of a preferred ingredient that it actually does").

Accordingly, Plaintiffs have sufficiently pled materiality.

D. Plaintiffs adequately pled reliance and/or causation.

Defendant argues that Plaintiffs failed to sufficiently allege reliance on Defendant's alleged misrepresentation or omission. ECF No. 91 at 29–31. Defendant contends that "no Plaintiff actually alleges that he or she *subjectively* was led to believe that the appliances lacked a coating, and that this belief was what induced them to make their purchase and consequently caused their harm." *Id.* at 30 (emphasis in original). Defendant asserts that instead of alleging Plaintiffs read any of Defendant's advertisements or statements regarding the "black stainless steel" option, the complaint alleges that Plaintiffs relied on "generalized 'prior favorable experiences' with [Defendant's] products, a 'belief' in the 'reliability' of [Defendant's] 'brand' or both" in deciding to make their purchases. *Id.* Finally, Defendant argues that "[e]ven minimal research would have naturally led Plaintiffs to the same kind of consumer statements Plaintiffs feature in the [complaint] that discuss the nature and existence of the finish." *Id.* at 31.

Of the consumer protection statutes which require a showing of reliance,[18] a plaintiff must show that she subjectively and personally was deceived by the defendant's misrepresentation or omission and/or that her reliance caused her to suffer the loss of money or property.[19]

***16** Here, Plaintiffs allege that Defendant misled consumers by offering a "black stainless steel" finish option for their appliances, when the finish actually consisted of a thin, plastic coating, and then charged consumers a premium price, upwards of an additional several hundred dollars, for selecting its "black stainless steel" appliances. ECF No. 87 ¶¶ 40, 41, 56–58, 78, 86, 107, 108, 113. Each Plaintiff alleges they selected the "black stainless steel" option in reliance on Defendant's misrepresentation that the "black stainless steel" finish was made of a durable, black stainless steel and not a thin, plastic coating—thereby showing that each Plaintiff viewed and relied upon both Defendant's misrepresentation and omission in making their selection. The misrepresentation was that the finish was "black stainless steel;" the omission was that the finish was in fact a black, plastic coating. *Id.* ¶¶ 41, 42, 61, 63, 75, 84, 86, 91, 99, 107, 111, 118.

Further, each Plaintiff alleges they paid a premium price for the "black stainless steel" finish in anticipation that this choice of appliance finish was a durable metal and not a thin plastic. *Id.* ¶¶ 57, 58, 64, 78, 87, 93, 94, 100, 108, 113, 120. Plaintiffs allege that the finish is worth less than its premium price and was manufactured with a subpar material: plastic instead of metal. *Id.* ¶¶ 56, 88, 109,

119. Each Plaintiff alleges that had they known the "black stainless steel" finish was actually a thin plastic coating, they would not have selected and paid a premium for the finish or they would not have purchased the appliance at all. *Id.* ¶¶ 56, 59. Plaintiffs have sufficiently alleged reliance/causation. *See* *Mewhinney v. London Wineman, Inc.*, 339 S.W.3d 177, 183 (Tex. App.—Dallas 2011, pet. denied) (reliance requirement met where evidence indicated consumer specifically relied on the defendant's misrepresentation when deciding to purchase product); *see also* *Tsao v. Ferring Pharm., Inc.*, No. 4:16-CV-01724, 2017 WL 746451, at *9–10 (S.D. Tex. Jan. 4, 2017), *report and recommendation adopted*, No. 4:16-CV-1724, 2017 WL 749009 (S.D. Tex. Feb. 24, 2017) (TDTPA requires more than conclusory allegation that consumer purchased product in reliance on misrepresentation—plaintiff failed to support assertion that she relied upon defendant's "promise" with specific facts).

Defendant is incorrect in its assertion that Plaintiffs alleged they relied on independent research and prior favorable experiences with Defendant in selecting and purchasing the additional "black stainless steel" finish. Although prior favorable experiences initially led Plaintiffs to look at Defendant's appliances, Plaintiffs clarify that ultimately their selection and purchase of the "black stainless steel" option was due to their reliance on Defendant's representation that the finish would be what it was represented to be: black stainless steel. ECF No. 87 ¶¶ 60, 61, 74, 75, 83, 84, 90, 91, 96, 98, 119. Nothing in the complaint alleges that any of Plaintiffs' prior research informed their decision to select the "black stainless steel" finish. Further, the Court is unpersuaded by Defendant's argument that Plaintiffs needed only minimal research to discover their foolishness in relying on Defendant's representation that the finish was black stainless steel and not a plastic coating. At this stage of proceedings, the Court must accept as true Plaintiffs' allegations that they relied upon Defendant's misrepresentation and omission in selecting and purchasing the "black stainless steel" finish. *See* *Click*, 2020 WL 3118577, at *5 (under a 12(b)(6) review, the plaintiff's allegations are taken as true).

The Court finds that Plaintiffs have sufficiently alleged reliance and causation.[20] The Defendant's motion to dismiss should be denied as to their contentions that Plaintiffs insufficiently pled their consumer claims.

V. PLAINTIFFS SUFFICIENTLY ALLEGED UNFAIR PRACTICES UNDER THE FDUTPA, SCUTPA, CHAPTER 93A, AND UCL, BUT INSUFFICIENTLY ALLEGED UNCONSCIONABLE PRACTICES UNDER THE TDTPA.

***17** Defendant argues that Plaintiffs have failed to plead claims for unfair or unconscionable practices under the five cited consumer protection statutes[21] which permit claimants to raise claims for "unfair" or "unconscionable" practices separate from allegations of deceptive and fraudulent practices. ECF No. 91 at 31. Defendant continues that despite mentioning the words "unfair" and "unconscionable," Plaintiffs offer "no facts or explanation of *what* about [Defendant's] practices is alleged to be improper." *Id.* (emphasis in original). Plaintiffs

respond that their allegations are sufficient and cite to large portions of their complaint, but do not identify any allegations relied upon in making this assertion. ECF No. 101 at 22, 23, 26–**28**.

A. Lee failed to sufficiently allege that Defendant engaged in an unconscionable act or course of action under the TDTPA.

"The DTPA defines an unconscionable action as one which 'takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree' and to the consumer's detriment." *Moskovits v. Mercedes-Benz Fin. Services USA, LLC*, No. 4:21-CV-2260, 2022 **WL** 3969547, at *5 (**S.D**. **Tex**. July 18, 2022) (quoting TEX. BUS. & COM. CODE § 17.45(5), *report and recommendation adopted*, No. 4:21-CV-02260, 2022 **WL** 3998507 (**S.D**. **Tex**. Aug. 31, 2022), *appeal dismissed sub nom. Moskovits v. Mercedes-Benz Fin. Services USA, L.L.C.*, No. 22-20522, **2023** **WL** 2770957 (5th Cir. Mar. 22, **2023**). "To prove an unconscionable action or course of action, a plaintiff must show that (1) the defendant took advantage of his lack of knowledge, and (2) 'the resulting unfairness was glaringly noticeable, flagrant, complete, and unmitigated.' " *Id.* (quoting *Bradford v. Vento*, 48 S.W.3d 749, 760 (Tex. 2001)).

In his response, **Lee** fails to defend the alleged deficiencies of his claim.[22] Even so, the Court finds that his claim is insufficiently pled. **Lee** does not identify which of Defendant's act(s) of are unconscionable. Additionally, **Lee** has not pled that Defendant took advantage of his lack of knowledge, ability, experience, or capacity to a grossly unfair degree, much less how Defendant did so. *See* *Moskovits*, 2022 **WL** 3969547, at *5; *see also* *Franklin v. Apple Inc.*, 569 F. Supp. 3d 465, 480–81 (E.D. Tex. 2021) (dismissing claim where plaintiff made no supporting factual allegations regarding the alleged unconscionable acts); *Diamond Beach Owners Ass'n v. Stuart Dean Co., Inc.*, No. 3:18-CV-00173, 2018 **WL** 7291722, at *7 (**S.D**. **Tex**. Dec. 21, 2018) ("Simply repeating the term 'unconscionable' multiple times in the First Amended Complaint is insufficient, without more, to invoke the DTPA's consumer protections."), *report and recommendation adopted*, No. 3:18-CV-00173, 2019 **WL** 245462 (**S.D**. **Tex**. Jan. 17, 2019).

Because it is insufficiently pled, the Court should grant Defendant's motion to dismiss **Lee's** unconscionability claim.

B. Plaintiffs have alleged claims for unfair practice under the FDUTPA, SCUTPA, and Chapter 93A.

Defendant argues that Plaintiffs have failed to allege any "unfair" claims "distinct from their deception claims." ECF No. 91 at 31. Although it appears that Plaintiffs primarily focus their various consumer claims on Defendant's deceptive conduct, courts have found that allegations of deceptive practices also satisfy pleading requirements for unfair practices.[23] *See* *Badawi v. Brunswick Corp.*, No. 8:21-CV-1825-TPB-AAS, 2022 **WL** 613807, at *3 (M.D. Fla. Mar. 2, 2022) ("An unfair and deceptive practice under FDUTPA includes conduct such as an omission 'that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.'

") (quoting *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003)); *Kirby v. Red Bull N. Am., Inc.*, No. 3:19-CV-2701-CMC, 2020 WL 509139, at *3 (D.S.C. Jan. 31, 2020) (SCUTPA); *Gov't Employees Ins. Co. v. Barron Chiropractic & Rehab., P.C.*, No. 1:16-CV-10642-ADB, 2017 WL 3526255, at *7 (D. Mass. Aug. 16, 2017) (Chapter 93A). Therefore, even though the complaint repeatedly discusses the misleading and deceptive misrepresentation and omission, the Court finds that this conduct also constitutes an unfair practice under FDUTPA, Chapter 93A, and SCUTPA.

C. Covington and Murray sufficiently allege a claim under the unfair prong of the UCL.

18** California law defines unfair competition as "unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising." CAL. BUS. & PROF. CODE § 17200. "Because section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair or fraudulent. A practice is prohibited as unfair or deceptive even if not unlawful or vice versa." *Brooks v. Bank of Am., N.A.*, No. 20-CV-01348-BAS-LL, 2021 WL 1541643, at *3 (S.D. Cal. Apr. 20, 2021) (quoting *Lippitt v. Raymond James Fin. Servs. Inc.*, 340 F.3d 1033, 1043 (9th Cir. 2003)); *see also* ***Lee *v. Pep Boys-Manny Moe & Jack of Cal.*, 186 F. Supp. 3d 1014, 1034 (N.D. Cal. 2016) ("Under the unfairness prong of the UCL, a practice may be deemed unfair even if not specifically proscribed by some other law.").

"To state a claim under the unfair prong of the UCL, a plaintiff needs to plead conduct that either: (1) 'offends an established public policy,' or (2) 'is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers' and the utility of that conduct is outweighed by the harm to the consumer." *Teton Glob. Investments LLC v. LC Inv. 2010*, No. 20-CV-01756-AJB-MSB, 2021 WL 5861565, at *2 (S.D. Cal. Aug. 11, 2021) (quoting *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012)). "The determination of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim....' " *Id.* (citing *Wilner v. Sunset Life Ins. Co.*, 78 Cal. App. 4th 952, 965 (2000)).

Here, Plaintiffs allege that Defendant's practice of "lulling consumers into believing that the Black Stainless Steel Appliances featured a premium, durable, luxury 'black stainless steel' finish, when in fact it was a temporary, thin, plastic coating that was prone to peel, chip, flake, bubble, and prematurely degrade through the ordinary use of the Black Stainless Steel Appliances" inflicted harm on consumers and provided no benefit or utility. ECF No. 87 ¶¶ 252, 253. Plaintiffs specifically allege that Defendant's actions are "unfair" because Defendant falsely represented the "black stainless steel" finish as a "premium, durable, luxury metal finish" to cause consumers to purchase the premium finish, leaving consumers with a plastic coating that is prone

to "peel, chip, flake, bubble, and prematurely degrade." *Id.* ¶ 259.

Such allegations are sufficient to demonstrate that Defendant's actions are unfair under the balancing test. *See* *Brooks*, 2021 WL 1541643, at *5; *see also* *Hawkins v. Kroger Co.*, No. 15-CV-2320 JM (BLM), 2019 WL 1506845, at *5 (S.D. Cal. Apr. 4, 2019) (finding that "nothing more" than the allegation that defendant's action causes harm and provides little utility was required to state a claim under the UCL's unfair prong). [24]

***19** To summarize, Defendant's motion to dismiss should be granted as to Plaintiffs' unconscionability claim under the TDTPA but should be denied as to Plaintiffs' claims for unfair business practices under the FDUTPA, SCUTPA, Chapter 93A, and UCL.

VI. PLAINTIFFS SHOULD BE PERMITTED TO ALTERNATIVELY PLEAD UNJUST ENRICHMENT CLAIMS.

Even though Plaintiffs have raised unjust enrichment claims under various state laws, "[t]he law is essentially the same." ***Lee***, 2022 WL 4243957, at *17. "As one court summarized it: 'unjust enrichment requires the same essential showing in every jurisdiction—the defendant unjustly obtained a benefit at the plaintiff's expense such that restitution is warranted.' " *Id.* (quoting *In re Checking Acct. Overdraft Litig.*, 307 F.R.D. 630, 653 (S.D. Fla. 2015)).

Defendant asserts that "Plaintiffs' unjust enrichment claims fail because they are premised on the same underlying theory of fraud as their statutory claims: that [Defendant] 'knowingly accepted ... unjust benefits' by selling 'the Black Stainless Steel Appliances with a thin, black plastic coating—instead of a durable metal finish." ECF No. 91 at 32. Defendant specifies that because Plaintiffs' fraud claims fail, so too must Plaintiffs' unjust enrichment claims. *Id.* at 32. For the same reasons detailed above, the Court rejects Defendant's incorporated argument. [25]

Defendant next argues that Plaintiffs' claims for unjust enrichment should be dismissed because other adequate legal remedies via consumer fraud claims are available to Plaintiffs. *Id.* at 32–33. Specifically, Defendant argues that the "mere availability of these remedies renders the equitable theory of unjust enrichment unavailable." *Id.* at 33.

As this Court previously explained regarding Plaintiffs' unjust enrichment claims, "Plaintiffs may plead alternative theories." ***Lee***, 2022 WL 4243957, at *18; *see also* *Berry*, 2022 WL 18671067, at *10–11 (permitting fraud, breach of warranty, and unjust enrichment claims to proceed); *Click*, 2020 WL 3118577, at *10 (rejected defendant's argument to dismiss plaintiffs' unjust enrichment claim of alternate, available remedies, and instead, permitted plaintiffs to plead unjust enrichment claim in the alternative). "Rule 8(a)(3) provides that a pleading 'may include relief in the alternative or different types of relief.' " ***Lee***, 2022 WL 4243957, at *18 (quoting FED. R. CIV. P. 8(a)(3)). As a result, pleading alternative theories is an insufficient basis for granting a motion to dismiss. *See id.* (citing *Gordon v. Sig Sauer, Inc.*, No. CV H-19-585, 2020 WL 6118466,

at *16 (S.D. Tex. Oct. 16, 2020)). At this juncture, the Court recommends permitting Plaintiffs to plead their unjust enrichment claims in the alternative. Thus, Defendant's motion to dismiss Plaintiffs unjust enrichment claims, aside from Mendez's time-barred unjust enrichment claim,[26] should be denied.

VII. CONCLUSION

***20** The Court recommends that Defendant's motion to dismiss, ECF No. 91, should be **GRANTED IN PART AND DENIED IN PART, AS FOLLOWS**:

- Defendant's Motion to Dismiss should be **GRANTED** as to Mendez's GBL § 349 claim and unjust enrichment claim. Such claims are time-barred and should be **DISMISSED WITH PREJUDICE**.
- Defendant's Motion to Dismiss should be **GRANTED** as to **Lee's** unconscionability claim under the TDTPA. This claim is insufficiently pled and should be **DISMISSED WITH PREJUDICE**.
- Defendant's Motion to Dismiss should be **DENIED** as to all remaining claims.

The Parties have fourteen days from service of this Report and Recommendation to file written objections. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). Failure to file timely objections will preclude review of factual findings or legal conclusions, except for plain error. *Quinn v. Guerrero*, 863 F.3d 353, 358 (5th Cir. 2017).

All Citations

Not Reported in Fed. Supp., 2023 WL 4240277

Footnotes

1 The District Judge to whom this case is assigned referred this case for all pretrial proceedings in accordance with 28 USC § 636(b). Order, ECF No. 31.

2 The complaint alleges that Defendant violated the following consumer protection laws: (1) the Texas Deceptive Trade Practices Act ("TDTPA") under TEX. BUS. & COM. CODE ANN. §§ 17.01–.63 (West 2023); (2) the Nevada Deceptive Trade Practices Act ("NDTPA") under NEV. REV. STAT. ANN. §§ 598.0903–.0999 (West 2021); (3) the Massachusetts Regulation of Business Practices for Consumer Protection ("Chapter 93A") under MASS. GEN. LAWS ANN. ch. 93A (West 2023); (4) the California Consumer Legal Remedies Act ("CLRA") under CAL. CIV. CODE §§ 1750–84 (West 2023); (5) the California Unfair Competition Law ("UCL") under CAL. BUS. & PROF. CODE §§ 17200–10 (West 2023); (6) the California False Advertising Law ("FAL") under CAL. BUS. & PROF. CODE §§ 17500–09 (West 2023); (7) the New York Deceptive Practices Act ("GBL § 349") under N.Y. GEN.

BUS. LAW §§ 349–350-F-1 (McKinney 2014); (8) the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") under FLA. STAT. ANN. § 501.201–.213 (West **2023**); and (9) the South Carolina Unfair Trade Practices Act ("SCUTPA") under S.C. CODE ANN. §§ 39-5-10–39-5-180 (**2023**). ECF No. 87.

3 A motion to dismiss is a dispositive motion appropriate for a report and recommendation. *See* **28** U.S.C. § 636(b)(1)(A); *Davidson v. Georgia-Pac., L.L.C.*, 819 F.3d 758, 763 (5th Cir. 2016).

4 Mendez has not pled any other basis for equitable tolling. *See Malek*, **2023** **WL** 2682408, at *9.

5 For the sake of completeness, the Court also addresses the merits of Mendez's consumer protection and unjust enrichment claims.

6 Defendant also briefly argues that Plaintiffs cannot rely on fraudulent concealment tolling. ECF No. 91 at 35. Plaintiffs do not address fraudulent concealment tolling in their response and instead focus their argument on the applicability of the discovery rule. *See* ECF No. 101. Because the discovery rule applies, the Court does not undertake analysis of fraudulent concealment.

7 Defendant mistakenly asserts that Covington and Murray's unjust enrichment claims are subject to a two-year statute of limitations. ECF No. 91 at 34. The case Defendant cited, *Deirmenjian v. Deutsche Bank, A.G.*, 526 F. Supp. 2d 1068, 1090 (C.D. Cal. 2007), relied upon § 339, which governs claims for quantum meruit, in deciding unjust enrichment claims are subject to a two-year statute of limitations. Section 338, which governs unjust enrichment claims, provides a three-year statute of limitations. *See BASF Corp. v. Cesare's Collision Repair & Towing, Inc.*, 364 F. Supp. 3d 1115, 1122 (E.D. Cal. 2019) ("California law provides a three-year limitations period for unjust enrichment claims and a two-year limitations period for quantum meruit claims.") (citing CAL. CODE CIV. P. §§ 338(d), 339; *Fed. Deposit Ins. Corp. v. Dintino*, 167 Cal. App. 4th 333, 347–48, 84 Cal.Rptr.3d 38 (2008); *Iverson, Yoakum, Papiano & Hatch v. Berwald*, 76 Cal. App. 4th 990, 996, 90 Cal.Rptr.2d 665 (1999)). Section 338 applies here.

8 The FAL "does not encompass omissions." *Id.* at 668.

9 Defendant contends that Rule 9(b)'s heightened pleading standard is applicable to Plaintiffs' consumer fraud claims. ECF No. 91 at 17. Plaintiffs do not address which pleading standard, Rule 8 or Rule 9(b), govern their claims. *See* ECF No. 101. "Federal courts have previously applied this heightened pleading requirement to claims like those at issue here." *See* ***Lee***, 2022 **WL** 4243957 at *9 (collecting

cases). Whether Rule 8 or 9(b)'s standard applies, Plaintiffs' consumer fraud claims meet the heightened standard.

10 The Court rejects Defendant's argument that the only permissible misrepresentation the Court allowed to proceed was "the fact that the products had a coating at all." ECF. No. 103 at 5 (quoting R&R re: Def.'s Mtn to Dismiss Pls.' Amd. Compl., ECF No. 47 at 32). There is nothing in the Report and Recommendation or transcript of the Court's scheduling conference on February 3, **2023**, that expressly disallowed Plaintiffs from proceeding with their current alleged misrepresentation. *See* ECF No. 47 at 51–52; Transcript re: Sched. Conf., ECF No. 83 at 7–10.

11 Defendant asserts that all of Plaintiffs' state consumer fraud claims "require an objectively deceptive misrepresentation or omission, i.e., one that would deceive a 'reasonable' consumer." ECF No. 91 at 17. Plaintiffs do not contest this assertion. *See* ECF No. 101. But, from the Court's review of Defendant's cited cases, whether the NDTPA applies the "reasonable consumer" standard to this element is unclear. *See* *Poole v. Nev. Auto Dealership Invs., LLC*, 449 P.3d 479, 485 (Nev. App. 2019) (under NDTPA, the plaintiff must establish a "material fact" as a matter "a reasonable man would attach importance to," as opposed to the reasonable consumer standard which considers whether a reasonable consumer would be deceived). Regardless, the Court finds Plaintiffs' allegations satisfy the reasonable consumer standard.

12 *See* *Piescik v. CVS Pharmacy, Inc.*, 576 F. Supp. 3d 1125, 1133 (S.D. Fla. 2021) (a reasonable consumer would not be misled by "kills 99.99% of germs" label, where same label disclosed that did not mean "kills 99.99% of *all* germs"); *Barrett v. Milwaukee Elec. Tool, Inc.*, No. 14-CV-1804, 2016 **WL** 4595947, at *5 (S.D. Cal. Jan. 26, 2016) (a video on the defendant's website showed it was unreasonable to interpret "100% Handcrafted" to mean without the use of equipment or automated processes); *Abecassis v. Wyatt*, 902 F. Supp. 2d 881, 900 (**S.D**. **Tex**. 2012) (widespread media reports and public documents did not contain explicit information of the defendant's wrongdoing, and therefore, a genuine issue of material fact as to whether ATA claims were tolled by fraudulent concealment existed); *Cordova v. Johnson*, 993 F. Supp. 473, 515 (W.D. Tex. 1998) (records relating to a mental condition were public because were filed in a criminal case); *Wolph v. Acer Am. Corp.*, 2009 **WL** 2969467, at *4 (N.D. Cal. Sept. 14, 2009) (determining whether the defendant had a duty to disclose, plaintiffs own allegations failed to demonstrate that the defendant had exclusive knowledge).

13 Merriam-Webster defines "finish" as "the final treatment or coating of a surface." https://www.merriam-webster.com/dictionary/finish?src=search-dict-box (last visited June 16, **2023**).

14 The courts in Defendant's cited cases all found the reasonable consumer standard unmet where the plaintiff disregarded common sense and readily available information. For example, in *Reinitz v. Kellogg Sales Co.*, No. 21-CV-1239, 2022 WL 1813891, at *3 (C.D. Ill. June 2, 2022), the court found that the public understood that a product's specific flavor did not indicate the use of specific ingredients as plaintiff suggested, but rather the intended taste—especially where the label did not include ingredient. Here, Plaintiffs here do not ignore common sense or general knowledge in asserting Defendant's misrepresentation and omission would mislead a reasonable consumer.

15 Defendant only briefly mentions duty to disclose standards for South Carolina, Nevada, and Massachusetts, but does not discuss them in relation to the sufficiency of the allegations in this case. ECF No. 91 at 25-26 (citing *Tomasella*, 962 F.3d at 72-75 (1st Cir. 2020) (Massachusetts); and *Harrell v. BMW of N. Am., LLC*, 517 F. Supp. 3d 527, 539 (D.S.C. 2021) (South Carolina)). Thus, Defendant's argument that it did not have a duty to disclose the plastic coating under South Carolina, Nevada, and Massachusetts law is waived for inadequate briefing. *See ADR*, 2023 WL 2719446, at *5 n.4 (an argument is waived for inadequate briefing when a party fails to identify the relevant legal standards or merely mentions or alludes to a legal theory) (citing *JTB Tools & Oilfield Servs., L.L.C. v. United States*, 831 F.3d 597, 601 (5th Cir. 2016)).

16 Finding that Plaintiffs have sufficiently alleged exclusive knowledge, the Court need not decide whether a duty to disclose arises by means of "superior knowledge."

17 Florida law treats this as an analysis of an FDUTPA's reliance and causation elements. *See Moss v. Walgreen Co.*, 765 F. Supp. 2d 1363, 1367 (S.D. Fla. 2011); *Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 691 (S.D. Fla. 2014).

18 To establish reliance or causation under the FDUTPA, "a plaintiff must simply prove that an objective reasonable person would have been deceived," which the Court has already found. *Hasemann v. Gerber Products Co.*, 331 F.R.D. 239, 257 (E.D.N.Y. 2019) (quoting *Fitzpatrick*, 635 F.3d at 1283); *see also Randolph*, 303 F.R.D. at 691.

19 *See In re ZF-TRW Airbag Control Units Products Liab. Litig.*, 601 F. Supp. 3d 625, 765–66 (C.D. Cal. 2022), *opinion clarified sub nom. In re: ZF-TRW Airbag Control Units Products Liab. Litig.*, No. LAML1902905JAKFFMX, 2022 WL 19425927 (C.D. Cal. Mar. 2, 2022) (Under the UCL, CLRA, and FAL, plaintiff may establish causation "by showing that in [misrepresentation's] absence the plaintiff in all reasonable probability would not have engaged in the injury-producing conduct."); *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev. 2009) (plaintiff's allegation that

she relied on "Made in the USA" label and suffered damages as a result satisfied reliance and causation elements of NDTPA claim); *Pennington v. CarMax Auto Superstores Inc.*, No. CIV.A. H-09-1937, 2012 WL 948389, at *3 (S.D. Tex. Mar. 19, 2012) ("[T]DTPA requires the claimant to prove it detrimentally relied on a false, misleading or deceptive act or practice."); *O'Hara v. Diageo-Guinness, USA, Inc.*, 306 F. Supp. 3d 441, 453 (D. Mass. 2018), *on reconsideration*, 370 F. Supp. 3d 204 (D. Mass. 2019) (Chapter 93A requires a plaintiff to allege "he suffer[ed] an 'objective, identifiable harm that goes beyond the deception [or unfairness] itself.' Allegations that the deceptive conduct inflated the product's price, causing the plaintiff to overpay, suffice.") (quoting *Shaulis v. Nordstrom*, Inc., 865 F.3d 1, 10 (1st Cir. 2017)); *Devey v. Big Lots, Inc.*, No. 21-CV-6688L, 2022 WL 6827447, at *4 (W.D.N.Y. Oct. 12, 2022) ("To establish the requisite causal connection between an alleged written misrepresentation and the resulting injury, plaintiff must plausibly allege that she actually viewed the misleading statement prior to making her decision to purchase, and must set forth 'where, when and how [she] came to view' it."); *Turkewitz v. Philips Oral Healthcare, Inc.*, No. 2:17-CV-2603-DCN, 2020 WL 833021, at *3 (D.S.C. Feb. 20, 2020) (SCUTPA requires proof that defendant "caused him to suffer the loss of money and/or property").

20 In addressing reliance/causation in its reply, Defendant cites *Elson v. Black*, 56 F.4th 1002 (5th Cir. 2023), for the proposition that Plaintiffs fail to sufficiently plead their consumer fraud claims. ECF No. 103 at 11–12. Defendant argues that in *Elson*, the Court faulted the plaintiffs for "failing to specify 'when they viewed the allegedly fraudulent representations' and how much time elapsed between viewing the representations and purchasing the product; for merely averring generally that they saw online advertisements without 'specify[ing] *where* on the website they saw them" or which exact YouTube video or Facebook post they saw; and for merely paraphrasing the type of representation they supposedly relied on without identifying the exact statement.' " ECF No. 103 at 12 (citing *Elson*, 56 F.4th at 1009–10 & n.7). The Court refers Defendant to the above analysis under Rule 9(b), but notes that Plaintiffs alleged they viewed the misrepresentation when they selected their finish option upon purchase on Defendant's and Defendant's vendor's websites under the finish options—screenshots of the exact location of the misrepresentation are included in the complaint. *See* ECF No. 87 ¶¶ 41, 42, 45, 57, 58. Plaintiffs' allegations satisfy *Elson.*

21 The TDTPA, UCL, FDUTPA, SCUTPA, and Chapter 93A each allow claimants to raise claims complaining of unfair or unconscionable practices. TEX. BUS. & COM. CODE § 17.50(a); CAL. BUS. & PROF. CODE § 17200 (unfair practices); FLA. STAT. § 501.204(1) (unfair and unconscionable practices); MASS. GEN. LAWS ch. 93A(a), § 2 (unfair practices); S.C. CODE § 39-5-20(a) (unfair practices).

22 **Lee** includes a citation to several pages of his complaint but does not identify which allegations he relies upon in concluding that he met his pleading requirement. ECF No. 101 at 22.

23 "To establish an unfair practice [under FDUTPA], the plaintiff must show that it is one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Marrache v. Bacardi U.S.A., Inc.*, 17 F.4th 1084, 1097 (11th Cir. 2021) (cleaned up). Under SCUTPA, "[a]n unfair act is one that 'is offensive to public policy or when it is immoral, unethical, or oppressive[.]' " ***Lee***, 2022 **WL** 4243957, at *9 (quoting *World Cam*, 2021 **WL** 4132100, at *6). "[A]n act is unfair within the meaning of Chapter 93A if it is 'oppressive or otherwise unconscionable in any respect.' " *Odemena v. Devlin*, No. 14-CV-12591-ADB, 2015 **WL** 13376541, at *4 (D. Mass. June 24, 2015) (quoting *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 778 (1986)).

24 Also, "[t]he actual weighing of the parties' respective interests is not appropriately resolved at the pleading stage." *Brooks*, 2021 **WL** 1541643, at *5 (citing *In re Solara Med. Supplies, LLC Customer Data Sec. Breach Litig.*, No. 3:19-CV-2284-H-KSC, 2020 **WL** 2214152, at *12 (S.D. Cal. May 7, 2020) (defendant's arguments against plaintiff's unfair practices UCL claim "are better suited for a motion for summary judgment when the record is more fully developed"); *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 990 (N.D. Cal. 2016) (holding, on a motion to dismiss, that "[w]hether Defendants' public policy violation is outweighed by the utility of their conduct under the balancing test is a question to be resolved at a later stage in this litigation"); *Puentes v. Wells Fargo Home Mort.*, 160 Cal. App. 4th 638, 645 n.5 (2008) (noting that "[t]he issue of whether a practice is deceptive or unfair is generally a question for the trier of fact," though it "may be disposed of by summary judgment on undisputed facts")).

25 The Court also notes that Defendant's assertion that it could not knowingly accept unjust benefits because "it openly disclosed the acrylic coating" is unconvincing considering the whole of Plaintiffs' allegations, which the Court must accept as true at this time. ECF No. 91 at 32.

26 Concerning Mendez's unjust enrichment claim, Defendant argues that she has failed to allege that Defendant received a direct and specific benefit from her purchase of the appliances at issue, as required under New York law. ECF No. 91 at 33 (citing *Legurnic v. Ciccone*, 63 F. Supp. 3d 241, 248 (E.D.N.Y. 2014)). "The Second Circuit has explained that, under the law of New York, 'the requirement of a connection between plaintiff and defendant is a modest one: [an unjust enrichment] claim will not be supported if the connection between the parties is too attenuated.' " *Miami Products & Chem. Co. v. Olin Corp.*, No. 1:19-CV-00385 EAW, 2022

WL 3701159, at *4 (W.D.N.Y. Aug. 26, 2022) (quoting *Myun-Uk Choi v. Tower Rsch. Cap. LLC*, 890 F.3d 60, 69 (2d Cir. 2018)). "There need not be a direct relationship between the parties." *Id.* "[T]his means that under New York law, while 'a product's indirect purchaser cannot assert an unjust enrichment claim against an entity that manufactured one of that product's *ingredients* ... [,] the indirect purchaser can assert such an unjust enrichment claim against the manufacturer of the *product* itself.' " *Id.* (quoting *Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398, 403 (E.D.N.Y. 2010) (emphasis in original). Here, Mendez asserts an unjust enrichment claims against Defendant, the manufacturer. Accordingly, the Court finds that Mendez's allegations sufficiently state a claim for unjust enrichment. *See id.*

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CASE NO. 47

2014 WL 12599332
Only the Westlaw citation
is currently available.
United States District Court,
S.D. **Texas**, McAllen Division.

Cayetano **POLANCO**, Plaintiff,
v.
INNOVATION VENTURES, **LLC**
dba Living Essentials, **LLC**, Defendant.

CIVIL ACTION
NO.
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CV
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568

Signed **05/05/2014**

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ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT INNOVATION'S MOTION TO DISMISS

Randy **Crane**, United States District Judge

I. Factual and Procedural Background

***1** Now before the Court is the "Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6)" filed by Defendant **Innovation Ventures**, **LLC** ("**Innovation**"). (Dkt. No. **5**).[1] Plaintiff Cayetano **Polanco** originally filed suit against **Innovation** and Susser Holdings Corporation ("Susser") on September 13, 2013 in the 139th District Court, Hidalgo County, Texas. (Dkt. No. 1-2). Plaintiff's Original Petition alleges that in September 2012, he suffered a heart attack as a direct and proximate result of ingesting a "**5**-hour ENERGY" drink manufactured by **Innovation** and sold to Plaintiff by Susser at its "Stripes" convenience store No. 56 in McCamey, Texas. *Id.* at ¶¶ 10-11. Plaintiff asserts causes of action for negligence, strict liability premised on "design defect" and "failure to warn" theories, and breach of implied warranties. *Id.* at ¶¶ 20-44. On October 14, 2013, **Innovation** removed the case to this Court on the grounds that the action meets the requirements of federal diversity jurisdiction: an amount in controversy exceeding $75,000, exclusive of interest and costs, and opposing parties who are citizens of different States absent the improper joinder of "non-diverse" Defendant Susser. (Dkt. No. 1); *see* 28 U.S.C. §§ 1332(a)(1), 1441, 1446.[2] Plaintiff moved to remand on the basis that Susser was a proper Defendant to his claims, and in the alternative moved for leave to join another non-diverse Defendant, Stripes, **LLC** ("Stripes"), as the targeted non-manufacturing seller of the product. (Dkt. Nos. 6, 7).[3] The Court denied both motions without prejudice, finding that

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Susser was improperly joined to the action at the time of removal, and that the record before the Court persuaded that adding Stripes would serve little purpose other than to defeat diversity jurisdiction. (Dkt. No. 23).

Having found the exercise of jurisdiction proper, the Court now turns to the instant Motion through which **Innovation** seeks dismissal of all claims against it under Rule 12(b)(6). (Dkt. No. **5**). Upon consideration of the Motion and the parties' responsive briefing (Dkt. Nos. 9, 14), in light of the relevant law, the Court finds that the Motion must be granted with respect to **Innovation's** request to dismiss the cause of action for breach of implied warranties, and otherwise denied.

II. Innovation's Motion to Dismiss

A. Rule 12(b)(6) Standard of Review

A party may move to dismiss under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Rule 12(b)(6) is read in conjunction with the pleading standard set forth in Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2); *see Ashcroft v. Iqbal*, 556 U.S. 662, 677-68 (2009). This standard does not require detailed factual allegations. *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). However, a party's "obligation to provide the 'grounds' of his 'entitle[ment]' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal citations omitted). To survive a Rule 12(b)(6) motion, the complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows the court, drawing upon its "judicial experience and common sense," to reasonably infer that the defendant is liable for the misconduct alleged. *Id.* at 678 (citing *Twombly*, 550 U.S. at 556), 679. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' " *Id.* at 679 (quoting FED. R. CIV. P. 8(a)(2)).

B. Strict Liability-Design Defect

***2** Under Texas law, a defendant may be held strictly liable for its products sold "in a defective condition unreasonably dangerous to the user or consumer." *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 381-82 (Tex. 1995) (quoting RESTATEMENT (SECOND) OF TORTS 402A(1) (1965)) (internal quotations and emphasis omitted). "A product may be unreasonably dangerous because of a defect in manufacturing, design, or marketing." *Id.* at 382. Plaintiff pleads only the latter two defects, and **Innovation** first moves for dismissal of Plaintiff's claim premised on the theory that the **5**-hour ENERGY product he ingested was defective in its design. (Dkt. No. **5**). To assert a design defect claim, a plaintiff must show that: "(1) the product was defectively designed so as to render it unreasonably dangerous; (2) a safer alternative design existed; and (3) the defect was a producing cause of the injury for which the plaintiff seeks recovery." *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 311 (Tex. 2009)

(citing *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 256-57 (Tex. 1999); TEX. CIV. PRAC. & REM. CODE § 82.005(a)).

Innovation claims that Plaintiff's pleading contains "no allegations describing how and why the product was designed defectively." (Dkt. No. **5**). The section of Plaintiff's Original Petition setting forth the design defect claim, although conclusory in its allegation that the **5**-hour ENERGY product consumed by Plaintiff "was unreasonably dangerous and defective," also incorporates Plaintiff's previous factual allegations. *See* (Dkt. No. 1-2 at ¶¶ 27, 32). Among those allegations are that "[r]eliable scientific and medical evidence establish that 'energy drinks' containing caffeine and amino acids (e.g. taurine) present material adverse health risks including the risk of heart attack, detrimental heart effects and death." *Id.* at ¶ 13. Plaintiff has provided some factual basis, however slight, for claiming a defect in the product's design.

Innovation also asserts that Plaintiff does not allege facts showing that a safer alternative existed, "including facts that would make a 'safer design' plausible, rather than speculative." (Dkt. No. **5**). Plaintiff in fact alleges that "[t]here are practicable, feasible[,] safer alternatives to achieve 'energy' and increased awareness," and the Court finds that its "plausibility" analysis should not infringe upon what is likely the province of an expert. (Dkt. No. 1-2 at ¶ 31); *see Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 42 (Tex. 2007) ("[E]xpert testimony is generally encouraged if not required to establish a products liability claim."); *Champion v. Great Dane Ltd. P'ship*, 286 S.W.3d 533, 538 (Tex.App.-Houston [14th Dist.] 2009, no pet.) (requirements to prove design defect generally require competent expert testimony). For the same reason, the Court cannot accept **Innovation's** argument that the design defect claim should be dismissed for failure "to plausibly allege causation." (Dkt. No. **5**). Standing alone, Plaintiff's allegation that he "was told by his treating physician at the Hospital that the energy drink was the cause of his heart attack" would not *prove* producing cause, but this and Plaintiff's additional allegations regarding the cardiac risks uncovered by "scientific and medical evidence" at least offer a theory of causation that the Court cannot simply assume to be implausible. *See* (Dkt. No. 1-2 at ¶ 11). The Court concludes that Plaintiff has pleaded some factual basis for each element of his design defect claim, and that **Innovation's** request to dismiss this claim under Rule 12(b)(6) must be denied.

C. Strict Liability-Failure to Warn

Innovation next argues that since Plaintiff expressly conditions his marketing defect/"failure to warn" claim on the allegation that the **5**-hour ENERGY product he consumed was defective in its design, this claim fails along with his design defect claim. (Dkt. No. **5**) (citing Dkt. No. 1-2 at ¶ 38). Since the Court has already found that Plaintiff's design defect claim survives **Innovation's** Rule 12(b)(6) challenge, it cannot accept the premise on which this argument relies. Moreover, "[a] product may be unreasonably dangerous if a manufacturer fails to warn of a foreseeable risk arising from the use of the product, and the lack of adequate warnings or instructions renders an otherwise adequate product unreasonably dangerous." *McLennan*

v. Am. Eurocopter Corp., Inc., 245 F.3d 403, 427 (5th Cir. 2001) (quoting Coleman v. Cintas Sales Corp., 40 S.W.3d 544, 549-50 (Tex.App.-San Antonio 2001, pet. denied)) (internal quotations omitted); Caterpillar, 911 S.W.2d at 382. Plaintiff may plead in the alternative, and has provided some factual basis for claiming that the absence of adequate warnings regarding the cardiac risks associated with 5-hour ENERGY rendered the product unreasonably dangerous. *See* (Dkt. No. 1-2 at ¶¶ 12-18, 36). The Court must therefore deny the request to dismiss Plaintiff's failure to warn claim on the grounds alleged in **Innovation's** Motion.

D. Negligence

***3** **Innovation** hinges its request for dismissal of Plaintiff's negligence claim on the district court's observation in Romo v. Ford Motor Co., 798 F.Supp.2d 798 (**S.D**. **Tex**. 2011), that "where the allegations and evidence are directed to whether the product is unreasonably dangerous and no other potentially negligent conduct is alleged ..., the negligence theories are subsumed by the strict liability theories asserted." Romo, 798 F.Supp.2d at 807-08 (quoting Kallasy v. Cirrus Design Corp., 2006 **WL** 1489248, at *4 (N.D. Tex. May 30, 2006)) (internal quotations omitted); (Dkt. No. 5). In Garrett v. Hamilton Standard Controls, Inc., 850 F.2d 253 (5th Cir. 1988), a decision also cited by **Innovation** and *Romo*, the Fifth Circuit explained that Texas law clearly allows a plaintiff to bring a product liability action under strict liability and negligence theories of recovery. Garrett, 850 F.2d at 255; *see* (Dkt. No. 5); Romo, 798 F.Supp.2d at 808. Negligence stands in contrast to strict liability in that the former " 'looks at the act of the manufacturer and determines if it exercised ordinary care,' " but both theories of recovery obviously share the requirement that the plaintiff prove causation. *Id.* at 256-57 (quoting Syrie v. Knoll Int'l, 748 F.2d 304, 307 (5th Cir. 1984)).

> Thus, although a negligence claim requires a different showing from a strict liability claim, a manufacturer logically cannot be held liable for failing to exercise ordinary care when producing a product that is not defective because: (1) if a product is not unreasonably dangerous because of the way it was manufactured, it was not negligent to manufacture it that way and (2) even if the manufacturer was somehow negligent in the design or production of the product, that negligence cannot have caused the plaintiff's injury because the negligence did not render the product "unreasonably dangerous."

Id. at 257.

Innovation argues that since Plaintiff's negligence claim "is based expressly on his allegations that 5-hour ENERGY was unreasonably dangerous due to a purported design or manufacturing defect," his

negligence claim is "subsumed" by his strict liability claims and is subject to dismissal. (Dkt. No. 5). The Court first observes that Plaintiff has not alleged a manufacturing defect, and has additionally alleged a marketing defect consisting of **Innovation's** failure to warn. In any event, assuming Plaintiff's negligence claim is "subsumed" by either of these strict liability theories, it is not accordingly dismissed unless Plaintiff fails to meet his burden "to prove that the injury resulted from a defect in the product." *See* *Kalassy*, 2006 WL 1489248, at *4. For the reasons explained *supra*, Plaintiff has at least met his Rule 12(b)(6) burden on causation, and therefore the Court cannot dismiss his negligence claim on the grounds advanced by **Innovation**.

E. Breach of Implied Warranties

Finally, **Innovation** moves for the dismissal of Plaintiff's cause of action for "breach of implied warranties" for failure to allege all of its required elements, or to allege any facts to support those elements. (Dkt. No. 5). Plaintiff pleads that at the time **Innovation** manufactured, designed, and marketed 5-hour ENERGY, it knew of the product's intended use and "impliedly warranted its products to be of merchantable quality and safe and fit for their intended use." (Dkt. No. 1-2 at ¶ 42). Plaintiff alleges that **Innovation** breached this warranty "because '5-hour ENERGY' is unreasonably dangerous and unfit for the ordinary purposes for which it is used," and that Plaintiff suffered injuries as a direct and proximate result of the breach. *Id.* at ¶¶ 43-44. Whether Plaintiff is alleging breach of the implied warranties of merchantability or fitness for a particular purpose, or both, **Innovation** correctly points out that this cause of action requires that the plaintiff provide particular and timely notice of the breach to the defendant. (Dkt. No. 5); *see* TEX. BUS. & COM. CODE § 2.607(c)(1) ("[T]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."); *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 201-03 (Tex.App.-Houston [1st Dist.] 2003, pet. denied) (§ 2.607(c)(1) notice requirement applies to claims for breach of implied warranties of merchantability and fitness for a particular purpose, and neither manufacturer's general knowledge of concerns about product nor commencement of lawsuit satisfies this requirement); *Lochinvar Corp. v. Meyers*, 930 S.W.2d 182, 189 (Tex.App.-Dallas 1996, no writ) (buyer has burden to allege and prove proper notice under § 2.607(c)(1), and "[f]ailure to notify the seller of the breach, thereby allowing the seller an opportunity to cure, bars recovery" for breach of implied warranty). Plaintiff does not allege that he provided such notice, either in the section setting forth his cause of action for breach of implied warranties or in the incorporated factual allegations. The Court therefore agrees with **Innovation** that this cause of action must be dismissed for failure to state a plausible claim to relief.

III. Conclusion

***4** For the foregoing reasons, the Court hereby **ORDERS** that Defendant **Innovation's** Motion to Dismiss under Rule 12(b)(6) is **GRANTED** with respect to **Innovation's** request to dismiss Plaintiff's cause of action for breach of implied warranties, and otherwise **DENIED**.

SO ORDERED this 5th day of May, **2014**, at McAllen, Texas.

All Citations

Not Reported in Fed. Supp., 2014 WL 12599332

Footnotes

1 **Innovation** alleges that it was sued incorrectly as **Innovation Ventures**, **LLC** d/b/a Living Essentials, **LLC**. (Dkt. No. **5**; *see* Dkt. No. 1-2).

2 Plaintiff obtained a default judgment against Susser in state court on the same day that **Innovation** removed the case, but upon removal the Court granted Susser's motion to vacate that judgment. (Dkt. No. 4; Dkt. No. 4-1; 12/04/13 Minute Entry).

3 Plaintiff did not contest, and the Court has found, that the amount in controversy exceeds the jurisdictional minimum. *See* (Dkt. Nos. 6, 23).

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CASE NO. 48

5B Fed. Prac. & Proc. Civ. § 1356 (4th ed.)

Federal Practice and Procedure (Wright & Miller) | September 2025 Update

Federal Rules of Civil Procedure

Chapter 4. Pleadings and Motions

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

Authors: Arthur R. Miller and A. Benjamin Spencer

C. Presentation of Defenses and Objections

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§ 1356 Motions to Dismiss—Purpose of the Rule 12(b)(6) Motion

Primary Authority

- **Fed. R. Civ. P. 12**

Forms

- **2C West's Federal Forms, District Courts—Civil §§ 11:11**, **11:80** to **11:90.50**

The purpose of a motion under Federal Rule of Civil Procedure 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; the motion is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case.[1] Thus, the provision must be read in conjunction with Federal Rule of Civil Procedure 8(a),[2] which sets forth the requirements for pleading a claim for relief in federal court and calls for "a short and plain statement of the claim showing that the pleader is entitled to relief."[3] Only when the plaintiff's complaint fails to meet this pleading standard—which has traditionally been understood to be a liberal standard[4] but which the Supreme Court has more recently interpreted to be more stringent[5]—is it subject to dismissal under Rule 12(b)(6).

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The motion under subdivision (b)(6) is available to test a claim for relief in any pleading, whether it be in the plaintiff's original complaint, a defendant's counterclaim, a defendant's crossclaim or counterclaim thereto, or a third-party claim or any other Federal Rule of Civil Procedure 14 claim.[6] Most commonly, of course, a Rule 12(b)(6) motion is directed against the plaintiff's complaint, and for convenience the discussion that follows will use that context as a model.

The motion under Rule 12(b)(6) should be distinguished from a number of other motions that may be made under Rule 12. The Rule 12(b)(6) motion addresses itself solely to the question of whether the complaint fails to state a claim[7] and is not designed to correct inartistic pleadings or to force compliance with the requirements of Federal Rule of Civil Procedure 10 as to the form of the pleadings.[8] If the complaint is ambiguous or does not contain sufficient information to allow a responsive pleading to be framed, a motion under Rule 12(b)(6) is not appropriate; the proper remedy is a motion for a more definite statement under Rule 12(e).[9] Similarly, an attempt to eliminate or strike improper or redundant matter from the complaint should be made under Rule 12(f).[10] However, repeated refusals by the plaintiff to conform to the dictates of Rule 8 and Rule 10 as to the proper form or content of the pleading may result in a dismissal for failure to state a claim.[11] Finally, the Rule 12(b)(6) motion is directed to the claim for relief and not to the defensive portion of any pleading. If a party wishes to attack a defense, he should move under Rule 12(f), which provides for the striking of "any insufficient defense."[12]

The Rule 12(b)(6) motion also must be distinguished from a motion for summary judgment under Federal Rule of Civil Procedure 56, which goes to the merits of the claim—indeed, to its very existence—and is designed to test whether there is a genuine issue of material fact.[13] The Rule 12(b)(6) motion, as has been mentioned above, only tests whether the claim has been adequately stated in the complaint. Thus, as the many cases cited in the note below make clear, on a motion under Rule 12(b)(6), the district court's inquiry essentially is limited to the content of the complaint;[14] a motion for summary judgment, on the other hand, often involves the use of pleadings, depositions, answers to interrogatories, and affidavits. This distinction between the two procedural provisions is not substantial in many situations, however, because Rule 12(d) provides that if "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." This conversion principle is discussed in a later section.[15]

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Footnotes

1 **Purpose of motion**

Neitzke v. Williams, 490 U.S. 319, 326–327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and factfinding.").

Ghee v. Comcast Cable Communications, LLC, 2023 WL 3813503, *2 (11th Cir. 2023) ("The purpose of a motion to dismiss under Rule 12(b)(6) 'is to test the facial sufficiency of' a complaint.") (quoting Brooks v. Blue Cross & Blue Shield, 116 F.3d 1364, 1368 (11th Cir. 1997)).

Hower v. Damron, 2022 WL 16578864, *4 (6th Cir. 2022) ("The very purpose of Rule 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery.") (internal quotation marks omitted) (quoting Yuhasz v. Brush Wellman, Inc., 341 F.3d 559, 566 (6th Cir. 2003)).

Savannah Heights Limited Partnership v. District of Columbia Housing Authority, 2022 WL 566459, *3 n.5 (D.C. Cir. 2022) ("No discovery is required because the Owners failed to state an actionable claim. The very purpose of Rule 12(b)(6) is to dispose of cases that do not warrant reaching the costly discovery phase because, under the facts as alleged by the Owners, they could never win."), **citing Wright & Miller**.

"[A] primary purpose of a Rule 12(b)(6) motion is to weed out cases that do not warrant reaching the (oftentimes) laborious and expensive discovery process because, based on the factual scenario on which the case rests, the plaintiff could never win. In short, plaintiffs are not required to submit evidence to defeat a Rule 12(b)(6) motion, but need only sufficiently allege in their complaint a plausible claim." Foley v. Wells Fargo Bank, N.A., 772 F.3d 63, 72 (1st Cir. 2014).

"As the Court of Appeals for the Seventh Circuit has observed, Rules 8 and 12(b)(6) of the Federal Rules of Civil Procedure * * * help 'to prevent settlement extortion-using discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit.'" Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Medical Centers Retirement Plan v. Morgan Stanley Inv. Management Inc., 712 F.3d 705, 719 (2d Cir. 2013), citing American Bank v. City of Menasha, 627 F.3d 261, 266 (7th Cir. 2010).

Pirraglia v. Novell, Inc., 339 F.3d 1182 (10th Cir. 2003) (court's function is not to weigh potential evidence, but to assess whether plaintiff's complaint alone is legally sufficient to state claim).

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In re Rockefeller Center Properties, Inc. Securities Litigation, 311 F.3d 198 (3d Cir. 2002).

Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999) ("The purpose of a Rule 12(b)(6) motion is to test sufficiency of complaint; importantly, a Rule 12(b)(6) motion does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.").

A Rule 12(b)(6) dismissal is only appropriate when a complaint does not present a legal claim. It is not the proper tool for questioning the validity of factual allegations. Johnson v. Revenue Management Corp., 169 F.3d 1057 (7th Cir. 1999).

"The purpose of the rule is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus spare litigants the burdens of unnecessary pretrial and trial activity." Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc., 988 F.2d 1157, 1160 (Fed. Cir. 1993) (Newman, J.).

Peck v. Hoff, 660 F.2d 371, 374 (8th Cir. 1981), **citing Wright & Miller.**

"Plaintiff's original complaint and first amended complaint were both dismissed without prejudice with leave to amend, based on two motions to dismiss Defendants filed pursuant to Federal Rule of Civil Procedure 12(b)(6). In making these rulings, Judge Byron did not speak to the merits of Plaintiff's claims, but rather addressed the sufficiency of Plaintiff's pleadings. In the absence of any authority to the contrary, the undersigned does not find that such rulings establish that Plaintiff's claims were meritorious, or that the questions of law and fact were close." Grayson v. No Labels, Inc., 2024 WL 473775, *25 (M.D. Fla. 2024), **quoting Wright & Miller**, report and recommendation adopted, 2024 WL 863117 (M.D. Fla. 2024).

Ideal Holdings of Michigan, LLC v. High Consultants, LLC, 2024 WL 4220667, *2 (E.D. Mich. 2024) ("The Court agrees that this pro se motion does not actually challenge the legal sufficiency of the claims pleaded by Plaintiffs. Rather, the motion is simply a narrative of this pro se Defendant's version of events and his views about the claims."), **quoting Wright & Miller**.

See also
Shed v. Oklahoma Department of Human Services, 729 Fed. Appx. 653, 658 (10th Cir. 2018) ("[T]he purpose of motion practice under Rule 12(b)(6) * * * is not for the court to 'identify' pleading deficiencies as to each defendant, with such deficiencies to be 'corrected' by serial amendments.") (citation omitted).

Smith v. Cash Store Management, Inc., 195 F.3d 325 (7th Cir. 1999) (court erred in dismissing because assessing factual support for suit is not office of Rule 12(b)(6)).

Compare

A court may not grant a motion to dismiss for failure to state a claim merely because the plaintiff failed to respond to it pursuant to local rules. Such a result would thwart the purpose of the motion, which is simply to assess the legal sufficiency of the complaint. Thus, a court still must determine whether the complaint states a claim, even if the plaintiff fails to respond. Alternatively, the court can dismiss the action as a sanction, but must in that case weigh the following factors: the prejudice of the nonresponse to the moving party, the amount of interference with the judicial process, and the culpability of the nonmoving party. Issa v. Comp USA, 354 F.3d 1174 (10th Cir. 2003).

2 **Read in conjunction**

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-1965, 167 L. Ed. 2d 929 (2007).

Zixiang Li v. Kerry, 710 F.3d 995, 998 (9th Cir. 2013).

Genova v. Total Card, Inc., 193 F. Supp. 3d 360, 364 (D.N.J. 2016), **quoting Wright & Miller**.

Ogle v. BAC Home Loans Servicing LP, 924 F. Supp. 2d 902, 907 (S.D. Ohio 2013).

Gallentine v. Housing Authority of City of Port Arthur, Tex., 919 F. Supp. 2d 787, 795 (E.D. Tex. 2013) ("A Rule 12(b)(6) motion to dismiss must be read in conjunction with Rule 8(a) of the Federal Rules of Civil Procedure.").

Guilbeaux v. 3927 Foundation, Inc., 177 F.R.D. 387 (E.D. Tex. 1998), **quoting Wright & Miller.**

3 **Rule 8(a)(2)**

See §§ 1215 to 1226.

See also

With limited exceptions such as those set out in Federal Rule of Civil Procedure 9(b), Rule 8(a)'s simplified pleading standard applies to all civil actions. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).

4 **Liberal standard**

Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (referring to "the liberal pleading standards set forth by Rule 8(a)(2)").

"'[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.' Twombly, 550 U.S. at 556, 127 S. Ct. 1955. The factually supported claim against Finnegan at issue on appeal lies well within that liberal pleading standard and therefore survives a Rule 12(b)(6) motion to dismiss based on qualified immunity." Stanley v. Finnegan, 899 F.3d 623, 628 (8th Cir. 2018).

Gelboim v. Bank of America Corp., 823 F.3d 759, 780 (2d Cir. 2016) (when there are two plausible interpretations on motion to dismiss, court should not decide which one is correct from factual allegations).

Vasaturo v. Peterka, 177 F. Supp. 3d 509, 510 (D.D.C. 2016) (pleading rules are not supposed to impose great burden on plaintiff).

5 **Supreme Court interpretation**

Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (pleading a claim sufficiently under Rule 8(a)(2) requires that a pleader "state a claim to relief that is plausible on its face").

6 **Any pleading**

Counterclaim

Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965).

King County v. Rasmussen, 299 F.3d 1077, 1090 (9th Cir. 2002) (affirming 12(b)(6) dismissal of the defendant's counterclaims).

Shenzhen Kangi Electronic & Plastic Co., Ltd. v. Kehoe, 2023 WL 3847108, *4 (N.D. Ill. 2023) ("Kangdi's Motion to Dismiss Kehoe's Counterclaims is granted in part and denied in part.").

Trustees of General Assembly of Lord Jesus Christ of Apostolic Faith, Inc. v. Patterson, 2023 WL 3767737, *1 (E.D. Pa. 2023) ("[T]he RICO counterclaim fails under Rule 12(b)(6) because Patterson does not have civil RICO standing and has failed to plead facts showing a pattern of racketeering activity.").

Crossclaim

Pietak v. State Farm Fire & Cas. Co., 189 F.3d 474 (9th Cir. 1999) (affirming district court's dismissal of a * * * compulsory crossclaim under Rule 12(b)(6)).

"A cross-defendant may move to dismiss a crossclaim pursuant to Rule 12(b)(6) if the crossclaim 'fail[s] to state a claim upon which relief can be granted.'" Shoppes at Mirador Square LLC v. Wild Oats Markets Incorporated, 2023 WL

2561567, *6 n.2 (D. Ariz. 2023), quoting Whitaker v. Tesla Motors, Inc., 985 F.3d 1173, 1175 (9th Cir. 2021).

Third-party claim

Burton v. State Farm Mut. Auto. Ins. Co., 105 Fed. Appx. 154, 157 (9th Cir. 2004) ("Because Burton did not allege any culpable conduct by State Farm that occurred between June 8, 1997 and June 7, 2000, we affirm the district court's August 28, 2002 order granting State Farm's 12(b)(6) motion to dismiss Burton's third party claims for common law bad faith and infliction of emotional distress.").

ELG Utica Alloys, Inc. v. Niagara Mohawk Power Corp., 2019 WL 5086020, *1 (N.D. N.Y. 2019) ("Presently before the Court is CBS's Motion to Dismiss National Grid's Third-Party Claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, the motion to dismiss is denied in part and granted in part.").

7 **Addressed solely to pleadings**

Calcutti v. SBU, Inc., 224 F. Supp. 2d 691 (S.D. N.Y. 2002).

Edwards v. Physician's Credit Bureau, 2001 WL 1678783 (S.D. Ohio 2001) (unpublished).

Trustees of Hotel Industry Pension Fund v. Carol Management Corp., 880 F. Supp. 1548 (S.D. Fla. 1995), **citing Wright & Miller.**

Payne v. North Carolina Farm Bureau Mut. Ins. Co., 67 N.C. App. 692, 313 S.E.2d 912, 913 (1984), **quoting Wright & Miller.**

8 **Form of pleading**

Dismissals for mere technical defects or ambiguities in pleadings are not favored. Arfons v. E. I. Du Pont De Nemours & Co., 261 F.2d 434 (2d Cir. 1958).

Nagler v. Admiral Corporation, 248 F.2d 319, 322 (2d Cir. 1957).

On a motion to dismiss, a court must look to the essence of each claim and not merely the form in which it is pleaded. Calcutti v. SBU, Inc., 224 F. Supp. 2d 691 (S.D. N.Y. 2002).

Pleadings are not to be held to the rigid standards of the common law, and neither absolute clarity nor absolute precision is required. U.S. v. Provident Nat. Bank, 259 F. Supp. 373 (E.D. Pa. 1966).

The fact that the complaint is something less than artistically drafted is not a pertinent consideration in deciding a motion to dismiss for failure to state a claim. Goldstein v. North Jersey Trust Co., 39 F.R.D. 363 (S.D. N.Y. 1966).

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The court is not permitted to impose a sanction as drastic as a dismissal to force the production of a legally artistic pleading, but must look beyond the mountain of words to the meaning sought to be conveyed. Stanley v. Harper Buffing Mach. Co., 28 F.R.D. 579 (D. Conn. 1961).

See also the discussions of Rule 8 and Rule 10 in §§ 1201 to 1286, §§ 1321 to 1327.

9 **More definite statement**

Swierkiewicz v. Sorema N. A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).

"[T]he fact that a careful Judge, in the exercise of that wise discretion controlled by the prescribed principles of [Rule 12(e)], might so conclude [that a party cannot be reasonably required to frame a responsive pleading] does not permit him to dismiss the complaint for failure to state a claim. It may well be that [plaintiff]'s complaint as now drawn is too vague, but that is no ground for dismissing his action." Paylor v. Hartford Fire Ins. Co., 748 F.3d 1117, 1126 n.4 (11th Cir. 2014) (quoting Mitchell v. E–Z Way Towers, Inc., 269 F.2d 126, 130 (5th Cir. 1959)).

Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999), **citing Wright & Miller.**

Scott v. City of Chicago, 195 F.3d 950 (7th Cir. 1999) (if complaint is unclear court should keep case moving and require plaintiff to prepare more definite statement under Rule 12(e)).

Sisk v. Texas Parks and Wildlife Dept., 644 F.2d 1056, 1059 (5th Cir. 1981), **citing Wright & Miller.**

Mere vagueness or lack of detail is not a ground for a motion to dismiss, but the pleading should be attacked by a motion for a more definite statement. Harman v. Valley Nat. Bank of Ariz., 339 F.2d 564 (9th Cir. 1964).

It was error for the district court to dismiss the action on the ground that the complaint was not clear as to which allegations referred to one claim and which to another claim. Robins v. Rarback, 325 F.2d 929 (2d Cir. 1963).

Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126 (5th Cir. 1959).

Drake University v. Des Moines Area Community College Foundation, 2024 WL 4132499, *2 (S.D. Iowa 2024) (noting that defendant's motion to dismiss for failure to state a claim should have been made as a motion seeking relief under Rule 12(e) because it challenged the complaint as an impermissible "shotgun" pleading), **citing Wright & Miller**.

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"The Court finds that White has failed to adequately link her factual allegations to her claims, creating a situation where although her claims conform to the liberal notice pleading requirements of Federal Rule of Civil Procedure 8, she fails to adequately link the causes of action to their attendant factual predicates, in violation of Federal Rule of Civil Procedure 12(e). * * * [T]he Court finds that the Plaintiff should be required to replead." White v. City of Grenada, Mississippi, 2021 WL 4449276, *5 (N.D. Miss. 2021), **citing Wright & Miller**.

Brownlee v. Mississippi Department of Public Safety, 2019 WL 4144307, *4 (N.D. MS Oxford Div. 2019) ("In short, the Plaintiffs fail to adequately link their factual allegations to their claims. This failure creates a situation where although the Complaint conforms to the liberal notice pleading requirements of Federal Rule of Civil Procedure 8, it fails to adequately link the Plaintiffs' causes of actions to their attendant factual predicates, running afoul of Federal Rule of Civil Procedure 12(e). * * * In such cases, the proper remedy is a motion for a more definite statement under Rule 12(e), or an order allowing the Plaintiffs to amend."), **citing Wright & Miller**.

The proper response to a pro se prisoner's Section 1983 complaint, which lacked allegations specific enough for correctional officers to answer with respect to some claims, was a motion for more definite statement rather than a motion to dismiss for failure to state a claim. Cunnningham v. Grozik, 2002 WL 1777278 (N.D. Ill. 2002).

See §§ 1374 to 1379 for further discussion of Rule 12(e).

See also

Neither vagueness nor lack of detail is a sufficient ground on which to grant a Rule 12(b)(6) motion. Kress v. Food Employers Labor Relations Ass'n, 217 F. Supp. 2d 682 (D. Md. 2002).

Despite a complaint stating a claim sufficiently, the court can order the pleader to provide a more definite statement before proceeding. 3rd Eye Surveillance, LLC v. United States, 124 Fed. Cl. 438, 442 (2015).

But see

Atlas Glass & Mirror, Inc. v. Tri-North Builders, Inc., 997 F.3d 367, 372 (1st Cir. 2021) ("The Rule 12(b)(6) standard is 'intended to screen out claims in which the factual allegations of the complaint are too scanty or too vague to render the claims plausible'") (quoting Ríos-Campbell v. U.S. Dep't of Com., 927 F.3d 21, 25 (1st Cir. 2019)).

"The district court concluded that Kyrkanides's due process claim, as alleged in the motion to amend, could not survive dismissal under Federal Rule of Civil Procedure 12(b)(6). The court first determined that Kyrkanides's vague and conclusory allegations that his 'good name, honor, and integrity' were harmed

failed to state a viable claim that he was deprived of a liberty interest without due process." Kyrkanides v. University of Kentucky, 2020 WL 7062675, *1 (6th Cir. 2020).

When a count of the complaint was so sketchy that it was hard to tell just what the plaintiff really claimed, the count was dismissed with leave to serve an amended complaint realleging the count in intelligible form. Dack v. Shanman, 227 F. Supp. 26 (S.D. N.Y. 1964).

10 **Rule 12(f)**

Anderson v. Royal Crest Dairy, Inc., 253 F. Supp. 2d 1136 (D. Colo. 2003) (motion to dismiss inappropriate method of striking paragraph containing evidence perceived to be irrelevant or inadmissible).

Amentler v. 69 Main Street, LLC, 2008 WL 4149125, *1 (D. N.J. 2008), **citing Wright & Miller**.

"The court notes that the proper course for Beech to have followed here would have been to move to strike the allegedly duplicative allegations contained in the complaint prior to filing their response to the pleading per Rule 12(f)." Dudley v. Business Exp., Inc., 882 F. Supp. 199, 208 n.11 (D. N.H. 1994).

Hill v. U.S., 751 F. Supp. 909 (D. Colo. 1990).

See §§ 1380 to 1383.

Compare

"Handi–Craft argues that Whittlestone's claim for lost profits and consequential damages should be stricken from the complaint, because such damages are precluded as a matter of law. Thus, Handi–Craft's 12(f) motion was really an attempt to have certain portions of Whittlestone's complaint dismissed or to obtain summary judgment against Whittlestone as to those portions of the suit—actions better suited for a Rule 12(b)(6) motion or a Rule 56 motion, not a Rule 12(f) motion." Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 974 (9th Cir. 2010).

11 **Proper form required**

Okusami v. Psychiatric Institute of Washington, Inc., 959 F.2d 1062, 1067 (D.C. Cir. 1992), **citing Wright & Miller.**

DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966).

A dismissal for failure to comply with the rules of proper pleading, although a severe sanction, was justified in view of the plaintiff's flagrant refusal to follow the sound and proper directions of the district court as to filing an amended complaint. Maddox v. Shroyer, 302 F.2d 903 (D.C. Cir. 1962).

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When the plaintiff, acting as his own attorney against the court's advice, failed to state a claim in a series of pleadings filed over a two-year period, an amended complaint that was redundant, prolix, and argumentative was properly dismissed. Rakonick v. Hamilton-Brown Shoe Co., 103 F.2d 553 (C.C.A. 8th Cir. 1939).

Kappus v. Western Hills Oil, Inc., 24 F.R.D. 123 (E.D. Wis. 1959).

12 **Insufficient defense**
See § 1381.

But compare
F.T.C. v. Bay Area Business Council, Inc., 2003 WL 21003711 (N.D. Ill. 2003) (although insufficient defenses are properly addressed by Rule 12(f) motions to strike, under that motion, affirmative defenses must comply with pleading requirements of Rule 8(a) and Rule 12(b)(6)).

13 **Distinguished from summary judgment**
Evans v. United States Marshals Service, 177 F. Supp. 3d 177, 180 (D.D.C. 2016), **quoting Wright & Miller**.

Wheeling Hosp., Inc. v. Ohio Valley Health Services and Educ. Corp., 2010 WL 4977987 (N.D. W. Va. 2010), **citing Wright & Miller**.

Brown v. Mitchell, 308 F. Supp. 2d 682 (E.D. Va. 2004) (Rule 12(b)(6) and summary judgment are "significantly different motions" that have different standards and require different analyses).

See §§ 2725 to 2725.3.

14 **Inquiry limited**
"We do not consider Estrada's contention that he was denied 'effective discovery.' The district court's Rule 12(b)(6) ruling was based solely on his pleadings, and evidence adduced through discovery would have had no effect on the ruling." Estrada v. Stewart, 703 Fed. Appx. 755, 761 n.4 (11th Cir. 2017) (citating Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1367 (11th Cir. 1997)).

Bowers v. Ophthalmology Grp., 733 F.3d 647, 655 (6th Cir. 2013) ("[U]nlike a Rule 56 motion that relies on evidence, a Rule 12(b)(6) motion is based solely on the pleadings.").

Doe ex rel. Magee v. Covington County School Dist. ex rel. Bd. of Educ., 649 F.3d 335 (5th Cir. 2011), judgment aff'd on reh'g en banc, 675 F.3d 849 (5th Cir. 2012).

MacArthur v. San Juan County, 309 F.3d 1216 (10th Cir. 2002).

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Browning v. Clinton, 292 F.3d 235 (D.C. Cir. 2002).

Friedl v. City of New York, 210 F.3d 79 (2d Cir. 2000).

Loyd v. Paine Webber, Inc., 208 F.3d 755 (9th Cir. 2000).

Henthorn v. Department of Navy, 29 F.3d 682 (D.C. Cir. 1994) (court should not consider factual allegations in plaintiff's response to motion to dismiss, especially when they contradict allegations set forth in complaint).

"We may not look beyond the pleadings." Cinel v. Connick, 15 F.3d 1338, 1341, (5th Cir. 1994) (Duhe, J.).

Loofbourrow v. C.I.R., 208 F. Supp. 2d 698 (S.D. Tex. 2002) (court will not look beyond "four corners" of pleadings).

See also
Smithrud v. City of St. Paul, 746 F.3d 391, 395 (8th Cir. 2014) ("[T]he court generally must ignore materials outside the pleadings, but it may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings.").

Gebhardt v. D.A. Davidson & Co., 203 Mont. 384, 387, 661 P.2d 855, 857 (1983), **citing Wright & Miller.**

Breliant v. Preferred Equities Corp., 109 Nev. 842, 858 P.2d 1258 (1993), **citing Wright & Miller**.

15 **Conversion into summary judgment motion**
See § 1366.

See also
Sacchetti v. Gallaudet University, 181 F. Supp. 3d 107, 117 (D.D.C. 2016) (trial court is sole decision maker for deciding whether motion to dismiss is converted into summary judgment and this decision should be based on whether summary judgment would be fair to both parties).

Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC, 151 F. Supp. 3d 287, 291 (E.D. N.Y. 2015) (court had discretion whether to exclude materials outside pleadings or convert motion to dismiss into motion for summary judgment), aff'd, 670 Fed. Appx. 731 (2d Cir. 2016).

Martin v. Mears, 602 P.2d 421, 426 (Alaska 1979), **quoting Wright & Miller.**

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CASE NO. 49

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United States District Court,
S.D. Texas, Houston Division.

Yuqi "Richard" LIN, Plaintiff,
v.
VERITEX COMMUNITY BANK, N.A. f/k/a Green Bank, N.A., Defendant.

Civil Action
No.
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Signed 01/04/2021

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Pete Thomas Patterson, Patterson PC, Houston, TX, for Defendant RG Opportunities I, L.P.

Mark David Hunter, Hunter Taubman et al, Coral Gables, FL, for Defendant New City Advisors, LLC.

MEMORANDUM AND ORDER

NANCY F. ATLAS, SENIOR UNITED STATES DISTRICT JUDGE

***1** This case is before the Court on the Motion to Dismiss [Doc. # 24] filed by Defendant Veritex Community Bank, N.A. ("Veritex"), seeking dismissal of Plaintiff Yuqi Richard Lin's First Amended Complaint ("Complaint") [Doc. # 23]. Lin filed a Response [Doc. # 25], and Veritex filed a Reply [Doc. # 26]. Having reviewed the record and the applicable legal authorities, the Court **denies** the Motion to Dismiss the breach of contract claim and **grants** the Motion to Dismiss the breach of fiduciary duty claim.

I. BACKGROUND

Lin is a resident of Beijing, China. He and other Chinese nationals established RG Opportunities I, LLP ("RGO") as a mechanism to invest in businesses in the United States. Because the investors are not United States citizens, they were required to file I-526 Petitions with the United States Citizenship and Immigration Services ("USCIS"). Before a foreign investor's investment can be finalized, USCIS approval of his I-526 Petition is required.

On September 14, 2016, Veritex and RGO entered into a Subscription Escrow Agreement ("Escrow Agreement").[1] The parties to the Escrow Agreement were (1) RGO, who deposited the investors' funds into the escrow account; (2) Veritex, the Escrow Agent; (3)

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New City Advisors LLC, the Subscriber Representative; and (4) NESF Escrow Services Corp., the Escrow Administrator. *See* Escrow Agreement, Exh. 1 to Motion to Dismiss. The investors were referred to in the Escrow Agreement as "Subscribers." *See id.* A Subscriber invested in units of five hundred thousand dollars ($500,000.00), referred to in the Escrow Agreement as the "Subscription Proceeds." *See id.* **Lin** was a Subscriber, but was not a party to the Escrow Agreement.

The Escrow Agreement required RGO to provide **Veritex** with "schedules disclosing the name, address and Tax Identification Number (as applicable) of each of the Subscribers, and such other information as will enable the Escrow Agent to attribute to a particular Subscriber all Subscription Proceeds received by the Escrow Agent." *See id.*, ¶ 1(d). When **Veritex**, the Escrow Agent, received a written direction from RGO and the Subscriber Representative stating that a Subscriber had filed his I-526 Petition, "the Escrow Agent shall ... disburse 25% of such Subscriber's Subscription Proceeds ($125,000.00), in accordance with the Written Direction." *See id.*, ¶ 3(a). When **Veritex** received a written direction from RGO and the Subscriber Representative "with certification from the USCIS that a minimum of two (2) Subscribers ... have received approval of their I-526 Petitions, the Escrow Agent shall ... disburse (i) an additional 65% of the Subscription Proceeds ($325,000.00) for each Subscriber who has filed his/her I-526 Petition and had 25% of his/her Subscription Proceeds previously disbursed from the Escrow Account ...." *See id.*, ¶ 3(b). The remaining 10% ($50,000.00) of each Subscriber's $500,000.00 would be held in a "holdback subaccount (the "Subscription Holdback Account") within the Escrow Account." *See id.* "Funds held in the Subscription Holdback Account shall be disbursed in $50,000.00 increments upon receipt by the Escrow Agent of Written Direction from [RGO] and Subscriber Representative which shall only be given following [RGO's] receipt of evidence that a Subscriber's 1-526 application has been approved." *See id.*

***2** The Escrow Agreement provides:

> Notwithstanding anything to the contrary provided in this Agreement, the Escrow Agent shall rely conclusively and without any further inquiry on the written directions, including but not limited to written directions pertaining to disbursements, furnished to the Escrow Agent by RGO and the Subscriber Representative. The parties to this Agreement acknowledge and agree that the Subscriber Representative is fully authorized to act on behalf of the Subscribers. The Escrow Agent shall have no duty to take notice of any request or direction of any Subscriber, but shall in all cases rely conclusively and without inquiry on the written directions of the Subscriber

> Representative with respect to all matters pertaining to Subscribers and the individual and collective interests of all Subscribers under this Agreement.

Id., ¶ 3(e). The "Duties of the Escrow Agent" section of the Escrow Agreement provides, in relevant part:

> In performing its duties under this Agreement, or upon the claimed failure to perform any of its duties hereunder, the Escrow Agent shall not be liable to anyone for any damages, losses or expenses which may be incurred as a result of the Escrow Agent's so acting or failing to so act; except to the extent that a court of competent jurisdiction determines that the Escrow Agent's gross negligence or willful misconduct was the primary cause of such damages.

Id., ¶ 6(a). This section of the Escrow Agreement further limits the Escrow Agent's liability by providing that the Escrow Agent incurs no liability with respect to:

> any action taken or omitted to be taken in reliance upon any instrument delivered to the Escrow Agent and believed by it to be genuine and to have been signed or presented by the proper party or parties. The Escrow Agent shall be under no duty to inquire into or investigate the validity, accuracy or content of any such instrument.

Id.

Lin alleges that after his I-526 Petition was approved, but before at least two Subscribers' I-526 Petitions were approved, **Veritex** released his remaining $375,000.00 to RGO in violation of ¶ 3(b) of the Escrow Agreement. *See* Complaint, ¶ 10. The Written Direction, dated March 2, 2017, identified **Lin** as the applicable Subscriber. *See* Written Direction, Exh. 2 to Motion. The Written Direction did not mention, or include certification, that USCIS had approved a second I-526 Petition. *See id.* **Lin** alleges that, as a result of **Veritex's** violation of the Escrow Agreement, he "lost his investment, and has been damaged in the amount of $375,000.00." *See* Complaint, ¶ 11.

Lin alleges that he is a third-party beneficiary of the Escrow Agreement and, as a result, has standing to sue **Veritex** for breach of that contract. **Lin** alleges also that **Veritex** breached its fiduciary duty to **Lin**.

Veritex filed its Motion to Dismiss. **Veritex** argues that **Lin** has failed to allege a legal and factual basis for third-party beneficiary status. **Veritex** argues also that **Lin** has failed to allege a breach of contract claim and a breach of fiduciary duty claim that are "plausible on their face." The Motion to Dismiss has been fully briefed and is now ripe for decision.

II. LEGAL STANDARD FOR RULE 12(b)(6) MOTION TO DISMISS

***3** A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure "is viewed with disfavor and is rarely granted." *See Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013) (quoting *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011)); *Shaikh v. Texas A&M Univ. Coll. of Med.*, 739 F. App'x 215, 218 (5th Cir. June 20, 2018). The Court accepts the factual allegations in the complaint as true, and construes the facts in the light most favorable to the plaintiff. *See Alexander v. Verizon Wireless Servs., L.L.C.*, 875 F.3d 243, 249 (5th Cir. 2017) (citing *Kelly v. Nichamoff*, 868 F.3d 371, 374 (5th Cir. 2017)). The complaint must, however, contain sufficient factual allegations, as opposed to legal conclusions, to state a claim for relief that is "plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Cicalese v. Univ. of Texas Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019); *Patrick v. Wal-Mart, Inc.*, 681 F.3d 614, 617 (5th Cir. 2012).

When considering a Motion to Dismiss, the Court's review is limited to the complaint or counterclaim, documents attached to the relevant pleading, and documents attached to the motion to dismiss that are central to the claim and are referenced in the complaint. *See Lone Star Fund V (U.S.), L.P. v. Barclays **Bank** PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000)). Documents attached to a party's briefing may be considered by the Court only if the documents are sufficiently referenced in the complaint and no party questions their authenticity. *See Walch v. Adjutant General's Dep't of Tex.*, 533 F.3d 289, 294 (5th Cir. 2008). In this case, both parties have submitted the Escrow Agreement as part of the record on the Motion to Dismiss. **Veritex** has submitted the Written Direction at issue, a document whose authenticity is not questioned.

III. ANALYSIS

A. Third-Party Beneficiary Status

Texas law allows a third party to sue for breach of a contract that is clearly intended for his direct benefit. *See City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011) (citing *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002) (per curiam)). In determining whether there is intent to benefit a third party, the Court must consider "the entire agreement, giving effect to all its provisions." *Williams*, 353 S.W.3d at 145. "The contract need not have been executed solely to benefit the noncontracting party." *Id.* Courts do not "create a third-party benefit by implication; the presumption is the parties contracted only for themselves, absent a clear showing of intent otherwise." *Id.* (citing *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 651-52 (Tex. 1999)). There is no requirement, however, for the contract to use the term " 'third-party beneficiary' or any similar magic words." *Id.* (citing Stine, 80 S.W.3d at 590-91).

The Escrow Agreement reflects an intent to provide a direct benefit the Subscribers, including **Lin**. The Escrow Agreement made clear that its purpose was to facilitate the Subscribers' purchases of $500,000.00 investment units. *See* Escrow Agreement, p. 1. The Escrow Agreement required that Subscriber information be provided to the Escrow Agent to enable the Escrow Agent to "attribute to each Subscriber the escrowed funds received by Escrow Agent." *See id.*, ¶ 1(a) and (d). The Escrow Agreement required RGO to secure a Payment Guaranty to protect any Subscriber whose I-526 Petition was denied if funds were not available in the Escrow Account or RGO's operating account to refund that Subscriber's investment. *See id.*, ¶ 1(c). The Escrow Agreement provided that if RGO rejected any Subscriber's investment, or if any Subscriber withdrew his investment, the Escrow Agent would disburse that Subscriber's funds "to the Subscriber." *See id.*, ¶ 2(a) and (b). The Escrow Agreement required that the Subscribers be provided a copy of the contract. *See id.*, ¶ 3(f). "These benefits are not offered to the world at large" but are provided only to Subscribers. Certain benefits, such as the Payment Guaranty and the disbursement of investment funds "to the Subscriber" in certain circumstances, are for the Subscribers' direct benefit. Indeed, the Escrow Agreement had no clear purpose other than to benefit the Subscribers. *See* *Basic Capital Mgmt., Inc. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 900 (Tex. 2011).

***4** The parties to the Escrow Agreement expressed a clear intent to benefit the Subscribers. Accordingly, the Subscribers, including Plaintiff **Lin**, have standing to sue for breach of the Escrow Agreement.

B. Breach of Contract Claim

Under Texas law, a breach of contract action requires proof of **four** elements: (1) a valid contract; (2) performance by the plaintiff; (3) breach by the defendant; and (**4**) damages to the plaintiff as a result of the breach. *See* *S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018). **Veritex** argues that Plaintiff has not alleged the existence of a valid contract between him and **Veritex**. As discussed above, **Lin** has alleged a legal and factual basis for his third-party beneficiary status that allows him to sue for breach of the Escrow Agreement.

Veritex argues also that **Lin** has not adequately alleged the third and fourth elements – breach and damages. **Lin** alleges that **Veritex** breached the Escrow Agreement by releasing $375,000.00 of his investment to RGO without receiving certification that at least two of the Subscribers' I-526 Petitions had been approved by USCIS. *See* Complaint, ¶¶ 8, 10, 11. **Lin** alleges that, as a result of **Veritex's** breach, he "lost his investment, and has been damaged in the amount of $375,000.00." *Id.*, ¶ 11. These allegations, accepted as true for purposes of a Motion to Dismiss, satisfy the federal pleading requirements for a breach of contract claim.

C. Breach of Fiduciary Duty Claim

Veritex argues that **Lin** has failed to allege a legal and factual basis for his breach of fiduciary duty claim. Under Texas law, an escrow agent under a written escrow agreement owes a fiduciary duty to both parties to the

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escrow agreement, but does not owe a fiduciary duty to a non-party. *See* *Gary E. Patterson & Assocs., P.C. v. Holub*, 264 S.W.3d 180, 203 (Tex. App.--Houston [1st Dist.] 2008, pet. denied); *see also* *In re Lopez*, 2019 WL 3987748, *4 (Bankr. S.D. Tex. Aug. 22, 2019) (escrow agent's "fiduciary duties were strictly limited to the two parties to the contract"). Therefore, under Texas law, **Veritex** did not owe a fiduciary duty to **Lin**, a non-party to the written Escrow Agreement. Because there is no fiduciary duty owed by **Veritex** to **Lin**, the breach of fiduciary duty claim is dismissed. [2]

IV. CONCLUSION AND ORDER

Lin has alleged, and the Escrow Agreement supports, **Lin's** third-party beneficiary status allowing him to assert a breach of contract claim against **Veritex**. He has alleged an adequate factual basis for the breach of contract claim and, therefore, the claim survives the Motion to Dismiss.

Under Texas law, **Lin** cannot assert a breach of fiduciary duty claim against an Escrow Agent serving under a written Escrow Agreement to which **Lin** is not a party. Accordingly, it is hereby

ORDERED that **Veritex's** Motion to Dismiss [Doc. # 24] is **DENIED** as to the breach of contract claim and **GRANTED** as to the breach of fiduciary duty claim.

All Citations

Not Reported in Fed. Supp., 2021 WL 3831986

Footnotes

1 The Escrow Agreement is "construed and enforced according to the laws of the State of Texas ... and applicable laws of the United States of America." Escrow Agreement, ¶ 9.

2 By Order [Doc. # 21] entered October 14, 2020, the Court directed Plaintiff to file an Amended Complaint and denied **Veritex's** Motion to Dismiss the original Complaint. Plaintiff filed the Amended Complaint by the November 5, 2020 deadline. Because Plaintiff has been given a prior opportunity to amend his complaint, the Court does not herein grant leave to amend again.

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CASE NO. 50

2020 WL 6146565
Only the Westlaw citation
is currently available.
United States District Court,
S.D. Texas, Houston Division.

ENVENTURE GLOBAL TECHNOLOGY INC., Plaintiff,
v.
WEATHERFORD U.S., L.P., Defendant.

Civil Action
No.
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Signed 10/02/2020

Attorneys and Law Firms

Lisa H. Meyerhoff, Myall S. Hawkins, Sharad Kotagiri Bijanki, Seyfarth Shaw LLP, Houston, TX, for Plaintiff.

Leslie V. Payne, Carlos Ignacio Ruiz, Christopher Michael First, James Boone Baxter, Heim Payne Chorush LLP, Houston, TX, for Defendant.

MEMORANDUM AND ORDER

NANCY F. ATLAS, SENIOR UNITED STATES DISTRICT JUDGE

***1** This patent case is before the Court on the Motion to Dismiss Third Amended Counterclaims ("Motion to Dismiss") [Doc. # 131] filed by Counterclaim-Defendant Enventure Global Technology, Inc. ("Enventure"), to which Counterclaim-Plaintiff Weatherford U.S., L.P. and Weatherford Technology Holdings, LLC (collectively, "Weatherford") filed an Opposition [Doc. # 142], and Enventure filed a Reply [Doc. # 143]. Having carefully reviewed the Third Amended Counterclaims [Doc. # 117], the parties' briefing, and the applicable legal authorities, the Court **denies** the Motion.

I. BACKGROUND

Enventure filed this lawsuit against Weatherford alleging patent infringement of several patents. Weatherford filed its Third Amended Counterclaims asserting, *inter alia*, five counterclaims alleging that Enventure is infringing Weatherford's patents, U.S. Patents No. 6,896,057, No. 6,722,443, No. 6,712,151, No. 6,976,536, and No. 7,228,915 (the "Weatherford Patents").

Enventure moved to dismiss the infringement counterclaims. Enventure asserts that in 2008 Weatherford granted a license to Enventure in exchange for Shell Oil Company ("Shell") licensing certain patents to Weatherford. Enventure argues that this 2008 License grants it the authority to use the technology covered by the Weatherford Patents. The Motion to Dismiss has been fully briefed and is now ripe for decision.

II. STANDARD FOR MOTION TO DISMISS

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A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure "is viewed with disfavor and is rarely granted." *See Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013) (quoting *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011)); *Shaikh v. Texas A&M Univ. Coll. of Med.*, 739 F. App'x 215, 218 (5th Cir. June 20, 2018). The Court accepts the factual allegations in the complaint as true, and construes the facts in the light most favorable to the plaintiff. *See Alexander v. Verizon Wireless Servs., L.L.C.*, 875 F.3d 243, 249 (5th Cir. 2017) (citing *Kelly v. Nichamoff*, 868 F.3d 371, 374 (5th Cir. 2017)). The complaint must, however, contain sufficient factual allegations, as opposed to legal conclusions, to state a claim for relief that is "plausible on its face." *See Ashcroft v. Iqbal*, 556 **U.S**. 662, 678 (2009); *Cicalese v. Univ. of Texas Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019); *Patrick v. Wal-Mart, Inc.*, 681 F.3d 614, 617 (5th Cir. 2012).

When considering a Motion to Dismiss, the Court's review is limited to the complaint or counterclaim, documents attached to the relevant pleading, and documents attached to the motion to dismiss that are central to the claim and are referenced in the complaint. *See Lone Star Fund V (**U.S.**), **L.P**. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000)). Documents attached to a party's briefing may be considered by the Court if the documents are sufficiently referenced in the complaint and no party questions their authenticity. *See Walch v. Adjutant General's Dep't of Tex.*, 533 F.3d 289, 294 (5th Cir. 2008). "In so attaching, the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated." *Collins*, 224 F.3d at 499.

III. ANALYSIS

***2** **Enventure** seeks dismissal of **Weatherford's** infringment counterclaims based on the existence and terms of the 2008 License. **Enventure** asserts that, pursuant to the 2008 License, it was the licensee of any **Weatherford** patents that involve a modification of a device, method, or product described and claimed in one or more of the patents identified in the 2008 License. **Enventure** argues that the **Weatherford** Patents asserted in the Third Amended Counterclaims are covered by the 2008 License because they are modifications of the Shell/**Enventure** Patent No. 6,634,431 ("the '431 Patent"), one of the patents in the 2008 License.

A. Matters Outside the Pleading

It is uncontroverted that neither the 2008 License nor the '431 Patent is referenced in the Third Amended Counterclaims. **Enventure** notes that **Weatherford** asserts infringement counterclaims, which require that the alleged infringer have acted "without authority." *See* Motion to Dismiss, p. 5 (citing 35 U.S.C. § 271(a)). Therefore, **Enventure** argues, the 2008 License is central to **Weatherford's** infringement counterclaims. The 2008 License, however, is not central to ***Weatherford's*** claims. Indeed, **Weatherford** alleges in the Third Amended Counterclaims that it has not licensed its rights in the **Weatherford** Patents to **Enventure**. See Third Amended Counterclaims, ¶¶ 174; 192; 208; 226; 243.

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The 2008 License may be central to an affirmative defense of license. It is not, however, central to **Weatherford's** infringement counterclaims, and it is not referenced in the Third Amended Counterclaims. Therefore, the Court excludes the 2008 License and the '431 Patent from its consideration when ruling on the Motion to Dismiss.

B. Failure to Plead Affirmative Defense

"In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense," including license. FED. R. CIV. P. 8(c)(1). An affirmative defense must be pled with "enough specificity or factual particularity to give the plaintiff 'fair notice' of the defense that is being advanced." *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999).

Enventure did not affirmatively assert the license defense in its Answer to the Third Amended Counterclaims [Doc. # 123]. **Enventure** argues that it raised the license defense by raising as an affirmative defense the failure to state a claim upon which relief can be granted, and by denying **Weatherford's** allegations that it has not licensed its rights in the **Weatherford** Patents and that **Enventure** acted without a license. *See* Reply, pp. 5-7. Such general denials are not sufficient to satisfy the pleading requirement of Rule 8(c)(1). *See Glass Containers Corp. v. Miller Brewing Co.*, 643 F.2d 308, 313 (5th Cir. 1981). Indeed, the Fifth Circuit has stated that pleading the affirmative defense of "license" does not preserve an "implied license" defense when the only evidence presented was of a written license. *See Ramirez v. Nichols*, 496 F. App'x 383, 386 (5th Cir. 2012).

Nonetheless, "a technical failure to comply with Rule 8(c) is not fatal." *LSREF2 Baron, LLC v. Tauch*, 751 F.3d 394, 398 (5th Cir. 2014). Therefore, the Court will allow **Enventure** to file an amended answer to **Weatherford's** Third Amended Counterclaims in order to assert the affirmative defense of license.

C. Consideration of Issues on Motion to Dismiss

Even if the Court were to consider the 2008 License and the '431 Patent, and even if **Enventure** had properly asserted the affirmative defense of license, the Court would deny the Motion to Dismiss. There are disputed issues regarding the correct interpretation of the 2008 License. There are disputed issues that will require the Court to compare multiple patents to determine whether the **Weatherford** Patents are modifications of the '431 Patent. These disputed issues are not proper for resolution on a motion to dismiss, where the Court's focus is whether the facts as pled in the counterclaims are sufficient under the federal pleading requirements. *See Ashcroft v. Iqbal*, 556 **U.S**. 662, 678 (2009); *Latham v. Wood*, 748 F. App'x 621, 622 (5th Cir. 2019). **Weatherford** alleges with sufficient factual specificity that it owns the **Weatherford** Patents and that **Enventure** is infringing. Indeed, **Enventure** does not challenge the adequacy of these allegations except to argue that patent infringement claims against a licensee should be dismissed for failure to state a claim upon which relief can be granted. *See* Motion to Dismiss, pp. 6-7.

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***3** The allegations in the Third Amended Counterclaims, taken as true for purposes of the Motion to Dismiss, satisfy the federal pleading requirements. As a result, dismissal is inappropriate and is denied. Issues regarding the effect of the 2008 License and whether the **Weatherford** Patents are modifications of the '431 Patent may be raised, if appropriate, in a subsequent motion for summary judgment filed after relevant discovery is completed.

IV. CONCLUSION AND ORDER

The 2008 License is not referenced in **Weatherford's** Third Amended Counterclaims, and **Enventure** has not affirmatively pled a license defense. Additionally, **Enventure** in its Motion to Dismiss relies on issues requiring interpretation of the 2008 License and comparisons among multiple patents, issues that are not properly resolved on a motion to dismiss in this case. As a result, it is hereby

ORDERED that **Enventure's** Motion to Dismiss Third Amended Counterclaims [Doc. # 131] is **DENIED**.

All Citations

Not Reported in Fed. Supp., 2020 WL 6146565

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CASE NO. 51

2019 WL 7037744
Only the Westlaw citation
is currently available.
United States District Court,
S.D. Texas, Houston Division.

IIITEC, LIMITED, Plaintiff,
v.
WEATHERFORD TECHNOLOGY HOLDINGS, LLC, Defendant.

Civil Action
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Signed 12/20/2019

Attorneys and Law Firms

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Billy Martin Donley, Baker Hostetler LLP, Houston, TX, Kevin W. Kirsch, Pro Hac Vice, Baker & Hostetler, LLP, Cincinnati, OH, for Defendant.

MEMORANDUM AND ORDER

NANCY F. ATLAS, SENIOR UNITED STATES DISTRICT JUDGE

***1** This case is before the Court on the Motion to Dismiss or for More Definite Statement ("Motion to Dismiss") [Doc. # 25] filed by Defendant Weatherford Technology Holdings, LLC ("Defendant" or "Weatherford").[1] Plaintiff iiiTec, Limited ("Plaintiff" or "iiiTec") filed a Response [Doc. # 37], and Weatherford filed a Reply [Doc. # 44]. Having reviewed the record and the applicable legal authorities, the Court **denies** the Motion to Dismiss.[2]

I. BACKGROUND

Plaintiff iiiTec alleges in the First Amended Complaint that Petrowell Limited ("Petrowell") developed a "radio frequency identification device ("RFID") controlled circulating sub for use in the drilling market of the oilfield service industry." First Amended Complaint [Doc. # 14], ¶ 9. Petrowell later discovered that Marathon Oil Company ("Marathon") held United States patents covering the use of RFID in downhole operations. *See id.* Plaintiff alleges that in early 2006, "Petrowell signed an exclusive license agreement with Marathon for all applications in the downhole environment for RFID technology." *Id.*, ¶ 10. Later that same year, Marathon moved its RFID technology to a new company, In-Depth Systems, Inc. ("In-Depth"). *See id.*, ¶ 11.

Plaintiff alleges that in August 2008, it entered into a Technology Development Agreement ("TDA") with Marathon and Petrowell.[3] *See id.*, ¶ 14. Under the TDA, Marathon is granted rights to new developments and/or improvements to the RFID technology made during the course of the TDA, which are

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defined as "Assigned IP" in the TDA. *See id.*, ¶ 16 (citing TDA ¶ 9.9). The TDA provides further that Marathon "shall grant to In-Depth or Developers [Petrowell and Plaintiff] licenses in any Assigned IP" depending on Marathon's agreement with In-Depth and others. *Id.* (quoting TDA ¶ 9.9). The TDA states that if assigned to the Developers, the Assigned IP license to Plaintiff shall be exclusive in the Drilling Field or Coiled Tubing Field. *Id.* (citing TDA ¶ 9.9).

Plaintiff alleges that the TDA included a "Program Plan" for "Program Tools" to be developed, and for the Developers to pay a **technology** development fee to Marathon. *See id.*, ¶¶ 21-22. Plaintiff alleges that as it developed a specific "Program Tool," it received a license covering that tool.[4] *See id.*, ¶ 22. Plaintiff alleges that the amount of the **technology** development fee was calculated based on a stated value for each tool and the "Gross Revenues" Plaintiff received from selling, renting, or using the tool. *See id.*, ¶ 23. Plaintiff alleges that, pursuant to the terms of the TDA, it paid a 17.5% fee, totaling $290,801.24, to Marathon in February 2013. *See id.*, ¶ 24.

***2** In April 2017, **Weatherford** and Marathon entered into an IP Purchase Agreement which stated that Marathon assigned ownership rights in the Assigned IP. *See id.*, ¶ 26. Plaintiff alleges that the TDA prevents Marathon from assigning its rights or obligations under that agreement "without the prior written consent of the Developers [and] any purported assignment or delegation without such consent [is] voidable and ineffective." *Id.* (quoting TDA ¶ 23). Plaintiff alleges that it has not consented to any assignment of the Assigned IP to **Weatherford**. *See id.*, ¶ 29. Plaintiff alleges that the IP Purchase Agreement provides also that the RFID **Technology** "shall remain subject to any and all rights and licenses granted" under the TDA. *Id.*, ¶ 27.

Plaintiff filed this lawsuit against **Weatherford** seeking primarily a declaratory judgment that any assignment of the Assigned IP by Marathon to **Weatherford** is invalid. *See* First Amended Complaint, Count 1. As an alternative, and only if there is a finding that the assignment to **Weatherford** is valid without Plaintiff's consent, Plaintiff seeks a declaratory judgment that it has a valid license under the TDA that is binding on **Weatherford** (Count 2), and asserts a breach of contract claim (Count 3). In Count 4 of the First Amended Complaint, Plaintiff seeks to recover its reasonable and necessary attorney fees.

Weatherford filed its Motion to Dismiss and Motion for Sanctions. **Weatherford** argues that the transfer of the Assigned IP from Marathon to **Weatherford** does not require Plaintiff's consent, that the TDA does not grant Plaintiff a license in the Assigned IP, and that there is no viable breach of contract claim because **Weatherford** is not a party to the TDA. The pending motions have been fully briefed and are now ripe for decision. The Court denies the Motion to Dismiss and the Motion for Sanctions.

II. STANDARD FOR MOTION TO DISMISS

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure "is viewed with disfavor and is rarely granted."

See Leal v. McHugh, 731 F.3d 405, 410 (5th Cir. 2013) (quoting *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011)); *Shaikh v. Texas A&M Univ. Coll. of Med.*, 739 F. App'x 215, 218 (5th Cir. June **20**, 2018). The Court accepts the factual allegations in the complaint as true, and construes the facts in the light most favorable to the plaintiff. *See Alexander v. Verizon Wireless Servs., **L.L.C.***, 875 F.3d 243, 249 (5th Cir. 2017) (citing *Kelly v. Nichamoff*, 868 F.3d 371, 374 (5th Cir. 2017)). The complaint must, however, contain sufficient factual allegations, as opposed to legal conclusions, to state a claim for relief that is "plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Cicalese v. Univ. of Texas Med. Branch*, 924 F.3d 762, 765 (5th Cir. **2019**); *Patrick v. Wal-Mart, Inc.*, 681 F.3d 614, 617 (5th Cir. 2012). When there are well-pleaded factual allegations, a court should presume they are true, even if doubtful, and "then determine whether they plausibly give rise to an entitlement to relief." *See Iqbal*, 556 U.S. at 679; *Doe v. Robertson*, 951 F.3d 383, 387 (5th Cir. 2014).

"The court's review is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000)); *see also Ironshore Europe DAC v. Schiff Hardin, L.L.P.*, 912 F.3d 759, 763 (5th Cir. **2019**); *Walch v. Adjutant General's Dep't of Tex.*, 533 F.3d 289, 294 (5th Cir. 2008) (on a Rule 12(b)(6) motion, documents attached to the briefing may be considered by the Court if the documents are sufficiently referenced in the complaint and no party questions their authenticity).

III. ANALYSIS

A. Count 1 - Assignment to Weatherford Without Consent

***3** **Weatherford** argues that Count 1 should be dismissed because the TDA's requirement for the Developers' consent prior to assignment applies only to an assignment of the TDA itself, not to the assignment of the Assigned IP to **Weatherford** under the IP Purchase Agreement. The TDA provides that Marathon "may not assign or delegate its rights or obligations under [the TDA] without the prior written consent of the Developers [and] any purported assignment or delegation without such consent will be voidable and ineffective." TDA [Doc. # 15-1], ¶ 23. Plaintiff alleges clearly and plausibly that ownership of the Assigned IP is a "right" that Marathon obtained under ¶ 9.6 of the TDA[5] and, therefore, assignment of that right requires Plaintiff's prior written consent to be effective. *See* First Amended Complaint, ¶¶ 26, 29.

The TDA requires Plaintiff's consent for Marathon to assign its "rights or obligations under [the TDA]," and Plaintiff alleges plausibly that Marathon's ownership of the Assigned IP is a right it acquired under ¶ 9.6 of the TDA. Therefore, Plaintiff alleges a plausible factual basis for its assertion that Marathon's assignment of the Assigned IP -- a right under the TDA – required Plaintiff's prior written consent. The Court denies **Weatherford's** Motion to Dismiss Count 1 of the First Amended Complaint.

B. Count 2 - Existence of License in Assigned IP [6]

Weatherford argues that Count 2 should be dismissed because the TDA does not grant a license to Plaintiff. In the First Amended Complaint, Plaintiff alleges that the development of Program Tools granted a license, effective upon development of the specific Program Tool, to the Developer. *See id.*, ¶ 22. Plaintiff alleges that the existence of a license allowed Plaintiff to market the Program Tools it developed, and required it to pay a "**technology** development fee" to Marathon in an amount based in part on the "Gross Revenues" received by Plaintiff in connection with marketing the tool. *See id.*, ¶¶ 22-23 (citing TDA ¶ 10.2; TDA Exh. 4 and Amended Exh. 4). Paragraph 10.2 of the TDA requires Plaintiff to pay Marathon a "**technology** development fee on the Gross Revenue of both sales and rental of all Exclusive Tools and Non-Exclusive Tools...." TDA ¶ 10.2. Moreover, Plaintiff alleges that the parties to the TDA intended and treated the Program Tools as being licensed as each tool was developed, even if the language in the TDA is ambiguous. *See id.*, ¶ 25.

Weatherford argues that the **technology** development fee was not based on the existence of a license, but was required under the TDA whether or not there was a license. **Weatherford's** argument is not persuasive at this stage of the proceedings. Paragraph 10.4 of the TDA provides that Plaintiff "will not be responsible for payment" of **technology** development fees until it has received payment for the tools from its customer. *See* TDA, ¶ 10.6. If, during the term of the TDA, the total amount of **technology** development fees paid to Marathon by the Developers equals "US $23.7MM," Plaintiff is no longer required to pay the **technology** development fee. *See* TDA, ¶ 10.5.

Plaintiff's allegations plausibly state a factual basis for the existence of a license under the TDA based on the parties' intent and conduct under the TDA, particularly in connection with the payment to Marathon of the **technology** development fee based on marketing of the "Program Tools," tools which Plaintiff argues it would not be allowed to market absent a license from Marathon. Therefore, the allegations in the First Amended Complaint are adequate to avoid dismissal under Rule 12(b)(6). The Motion to Dismiss Count 2 is denied.

C. Count 3 - Breach of TDA

***4** **Weatherford** argues that Count 3 should be dismissed because it was not a party to the TDA. Plaintiff alleges that the IP Purchase Agreement between **Weatherford** and Marathon stated that the Assigned IP "shall remain subject to any and all rights and licenses" granted under the TDA. *See id.*, ¶¶ 27-28. Plaintiff argues that, as a result, **Weatherford** obtained the Assigned IP subject to Plaintiff's right to receive a license, and assumed Marathon's rights and obligations under the TDA.

Weatherford argues that Plaintiff's position "is not true" and "simply makes no sense." *See* Reply [Doc. # 44], pp. 9, 10. While **Weatherford's** argument may ultimately succeed, it is not a basis for dismissing Count 3. Plaintiff alleges a plausible factual basis

for its position that **Weatherford** obtained the Assigned IP subject to the TDA, and assumed Marathon's obligations under that agreement. The Motion to Dismiss Count 3 is denied.

D. Count 4 - Claim for Attorney Fees

Weatherford seeks dismissal of Plaintiff's claim for attorney fees. **Weatherford** argues that Plaintiff is not entitled to recover fees because Counts 1 through 3 should be dismissed. As explained above, the Court denies the Motion to Dismiss Counts 1 through 3. Therefore, the Motion to Dismiss Count 4 is likewise denied.

IV. CONCLUSION AND ORDER

Based on the foregoing, Plaintiff has adequately alleged a plausible claim for relief in this case. Accordingly, it is hereby

ORDERED that the Motion to Dismiss or for More Definite Statement [Doc. # 25] is **DENIED**. It is further

ORDERED that the Motion for Sanctions [Doc. # 30] is **DENIED**.

All Citations

Not Reported in Fed. Supp., 2019 WL 7037744

Footnotes

1 Also pending is **Weatherford's** Motion for Sanctions [Doc. # 30], to which Plaintiff filed a Response [Doc. # 41], and **Weatherford** filed a Reply [Doc. # 46]. Because the Court denies the Motion to Dismiss or for More Definite Statement, sanctions under Rule 11 of the Federal Rules of Civil Procedure are inappropriate. The Motion for Sanctions is **denied**.

2 The information **Weatherford** seeks through its alternative request for a more definite statement can be obtained through discovery. Therefore, the Motion for More Definite Statement is **denied**.

3 The TDA is attached to the First Amended Complaint as Exhibit 2.

4 Plaintiff alleges that even if the TDA is ambiguous, “the Parties actually treated the Program Tools as being licensed to Plaintiff **iiiTec** as they were developed.” First Amended Complaint, ¶ 25.

5 Paragraph 9.6 of the TDA states:

> Any IP that is conceived, originated or developed solely or jointly by any Developer Entity, with or without [Marathon] and any third party, in the course of the Program, and any IP that is derived by any Developer Entity from, arising out of, or relating to the RFID **Technology** or Confidential Information, shall belong to [Marathon] and be owned solely by [Marathon], and the Developer Entities hereby assign to [Marathon] all right, title and interest therein, including all interest in..."Assigned IP."

6 Counts 2 and 3 are asserted only as an alternative to Count 1 in the event there is a finding that Marathon's assignment of the Assigned IP to **Weatherford** is valid.

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CASE NO. 52

2017 WL 1474093
Only the Westlaw citation
is currently available.
United States District Court,
S.D. **Texas**, Houston Division.

Larry Eugene **BALCEROWICZ**,
Jr., a/k/a Larry Michael Johnson,
TDCJ-CID # 1672723, Plaintiff,
v.
David W. **SWEETIN**, et al., Defendants.

Civil Action
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Signed 04/**06**/**2017**

Attorneys and Law Firms

Larry **Balcerowicz**, Jr., Houston, TX, pro se.

Jennifer Lynn Daniel, Kyle M. Smith, Craig McCam Jacobs, Office of the Attorney General, Austin, TX, for Defendants.

MEMORANDUM OPINION AND ORDER

KEITH P. **ELLISON**, UNITED STATES DISTRICT JUDGE

***1** Plaintiff Larry Eugene **Balcerowicz**, also known as Larry Michael Johnson, a state inmate at the time of filing, filed this *pro se* section 1983 lawsuit raising claims of deliberate indifference to his health and serious medical needs against prison correctional officers Warden David W. **Sweetin**, Assistant Warden Christopher G. Carter, Major David Forrest, and Peggy Haggard (collectively the "Correctional Defendants"), and against prison medical care providers Thomas Powell, P.A., Randall Healy, P.A., and Maureen Liles, R.N. (collectively the "Medical Defendants"). All of the named defendants are sued in their individual capacities. (Docket Entry No. 12.)

The Correctional Defendants filed a motion to dismiss (Docket Entry No. 15), to which plaintiff filed a response (Docket Entry No. 18). The Medical Defendants filed a motion for summary judgment (Docket Entry No. 24), to which plaintiff filed a response (Docket Entry No. 26). The Medical Defendants filed a reply to plaintiff's response (Docket Entry No. 27), followed by a sur-reply filed by plaintiff (Docket Entry No. 28).

Based on careful consideration of the motions and the various responsive pleadings, the exhibits, the record, and the applicable law, the Court **GRANTS** the motion to dismiss, **GRANTS** the motion for summary judgment, and **DISMISSES** this lawsuit for the reasons that follow.

I. BACKGROUND AND CLAIMS

Plaintiff alleges in his complaint that, on or about November 2, 2010, he arrived at the Estelle Unit from the Garza Transfer Facility. Plaintiff states that he had been evaluated by

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medical staff at the Garza Transfer Facility, where he reported his hearing impairment, asthma, and history of short "black out" seizures, but that he was not examined or evaluated by medical personnel upon his arrival at the Estelle Unit. He claims that he was not seen by Estelle Unit medical personnel until he suffered an asthma attack on November 9, 2010, and was treated by the medical staff and prescribed an asthma inhaler. He complained to one or more of the Medical Defendants that he had not been evaluated by Estelle Unit personnel upon his arrival, and had not received his asthma medication or any work restrictions.

Plaintiff reports that a few months later, he was assigned to work in the outdoor field squad. He reports no specific beginning date, but does state that on June 24, 2011, he complained to medical personnel that his working in the fields was causing problems with his asthma and seizures. Plaintiff states that he also sent I-60 complaints to the Correctional Defendants complaining that he was being "worked against restrictions" in the field squad. He complains here that he was only able to get a drink of water once an hour, and that he developed headaches, "shakes," and breathing difficulties. On July 26, 2011, he asked defendant Healy for medical restrictions to keep him from working in the fields; Healy responded that medical staff cannot make work assignment decisions. The next day, July 27, 2011, plaintiff reportedly "fell out" while working the fields and "woke up" in the infirmary, claiming that he had a "space out" seizure from being outside.

***2** As to the Correctional Defendants, plaintiff claims that **Sweetin** "ignored all pleas for help medical and safety. I wrote letters and requests for his help and authority power," that Carter "failed to respond and help to all pleas of help and assistance," that Forrest "refused to help me. Failed to help w/my pleas for med & safety," and that Haggard "ignored and refused to help me w/my pleas for help medically & security & safety." (Docket Entry No. 1, p. 3.) As to the Medical Defendants, plaintiff states that Powell and Healy "refused and denied me proper medical help and treatment," and that Liles "refused and denied me proper medical treatment and held against a P.A. Dr.s [*sic*] orders and advice." *Id.* Construed liberally, plaintiff's complaint raises claims against all of the defendants for deliberate indifference to his health and serious medical needs. He seeks monetary compensation and injunctive relief.

II. THE CORRECTIONAL DEFENDANTS

In their pending Rule 12(b)(6) motion to dismiss, the Correctional Defendants argue that plaintiff's claims against them should be dismissed because he fails to state a viable section 1983 Eighth Amendment deliberate indifference claim.

A. Rule 12(b)(6) Standards

In reviewing the adequacy of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must accept all well-pleaded facts as true and view all facts in the light most favorable to the plaintiff. *Thompson v. City of Waco*, 764 F.3d 500, 502 (5th Cir. 2014). It need not, however, accept a plaintiff's legal conclusions as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive dismissal

under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. As recognized by the Fifth Circuit Court of Appeals, the court's task "is to determine whether the plaintiff stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success." *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 854 (5th Cir. 2012) (en banc).

On a Rule 12(b)(6) motion, a district court generally "must limit itself to the contents of the pleadings, including attachments thereto." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). The court may also consider documents attached to either a motion to dismiss or an opposition to that motion when the documents are referred to in the pleadings and are central to a plaintiff's claims. *Id.*; *see also Walch v. Adjutant General's Dep't of Tex.*, 533 F.3d 289, 293-94 (5th Cir. 2008) (considering exhibits attached to an opposition because no party questioned the authenticity of the documents and they were sufficiently referenced in the complaint to permit their consideration on a motion to dismiss). Although no documents were attached to plaintiff's complaint or defendants' motion to dismiss in the instant case, plaintiff attached documents to his response in opposition to the motion to dismiss. The Correctional Defendants do not challenge the authenticity of the documents; to the contrary, the same documents are among those submitted by the Medical Defendants in support of their own motion for summary judgment. Consequently, in considering the pending motion to dismiss, the Court will include the exhibits attached to plaintiff's response in opposition to the motion.

A pleading filed *pro se* is to be liberally construed, and "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Under this standard, pleadings filed by a *pro se* litigant are entitled to a liberal construction that affords all reasonable inferences which can be drawn from them. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Oliver v. Scott*, 276 F.3d 736, 740 (5th Cir. 2000). Because plaintiff is proceeding *pro se*, he will be afforded the benefit of liberal construction under *Haines*.

B. Deliberate Indifference

***3** Plaintiff claims that the Correctional Defendants violated his Eighth Amendment rights through deliberate indifference to his health and safety.

A claim for deliberate indifference to a prisoner's health and safety requires proof that an officer knew of and disregarded an excessive risk to the inmate's physical health or safety, and that the inmate suffered physical harm or injury as a result. The inmate must show that the officer was aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and that the officer did in fact draw the inference and disregarded it. *Farmer v. Brennan*, 511

U.S. 825, 838 (1994). The failure of an officer to alleviate a significant risk which he should have perceived, but did not, does not constitute deliberate indifference. Moreover, mere negligence or a lack of reasonable care which falls short of being deliberately indifferent does not give rise to a constitutional violation. *Id.* at 832-33; *Horton v. Cockrell*, 70 F.3d 397, 401 (5th Cir. 1995). To meet this standard, a prisoner must establish more than mere negligence or an unreasonable response. *Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006).

C. Analysis

The record shows that plaintiff had been evaluated immediately prior to his transfer to the Estelle Unit, as shown by his Correctional Managed Care Intake History and Health Screening dated November 2, 2011. (Docket Entry No. 24-3, p. 22.) The form indicated that plaintiff had an asthma inhaler with him and was allowed to keep it on his person. That same day, prison physician Dr. Lieninger ordered that plaintiff be given a permanent bottom bunk restriction and a prescription for his regular seizure medication.

Plaintiff's medical and prison records also show that, on November 4, 2010, his Medical and Mental Health Transfer Screening form was completed at the Estelle Unit. *Id.*, pp. 278-79. The form noted that plaintiff was complaining of left-sided chest pain, and that he was taking phenytoin, an anti-seizure medication. He was approved for release to general population, and was given housing restrictions. *Id.*, p. 279. His work restrictions were noted as "12, 19, 20, 23, 25, & 27."[1] *Id.* On November 4, 2010, he was seen by defendant registered nurse Liles at the Estelle Unit after complaining of left-sided chest pain of two days duration. *Id.*, pp. 219. The medical chart entry noted that plaintiff had been in a fight two days prior at the Lychner Jail. *Id.* Plaintiff was provided a cold pack and ibuprofen, and was returned to his cell.

Thus, plaintiff's allegations and his medical records show that he was provided an intake evaluation, work restrictions, housing assignment and bunk restrictions, as well as prescriptions for his regular medications. He was allowed to keep his asthma inhaler on his person. He was seen, evaluated, and treated for complaints of muscle pain in his chest two days after his arrival at the Estelle Unit.

Plaintiff asserts that unidentified persons assigned him at an unidentified time to work in the fields. In arguing that the Correctional Defendants were deliberately indifferent to his health and safety, he states that they were aware of his hearing impairment and had knowledge of facts "from which they could infer that plaintiff's assignment to work in the fields would expose him to a substantial risk of serious harm." (Docket Entry No. 18, p. 3.) Specifically, he argues that his hearing impairment could have resulted in his being shot by armed guards if he were to venture out of bounds and not hear their warnings. *Id.* Or, he continues, he could not hear shouts to "move out of the way" of a falling tree. *Id.*, p. 4. However, plaintiff does not allege in his complaint that the defendants knew, or could infer from known facts, that plaintiff's field work exposed him to a serious risk of being shot or struck by falling trees and that they deliberately disregarded those

risks. Rather, plaintiff claims that working in the hoe squad caused him to overheat, and that the Corrections Defendants deliberately ignored the substantial risk of his overheating if assigned to the hoe squad.

***4** Plaintiff makes no correlation between his hearing impairment and a substantial risk of overheating. That is, he fails to allege facts showing that defendants could infer, from their knowledge of his hearing impairment, that his working in the fields would expose him to a substantial risk of serious overheating. To the contrary, plaintiff sets forth no factual allegations establishing that, at the time he was assigned to the hoe squad, the Correctional Defendants knew that the work assignment would expose plaintiff to an excessive risk of overheating and that they disregarded that risk. He further fails to allege and show that the Correctional Defendants were both aware of the facts from which the inference could be drawn that a substantial risk of serious harm existed, and that they drew the inference.

At some point after his assignment to the hoe squad, plaintiff sent an internal communication to the Unit Classification Committee, stating his belief that the work was dangerous for him because of his hearing impairment. He was not removed from the work assignment. *Id.,* pp. 5-**6**. Plaintiff did not inform anyone that he was experiencing physical problems working in the heat until July 26, 2011, following his claim that he had experienced a seizure while working outside, despite having purportedly taken his anti-seizure medications.[2] He complained to staff immediately after the alleged seizure that he "should not be outside working and needs restrictions changed." (Docket Entry No. 18, p. 25.) His physical examination revealed "chest clear, no wheezes, not on resp rx," "no tremors, good gait, no leg edema or atrophy." The nursing staff noted no seizure activity. *Id.,* p. 21. His respirations were "even & unlabored" when he was brought in from the field. *Id.*, p. 25. On July 27, 2011, his medical care providers added a work restriction for "no work in direct sunlight." (Docket Entry No. 26, Exhibit H.) Plaintiff does not claim that he was required to work outside in the field squad after that date.

Plaintiff fails to allege facts showing that the Correctional Defendants knew, or could infer from their existing knowledge, that his working in the fields would expose him to a substantial risk of serious overheating or seizure activity, and that they disregarded that risk. He further fails to allege and show that the Correctional Defendants were both aware of the facts from which such inference could be drawn that a substantial risk of serious harm existed, and that they drew the inference.

Plaintiff does not state a viable Eighth Amendment claim for deliberate indifference as to the Correctional Defendants, and the Correctional Defendants are entitled to dismissal of plaintiff's claims against them.

III. THE MEDICAL DEFENDANTS

The Medical Defendants move for summary judgment and argue that plaintiff fails to establish an Eighth Amendment violation for deliberate indifference to his serious health and medical needs.

A. Summary Judgement Standards

***5** Summary judgment should be granted when the moving party conclusively establishes that there is no genuine issue of material fact. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). There is no issue for resolution at trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party may satisfy its burden by negating the existence of an essential element of the nonmoving party's case. *Celotex Corp.*, 477 U.S. at 325. Alternatively, if the moving party will not bear the burden of proof at trial on a particular issue, it may meet its initial burden by pointing out the absence of evidence supporting that element of the nonmoving party's case. *Id.*; *Stults v. Conoco, Inc.*, 76 F.3d 651, 656 (5th Cir. 1996); *Transamerica Ins. Co. v. Avenall*, 66 F.3d 715, 718-719 (5th Cir. 1995).

Once the moving party has carried its burden, the burden shifts to the nonmoving party to show that summary judgment is not appropriate. *Exxon Corp. v. Baton Rouge Oil*, 77 F.3d 850, 853 (5th Cir. 1996). The nonmoving party cannot discharge its burden by alleging legal conclusions or unsubstantiated assertions, nor can it rest on the allegations of the pleadings; instead, it must present affirmative evidence in order to demonstrate the existence of a genuine issue of material fact and defeat a motion for summary judgment supported by competent evidence. *Anderson*, 477 U.S. at 248-250; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

"At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). When the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Id.* However, when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt the version of the facts for purposes of ruling on a motion for summary judgment. *Id.*

B. Deliberate Indifference

Under the Eighth Amendment, prison officials have a duty to provide adequate medical care to prisoners. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Rogers v. Boatright*, 709 F.3d 403, 409 (5th Cir. 2013). To allege an Eighth Amendment violation, an inmate must show that prison officials or prison medical care providers acted with deliberate indifference toward his serious medical needs, resulting in the unnecessary and wanton infliction of pain. *Id.*

To prevail under the "extremely high standard" of deliberate indifference, a prisoner "must show that the officials refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Domino v. Tex. Dep't of Crim. Justice*, 239 F.3d 752, 756 (5th Cir. 2001). "An incorrect diagnosis by prison medical personnel does not suffice to state a claim

for deliberate indifference." *Id.* Moreover, "unsuccessful medical treatment, acts of negligence, or medical malpractice do not constitute deliberate indifference." *Id.*

Deliberate indifference is especially difficult to show when, as here, the inmate has been provided with ongoing medical treatment. *See Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006). The decision not to provide additional or different treatment "is a classic example of a matter for medical judgment" rather than a basis for a deliberate indifference claim. *Estelle v. Gamble*, 429 U.S. 97, 107 (1976); *Domino*, 239 F.3d at 756. An inmate's disagreement with medical treatment does not state a claim for deliberate indifference. *Gobert*, 463 F.3d at 346-47; *Norton v. Dimizana*, 122 F.3d 286, 292 (5th Cir. 1997). Records showing that an inmate was given medical examinations, treatments, and medications may rebut an inmate's allegations of deliberate indifference in denying or delaying medical care. *See Varnado v. Lynaugh*, 920 F. 2d 320, 321 (5th Cir. 1991).

C. Analysis

***6** Plaintiff contends that the Medical Defendants were deliberately indifferent to his health and serious medical needs in denying him medical care and appropriate work restrictions. He claims that, due to their deliberate indifference, he sustained an asthma attack and, later, a seizure or episode of overheating while working outside in the field squad. He asserts that defendants' knowledge of his hearing impairment and history of a seizure disorder was sufficient to put them on notice that he should not work outside in the fields.

In support of their motion for summary judgment, the Medical Defendants have submitted an affidavit of Steven Bowers, M.D., who reviewed the medical records of plaintiff and testified as follows:

> An Intake History and Health Screening form was completed on November 2, 2010, and was signed by [plaintiff]. The Intake History and Health Screening form requests various information such as the patient's family medical history, the patient's personal medical history, the dates and types of treatment received, history of hospitalization, if the patient has any current medical, mental health or dental complaints, if the patient has used illegal drugs or alcohol, current medications, and a visual exam, etc. [Plaintiff's] Intake form noted that he had asthma, a back injury, a fish allergy, seizures, that he wore glasses and a hearing aid, he had a prior head injury, a problem with his right wrist, and a history of mental illness. In section A of the intake form, the writer noted [plaintiff] had an inhaler, KOP (keep on person), for his asthma; and that he was on medication for his seizures. The same day [plaintiff] entered the Texas Department of Criminal Justice, Licensed Vocational Nurse (LVN) Gomez received verbal orders from [a physician] for [plaintiff] to have a permanent bottom bunk restriction on his HSM-18 form and for the patient to be started on Dilantin 100mg (seizure medication), three capsules every evening, with 11 refills.
>
> [Plaintiff] arrived at the Estelle Unit on November 4, 2010. He was seen in the clinic by Registered Nurse (RN) Liles the day of his arrival for complaints of chest pain from

a fight he had two days ago at Lynchner jail. The patient indicated that it hurt under his chest in the ribcage area. RN Liles noted the area was tender to palpation, there was no obvious bruising or deformities, and that the patient indicated he had pain with inhalation with no radiation of pain. [Plaintiff] was given Ibuprofen 200mg three times a day for three days and instructed to submit a sick call request if the problem persisted after three days of medication. There is nothing in the medical record that indicates [plaintiff] had any complaints regarding his asthma or that he requested an inhaler. On November 8, 2010, Donna Stebbins sent an email to the Estelle Scheduling Group stating, "Please schedule CCC (Chronic Care Clinic) for Seizure D/O (disorder) ASAP also HSM-18 (Health Unit for Classification form) update."

On November 9, 2010, [plaintiff] was seen in the clinic by RN Calyen for complaints of pain to his left chest area. The patient reported getting into a fight two weeks ago at a county jail. The examination showed the patient's oxygen saturation level was 97% (normal), and that he had wheezy breath sounds. PA Powell was asked to come assess the patient. PA Powell ordered an Albuterol Unit Dose Nebulizer treatment at that time and a Proventil Inhaler was ordered KOP. The patient was instructed to increase his fluid intake and to return to the clinic if the wheezing worsened. Ibuprofen was also ordered for his chest pain. There is nothing in the record that indicates [plaintiff] had an asthma attack on November 9, 2010, only that he had asthmatic symptoms. PA Powell prescribed the appropriate medical treatment to [plaintiff] and no further complaint was received regarding this issue for the remainder of 2010.

***7** Upon entry to TDCJ [plaintiff] was referred to Assistive Disability Services (ADS) for his loss of hearing. His first appointment was scheduled for November 23, 2010 and he was a no show for his appointment. He was also a no show on December 13, 2010, December 14, 2010, January 5, 2011, January 10, 2011, January 25, 2011, March 7, 2011, March 24, 2011, August 2, 2011, and January 24, 2012. The patient was not seen for the first time by ADS until August 5, 2011. The caseworker noted the patient appear[ed] to have moderate to severe hearing loss and can hear better when facing the person speaking. It was also noted the patient appears to have some difficulty with speech and a delayed response to questions. The record noted the patient was provided information on developing program goals, available through ADS, program management, patient rights, and methods of communicating with his caseworker. The caseworker determined that the patient currently had no ADS needs and that his case management would be reviewed every 180 days.

It should be noted that [plaintiff] was scheduled for a Chronic Care Clinic appointment for his seizures and to update his Health Unit for Classification form (HSM-18) on December 20, 2010, but he was a no show for the appointment. PA Powell requested that the patient be rescheduled for the appointment.

On January 14, 2011, [plaintiff] was seen in the clinic by Licensed Vocational Nurse

(LVN) Phlegm for complaints that he had an asthma attack earlier and officers wanted him to be checked. It was noted that the patient had a cough but that his lungs were clear, his oxygen saturation level was 98%, and that his peak flow readings were normal at 400, 375, and 400. LVN Phlegm consulted with RN Liles and the patient was instructed to drink plenty of fluids, avoid factors which trigger an attack (strong odors, smoke, etc[.]), and to return to the clinic as needed.

On January 25, 2011, PA Powell changed [plaintiff's] evening medications to the morning pill window, per the patient's request, due to his work schedule being from 10:00pm [to] 6am but noted that the patient had not had any Dilantin for 20 days. PA Powell requested that RN Lackey notify the patient of the change and the need to comply with his medications. On February 14, 2011, PA Powell renewed [plaintiff's] prescription for a Proventil Inhaler.

On April 13, 2011, [plaintiff] was scheduled for a Chronic Care Clinic appointment, an HSM-18 update, and follow-up for his seizure disorder but he was a no show for his appointment. PA Healy requested that the patient be rescheduled within the week. On April 22, 2011, [plaintiff] was again a no show for his clinical appointment. On April 22, 2011, PA Healy noted that [plaintiff] had been a no show for two Chronic Care Clinic appointments and that the patient had very poor compliance with his seizure medication. PA Healy's plan of care was to discontinue the Dilantin due to the patient's noncompliance with the recommended treatment plan, and to reschedule for Chronic Care Clinic in 90 days. On April 27, 2011, PA Powell renewed the patient's prescription for Dilantin.

On June 28, 2011, [plaintiff] submitted a sick call request to see the doctor in the Chronic Care Clinic about his asthma and seizures. He was informed that he had an appointment already scheduled.

On July 26, 2011, [plaintiff] was seen in the Chronic Care Clinic by PA Healy. PA Healy noted that the interview was conducted by him writing to the patient and that the patient was able to respond verbally. The patient claimed that he had been on seizure medication since he was 12 and that his last seizure was two weeks ago. The examination showed the patient's lungs were clear with no wheezes, and that he was not currently on an inhaler, that his right wrist exam was within normal limits, no tremors were noted, cranial nerves 2-12 grossly intact, he had a good gait, and no leg edema or atrophy. PA Healy's plan of care was continue low bunk restriction; a classification notation for permanent chronic medical conditions —seizures; that there was no need for an asthma Chronic Care Clinic at that time [*sic*]; changed Dilantin to evenings pursuant to the patient's request; a follow-up Chronic Care Clinic appointment in one year; no repetitive use of hands, no work in direct sunlight, and no temperature extremes work restrictions to the patient's HSM-18 form; Dilantin level testing; and prescriptions for Ibuprofen 600mg (for wrist pain) and renewal of Dilantin (for seizures).

***8** On July 27, 2011, [plaintiff] was brought to the Estelle Unit emergency room after

officers found him sitting on the ground. The nurse noted the patient was alert and oriented times three, that his respirations were even and unlabored, his skin was warm and moist, and that no injuries were noted. The patient complained of a headache and indicated that he should not be outside working and he needs his restrictions changed. The patient was then seen by PA Healy. PA Healy noted that the patient was deaf and had a seizure disorder; that the patient had been assigned to the field squad, and that he may have had a mild seizure outside today but that no seizure activity had been noted by the nurses. PA Healy added a sedentary work only and no work in direct sunlight restrictions to the patients HSM-18 form.

On August 10, 2011, [plaintiff] was seen in the clinic by PA Powell for complaints of seizures, zone-out episodes, headaches, and blurred vision. PA Powell's examination of the patient was normal except for decreased sensation noted in his forehead and check; decreased hearing in both ears; sensory was normal except for V1, V2, and V3 (sensory branches of the 5th cranial nerve supplying the upper, middle and lower face) on the left with a slight decrease; and his grip was weak in the right (history of fractured wrist) with the remainder of his motor skills being normal. PA Powell's assessment was seizure disorder. The plan of care was for the patient to continue taking the Dilantin for seizures; keep well hydrated; to keep a log book of seizures (time, type, and how long); follow-up in one week with log book; laboratory work up (CMP, CBC, and Dilantin level testing); and prescriptions for Ibuprofen 800mg and an antacid. Dilantin level testing was performed on August 10, 2011 and was a 9.2 ug/ml, which is slightly below the recommended therapeutic range (10-20). On August 18, 2011, [plaintiff] was seen by PA Powell for follow-up on his seizures. The log book showed the patient had four episodes during the past week with his symptoms best described as Petit Mal, or absence seizures (tongue rolling and lip biting). Absence seizures are characterized by a brief impairment of consciousness, which usually lasts no more than a few seconds. PA Powell increased [plaintiff's] Dilantin to 400mg per day and a follow-up appointment in two weeks. Dilantin level testing performed on August 30, 2011, showed the patient's level was a 16.1 ug/ml which is within the therapeutic range. On August 31, 2011, [plaintiff] was seen by PA Powell for a referral for evaluation and a referral to audiology for a hearing test. PA Powell noted the patient's speech is understandable; that the patient reads lips; and that he does not have some hearing. PA Powell's examination noted the patient's left eardrum was perforated. PA Powell referred the patient to audiology for hearing testing and for an intake physical.

On September 13, 2011, [plaintiff] submitted a sick call request with complaints of severe headaches and pains from his blackout seizures. On September 14, 2011, [he] was seen by PA Healy for a physical examination. It is noted the patient had no complaints of blackout, syncope, or face numbness at that time; appeared well rested; normal gait and stance; sits/stands with ease; no tremors; not icteric (jaundice); and that the patient requested Ibuprofen for his headaches. PA Healy's plan of care was to add a no work exposure to loud noises restriction to the

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patient's HSM-18 form and a prescription for Ibuprofen 800mg twice a day.

On October 3, 2011, [plaintiff] was seen in sick call by PA Powell for complaints of wrist pain since September 2010. The patient stated his wrist was in a cast for **six** weeks, removed, and then he received no further treatment. [Plaintiff] relates that he requested that the Nurse Manager look into the fact this [*sic*] his restrictions were not complied with and that he did not request to be seen for his wrist. The record notes the patient declined the exam. PA Powell discussed restrictions and the fact that medical only assigns recommendations for restrictions and not specific job assignments.

***9** On January 30, 2012, [plaintiff] had an ADS case management interview. During the interview, the patient indicated that he had been missing lay-ins and needs to be shaken awake. The patient was advised that he is not currently eligible for adaptive aids because he must have his hearing tested to determine eligibility. Plaintiff reported that he was scheduled on November 17, 2011 for hearing testing but was a no show for the appointment because he was not aware of it. The caseworker noted that she was going to contact the unit major to discuss.

On February 24, 2012, [plaintiff] was seen in the Estelle Unit emergency room for complaints of a seizure and head wound. At first, the patient indicated he had a seizure. A 3cm long wound was noted between the patient's eyes with scratches on his face, neck and both lips so security was called in to take pictures. The patient's wounds were treated, and he remained alert and oriented without any neurological changes, and was then released to security.

On April 1, 2012, the patient was escorted to the clinic for complaints of blurred vision, seizures, numbness, and head pain. The record notes that when the patient entered the clinic he asked, 'What is this for, I put in to see the doctor?' The nurse noted the patient became angry and showed aggression when he was asked why he was being seen. The patient was informed that there was not a doctor there today, and that the nurse could see him and then refer him to a provider, if necessary. During this episode, the nurse noted the patient had no distress or respiratory problems. The patient indicated he wanted to refuse the appointment and was escorted back to his cell.

On July 31, 2012, [plaintiff] was seen by Dr. Robertson in the Chronic Care Clinic for follow-up for his seizures and asthma. Dr. Robertson noted that the patient was only 71% compliant with his medication, and he complained of a seizure a few weeks ago, that he complained of shortness of breath and wheezing, and a history of a closed head injury as a child. Dr. Robertson's examination of the patient was within normal limits. Dr. Robertson's plan of care was a laboratory work-up including Dilantin level testing, a complete blood count, complete metabolic panel, and lipids; a prescription for Motrin 800mg, Proventil Inhaler, Atrovent Inhaler, an antacid; and a dental consult for a night guard for teeth.

In summary, [plaintiff's] claim that he did not receive an intake physical is not accurate. The record shows that on November 2, 2010,

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an Intake History and Health Screening form was completed. This form indicated that [plaintiff] came into TDCJ with an inhaler and was allowed to keep it on his person. That same day, Dr. Lieninger ordered that [plaintiff] was to be given a permanent bottom bunk restriction on his HSM-18 form and a prescription for Dilantin 100mg (seizure medication), three capsules every evening with 11 refills. [Plaintiff] claims that he had an asthma attack on November 9, 2010 but the medical record does not support his claim. The record shows his oxygen saturation level on November 9, 2010 was at a normal level (97%) and his peak flow readings were normal. During this visit, PA Powell prescribed an Albuterol Inhaler and instructed the patient to return to the clinic if his symptoms worsened.

[Plaintiff] was scheduled for the Chronic Care Clinic on three separate occasions (December 20, 2010, April 13, 2011 and April 22, 2011) to be examined and to have his HSM-18 form updated but he was a no show for these appointments. [Plaintiff] claims that he was denied medical restrictions but his failure to appear for his scheduled Chronic Care Clinic appointments delayed any review of his work restrictions. Medical personnel are not responsible for job assignments and they only provide medically indicated work restrictions. After [plaintiff] began to experience difficulty working in the fields in July 2011, PA Powell and PA Health [*sic*] modified his work restrictions.

***10** My review of the medical record shows RN Liles only saw the plaintiff on two occasions. On each of these occasions, RN Liles performed an examination of the patient, completed the nursing protocol, and followed the protocol appropriately based on her examination findings.

(Docket Entry No. 24, Exhibit C, pp. 2-8.) Bowers further testified that,

> My review showed that between the time [plaintiff] entered TDCJ on November 2, 2010 and July 31, 2011, he only submitted seven sick call requests. One requested a pill window pass, one requested a change in time for him to receive his medication, one requested a refill for his inhaler which was given, one requested new glasses, one requested that his seizure medication be renewed which was given, one requested the name of his seizure medication, and the last requested a Chronic Care Clinic appointment for his asthma and seizure.

Id., p. 8.

In his pleadings, plaintiff specifically alleges that, on August 16, 2011, he had a small, forty-second "space out" seizure and went to the infirmary so it could be documented. He was escorted by a prison officer. When they arrived at the infirmary, defendant Maureen Liles, R.N., told the officer to return plaintiff to his cell because if he could "walk and talk," there was nothing she could do. (Docket Entry No.

26, p. 3; Docket Entry No. 28, p. 2.) Plaintiff complains that defendant Liles's refusal to see him resulted in lack of medical documentation that he had a seizure on that date. However, according to the prison's response to plaintiff's step 2 grievance, officers had neglected to inform Liles that plaintiff only wanted to document the episode, not seek treatment. (Docket Entry No. 26, Exhibit A.) Regardless, plaintiff was seen in clinic two days later on August 18, 2011, and was able to have his seizure episode documented and his medication increased. (Docket Entry No. 26, Exhibit A.) Plaintiff fails to establish that defendant Liles caused him any injury or harm by not seeing him on August 16, 2011.

Plaintiff fails to present probative summary judgment evidence demonstrating that Liles was deliberately indifferent to his serious medical needs, and the Medical Defendants are entitled to dismissal of plaintiff's claims against her.

Plaintiff further argues that defendant Thomas Powell, P.A., was deliberately indifferent to his health and serious medical needs by not renewing a prescription for plaintiff's asthma inhaler. He asserts that Powell examined him on November 9, 2010, following an episode of asthma, and prescribed him an inhaler for ninety days. He further asserts that a nurse gave him an inhaler in February of 2011, but that Powell refused to renew the prescription when the inhaler ran out.

Plaintiff's medical records show that, on November 9, 2010, Powell prescribed Proventil for plaintiff, with two puffs to be taken four times a day for ninety days. Plaintiff was allowed to keep the inhaler with him at all times, a policy known as "Keep on Person," or KOP. Even so, plaintiff's compliance with his inhaler usage was recorded as only 28%. (Docket Entry No. 24, Exhibit A, p. 5; Exhibit B, pp. 214-18.) When the prescription expired in February 2011, Powell renewed the prescription for another ninety days. *Id.*, Exhibit A, p. 5. Plaintiff submitted a "sick call request" for a new inhaler shortly after Powell ordered the refill, and was informed that the new prescription was valid until May 2011. Plaintiff's compliance with this renewal prescription was recorded as 37%. *Id.*

***11** Plaintiff sent no further sick call requests to Powell regarding inhaler refills after the prescription expired in May 2011. *Id.*, Exhibit B, pp. 226-238. To the contrary, plaintiff states that he sent an *e-mail* requesting a renewal to *defendant Randall Healy.* Nevertheless, plaintiff argues that Powell should have automatically renewed the prescription in May 2011 without waiting to hear from plaintiff. In support of his argument, plaintiff proffers nothing more than his bare assertion that chronic care medications such as asthma inhalers should be automatically renewed every ninety days, even if not requested by the inmate. Stated differently, plaintiff contends that it is the care provider, not the inmate, who is responsible for ensuring medication compliance. Plaintiff fails to direct this Court to any applicable authority supporting his position. Nor does plaintiff show that the non-automatic renewal of his inhaler prescription in May 2011 caused him any injury or harm. Plaintiff fails to show that defendant Powell was deliberately indifferent to plaintiff's health

or serious medical needs in not automatically renewing his inhaler prescription.

Plaintiff further claims that defendant Powell was deliberately indifferent to his health and safety needs in not examining him and giving him work restrictions upon his arrival at the Estelle Unit. In particular, plaintiff asserts that Powell failed to provide work restrictions based on his hearing impairment that would have excluded his working outside in the fields.

According to medical and prison records submitted by defendants, plaintiff underwent a Correctional Managed Care Intake History and Health Screening on November 2, 2011. (Docket Entry No. 24-3, p. 22.) The form, which was signed by plaintiff, indicated that plaintiff reported a personal history of asthma and paranoid schizophrenia and complained that his "wrist is out of place." *Id.* He was given a "routine referral" to medical and mental health. *Id.*, p. 23. The records also show that plaintiff underwent a Correctional Managed Care TB History and Classification, Immunization Review, and Intake Interview that same day. *Id.*, pp. 41-44. These forms and interviews clearly evince inquiries regarding lab testing, immunizations, and authorizations to test and immunize. *Id.*

On November 4, 2010, a Medical and Mental Health Transfer Screening form was completed at the Estelle Unit regarding plaintiff. *Id.*, pp. 278-79. The form noted that plaintiff was complaining of left-sided chest pain, and that he was taking phenytoin, an anti-seizure medication. He was approved for release to general population, and was given housing restrictions of "IIB-2? C-2? [*sic*]" *Id.*, p. 279. He was provided a lower bunk restriction. *Id.*, p. 226. Significantly, his work restrictions were noted as "12, 19, 20, 23, 25, & 27." *Id.* Thus, plaintiff is incorrect in asserting that he was not provided work restrictions upon his arrival at the Estelle Unit. According to the records, Powell first saw plaintiff on November 9, 2010, at which point plaintiff's medical and work restrictions had already been determined. Powell did not learn about plaintiff's work assignment complaints until October 3, 2011, at which time Powell informed him that "medical only assigns recommendations for restriction and not specific job assignments." *Id.* at 45.

Plaintiff fails to present probative summary judgment evidence demonstrating that Powell was deliberately indifferent to his health or serious medical needs, and the Medical Defendants are entitled to dismissal of plaintiff's claims against him.

Plaintiff also raises deliberate indifference claims against defendant Randall Healy, P.A. He alleges that Healy failed to modify his work restrictions or provide proper medications and/or refills of medications, resulting in physical injury. Specifically, plaintiff alleges that he saw Healy on July 26, 2011, and told him about the problems he experienced working in the field. Plaintiff complains that, instead of changing his medical restrictions, Healy told him to take breaks while in the field. As shown by the medical records and Dr. Bowers's affidavit, Healy examined plaintiff and found no abnormalities. He also changed the timing of plaintiff's Dilantin dose at plaintiff's request. Work restrictions were added to plaintiff's HSM-18 form for no repetitive use of hands, no work in direct sunlight, and no temperature

extremes. Dilantin level testing was ordered, and plaintiff's prescriptions for Ibuprofen 600mg and Dilantin were renewed.

***12** Plaintiff does not demonstrate that Healy refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for serious medical needs. *Domino*, 239 F.3d at 756. Plaintiff's disagreements with Healy's decisions as to renewing or not renewing his prescriptions does not constitute deliberate indifference. *Varnado*, 920 F.2d at 321. Moreover, Healy added restrictions to plaintiff's HSM-18 form on July 26, 2011, including restrictions against working in direct sunlight or temperature extremes. It is undisputed that medical personnel can issue work or medical restrictions, but that job assignments are made by prison officials.

Plaintiff fails to present probative summary judgment evidence demonstrating that Healy was deliberately indifferent to his health or serious medical needs, and the Medical Defendants are entitled to dismissal of plaintiff's claims against him.

IV. INJUNCTIVE RELIEF

Plaintiff reports that he has been released from prison and is no longer incarcerated. His requests for injunctive relief regarding his conditions of confinement are **DENIED AS MOOT.**

V. CONCLUSION

The motion to dismiss filed by defendants Warden David W. **Sweetin**, Assistant Warden Christopher G. Carter, Major David Forrest, and Peggy Haggard (Docket Entry No. 15) is **GRANTED,** and plaintiff's claims against them are **DISMISSED WITH PREJUDICE** for failure to state a viable claim for which relief may be granted under section 1983.

The motion for summary judgment filed by defendants Thomas Powell, P.A., Randall Healy, P.A., and Maureen Liles, R.N. (Docket Entry No. 24) is **GRANTED** and plaintiff's claims against them are **DISMISSED WITH PREJUDICE**.

Any and all pending motions are **DENIED AS MOOT**.

All Citations

Not Reported in Fed. Supp., 2017 WL 1474093

Footnotes

1 These restrictions included: no climbing, no work in direct sunlight, no temperature extremes, no work with chemicals or irritants, and no work around machines with moving parts.

2 Plaintiff's medical care provider ordered that, as of that day, medical personnel were to actually watch plaintiff take and swallow his medications. (Docket Entry No. 18, p. 20.)

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CASE NO. 53

2012 WL 1355591
Only the Westlaw citation
is currently available.
United States District Court,
S.D. **Texas**,
Houston Division.

AMERICAN GENERAL LIFE
INSURANCE COMPANY, Plaintiff,
v.
David F. **MICKELSON**, Defendant.

Civil Action
No.
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3421
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|
April **18**, **2012**.

Attorneys and Law Firms

Jessica Lynne Wilson, David T. McDowell, Edison McDowell & Hetherington LLP, Houston, TX, for Plaintiff.

Brian Thomas Swift, The B. Swift Law Firm, P.C., Houston, TX, Christopher R. Erwin, Erwin Legal, PC, Irvine, CA, David Beitchman, Beitchman Zekian, Encino, CA, for Defendant.

MEMORANDUM AND ORDER

KEITH P. **ELLISON**, District Judge.

***1** Pending before the Court is Defendant's Motion to Dismiss for Failure to State a Claim (Doc. No. 9). After considering the parties' arguments and the applicable law, the Court finds that Defendant's Motion to Dismiss should be denied.

I. BACKGROUND [1]

Plaintiff **American General** is in the business of underwriting and issuing policies of **life** insurance. (Compl., Doc. No. 1, ¶ 6.) Defendant David **Mickelson** entered into an Agent Contract with Plaintiff to solicit applications for Plaintiff's insurance plans. (*Id.* ¶¶ 7–8; Agent Contract, Doc. No. 15–3.) Plaintiff contends that Defendant marketed **American General life** insurance to a customer named Adele Ciccati, and Plaintiff paid Defendant $83,329 .20 in commissions when the policy was issued to Ciccati in January 2007. (Compl.¶ 8.) The policy was rescinded and the premiums paid for the policy were returned to Ciccati in March 2011, and thus Plaintiff contends that, under the Agent Contract, Defendant must return the commissions issued for that policy. (*Id.* ¶¶ 9–10 .)

Plaintiff brings claims for breach of contract and breach of fiduciary duty. Plaintiff asserts that Plaintiff and Defendant have a fiduciary relationship, and that Defendant owed Plaintiff a duty to discharge his duties in good faith and with reasonable diligence, and not to materially prejudice Plaintiff's interest. (*Id.* ¶ 16.) A portion of Defendant's debt has been offset by other commissions payable to Defendant,

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but Defendant remains liable to **American General** for $78,511.90. (*Id.* ¶ 11.)

Defendant moves to dismiss for failure to state a claim under Rule 12(b)(6). Although Defendant initially moved to dismiss both claims, he withdrew his motion to dismiss with respect to Plaintiff's breach of contract claim. (Reply, Doc. No. 16, at 2.) Thus, the Court considers only Defendant's arguments about Plaintiff's breach of fiduciary duty claim.

II. LEGAL STANDARD

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.' " *Cuvillier v. Taylor,* 503 F.3d 397, 401 (5th Cir.2007) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). That is, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Twombly,* 550 U.S. at 570). A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly,* 550 U.S. at 556). The plausibility standard is not akin to a "probability requirement," but asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* A pleading need not contain detailed factual allegations, but must set forth more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555 (citation omitted).

***2** Ultimately, the question for the court to decide is whether the complaint states a valid claim when viewed in the light most favorable to the plaintiff. The court must accept well-pleaded facts as true, but legal conclusions are not entitled to the same assumption of truth. *Iqbal,* 129 S.Ct. at 1950 (citation omitted). The court should not " 'strain to find inferences favorable to the plaintiffs' " or "accept 'conclusory allegations, unwarranted deductions, or legal conclusions.' " *R2 Investments LDC v. Phillips,* 401 F.3d 638, 642 (5th Cir.2005) (quoting *Southland Sec. Corp. v. Inspire Ins. Solutions, Inc.,* 365 F.3d 353, 362 (5th Cir.2004)). A district court can consider the contents of the pleadings, including attachments thereto, as well as documents attached to the motion, if they are referenced in the plaintiff's complaint and are central to the claims. *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 499 (5th Cir.2000). Importantly, the court should not evaluate the merits of the allegation, but must satisfy itself only that plaintiff has adequately pled a legally cognizable claim. *United States ex rel. Riley v. St. Luke's Episcopal Hosp.,* 355 F.3d 370, 376 (5th Cir.2004). "Motions to dismiss under Rule 12(b)(6) are viewed with disfavor and are rarely granted." *Lormand v. U.S. Unwired, Inc.,* 565 F.3d 228, 232 (5th Cir.2009) (citation omitted); *Duke Energy Intern., L.L.C. v. Napoli,* 748 F.Supp.2d 656 (S.D.Tex.2010). The Court should **generally** "afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that

the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir.2002).

III. ANALYSIS

As an initial matter, Defendant states that the Court may not consider the Agent Contract attached to Plaintiff's Response to the Motion to Dismiss. (Reply at 2.) However, a court may consider a document attached to a response to a motion to dismiss when that document is sufficiently referenced in the complaint and its authenticity is unquestioned. *Walch v. Adjutant General's Dept. of Tex.*, 533 F.3d 289, 293–94 (5th Cir.2008) (relying on documents that were "explicitly referenced in the complaint, acknowledged in the answers, and attached to [Plaintiff]'s opposition to the Defendants' motions to dismiss"); *see also U.S. ex rel. Colquitt v. Abbott Laboratories*, No. 3:06–cv–1769–M, **2012** **WL** 1081453, at *29 (N.D.Tex. Mar.30, **2012**); *Keel v. Wal–Mart Stores, Inc.*, No. 1:11–CV–248, **2012** **WL** 488248, at *2 (E.D.Tex. Jan.11, **2012**). In the present case, Plaintiff's Complaint references the Agent Contract and states that "this lawsuit arises out of the Agent Contract." (Compl.¶ 7.) It also notes Defendant's obligations under the contract. (*Id.* ¶¶ 10, 13.) Defendant also states, in his initial disclosures, that he is in possession of a "[c]opy of an agency agreement between plaintiff and defendant." (Doc. No. 13, at 3.) Defendant does not object to the authenticity of the Agent Contract attached to Plaintiff's Response or assert that he is in possession of a different contract, but rather withdrew a portion of his Motion to Dismiss based on this copy of the contract. Accordingly, the Court is satisfied that the Agent Contract is central to Plaintiff's claims and that Defendant has not objected to the authenticity of the document, and will consider its contents in evaluating Defendant's Motion to Dismiss.

3** Under Texas law, the elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant, (2) a breach by the defendant of his fiduciary duty to the plaintiff, and (3) an injury to the plaintiff or benefit to the defendant as a result of the defendant's breach. *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex.App.-Dallas 2006, pet. denied); *Punts v. Wilson*, 137 S.W.3d 889, 891 (Tex.App.-Texarkana 2004, no pet.). Defendant asserts that Plaintiff has not alleged facts sufficient to show that a fiduciary relationship exists. The parties agree that there are two types of fiduciary duties under Texas law: duties that arise as a matter of law and duties that arise out of the parties' past relationship and previous dealings. *See* ***Ins. Co. *of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex.1998). "An agency relationship creates, as a matter of law, a fiduciary relationship." *Harding Co. v. Sendero Resources, Inc.*, —— S.W.3d ——, **2012** **WL** 840383 (Tex.App.-Texarkana **2012**, no pet. h.) (citing *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex.2002)). "[T]he agent owes his principal loyalty and good faith, integrity of the strictest kind, fair, honest dealing, and the duty not to conceal matters which might influence his actions to his principal's prejudice." *Hartford Cas. Ins. Co. v. Walker County Agency, Inc.*, 808 S.W.2d 681, 688 (Tex.App.-Corpus Christi 1991). An agent also has a fiduciary duty to "account for profits arising out of the employment ... and the duty to deal fairly with

the principal in all transactions between them." *Brewer & Pritchard,* 73 S.W.3d at 200 (citing Restatement (Second) of Agency § 387). At a minimum, a fiduciary duty encompasses a duty of good faith and fair dealing, requiring the parties to "deal fairly" with one another. *Crim Truck & Tractor Co. v. Navistar International Transportation Corp.,* 823 S.W.2d 591, 594 (Tex.1992), *superseded by statute on other grounds,* Tex.Rev.Civ. Stat. Ann. art. 4413, § 6.06(e) (Vernon 2001).

The Court must consider the substance of an agreement to act on a principal's behalf in determining the nature of the relationship. *See National Plan Adm'rs, Inc. v. National Health Ins. Co.*, 235 S.W.3d 695, 702–03 (Tex.2007); *Horizon Offshore Contrs., Inc. v. Aon Risk Servs. of Tex.,* 283 S.W.3d 53, 57–59 (Tex.App.-Houston [14th Dist.] 2009, pet. denied) ("under the unambiguous language of the Agreement," the defendant was not acting as the plaintiff's agent and thus no fiduciary relationship was established). Unlike *National Plan Administrators* and *Horizon,* however, the Agent Contract at issue in this case specifically establishes an agency relationship, and provides that, upon demand, Defendant must pay Plaintiff any unearned commissions or service fees received by him with respect to premiums or payments that have been returned to the policy owner by Plaintiff for any reason. (Compl. ¶ 10; Agent Contract ¶ 4.7.) Thus, Plaintiff has asserted facts sufficient to show that the Defendant breached a fiduciary duty by failing to return the unearned commissions. *See American General Life Ins. Co. v. Rasche,* 273 F.R.D. 391, 393, 397 (S.D.Tex.2011) (interpreting a similar agent contract, which "requires defendant to return any unearned commissions paid to him in the event that **American General** returns premiums to the policy owner" and "does not explicitly state that no fiduciary relationship exists," to impose a fiduciary duty of good faith and fair dealing).

***4** Additionally, Defendant argues that Plaintiff has not alleged facts sufficient to show a breach of the duty. However, Plaintiff's Complaint contends that Defendant failed to return the commissions associated with Ciccati's rescinded policy after they were demanded by Plaintiff. Thus, Plaintiff has stated a claim for breach of fiduciary duty.

IV. CONCLUSION

For the reasons discussed in this order, Defendant's Motion to Dismiss is **DENIED.**

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 1355591

Footnotes

1 The following facts are drawn from Plaintiff's Complaint (Doc. No. 1) and are accepted as true for purposes of the Motion to Dismiss.

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CASE NO. 54

2011 WL 2455724
Only the Westlaw citation
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United States District Court,
S.D. Texas,
Houston Division.

Vicente **CORTEZ**, Plaintiff,
v.
PHARIA L.L.C., Defendant.

Civil Action
No.
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5068
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May **18**, **2011**.

Attorneys and Law Firms

Lu Ann Trevino, The Trevino Law Firm, Houston, TX, for Plaintiff.

Jason Anderson, Weinstein and Riley PS, Seattle, WA, for Defendant.

MEMORANDUM AND ORDER

FRANCES H. **STACY**, United States Magistrate Judge.

***1** Pending is Defendant **Pharia L.L.C.'s** Motion to Dismiss Pursuant to FRCP 12(b)(6) (Document No. 2). Having considered the motion, the response in opposition, the claims alleged herein, and the applicable law, the Court ORDERS, for the reasons set forth below, that Defendant's Motion to Dismiss is GRANTED and Plaintiff's claims are DISMISSED WITH PREJUDICE.

I. ***Background***

This is a Fair Debt Collection Practices Act ("FDCPA") case, 15 U.S.C. § 1692 *et seq.*, that was timely removed by Defendant from the County Court at Law # 2 of Harris County, Texas. In this action, Plaintiff Vicente **Cortez** ("**Cortez**") alleges that Defendant **Pharia L.L.C.** ("**Pharia**") engaged in unfair debt collection practices when it sued him to collect on a debt in a Harris County justice of the peace court (hereafter referred to as "JP lawsuit") after the applicable statute of limitations had expired:

> Plaintiff complains of Defendant ... for violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. Specifically, Defendant ... filed suit styled Cause No. CV41C0173244, ***Pharia, LLC*** *v. Vicente* ***Cortez***, In the Justice Court, Precinct 4, Place 1, Harris County, Texas, against Plaintiff after statute of limitation expired.

Original Petition, attached to Notice of Removal (Document No. 1) at 2. **Cortez** also

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alleges that **Pharia** misstated the amount owed in the JP lawsuit:

> Plaintiff further complains of Defendant ... for violation of the Fair Debt Collection Practices Act. **Pharia** used false representations in its attempt to collect an alleged debt in violation of 15 U.S.C. § 1692e(5) and 15 U.S.C. § 1692f(1). Specifically, Defendant demanded from and then sued Plaintiff the sum of $2,741.69 when the true amount of the alleged debt was never more than $2,303.16." *Id.*

Pharia seeks to dismiss **Cortez**' claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim and on the basis of *res judicata.*

II. ***Standard of Review***

Rule 12(b)(6) provides for dismissal of an action for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). When a district court reviews the sufficiency of a complaint before it receives any evidence either by affidavit or admission, its task is inevitably a limited one. *See* *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). The issue is not whether the plaintiff ultimately will prevail, but whether the plaintiff is entitled to offer evidence to support the claims. *Id.*

In considering a motion to dismiss under Rule 12(b)(6), the district court must construe the allegations in the complaint favorably to the pleader and must accept as true all well-pleaded facts in the complaint. *See* *Lowrey v. Tex. A & M Univ. Sys.,* 117 F.3d 242, 247 (5th Cir.1997). To survive dismissal, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* ––– U.S. ––––, ––––, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). While a complaint "does not need detailed factual allegations ... [the] allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly,* 127 S.Ct. at 1964–65 (citations and internal footnote omitted).

***2** **Pharia's** motion to dismiss based on *res judicata* may be addressed under Rule 12(b)(6) because the elements of *res judicata* are evident on the face of the pleadings, *see* *Kansa Reinsurance Co. v. Mktg. Corp. of Tex.,* 20 F.3d 1362, 1366 (5th Cir.1994), and are matters of which the Court may take judicial notice. *Hall v. Hodgkins,* 305 F. App'x 224, 227 (5th Cir.2008). Generally, a court must limit itself to the contents of the pleadings and the attachments thereto in a motion to dismiss. *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498 (5th Cir.2000). However, documents attached to the pleadings, a motion to dismiss, or responses thereto

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may be considered if those documents are sufficiently referenced in the pleadings, central to the plaintiff's claim, and of unquestioned authenticity. *See* Walch v. Adjutant Gen.'s Dep't of Tex., 533 F.3d 289, 294 (5th Cir.2008) (court's consideration of discharge letters, which "were explicitly referenced in the complaint, acknowledged in the answers, and attached to [plaintiff's] opposition to the Defendant's motion to dismiss ... is consistent with our precedents"); *see also* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 376 (3d ed. 2004) ("Numerous cases ... have allowed consideration of matters incorporated by reference or integral to the claim ... items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned ...."). Here, judicial notice is taken of the pleadings in the JP lawsuit. *See* Jefferson v. Lead Indus. Ass'n, Inc., 106 F.3d 1245, 1250 n. 14 (5th Cir.1997) (the court may take judicial notice of matters of public record, such as court documents, in considering a Rule 12(b)(6) motion).

III. *Discussion*

Pharia argues, in its motion to dismiss, that *res judicata* bars **Cortez**' claims herein because: (1) the exact same claims were raised by **Cortez** as counterclaims in the JP lawsuit; (2) the claims were rejected by the court in the JP lawsuit; and (3) the dismissal of those claims was a final adjudication of the claims. In addition and in the alternative, **Pharia** argues in the motion to dismiss that **Cortez** has not stated a claim under the FDCPA.

In determining whether *res judicata* bars **Cortez's** federal claims as a matter of law, the Court must give the state court judgment the same preclusive effect as would be given that judgment under Texas law. *Hogue v. Royse City, Tex.*, 939 F.2d 1249, 1252 (5th Cir.1991). "For *res judicata* to apply, there must be: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims that were raised or could have been raised in the first action." *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 449 (Tex.2007). *Res judicata* applies to justice court judgments on the merits only when the particular claim in question has been adjudicated in that court. *See* TEX. CIV. PRAC. & REM.CODE § 31.005 (West 2008).

***3** Here, the record shows that **Cortez** asserted as counterclaims in the JP lawsuit the exact same claims he raises herein. In the Amended Counterclaim he filed in the JP lawsuit, **Cortez** alleged as follows:

> Counter Claimant/Defendant complains of Counter Defendant, Plaintiff **PHARIA L.L.C**. for violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. Specifically, Counter Defendant/ Plaintiff **PHARIA**, **L.L.C**. filed this lawsuit against Counter Claimant/Defendant after the statute of limitations had expired.
>
> Counter Claimant/Defendant further complains of Counter Defendant/Plaintiff, **PHARIA**, **L.L.C**., N.A., for violation of the Fair Debt Collection Practices Act. **Pharia** used false representations in its attempt to collect an alleged debt in violation of 15 U.S.C. § 1692e and 15 U.S.C. § 1692f. Specifically, Counter Claimant/ Plaintiff demanded from and then sued

> Fuertes [sic] the sum of $2,741.69 when the true amount of the alleged debt was never more than $2,303.16

See Amended Counter Claim in JP lawsuit, attached to Defendant's Motion to Dismiss (Document No. 2) as 2–1. **Cortez** has admitted in this case that his counterclaims in the JP lawsuit were dismissed. *See* Original Petition, attached to Defendant's Notice of Removal (Document No. 1). at 2. In addition, the record shows, and **Cortez** does not dispute, that he did not appeal the rulings in the JP lawsuit. Those rulings therefore became final.

Because the justice court was a court of competent jurisdiction to hear **Cortez's** counterclaim, see TEX. GOV'T CODE § 27.031(a) (1) (West Supp.2010), and because **Cortez** does not dispute that the dismissal of his counterclaims in the JP lawsuit constituted a final judgment on the merits of those counterclaims, those same claims, which have been raised by **Cortez** herein, are barred by *res judicata*. *See* *Elliott v. West,* No. 01–09–00425–CV, **2011** **WL** 1233434, at *3 (Tex.App.-Houston [1st Dist.] Mar. 31, **2011**, no pet. h.) (holding that *res judicata* barred plaintiff's claims which were previously adjudicated in justice court).

IV. *Conclusion and Order*

Based on the foregoing, and the conclusion that the claims asserted by Plaintiff Vincente **Cortez** are the same claims that were finally adjudicated against **Cortez** in the JP lawsuit, it is

ORDERED that Defendant **Pharia** **L.L.C.'s** Motion to Dismiss (Document No. 2) is GRANTED and Plaintiff Vicente **Cortez's** claims against Defendant **Pharia** **L.L.C** are DISMISSED WITH PREJUDICE.

All Citations

Not Reported in F.Supp.2d, 2011 WL 2455724

End of Document

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CASE NO. 55

5B Fed. Prac. & Proc. Civ. § 1357 (4th ed.)

Federal Practice and Procedure (Wright & Miller) | September 2025 Update

Federal Rules of Civil Procedure

Chapter 4. Pleadings and Motions

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

Authors: Arthur R. Miller and A. Benjamin Spencer

C. Presentation of Defenses and Objections

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§ 1357 Motions to Dismiss—Practice Under Rule 12(b)(6)

Primary Authority

- **Fed. R. Civ. P. 12**

Forms

- **2C West's Federal Forms, District Courts—Civil §§ 11:11**, **11:80** to **11:90.50**

Federal pleading standards are applied to determine whether a complaint in a federal court action states a claim for relief.[1] For purposes of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), those standards dictate that (1) the complaint is construed in the light most favorable to the plaintiff,[2] (2) its non-conclusory[3] allegations are taken as true,[4] and (3) all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader.[5] However, it is clear that the district judge does not have to accept each and every allegation in the complaint as true in considering its sufficiency. Courts have used varying language to draw the line between what is admitted for purposes of a Rule 12(b)(6) motion to dismiss and what is not considered admitted. For example, federal courts have said that they accept the truth of a pleading's "facts,"[6] "non-conclusory allegations,"[7] "factual allegations,"[8] "material

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allegations,"[9] "well-pleaded facts,"[10] and "well-pleaded factual allegations."[11] Nothing appears to turn on the differences in these semantic formulations of the standard.

Conversely, a number of federal courts also have said that there are other types of allegations that need not be accepted as true on a Rule 12(b)(6) motion. Various phrases have been used by the federal courts to express this point. Among these are that the district court is not bound by a pleading's "legal conclusions,"[12] or its "unwarranted inferences,"[13] or its "mere conclusory statements."[14] Once again, these different verbalizations can be considered more or less synonymous in terms of the judicial application of Rule 12(b)(6).

If, after following these tenets, the court concludes that the complaint states any legally cognizable claim for relief, the court must deny the motion to dismiss and permit the action to continue.[15] Ultimately, the burden is on the moving party to prove that no legally cognizable claim for relief exists.[16]

District courts primarily consider the allegations in the complaint when deciding a Federal Rule 12(b)(6) motion to dismiss; if matters outside of the pleadings are presented and not excluded by the court on a motion under Rule 12(b)(6), then—pursuant to Rule 12(d)—the motion must be treated as one for summary judgment under Federal Rule of Civil Procedure 56 and the opposing party must be given an opportunity to respond.[17] However, courts resolving Rule 12(b)(6) motions may consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned without converting the motion into one for summary judgment under Rule 12(d).[18]

As for timing, a motion made under Rule 12(b)(6) that raises the defense of failure to state a claim upon which relief may be granted must be made before the service of a responsive pleading, but according to Rule 12(h)(2) the defense is preserved and may be raised as late as trial.[19] Technically therefore, a post-answer Rule 12(b)(6) motion is untimely[20] and the cases indicate that some other vehicle, such as a motion for judgment on the pleadings or for summary judgment, must be used to challenge the plaintiff's failure to state a claim for relief at that point.[21] However, circuit courts tend to be forgiving of district courts that consider the merits of late-filed Rule 12(b)(6) motions.[22]

Most federal courts will not grant a motion to dismiss for failure to state a claim only because the nonmoving party failed to respond to the motion. The court is still required to conduct the Rule 12(b)(6) inquiry to determine if the complaint states a valid claim for relief.[23] Additionally, if a party does not make a formal motion under Rule 12(b)(6), the district judge on his or her own initiative may note the inadequacy of the complaint and dismiss it for failure to state a claim as long as the procedure employed is fair to the parties.[24] This power is enhanced in the context of

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a complaint brought by a prisoner proceeding in forma pauperis under 28 U.S.C.A. § 1915, which permits the court to dismiss complaints it deems to be "frivolous." [25]

A district court need not deal with a 12(b)(6) motion itself in the first instance, however. A district court has the power to designate a magistrate judge appointed under the Federal Magistrates Act to conduct hearings and to make recommendations regarding the disposition of a motion to dismiss under Rule 12(b)(6). [26] Note, though, that based on limitations in the Act and under Article III of the Constitution, magistrates have no power to rule on such dispositive motions. [27] Thus, Federal Rule of Civil Procedure 72 provides that magistrate judges only may make a recommended disposition to the district court regarding whether to grant motions under Rule 12(b)(6), to which the parties may object and which the district judge then must review de novo. [28]

The motion to dismiss under Rule 12(b)(6) raises only an issue of law. [29] Further, a court has no discretion as to whether to dismiss a complaint that it determines is formally or substantively insufficient. [30] However, as will be discussed later in this section, district courts have some leeway under the pleading standards of the federal rules in deciding when a complaint is formally insufficient and whether to permit leave to replead. [31]

A district court's ruling on a Rule 12(b)(6) motion is reviewed de novo by the court of appeals, [32] although there are some instances in which components of the underlying dismissal determination may be reviewed under a more deferential standard. [33] Because the motion raises a question of law and the lower court's decision is based only on the sufficiency of the complaint, any documents attached thereto or incorporated by reference, and the doctrine of judicial notice, that standard is entirely appropriate. Inasmuch as a denial of a motion to dismiss does not produce a final judgment, appellate review most frequently involves a grant of the Rule 12(b)(6) motion. [34] Further, because an amended complaint entirely supersedes the previous complaint, prior dismissals of superseded complaints are not amenable to appellate review if the amended complaint abandons the claims that were subject to the previous dismissal. [35]

The court of appeals will evaluate the complaint in the same manner as the district court, meaning the same principles of construction will apply. Thus, for example, the appellate court will accept the facts pleaded as true and read the complaint in the light most favorable to the pleader, [36] but it has no obligation to conjure up unpleaded allegations. [37] Although some courts of appeal will not accept arguments raised, or consider facts presented, for the first time on appeal, [38] the Court of Appeals for the Seventh Circuit has held to the contrary with regard to factual allegations that are consistent with the complaint. [39]

Substantively, the sufficiency of a complaint (i.e., whether it states a claim for relief) is ordinarily judged under the standard provided by Federal Rule of Civil Procedure 8(a)(2), [40] although Rule

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12(b)(6) also has been used to enforce the special heightened pleading requirements for fraud and mistake prescribed by Federal Rule of Civil Procedure 9(b).[41] To state a claim under Rule 8(a), as announced by the Supreme Court in Bell Atlantic Corporation v. Twombly,[42] the complaint must contain "enough facts to state a claim to relief that is plausible on its face."[43]

Twombly's plausibility standard—clarified and made applicable to all federal civil cases in Ashcroft v. Iqbal[44]—replaced the long-standing test from the 1957 case Conley v. Gibson.[45] The Conley test admonished courts not to dismiss a complaint for failure to state a claim "unless it appear[ed] beyond doubt that the plaintiff c[ould] prove no set of facts in support of his claim which would entitle him to relief.[46] Accordingly, for many years after the promulgation of the Federal Rules of Civil Procedure the motion to dismiss for failure to state a claim was viewed with disfavor and was rarely granted; in many cases and in many courts, that restrained approach to the use of the motion continued to be the norm for several decades.[47]

The Twombly Court concluded that the "no set of facts" language from Conley "has earned its retirement,"[48] and asserted that the "accepted pleading standard" is: "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[49] Most importantly, the Court in Twombly created a new factual plausibility standard by requiring facts that "raise the right to relief above the speculative level" to the plausible level in order for the claim to survive the motion to dismiss.[50] Two years later, the Iqbal Court added that in determining plausibility, conclusory statements are not entitled to the presumption of truth ordinarily accorded to factual allegations when resolving motions to dismiss under Rule 12(b)(6)[51] and that district judges may consider "judicial experience" and "common sense" when deciding a Rule 12(b)(6) motion to dismiss.[52] The Iqbal Court also reiterated the statement in Twombly that "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief." ' "[53] For a lengthy discussion of these important cases and a fuller analysis of the pleading standard under Rule 8(a)(2), see § 1216 in this Treatise.

It is worth pausing to note the Supreme Court's declaration that a complaint that pleads facts that are merely consistent with liability will be deemed insufficient in the face of a motion to dismiss. That does not mean that the mere existence of an alternative explanation entitles a defendant to dismissal. Rather, there must be a factual context that supports an inference of liability as one plausible explanation for what has been alleged. As a Sixth Circuit opinion stated, "[I]f a plaintiff's claim is plausible, the availability of other explanations—even more likely explanations—does not bar the door to discovery. But you can't assess the plausibility of an inference in a vacuum. The reasonableness of one explanation for an incident depends, in part, on the strength of competing explanations. * * * Where, as here, the complaint alleges facts that are merely consistent with liability * * * as opposed to facts that demonstrate discriminatory intent * * *, the existence of

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obvious alternative explanations simply illustrates the unreasonableness of the inference sought and the implausibility of the claims made." [54]

Compare that passage with the Seventh Circuit, which stated, "'Plausibility' in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not. * * * In other words the court will ask itself could these things have happened, not did they happen. For cases governed by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences." [55] See also a decision of the Second Circuit, which stated that "[a] court * * * may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible." [56]

Another aspect of the pleading standard under Twombly and Iqbal worth noting is its embrace of the term "conclusory" to identify the class of allegations not entitled to the presumption of truth for purposes of a motion to dismiss. This harkens back to some of the nomenclature of the code pleading regime, [57] such as "facts" and "conclusions," that the Federal Rules of Civil Procedure were designed to supplant. [58] Nonetheless, it is clear that a plaintiff cannot simply make a bald "conclusory" statement that she has a valid claim of some legally recognizable type against the defendant. [59] Further, a court will not accept conclusory allegations concerning the legal effect of the events the plaintiff has set out if these allegations do not reasonably follow from the pleader's description of what happened, or if these allegations are contradicted by the description itself. [60] Thus one plaintiff's conclusory allegation that he had been deprived of his "property and personal rights and professional status, contrary to the Constitution and laws of the United States," and therefore had a right of action under the Civil Rights Act of 1964, was not accepted as true, since the plaintiff's more specific allegations that the defendant had uttered a derogatory word in reference to him indicated that at best he had an action for slander under state law. [61] In another case, the plaintiff's allegation that there was a conspiracy in violation of the Sherman Antitrust Act was not accepted, inasmuch as the complaint itself indicated that only one business entity was involved and a conspiracy claim requires at least two parties. [62]

What is less clear is what the precise line is between a conclusory allegation and a factual allegation. Courts vary in how narrowly or expansively they define the conclusory category. [63] This variation is understandable, because the term "conclusory" is an imprecise concept that was destined to result in it being largely a matter that is in the eye of the beholder. Indeed, in both Twombly and Iqbal the Justices were sharply divided over whether the core allegations of the complaint were properly regarded as mere "legal conclusions." [64]

Many federal courts have concluded that the complaint should not be dismissed merely because the plaintiff's allegations do not support the legal theory he or she intends to proceed on, since the district court is under a duty to examine the complaint to determine if the allegations provide

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for relief on any possible legal theory.[65] Relatedly, in 2014 the Supreme Court decided the case of Johnson v. City of Shelby, Mississippi,[66] which clarified that the Twombly-Iqbal factual plausibility standard applies only to the facts pled. Thus a plaintiff who pleads facts sufficient to satisfy the Twombly-Iqbal standard, but does not perfectly invoke the correct legal theory should not be dismissed under Rule 12(b)(6).[67] Similarly, it need not appear that the plaintiff can obtain the particular relief prayed for in the complaint, as long as the district judge can ascertain from what has been alleged that some relief may be granted by the court.[68] Nonetheless, as is discussed more fully in this Treatise's analysis of Rule 8, the pleader must set forth sufficient information to outline the legal elements of a viable claim for relief or to permit inferences to be drawn from the complaint that indicate that these elements exist.[69]

Nor should the complaint be dismissed merely because the district court believes that the case is legally or factually doubtful or that it is unlikely that the plaintiff will prevail in the action on the merits.[70] Whether the plaintiff ultimately can prevail on the merits is a matter properly determined on the basis of proof, which means on a summary judgment motion or at trial by the judge or a jury, and not merely on the face of the pleadings.[71] Likewise, courts have refused to consider presumptions in favor of the defendant on a motion to dismiss since presumptions are evidentiary standards that are inappropriate for evaluation at the pleadings stage.[72] The district court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or even "extreme," since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions.[73]

A significant number of federal courts have adopted a more lenient attitude towards pro se plaintiffs on a Rule 12 motion than is accorded other plaintiffs, although this does not mean that they have granted such litigants complete amnesty from the requirement of the rules.[74] In the same vein, some courts appear to have adopted a stricter stance against defendants trying to dismiss civil rights claims.[75] In any event, in many contexts the motion for summary judgment provides a more expeditious and effective procedure than the Rule 12(b)(6) motion for quickly terminating an action that does not appear to entitle the plaintiff to relief on its substantive merits.[76]

A dismissal under Rule 12(b)(6) is likely to be granted by the district court when the plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to securing relief.[77] In such cases, dismissal is justified because the allegations of the complaint itself clearly demonstrate that whatever interpretation is given to the facts the plaintiff does not have a claim that is legally redressible; in a real sense, the plaintiff has pleaded himself or herself out of federal court.[78]

A good example of these propositions is Massey v. Merrill Lynch & Company,[79] in which the plaintiffs alleged fraud in a direct (as opposed to a derivative) lawsuit. However, the complaint

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and the attached exhibits plainly established that the allegedly fraudulent representations were made to the corporation itself, not to the plaintiffs as individual shareholders. Accordingly, the facts alleged in the complaint made recovery in a non-derivative shareholder action impossible, so the district court dismissed the complaint under Rule 12(b)(6) and the Seventh Circuit affirmed. Similarly, when the complaint in an action for negligence contained allegations indicating that the sole proximate cause of the injury was the negligence of the plaintiff and not that of the defendant, the complaint was dismissed for insufficiency. [80]

As the case law makes clear, the complaint also is subject to dismissal under Rule 12(b)(6) when its allegations indicate the existence of an affirmative defense that will bar the award of any remedy. [81] However, for this to occur the applicability of the defense has to be clearly indicated and must appear on the face of the pleading to be used as the basis for the motion. [82] This situation should be distinguished from cases that involve instances in which the statement of the claim itself is defective as a matter of the applicable substantive law. In a situation involving the barring effect of an affirmative defense, the claim is stated adequately from that perspective, but in addition to the claim the contents of the complaint include matters of avoidance that effectively vitiate the pleader's ability to recover on the claim. In both situations the complaint is said to have a built-in defense and is essentially self-defeating. [83] Thus, the problem is not that the plaintiff merely has anticipated the defendant's answer and tried to negate a defense he believes his opponent will attempt to use against him. Rather, the plaintiff's own allegations show that a defense exists that legally defeats the claim for relief. Of course, the district court in its discretion may choose to postpone dealing with this problem by deciding that a motion for summary judgment—which provides an opportunity for an investigation of the facts surrounding the bare allegations in the pleading—is a more appropriate procedural device to deal with the built-in defense than a motion to dismiss under Rule 12(b)(6). [84]

The most common situation in which the affirmative defense appears on the face of the pleading and provides a basis for a motion to dismiss under Rule 12(b)(6) is a complaint showing that the governing statute of limitations has run on the plaintiff's claim for relief—as the many illustrative cases cited in the note below attest. [85] Because Rule 9(f) makes allegations of time material, the inclusion of dates in the complaint indicating that the action is untimely renders it subject to dismissal for failure to state a claim. [86] This particularly is true if the action sued on is statutory in origin, because the bar of the statute of limitations then is said to extinguish not only the remedy but the underlying substantive right as well. [87]

Another instance where a self-defeating affirmative defense appears in the pleading is where the complaint reveals the claim's susceptibility to arbitration. A particularly illustrative case regarding the pleading requirements for an affirmative defense in this context is Guidotti v. Legal Helpers Debt Resolution, LLC. [88] In Guidotti, the Third Circuit held that a motion to compel arbitration should be resolved under the Rule 12(b)(6) standard when the affirmative defense of arbitrability of claims is “apparent” on the face of the complaint. [89] But if the complaint does not establish on its

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face that the parties agreed to arbitrate and the opposing party has not presented reliable evidence that it did not intend to be bound by an arbitration agreement, a motion to compel arbitration should be decided under the Rule 56 summary-judgment standard.[90] Not all federal courts will resolve a successful motion to compel arbitration by dismissing under Rule 12(b)(6), however; some courts will dismiss under Rule 12(b)(1), and others will not dismiss at all—they will merely stay proceedings, something outside of Rule 12's scope.[91] Regardless of which vehicle is used to enforce an arbitration agreement, litigants must take care not to waive their right to compel arbitration by pursuing a motion to dismiss that makes no mention of compelling arbitration.[92]

Other affirmative defenses that have been considered on a motion to dismiss under Rule 12(b)(6) include the plaintiff's assumption of risk,[93] the presence of contributory negligence,[94] federal preemption of a state cause of action,[95] various types of estoppel,[96] an assertion of illegality,[97] a wide range of forms of legal immunity from suit,[98] the applicability of various statutory exceptions to liability,[99] the equitable doctrine of laches,[100] a claim of privilege,[101] the plaintiff's execution of a release,[102] the barring effect of res judicata and related preclusion principles,[103] a failure to exhaust administrative remedies,[104] a claim of improper joinder,[105] and the applicability of the statute of frauds.[106] Rule 12(b)(6) motions also have been used to raise capacity,[107] standing,[108] ripeness,[109] wrong defendant,[110] and real party in interest defenses.[111]

Although dismissal is appropriate when an affirmative defense appears on the face of the complaint, a plaintiff is not required to plead the negation of an affirmative defense in order to survive a motion to dismiss.[112] The Supreme Court reiterated this rule in 2007, in Jones v. Bock,[113] where the Court unanimously held "that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints."[114] Chief Justice Roberts, writing for the Court, "conclude[d] that failure to exhaust is an affirmative defense under the PLRA," and accordingly held "that inmates are not required to specially plead or demonstrate exhaustion in their complaints." In doing so, the Court dismissed the notion "that Congress implicitly meant to transform exhaustion from an affirmative defense to a pleading requirement by the curiously indirect route of specifying that courts should screen PLRA complaints and dismiss those that fail to state a claim." As noted in the preceding paragraph, however, failure to exhaust can be a basis for dismissal for failure to state a claim.[115]

Over the years a number of federal courts have gone against the general rule that the complaint will be construed liberally on a Rule 12(b)(6) motion in the context of "traditionally disfavored" causes of action, such as defamation.[116] For example, in National Bowl-O-Mat Corporation v. Brunswick Corporation,[117] the district court dismissed the third count of the defendant's counterclaim for failing to state a claim for defamation. Two of the "pleading deficiencies" noted by the court were the defendant's failure to set out the alleged defamatory statements with sufficient particularity to

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allow the court to determine if they would support the action, and the defendant's failure to plead dates indicating that the action was not barred by the statute of limitations.

Had the court applied the usual liberal standard for construing a complaint prescribed by Rule 8(a) and then-Rule 8(f) [now Rule 8(e)], it probably would have assumed, for purposes of the motion, that the statements were defamatory and that the action was timely. [118] The Federal Rules of Civil Procedure impose no special pleading requirements for defamation, so a plaintiff asserting a state-law defamation claim in federal court should only need to satisfy the ordinary Rule 8 standard. [119] That said, there are district courts that have occasionally applied a state's heightened pleading standards to defamation actions. [120]

The impropriety of using a stricter pleading standard on a motion to dismiss in a disfavored action extends beyond state causes of action and can be traced back to the Supreme Court's 1993 decision in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, [121] which struck down a stringent pleading standard in civil rights cases alleging municipal liability under Section 1983 of Title 42, and its 2002 decision in Swierkiewicz v. Sorema N.A., [122] which struck down another special pleading rule applied in some employment discrimination cases. In both cases the Court makes it clear that Rule 8 announces a pleading standard that is applicable to all cases except those governed by Rule 9(b) or a heightened pleading requirement in a federal statute. [123] Thus, the notion that a federal court can demand more than a statement of a claim for relief that is plausible on its face and enforce that standard by a motion to dismiss under Rule 12(b)(6) is antithetical to the Leatherman and Swierkiewicz philosophy (as updated by Twombly and Iqbal). [124] Although some federal courts may determine that they can impose heightened pleading standards because of a belief that the pleading burden is an element of the governing substantive law or that the long-standing heightened pleading traditionally imposed in disfavored actions have somehow been incorporated into the federal rule pleading practice, these views seem quite dubious given the relative clarity and breadth of the Supreme Court's language in both the Leatherman and Swierkiewicz opinions.

Gove v. Sargento Foods, Incorporated, [125] is a recent example of the impact of the Leatherman and Swierkiewicz philosophy on stricter pleading requirements for disfavored actions and the philosophy's interplay with Twombly and Iqbal. In Gove, the district court dismissed the plaintiff's Title VII claims for workplace harassment, retaliation, and sex and age discrimination. With respect to the hostile work environment claim specifically, the district court found the harassment the plaintiff described in his complaint was not "severe or pervasive" but "[a]t worst * * * merely vulgar and inappropriate" and demanded more specifics about the nature of the abusive work environment and particular actions taken by individual coworkers or administrators. However, the Seventh Circuit reversed, agreeing with the plaintiff that the district court erred by demanding too much specificity in his complaint. Citing Twombly, Iqbal, and Swierkiewicz, the panel explained that the plaintiff "did not need to allege every evidentiary element of his claims" at the 12(b)(6) stage; all that was required was that his complaint contain facts sufficient to state a claim that is

plausible on its face. And "[b]ecause the district court imposed a pleading standard stricter than the applicable notice-pleading regime of Federal Rule of Civil Procedure 8," the Seventh Circuit reversed the district court's dismissal of the plaintiff's claims.

The exceptions to the Leatherman and Swierkiewicz proposition that Rule 8's pleading standard applies in all cases are cases falling under Rule 9(b) or a federal statute that contains a heightened pleading requirement. One such federal statute is the Private Securities Litigation Reform Act of 1995 (PSLRA). In Tellabs, Incorporated v. Makor Issues & Rights, Incorporated,[126] the Supreme Court interpreted the special pleading requirements for determining whether a plaintiff's allegations are sufficient as to scienter in securities-fraud claims under the PSLRA. The proper inquiry is "whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard."[127] The Court held that an allegation of scienter will survive "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged."[128]

As the numerous case citations in the note below make clear, dismissal under Rule 12(b)(6) generally is not with prejudice—meaning, not immediately final or on the merits—because the district court normally will give the plaintiff leave to file an amended complaint to see if the shortcomings of the original document can be corrected.[129] The federal policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that the plaintiff be given every opportunity to cure a formal defect in the pleading. This is true even when the district judge doubts that the plaintiff will be able to overcome the shortcomings in the initial pleading.[130] Thus, the cases make it clear that leave to amend the complaint should be refused only if there is no basis for concluding that the plaintiff can state a claim and thus permitting an amendment would be futile.[131] A district court's refusal to allow leave to amend is reviewed for abuse of discretion by the court of appeals.[132] A wise judicial practice would be to allow at least one amendment regardless of how unpromising the initial pleading appears because it usually is unlikely that the district court will be able to determine conclusively on the face of a defective pleading whether the plaintiff actually can state a claim for relief.[133] Such a practice would be in line with the more forgiving treatment courts typically give to initial attempts to amend.[134]

In the 1981 case Federated Department Stores, Incorporated v. Moitie,[135] the Supreme Court noted in a footnote that a Rule 12(b)(6) dismissal is a judgment on the merits.[136] Numerous courts have taken this to indicate that a Rule 12(b)(6) dismissal of a claim—with or without prejudice—implicates res judicata principles, barring any further attempt to present the same claim in the future.[137] The ostensible rationale for this is that plaintiffs have liberal opportunities to amend their complaints, so an inability to do so that results in a Rule 12(b)(6) dismissal leading to an entry of a final judgment indicates the absence of a valid claim for relief.[138] A denial of a Rule 12(b)(6) motion, however, is not a final determination on the merits for purposes of res judicata.[139]

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Notwithstanding the liberal amendment policy of the federal rules, it seems dubious that a Rule 12(b)(6) dismissal should dispose of more than the question of whether a particular statement constitutes a claim for relief,[140] especially in courts other than the original forum, given the federal courts' lack of uniformity in dealing with pleading amendments and Rule 12(b)(6) dismissals and the discretionary character of Federal Rule of Civil Procedure 15 amendments. The situation is further complicated by the Supreme Court's ruling in 2001 in Semtek International Inc. v. Lockheed Martin Corporation,[141] in which the Court held that in diversity of citizenship cases, the claim preclusive effect of a Rule 12(b)(6) motion should be determined based on the preclusion law of the state in which the federal diversity court sits.[142] The Court noted that the language in Federal Rule of Civil Procedure 41(b)[143] about judgment on the merits does not pertain to claim preclusion and that it is a question of federal common law whether a Rule 12(b)(6) dismissal has that effect.[144]

Thus, reading the Semtek and Moitie decisions together, it appears that federal common law, not the Federal Rules of Civil Procedure, dictates the claim preclusive effect of a Rule 12(b)(6) dismissal and that the federal rule of decision is that in diversity of citizenship actions, the preclusion law of the forum state governs. However, in federal question actions, many courts unfortunately have concluded that a Rule 12(b)(6) dismissal carries claim preclusive effect, presumably with regard to the transaction and occurrence embraced by the allegations in the dismissed complaint.[145] In light of Semtek, it is doubtful that this result is mandated by Rule 41(b).

Several technical problems arise with regard to the amendment of the complaint following a successful motion under Rule 12(b)(6). First, there is a split of authority as to whether the plaintiff can amend once as a matter of right under Rule 15(a) despite the dismissal if no responsive pleading has been served or whether the plaintiff must obtain the court's permission for any amendment when the dismissal order does not expressly grant leave to replead or expressly negates any right to amend.[146] The better view is that the right to amend is retained, because a dismissal order is not one of the two events that triggers termination of the right to amend as a matter of course under Rule 15(a)(1).[147] Once there has been an entry of judgment, of course, any ability to amend as of right ends,[148] although the entry of judgment should be delayed until the time to amend as of right has expired.[149] To avoid the problems that arise when the plaintiff attempts to exercise the automatic right of amendment after the trial court has entered the dismissal, those courts that consider amendment to be a matter of right should be careful to ascertain whether the plaintiff wishes to amend the complaint and should prescribe a reasonable time period in the order within which the plaintiff may exercise that right to amend the complaint.

A related problem arises when a plaintiff who has lost an appeal from a judgment following the dismissal of his complaint returns to the trial court and asks for permission to file an amended pleading. Some authority indicates that under certain circumstances only the appellate court can grant leave to amend at this stage of the proceedings.[150] These problems are analyzed in greater

detail in the discussion under Rule 15 concerning the amendment of pleadings, the discussion under Federal Rule of Civil Procedure 59 on the amendment of judgments, and the discussion under Federal Rule of Civil Procedure 60 relating to relief from a judgment or order. [151]

One final point, peculiar to multidistrict litigation. One court of appeals has held that a transferee court under Section 1407 has the power to dismiss a complaint under Rule 12(b)(6). [152] This is not surprising inasmuch as Section 1407(a) of Title 28 of the United States Code—which establishes the procedure for consolidation of multidistrict litigation—gives the transferee court plenary power over the pretrial process of the cases before it including the ability to terminate one or more of the transferred cases. [153]

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Footnotes

1

Federal law

ML Healthcare Services, LLC v. Publix Super Markets, Inc., 881 F.3d 1293, 1299 (11th Cir. 2018) ("In federal diversity actions, state law governs substantive issues, but federal law governs procedural issues.").

Karnatcheva v. JPMorgan Chase Bank, N.A., 704 F.3d 545, 548 (8th Cir. 2013) ("We apply federal pleading standards—Rules 8 and 12(b)(6)—to state substantive law to determine if a complaint makes out a claim under state law").

Windy City Metal Fabricators & Supply, Inc. v. CIT Technology Financing Services, Inc., 536 F.3d 663, 679 (7th Cir. 2008) ("It is well settled that a federal court sitting in diversity applies federal pleading requirements even when the claim pleaded arises under state rather than federal law") (internal quotation marks omitted).

Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102 (9th Cir. 2003) ("The Federal Rules of Civil Procedure apply irrespective of the source of subject matter jurisdiction, and irrespective of whether the substantive law at issue is state or federal.").

Carter v. Norfolk Community Hosp. Ass'n, Inc., 761 F.2d 970 (4th Cir. 1985).

See also

Klocke v. Watson, 936 F.3d 240 (5th Cir. 2019), as revised, (Aug. 29, 2019) ("Because the TCPA's burden-shifting framework imposes additional

requirements beyond those found in [FRCP] 12 and 56 and answers the same question as those rules, the state law cannot apply in federal court.").

But compare

"Whether a defendant has been fraudulently joined and whether the claim against that defendant should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) do not involve the same inquiry. Said another way, Plaintiffs' claims against the Purchaser Defendants may fail under Rule 12(b)(6), but those defendants have not necessarily been fraudulently joined. The fraudulent joinder analysis looks at whether it is possible that a state court would deny a motion to dismiss the claim against the non-diverse defendant. Integral to this analysis is what Hawai'i law demands when determining whether a complaint fails to state a claim upon which relief can be granted." Carpenter v. PNC Bank, N.A., 386 F. Supp. 3d 1339 (D. Haw. 2019) (citations and internal quotation marks omitted).

2 **Light most favorable to pleader**

Holland v. Carnival Corporation, 50 F.4th 1088 (11th Cir. 2022) ("Because the procedural posture of this case involves a Federal Rule of Civil Procedure 12(b)(6) motion, we must accept the allegations of plaintiff's complaint as true and construe them in the light most favorable to the plaintiff.").

Levy v. West Coast Life Insurance Company, 44 F.4th 621, 626 (7th Cir. 2022) ("We review 'a district court's dismissal under Rule 12(b)(6) de novo, construing the complaint in the light most favorable to the plaintiff. * * *'").

Product Solutions International, Inc. v. Aldez Containers, LLC, 46 F.4th 454, 458 (6th Cir. 2022) ("[W]e construe the complaint in the light most favorable to the plaintiff, draw all reasonable inferences in its favor, and accept all well-pleaded allegations in the complaint as true.").

Doe v. Princeton University, 30 F.4th 335, 340 (3d Cir. 2022) ("On a motion to dismiss, a court must 'accept all factual allegations in the complaint as true and view them in the light most favorable to the plaintiff.'").

Franklin v. United States, 49 F.4th 429, 435 (5th Cir. 2022) ("We review a district court's ruling on a motion to dismiss de novo, 'accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs.'").

3 **Disregard of conclusory statements**

Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Tavernaro v. Pioneer Credit Recovery, Inc., 43 F.4th 1062, 1067 (10th Cir. 2022) ("We 'disregard conclusory statements and look only to whether the remaining[ ] factual allegations plausibly suggest the defendant is liable.'").

O'Brien v. Deutsche Bank National Trust Company, 948 F.3d 31, 35 (1st Cir. 2020) ("In assessing the sufficiency of the complaint under Rule 12(b)(6), we first 'disregard all conclusory allegations that merely parrot the relevant legal standard,' and then 'inquire whether the remaining factual allegations state a plausible, rather than merely a possible, assertion of defendants' liability.'").

Harper v. Professional Probation Services Inc., 976 F.3d 1236, 1240 n.4 (11th Cir. 2020) ("A complaint may be dismissed for failure to state a claim when, ignoring any 'mere conclusory statements,' the remaining allegations do not 'plausibly suggest' that the defendant is liable."), quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 681, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

Simio, LLC v. FlexSim Software Products, Inc., 983 F.3d 1353, 1365 (Fed. Cir. 2020) ("We disregard conclusory statements when evaluating a complaint under Rule 12(b)(6).").

Wikimedia Foundation v. National Security Agency, 857 F.3d 193, 208 (4th Cir. 2017) ("[L]egal conclusions pleaded as factual allegations, 'unwarranted inferences,' 'unreasonable conclusions,' and 'naked assertions devoid of further factual enhancement' are not entitled to the presumption of truth.").

4 **Allegations taken as true**

Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007).

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

Mitchell v. Kirchmeier, 28 F.4th 888, 895 (8th Cir. 2022) ("A claim survives a Rule 12(b)(6) motion to dismiss only if the complaint's nonconclusory allegations, accepted as true, make it not just 'conceivable' but 'plausible' that the defendant is liable.").

In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litigation, 28 F.4th 42, 46 (9th Cir. 2022) ("In conducting [a] review [of the district court's dismissal of a complaint for failure to state a claim under Rule 12(b)(6)], we accept all nonconclusory facts alleged in the complaint as true and determine whether those allegations 'plausibly give rise to an entitlement to relief.'").

Allen v. Vertafore, Incorporated, 28 F.4th 613, 616 (5th Cir. 2022) ("In reviewing a motion to dismiss, we 'accept[ ] all well-pleaded facts as true and view[ ] those facts in the light most favorable to the plaintiff.'").

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Kaplan v. Lebanese Canadian Bank, SAL, 999 F.3d 842, 854 (2d Cir. 2021) ("In reviewing a Rule 12(b)(6) dismissal, we must accept as true all nonconclusory factual allegations in the complaint.").

Cruz-Arce v. Management Administration Services Corporation, 19 F.4th 538, 543 (1st Cir. 2021) ("[W]e accept all well-pleaded, non-conclusory facts set forth in the complaint as true. * * *").

Compare
The court is not required to draw unreasonable inferences or "to accept as plausible wholly unrealistic assertions." Brown v. Medtronic, Inc., 628 F.3d 451, 461 (8th Cir. 2010).

Lormand v. US Unwired, Inc., 565 F.3d 228, 239 (5th Cir. 2009) ("Usually, under Rule 12(b)(6), we must draw all reasonable inferences in the plaintiff's favor. However, for scienter only, as required by the PSLRA, 'a court must take into account plausible inferences opposing as well as supporting a strong inference of scienter.'"), quoting Indiana Elec. Workers' Pension Trust Fund IBEW v. Shaw Group, Inc., 537 F.3d 527, 533 (5th Cir. 2008).

But see
Under the PSLRA, a court considering a Rule 12(b)(6) motion must draw all reasonable inferences from the allegations, including inferences unfavorable to the plaintiff, in determining whether or not the plaintiff has pled scienter sufficiently. In re Metricom Securities Litigation, 2004 WL 966291 (N.D. Cal. 2004), aff'd, 182 Fed. Appx. 714 (9th Cir. 2006).

5 **Drawing all reasonable inferences in favor of the pleader**
Melendez v. Sirius XM Radio, Inc., 50 F.4th 294 (2d Cir. 2022) ("We review the district court's grant of [a] motion to dismiss de novo, '* * * drawing all reasonable inferences in favor of the plaintiff.'").

Healy v. Fox, 46 F.4th 739, 743 (8th Cir. 2022) ("To determine whether a complaint states a facially plausible claim, we accept the factual allegations in the complaint as true and draw all reasonable inferences in the nonmovant's favor.").

Boquist v. Courtney, 32 F.4th 764, 773 (9th Cir. 2022) ("A court must 'draw all reasonable inferences in favor of the nonmoving party [in considering a motion to dismiss for failure to state a claim].').

United States ex rel. Sibley v. University of Chicago Medical Center, 44 F.4th 646, 662 (7th Cir. 2022) ("[A] ruling on a motion to dismiss considers only the pleadings and draws all reasonable inferences in the pleader's favor.").

Cruz-Arce v. Management Administration Services Corporation, 19 F.4th 538, 543 (1st Cir. 2021) ("[W]e accept all well-pleaded, non-conclusory facts set forth

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in the complaint as true and draw all reasonable inferences therefrom to the pleader's behoof.").

Ray v. Roane, 948 F.3d 222, 226 (4th Cir. 2020) ("In reviewing a motion to dismiss for failure to state a claim, we must" * * * draw all reasonable inferences in favor of the plaintiff.'").

6 **Facts**

Kugler v. Helfant, 421 U.S. 117, 125-126 n.5, 95 S. Ct. 1524, 1531 n.5, 44 L. Ed. 2d 15 (1975).

Everything

Maxwell v. Henry, 815 F. Supp. 213 (S.D. Tex. 1993) ("everything").

7 **Non-conclusory allegations**

Mitchell v. Kirchmeier, 28 F.4th 888, 895 (8th Cir. 2022) ("A claim survives a Rule 12(b)(6) motion to dismiss only if the complaint's nonconclusory allegations, accepted as true, make it not just 'conceivable' but 'plausible' that the defendant is liable.").

In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litigation, 28 F.4th 42, 46 (9th Cir. 2022) ("In conducting [a] review [of the district court's dismissal of a complaint for failure to state a claim under Rule 12(b)(6)], we accept all nonconclusory facts alleged in the complaint as true and determine whether those allegations 'plausibly give rise to an entitlement to relief.'").

Kaplan v. Lebanese Canadian Bank, SAL, 999 F.3d 842, 854 (2d Cir. 2021) ("In reviewing a Rule 12(b)(6) dismissal, we must accept as true all nonconclusory factual allegations in the complaint.").

Cruz-Arce v. Management Administration Services Corporation, 19 F.4th 538, 543 (1st Cir. 2021) ("[W]e accept all well-pleaded, non-conclusory facts set forth in the complaint as true. * * *").

International Outdoor, Inc. v. City of Troy, Michigan, 974 F.3d 690, 701 (6th Cir. 2020) ("[W]e accept as true all non-conclusory allegations in the complaint and determine whether they state a plausible claim for relief.").

Harper v. Professional Probation Services Inc., 976 F.3d 1236, 1238 n.1 (11th Cir. 2020) ("[W]e accept as true all non-conclusory allegations in the plaintiffs' complaint.").

8 **Factual allegations**

Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007).

Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006).

Manning v. Boston Medical Center Corp., 725 F.3d 34 (1st Cir. 2013).

But see
Grant v. County of Erie, 542 Fed. Appx. 21 (2d Cir. 2013) ("This Circuit has recognized an exception to the rule that a court must accept all factual assertions as true when attenuated allegations supporting the claim are contradicted by more specific allegations in the Complaint or when a claim is based on wholly conclusory and inconsistent allegations."), citing ATSI Communications, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007).

"Factual allegations that amount to labels and conclusions or naked assertions are not entitled to the assumption of truth." Smith v. Pallman, 420 Fed. Appx. 208, 212 (3d Cir. 2011) (internal citations and quotation marks omitted).

See also
After Twombly and Iqbal, the court should accept the truth of plausible factual allegations. Adler v. Anchor Funding Services, LLC, 2011 WL 1843226 (W.D. N.C. 2011).

9 **Material allegations**
Chubb Custom Ins. Co. v. Space Systems/Loral, Inc., 710 F.3d 946, 956 (9th Cir. 2013), citing Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994).

Geraci v. Homestreet Bank, 347 F.3d 749 (9th Cir. 2003).

10 **Well-pleaded facts**
Miller v. Town of Wenham Massachusetts, 833 F.3d 46, 48 (1st Cir. 2016).

O'Connell v. Marrero-Recio, 724 F.3d 117, 122 (1st Cir. 2013).

11 **Well-pleaded factual allegations**
Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

Hess v. Cohen & Slamowitz LLP, 637 F.3d 117, 119 (2d Cir. 2011) ("well-pleaded, non-conclusory factual allegations" must be accepted as true).

Cogan v. Phoenix Life Ins. Co., 310 F.3d 238 (1st Cir. 2002) ("well-pleaded factual averments").

Only when the factual allegations in support of a claim are not well-pleaded—for example, when they are functionally illegible or baldly conclusory—should they not be accepted as true and the claim dismissed. Rhee Bros., Inc. v. Han Ah Reum Corp., 178 F. Supp. 2d 525 (D. Md. 2001).

12 **Legal conclusions**

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First Circuit
Haag v. U.S., 736 F.3d 66 (1st Cir. 2013).

Schatz v. Republican State Leadership Committee, 669 F.3d 50, 55 (1st Cir. 2012) (ignore "legal labels and conclusions").

Eastern Food Services, Inc. v. Pontifical Catholic University Services Ass'n, Inc., 357 F.3d 1 (1st Cir. 2004) ("conclusory terms").

Second Circuit
In re Terrorist Attacks on September 11, 2001, 714 F.3d 118, 124 (2d Cir. 2013).

Mayor and City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 135-136 (2d Cir. 2013) ("The ultimate existence of an 'agreement' under antitrust law, however, is a legal conclusion, not a factual allegation. * * * A plaintiff's job at the pleading stage, in order to overcome a motion to dismiss, is to allege enough facts to support the inference that a conspiracy actually existed.").

Vossler v. Phasecom America, Inc., 2004 WL 1628903 (W.D. N.Y. 2004) (legal conclusions and vague factual allegations were not enough to prevent dismissal).

Third Circuit
Morrow v. Balaski, 719 F.3d 160, 165 (3d Cir. 2013), as amended, (June 14, 2013), citing Baraka v. McGreevey, 481 F.3d 187, 195 (3d Cir. 2007).

An allegation that an agreement has been reached in a contract dispute is a legal assertion, not a factual one, and thus should be ignored by the court in the context of a motion to dismiss. Cotter v. Newark Housing Authority, 422 Fed. Appx. 95 (3d Cir. 2011).

Wilson v. City of Philadelphia, 415 Fed. Appx. 434, 436 (3d Cir. 2011) (conclusory allegations not entitled to presumption of truth).

Sunquest Information Systems, Inc. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644 (W.D. Pa. 1999) (court need not credit bald assertions or legal conclusions).

Fourth Circuit
Vitol, S.A. v. Primerose Shipping Co. Ltd., 708 F.3d 527, 548 (4th Cir. 2013).

Burnette v. Fahey, 687 F.3d 171, 180 (4th Cir. 2012) (allegation that parole board no longer exercises discretion is legal, not factual).

Walters v. McMahen, 684 F.3d 435, 439 (4th Cir. 2012) (applying Twombly/Iqbal standard, court does not accord deference to legal conclusions).

Aziz v. Alcolac, Inc., 658 F.3d 388, 391 (4th Cir. 2011) ("bare legal conclusions").

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Braun v. Maynard, 652 F.3d 557 (4th Cir. 2011).

Simmons v. United Mortg. and Loan Inv., LLC, 634 F.3d 754, 768 (4th Cir. 2011).

Basnight v. Potter, 2011 WL 1366376, *1 (E.D. N.C. 2011) (court will not consider as true " 'legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement' "), quoting Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009).

Fifth Circuit

Tucker v. Parish, 582 Fed. Appx. 363, 365 (5th Cir. 2014).

Randall D. Wolcott, M.D., P.A. v. Sebelius, 635 F.3d 757, 763 (5th Cir. 2011).

Rodriguez v. Lewis, 427 Fed. Appx. 352 (5th Cir. 2011) (legal conclusions purporting to be factual allegations not sufficient to survive motion to dismiss).

Richards v. JRK Property Holdings, 405 Fed. Appx. 829, 831 (5th Cir. 2010) ("[The plaintiff's] assertion of racial discrimination is a legal conclusion that the court is not required to accept and does not suffice to prevent a motion to dismiss.").

Blackburn v. City of Marshall, 42 F.3d 925 (5th Cir. 1995).

"[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993) (Goldberg, J.).

Lowe v. American Eurocopter, LLC, 24 A.D. Cas. (BNA) 40, 2010 WL 5232523, *5 (N.D. Miss. 2010) (" '[L]egal conclusions masquerading as factual conclusions will not prevent a motion to dismiss.' "), quoting Taylor v. Books A Million, Inc., 296 F.3d 376, 378 (5th Cir. 2002).

Sixth Circuit

Binno v. American Bar Association, 826 F.3d 338, 345 (6th Cir. 2016).

Philadelphia Indem. Ins. Co. v. Youth Alive, Inc., 732 F.3d 645, 649 (6th Cir. 2013).

Goss v. ABN AMRO Mortg. Group, 549 Fed. Appx. 466, 469 (6th Cir. 2013).

Republic Bank & Trust Co. v. Bear Stearns & Co., Inc., 683 F.3d 239, 246 (6th Cir. 2012).

Boland v. Holder, 682 F.3d 531, 534 (6th Cir. 2012).

Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 444 (6th Cir. 2012) ("To conduct this analysis, a court should first identify factual allegations that are entitled to

a presumption of truth-that is, those allegations that are more than just legal conclusions.").

Severe Records, LLC v. Rich, 658 F.3d 571, 578 (6th Cir. 2011).

Rondigo, L.L.C. v. Township of Richmond, 641 F.3d 673, 684 (6th Cir. 2011) (claim that plaintiffs "were treated differently because of gender-based discrimination" was legal conclusion couched as factual allegation and should not have been accepted as true without factual support).

Schellenberg v. Tp. of Bingham, 436 Fed. Appx. 587, 598 (6th Cir. 2011) (legal conclusions presented as factual allegations not entitled to presumption of truth on motion to dismiss).

Although RICO pleadings are to be liberally construed, the applicable standard does not require the district court to accept legal conclusions unsupported by the facts pleaded. Jersevic v. Kuhl, 2002 WL 84624 (E.D. Mich. 2002), **citing Wright & Miller** (unpublished).

In re Imagepoint Inc., 2010 WL 3037436, *3 (Bankr. E.D. Tenn. 2010) ("Undeniably, a complaint must contain more than bare assertions or legal conclusions.").

Seventh Circuit
Agnew v. National Collegiate Athletic Ass'n, 683 F.3d 328, 334 (7th Cir. 2012).

Virnich v. Vorwald, 664 F.3d 206, 212 (7th Cir. 2011), as amended, (Jan. 3, 2012).

Kolbe & Kolbe Health & Welfare Benefit Plan v. Medical College of Wisconsin, Inc., 657 F.3d 496, 502 (7th Cir. 2011).

Eighth Circuit
Hager v. Arkansas Dept. of Health, 735 F.3d 1009 (8th Cir. 2013).

Outdoor Cent., Inc. v. GreatLodge.com, Inc., 643 F.3d 1115 (8th Cir. 2011), as corrected, (Aug. 4, 2011).

Brown v. Medtronic, Inc., 628 F.3d 451, 459 (8th Cir. 2010).

Ninth Circuit
ESG Capital Partners, LP v. Stratos, 828 F.3d 1023, 1031 (9th Cir. 2016).

Dorrough v. Ruff, 552 Fed. Appx. 728, 729 (9th Cir. 2014).

U.S. v. Corinthian Colleges, 655 F.3d 984, 991 (9th Cir. 2011).

Fayer v. Vaughn, 649 F.3d 1061 (9th Cir. 2011).

Northern Highlands I, II, LLC v. Comerica Bank, 328 Fed. Appx. 358, 359 (9th Cir. 2009) ("need not assume the truth of opinions, factual and legal conclusions, or arguments").

"Legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. Similarly, conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." Escalante v. Minnesota Life Ins. Co., 2010 WL 4975658, *1 (S.D. Cal. 2010) (internal citations and quotation marks omitted).

Tenth Circuit

Lebahn v. National Farmers Union Uniform Pension Plan, 828 F.3d 1180, 1183 (10th Cir. 2016).

Khalik v. United Air Lines, 671 F.3d 1188, 1193 (10th Cir. 2012) (plaintiff's allegation that she was targeted because of her race conclusory and not entitled to presumption of truth).

Johnson v. Liberty Mut. Fire Ins. Co., 648 F.3d 1162, 1165 (10th Cir. 2011) ("naked legal conclusion").

Bixler v. Foster, 596 F.3d 751, 756 (10th Cir. 2010).

Eleventh Circuit

Arafat v. School Bd. of Broward County, 549 Fed. Appx. 872, 873 (11th Cir. 2013).

Mack v. City of High Springs, 486 Fed. Appx. 3 (11th Cir. 2012) (per curiam).

Kendall v. Thaxton Road LLC, 443 Fed. Appx. 388 (11th Cir. 2011).

Cline v. Tolliver, 434 Fed. Appx. 823 (11th Cir. 2011) (formulaic allegations that were no more than legal conclusions were not sufficient to state claim for relief).

Bell v. HCR Manor Care Facility of Winter Park, 432 Fed. Appx. 908 (11th Cir. 2011).

Duru v. HSBC Card Services, Inc., 411 Fed. Appx. 240, 241 (11th Cir. 2011).

Christman v. Holmes, 448 Fed. Appx. 869 (11th Cir. 2011) (legal conclusions are not allegations that court must accept as true).

Jacobs v. Tempur-Pedic Intern., Inc., 626 F.3d 1327, 1333 (11th Cir. 2010) (legal conclusions not entitled to assumption of truth).

A plaintiff may not merely "label" his or her claims to survive a motion to dismiss. DiGiro v. Pall Corp., 993 F. Supp. 1471 (M.D. Fla. 1998).

D.C. Circuit

Coulibaly v. Kerry, 213 F. Supp. 3d 93 (D.D.C. 2016), subsequent determination, 278 F. Supp. 3d 294 (D.D.C. 2017), **quoting Wright & Miller**.

Hettinga v. U.S., 677 F.3d 471, 476 (D.C. Cir. 2012).

In re Interbank Funding Corp. Securities Litigation, 629 F.3d 213, 218 (D.C. Cir. 2010).

Legal conclusions are not admitted for purposes of a motion to dismiss for failure to state a claim on which relief could be granted. Donald v. Orfila, 618 F. Supp. 645 (D.D.C. 1985), judgment aff'd, 788 F.2d 36 (D.C. Cir. 1986).

13 **Unwarranted inferences**

Ortiz v. Holmes, 157 F. Supp. 3d 692, 696 (N.D. Ohio 2016) ("unwarranted factual inferences"), quoting Mixon v. State of Ohio, 193 F.3d 389, 400 (6th Cir. 1999).

Pension Trust Fund for Operating Engineers v. Mortgage Asset Securitization Transactions, Inc., 730 F.3d 263, 268 (3d Cir. 2013).

Morrow v. Balaski, 719 F.3d 160, 165 (3d Cir. 2013).

U.S. ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc., 707 F.3d 451, 455 (4th Cir. 2013).

Severe Records, LLC v. Rich, 658 F.3d 571, 578 (6th Cir. 2011) ("unwarranted factual inferences").

Fayer v. Vaughn, 649 F.3d 1061 (9th Cir. 2011).

Juniper Networks, Inc. v. Shipley, 643 F.3d 1346 (Fed. Cir. 2011).

Katyle v. Penn Nat. Gaming, Inc., 637 F.3d 462, 466 (4th Cir. 2011) (court need not credit unwarranted inferences, unreasonable conclusions, or arguments drawn from facts in complaint).

Simmons v. United Mortg. and Loan Inv., LLC, 634 F.3d 754, 768 (4th Cir. 2011).

Masterson v. Ihara, 442 Fed. Appx. 849 (4th Cir. 2011) (neither unwarranted inferences nor unreasonable conclusions or arguments need be taken as true).

Kundratic v. Thomas, 407 Fed. Appx. 625, 627 (3d Cir. 2011).

Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009).

Philips v. Pitt County Memorial Hosp., 572 F.3d 176 (4th Cir. 2009).

Cousins v. Lockyer, 568 F.3d 1063 (9th Cir. 2009).

Zaluski v. United American Healthcare Corp., 527 F.3d 564 (6th Cir. 2008).

J & R Marketing, SEP v. General Motors Corp., 519 F.3d 552 (6th Cir. 2008), amended and superseded on reh'g, 549 F.3d 384 (6th Cir. 2008).

Thomas v. New Mexico Corrections Dept., 272 Fed. Appx. 727 (10th Cir. 2008).

Montgomery v. Huntington Bank, 346 F.3d 693 (6th Cir. 2003) (unwarranted factual inferences).

Farm Credit Services of America v. American State Bank, 339 F.3d 764 (8th Cir. 2003), opinion corrected on reh'g, (Aug. 28, 2003).

Gean v. Hattaway, 330 F.3d 758 (6th Cir. 2003).

In re K-tel Intern., Inc. Securities Litigation, 300 F.3d 881 (8th Cir. 2002).

Thomas v. Publishers Clearing House, Inc., 29 Fed. Appx. 319 (6th Cir. 2002).

Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173 (3d Cir. 2000).

National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology, 228 F.3d 1043 (9th Cir. 2000).

Maio v. Aetna, Inc., 221 F.3d 472 (3d Cir. 2000).

Eastern Shore Markets, Inc. v. J.D. Associates Ltd. Partnership, 213 F.3d 175 (4th Cir. 2000), **citing Wright & Miller.**

Claybrook v. Birchwell, 199 F.3d 350 (6th Cir. 2000) (unwarranted factual inferences).

Associated General Contractors of America v. Metropolitan Water Dist. of Southern California, 159 F.3d 1178 (9th Cir. 1998).

City of Pittsburgh v. West Penn Power Co., 147 F.3d 256 (3d Cir. 1998).

Pareto v. F.D.I.C., 139 F.3d 696 (9th Cir. 1998).

Bradley v. Chiron Corp., 136 F.3d 1317 (Fed. Cir. 1998), **citing Wright & Miller.**

In re VeriFone Securities Litigation, 11 F.3d 865 (9th Cir. 1993).

Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968 (8th Cir. 1968).

Ryan v. Scoggin, 245 F.2d 54 (10th Cir. 1957).

Ogden River Water Users' Ass'n v. Weber Basin W. Cons., 238 F.2d 936 (10th Cir. 1956).

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Conner v. U.S. Dept. of the Army, 6 F. Supp. 3d 717 (W.D. Ky. 2014).

Ashland Hosp. Corp. v. International Broth. of Elec. Workers Local 575, 807 F. Supp. 2d 633, 638 (E.D. Ky. 2011), aff'd, 708 F.3d 737 (6th Cir. 2013) ("unwarranted factual inferences").

Hufford v. Bank United, FSB, 2011 WL 4985920, *2 (D. Md. 2011) ("unwarranted inferences, unreasonable conclusions or arguments"), quoting Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 253 (4th Cir. 2009).

Adler v. Anchor Funding Services, LLC, 2011 WL 1843226, *2 (W.D. N.C. 2011) ("'unwarranted inferences, unreasonable conclusions, or arguments'"), quoting Eastern Shore Markets, Inc. v. J.D. Associates Ltd. Partnership, 213 F.3d 175, 180 (4th Cir. 2000).

Baker v. County of Missaukee, 2011 WL 1670953, *2 (W.D. Mich. 2011), report and recommendation adopted, 2011 WL 1670949 (W.D. Mich. 2011) ("unwarranted factual inferences").

Basnight v. Potter, 2011 WL 1366376 (E.D. N.C. 2011).

"This Court also declines to consider 'unwarranted inferences, unreasonable conclusions, or arguments.'" Wheeling Hosp., Inc. v. Ohio Valley Health Services and Educ. Corp., 2010 WL 4977987 (N.D. W. Va. 2010), quoting Wahi v. Charleston Area Medical Center, Inc., 562 F.3d 599, 615 n.26 (4th Cir. 2009).

Zepeda v. Tate, 2010 WL 4977596, *2 (E.D. Cal. 2010), quoting Ove v. Gwinn, 264 F.3d 817, 821 (9th Cir. 2001) ("conclusory allegations of law and unwarranted inferences").

Yarney v. Wells Fargo Bank, N.A., 2010 WL 3075460, *2 (W.D. Va. 2010).

Morris Aviation, LLC v. Diamond Aircraft Industries, Inc., 730 F. Supp. 2d 683 (W.D. Ky. 2010), aff'd, 536 Fed. Appx. 558 (6th Cir. 2013).

Kingsburg Apple Packers, Inc. v. Ballantine Produce Co., Inc., 2010 WL 2817056, *2 (E.D. Cal. 2010).

Logue v. West Penn Multi-List, Inc., 2010 WL 2720787, *2 (W.D. Pa. 2010).

Williams v. Rickard, 2010 WL 2640102, *3 (D. Haw. 2010) ("However, conclusory allegations of law, unwarranted deductions of fact, and unreasonable inferences are insufficient to defeat a motion to dismiss.").

Bilyeu v. Metropolitan Government of Nashville, 2010 WL 2595129, *2 (M.D. Tenn. 2010).

"But, the Court is not required 'to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.'" Young v. City of Visalia, 687 F. Supp. 2d 1141 (E.D. Cal. 2009), quoting In re Gilead Sciences Securities Litigation, 536 F.3d 1049, 1056-1057 (9th Cir. 2008).

Alexander v. Ohio Public Employees Retirement System, 2008 WL 2397300 (S.D. Ohio 2008).

In re Southeastern Milk Antitrust Litigation, 2008 WL 2368212 (E.D. Tenn. 2008).

Martinez v. Warner, 2008 WL 2331957 (E.D. Pa. 2008).

Mosher v. New Jersey, 2007 WL 1101230 (D.N.J. 2007).

"The Court, however, is not obligated to draw an inference that is not supported by the facts presented." Burnett v. Sharma, 2007 WL 1020782, *9 (D.D.C. 2007).

Freedom From Religion Foundation, Inc. v. Nicholson, 448 F. Supp. 2d 1028 (W.D. Wis. 2006).

Flagg v. City of Detroit, 447 F. Supp. 2d 824 (E.D. Mich. 2006).

Whitesell v. Town of Morrisville, 446 F. Supp. 2d 419 (E.D. N.C. 2006).

Freightliner of Knoxville, Inc. v. DaimlerChrysler Vans, LLC, 438 F. Supp. 2d 869 (E.D. Tenn. 2006), aff'd in part, rev'd in part and remanded, 484 F.3d 865 (6th Cir. 2007).

Mansfield v. Billington, 432 F. Supp. 2d 64 (D.D.C. 2006), on reconsideration in part, 669 F. Supp. 2d 11 (D.D.C. 2009) (inferences unwarranted by the facts set out).

Rasul v. Rumsfeld, 414 F. Supp. 2d 26 (D.D.C. 2006), aff'd, 512 F.3d 644 (D.C. Cir. 2008), cert. granted, judgment vacated, 555 U.S. 1083, 129 S. Ct. 763, 172 L. Ed. 2d 753 (2008) and aff'd, 563 F.3d 527 (D.C. Cir. 2009).

Onawola v. Johns Hopkins University, 412 F. Supp. 2d 529 (D. Md. 2006), aff'd, 221 Fed. Appx. 211 (4th Cir. 2007), **citing Wright & Miller.**

Hilton v. Whitman, 2006 WL 1307900 (D.N.J. 2006).

Wilson v. Board of Trustees of Community College of Baltimore County, 333 F. Supp. 2d 392 (D. Md. 2004), **citing Wright & Miller.**

Mitchell v. Cellone, 291 F. Supp. 2d 368 (W.D. Pa. 2003), rev'd and remanded, 389 F.3d 86 (3d Cir. 2004).

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Keith v. U.S. Railroad Retirement Bd., 284 F. Supp. 2d 31 (D.D.C. 2003) (unsupported inferences).

Aldridge v. U.S., 282 F. Supp. 2d 802 (W.D. Tenn. 2003) ("unwarranted factual inferences").

In re Sagent Technology, Inc., Derivative Litigation, 278 F. Supp. 2d 1079 (N.D. Cal. 2003).

Foley v. Marquez, 2003 WL 22288160 (N.D. Cal. 2003) ("unreasonable inferences").

Farm Credit Services of America v. American State Bank, 212 F. Supp. 2d 1034 (N.D. Iowa 2002), aff'd, 339 F.3d 764 (8th Cir. 2003), opinion corrected on reh'g, (Aug. 28, 2003).

Ileto v. Glock, Inc., 194 F. Supp. 2d 1040 (C.D. Cal. 2002), aff'd in part, rev'd in part and remanded, 349 F.3d 1191 (9th Cir. 2003) ("unreasonable inferences").

Schultzen v. Woodbury Central Community School Dist., 187 F. Supp. 2d 1099 (N.D. Iowa 2002) (rejected by, E.N. v. Susquehanna Tp. School Dist., 2010 WL 4853700 (M.D. Pa. 2010)).

Global Marine Shipping (No. 10) Ltd. v. Finning Intern. Inc., 2002 WL 31246548 (E.D. La. 2002), **quoting Wright & Miller.**

Phillips Kiln Services, Ltd. v. Intern. Paper Co., 2002 WL 1712870 (N.D. Iowa 2002), **citing Wright & Miller.**

Iowa Health System v. Trinity Health Corp., 177 F. Supp. 2d 897 (N.D. Iowa 2001), **citing Wright & Miller.**

Small v. Strain, 2001 WL 1631341 (E.D. La. 2001), **citing Wright & Miller** (unpublished).

Cortes v. R.I. Enterprises, Inc., 95 F. Supp. 2d 255 (M.D. Pa. 2000), **citing Wright & Miller.**

In re Cendant Corp. Securities Litigation, 81 F. Supp. 2d 550 (D.N.J. 2000).

Bristol-Myers Squibb Co. v. IVAX Corp., 77 F. Supp. 2d 606 (D.N.J. 2000).

State ex rel. Attorney General v. Federal Emergency Management Agency, 78 F. Supp. 2d 1111 (D. Haw. 1999).

Oh v. AT & T Corp., 76 F. Supp. 2d 551 (D.N.J. 1999).

In re Cendant Corp. Securities Litigation, 76 F. Supp. 2d 539 (D.N.J. 1999) (rejected by, Falkowski v. Imation Corp., 309 F.3d 1123 (9th Cir. 2002)).

Barapind v. Reno, 72 F. Supp. 2d 1132 (E.D. Cal. 1999), aff'd but criticized, 225 F.3d 1100 (9th Cir. 2000) (unreasonable inferences).

F.T.C. v. Commonwealth Marketing Group, Inc., 72 F. Supp. 2d 530 (W.D. Pa. 1999).

In re Cendant Corp. Securities Litigation, 72 F. Supp. 2d 498 (D.N.J. 1999).

American Special Risk Ins. Co. ex rel. South Macomb Disposal Authority v. City of Centerline, 69 F. Supp. 2d 944 (E.D. Mich. 1999).

Akella v. Michigan Dept. of State Police, 67 F. Supp. 2d 716 (E.D. Mich. 1999).

Culberson v. Doan, 65 F. Supp. 2d 701 (S.D. Ohio 1999).

Cauchi v. Brown, 51 F. Supp. 2d 1014 (E.D. Cal. 1999).

Prevard v. Fauver, 47 F. Supp. 2d 539 (D.N.J. 1999), order aff'd, 202 F.3d 254 (3d Cir. 1999).

Federal Exp. Corp. v. U.S. Postal Service, 40 F. Supp. 2d 943 (W.D. Tenn. 1999).

Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co., 35 F. Supp. 2d 597 (S.D. Ohio 1999).

In re Cendant Corp. Securities Litigation, 190 F.R.D. 331 (D.N.J. 1999).

In re Cendant Corp. Derivative Action Litigation, 189 F.R.D. 117 (D.N.J. 1999).

Campos v. I.N.S., 32 F. Supp. 2d 1337 (S.D. Fla. 1998).

Tennessee Protection and Advocacy, Inc. v. Board of Educ. of Putnam County, Tenn., 24 F. Supp. 2d 808 (M.D. Tenn. 1998).

Miceli v. Ansell, Inc., 23 F. Supp. 2d 929 (N.D. Ind. 1998) (court need not strain to find inferences favorable to pleader).

Organic Chemicals Site PRP Group v. Total Petroleum, Inc., 6 F. Supp. 2d 660 (W.D. Mich. 1998).

U.S. v. BCCI Holdings (Luxembourg), S.A., 3 F. Supp. 2d 31 (D.D.C. 1998).

Slaby v. Fairbridge, 3 F. Supp. 2d 22 (D.D.C. 1998).

Spivey v. State of Ohio, 999 F. Supp. 987 (N.D. Ohio 1998).

Ramirez v. U.S., 998 F. Supp. 425 (D.N.J. 1998).

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Petrone v. Cleveland State University, 993 F. Supp. 1119 (N.D. Ohio 1998) (disapproved of by, Kovacevich v. Kent State University, 224 F.3d 806 (6th Cir. 2000)).

It is improper to assume that the plaintiff can prove facts that it has not alleged. Mruz v. Caring, Inc., 991 F. Supp. 701 (D.N.J. 1998).

U.S. ex rel. Roby v. Boeing Co., 184 F.R.D. 107 (S.D. Ohio 1998).

Guilbeaux v. 3927 Foundation, Inc., 177 F.R.D. 387 (E.D. Tex. 1998).

Diaz v. Carlson, 5 F. Supp. 2d 809 (C.D. Cal. 1997), aff'd, 142 F.3d 443 (9th Cir. 1998) (unreasonable inferences).

Amway Distributors Benefits Ass'n v. Federal Ins. Co., 990 F. Supp. 936 (W.D. Mich. 1997).

Terra Industries, Inc. v. Commonwealth Ins. Co. of America, 990 F. Supp. 679 (N.D. Iowa 1997).

Pagano v. Bell Atlantic-New Jersey, Inc., 988 F. Supp. 841 (D.N.J. 1997).

Fox v. Van Oosterum, 987 F. Supp. 597 (W.D. Mich. 1997), aff'd, 176 F.3d 342 (6th Cir. 1999).

Leslie v. U.S., 986 F. Supp. 900 (D.N.J. 1997), judgment aff'd, 178 F.3d 1279 (3d Cir. 1999) (facts not alleged).

Spinks v. City of St. Louis Water Div., 176 F.R.D. 572 (E.D. Mo. 1997).

Burks v. City of Philadelphia, 904 F. Supp. 421 (E.D. Pa. 1995).

Steiner v. Hale, 868 F. Supp. 284 (S.D. Cal. 1994).

Violanti v. Emery Worldwide A-CF Co., 847 F. Supp. 1251 (M.D. Pa. 1994) ("Conclusory allegations of law, unsupported conclusions and unwarranted inferences need not be accepted as true.") (McClure, J.).

Waye v. First Citizen's Nat. Bank, 846 F. Supp. 310 (M.D. Pa. 1994), judgment aff'd, 31 F.3d 1175 (3d Cir. 1994).

Gen-Probe Inc. v. Center for Neurologic Study, 853 F. Supp. 1215 (S.D. Cal. 1993).

Mackey v. Cleveland State University, 837 F. Supp. 1396 (N.D. Ohio 1993).

City of Heath, Ohio v. Ashland Oil, Inc., 834 F. Supp. 971 (S.D. Ohio 1993).

Mylan Laboratories, Inc. v. Pharmaceutical Basics, Inc., 808 F. Supp. 446 (D. Md. 1992), judgment rev'd, 7 F.3d 1130 (4th Cir. 1993), **citing Wright & Miller.**

14 **Mere conclusory statements**

Dejesus v. HF Management Services, LLC, 726 F.3d 85, 87 (2d Cir. 2013), quoting Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 1940, 173 L. Ed. 2d 868 (2009).

See also

"Appellants' pleading of an enterprise in the Fourth Amended Complaint is wholly conclusory and unsupported by facts. Walker asserts that all Appellees shared some connection with him, were similarly critical of his dealings with the BISD, and/or have sought or supported the imposition of criminal and/or civil penalties against him relating to his dealings with the BISD. Nevertheless, assuming all of that to be true, the facts alleged are insufficient to render plausible Walker's attempted characterization of the various unrelated Appellees as an 'ongoing organization, formal or informal, that functions as a continuing unit.'" Walker v. Beaumont Independent School District, 938 F.3d 724 (5th Cir. 2019).

Lyda v. CBS Corporation, 838 F.3d 1331 (Fed. Cir. 2016).

Haddad v. Randall S. Miller Associates, PC, 587 Fed. Appx. 959 (6th Cir. 2014).

IKB Intern. S.A. v. Bank of America Corp., 584 Fed. Appx. 26 (2d Cir. 2014).

Trump v. Vance, 480 F. Supp. 3d 460, 493 (S.D. N.Y. 2020), stay pending appeal denied, 481 F. Supp. 3d 161 (S.D. N.Y. 2020) and aff'd, 977 F.3d 198 (2d Cir. 2020).

Pollard v. District of Columbia, 191 F. Supp. 3d 58, 66 (D.D.C. 2016), judgment aff'd, 698 Fed. Appx. 616 (D.C. Cir. 2017).

Sepulveda v. UMass Correctional Health, Care, 160 F. Supp. 3d 371, 383 (D. Mass. 2016) (court must distinguish factual allegations from conclusory legal allegations).

Ortiz v. Lewis, 2014 WL 6788091, *4 (N.D. Cal. 2014) ("Plaintiff only presented conclusory allegations of retaliation.").

Foreman v. Foodtronix, LLC, 2014 Wage & Hour Cas. 2d (BNA) 157416, 2014 WL 2039055, *1 (N.D. Tex. 2014).

15 **Legally cognizable claim**

Atchley v. AstraZeneca UK Limited, 22 F.4th 204, 238 (D.C. Cir. 2022) (reversing the district court's dismissal because the plaintiffs' "allegations, together with the reasonable inferences to be drawn from them in plaintiffs' favor,

suffice[d] to state a legally cognizable claim," sufficient to prevent dismissal of the claims at the pleading stage).

Parker v. Sea-Mar Community Health Center, 853 Fed. Appx. 197 (9th Cir. 2021) ("Dismissal under Rule 12 (b)(6) may be based on either: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory.").

Sherrod v. United Way Worldwide, 821 Fed. Appx. 311, 315 (5th Cir. 2020) ("On appeal, we are not concerned with whether the plaintiff was likely to succeed on the claims but only whether the complaint contains any legally cognizable claims that are plausible.").

Body by Cook, Incorporated v. State Farm Mutual Automobile Insurance, 869 F.3d 381, 385 (5th Cir. 2017).

Mills v. Barnard, 869 F.3d 473, 487 (6th Cir. 2017) ("It is important to note that this appeal comes to us at the motion-to-dismiss stage, rather than at summary judgment. * * * [A]t this stage, the complaint has stated legally cognizable claims.").

See also
Walker v. Beaumont Independent School District, 938 F.3d 724 (5th Cir. 2019) (finding dismissal of a RICO claim warranted because "neither defamation, intentional interference, nor online harassment qualifies as a RICO predicate act").

"Upon review of Plaintiff's complaint, the parties' arguments, and the applicable law, the Court will dismiss all of Plaintiff's claims against Defendant Verizon because respondeat superior liability is inapposite in this case and, consequently, Defendant Verizon cannot be held vicariously liable as a matter of law for the conduct committed by Defendant Kostick that has given rise to this suit." Bissett v. Verizon Wireless, 401 F. Supp. 3d 487 (M.D. Pa. 2019).

"Evaluating Plaintiffs' well-articulated complaint applying established Supreme Court and Third Circuit precedent that limits the breadth of the constitutional claims asserted here, this Court is constrained to find that Plaintiffs' factual allegations do not support a claim for violations of the dormant Commerce Clause or the constitutional right to travel. Accordingly, * * * the Court will grant the * * * motions to dismiss." Owner Operator Independent Drivers Association, Inc. v. Pennsylvania Turnpike Commission, 383 F. Supp. 3d 353 (M.D. Pa. 2019), aff'd, 934 F.3d 283 (3d Cir. 2019).

McClean v. Duke University, 376 F. Supp. 3d 585 (M.D. N.C. 2019) ("Because this court finds that any harassment by Broderick was likely driven by personal animus unrelated to Plaintiff's sex, this harassment is not cognizable under Title IX. * * * [T]his fact defeats any plausible inference of sexual bias.").

16

Burden on movant

Marcure v. Lynn, 992 F.3d 625, 631 (7th Cir. 2021) ("[E]very circuit court to address th[e] issue [of who bears the burden on a Rule 12(b)(6) motion]—this Court included—has interpreted Rule 12(b)(6) as requiring the movant to show entitlement to dismissal."), **citing Wright & Miller**.

Hochendoner v. Genzyme Corp., 823 F.3d 724, 729 (1st Cir. 2016) (plaintiff bears burden of alleging facts to meet plausibility standard).

Cohen v. Board of Trustees of the University of the Dist. of Columbia, 819 F.3d 476, 481 (D.C. Cir. 2016), **citing Wright & Miller**.

Mediacom Southeast LLC v. BellSouth Telecommunications, Inc., 672 F.3d 396, 399 (6th Cir. 2012) (district court reversed for placing burden of proof improperly on non-moving party).

Spirit Lake Tribe v. Jaeger, 2020 WL 625279, *4 (D.N.D. 2020) ("Dismissal will not be granted unless it appears beyond doubt the plaintiff can prove no set of facts entitling him to relief. * * * The burden is on the moving party to prove that no legally cognizable claim for relief exists."), **citing Wright & Miller**.

Preston v. Seterus, Inc., 931 F. Supp. 2d 743, 751 (N.D. Tex. 2013) ("Whether Plaintiffs have the ultimate burden of proof at trial on any of their claims is irrelevant here because, for purposes of Defendants' Rule 12(b)(6) motion, Plaintiffs have no burden of proof. Rather, the issue is whether Plaintiffs, based on their pleadings, have stated a claim upon which relief can be granted.").

But see

"The burden is on the plaintiff to frame a complaint with enough factual matter (taken as true) to suggest that he or she is entitled to relief." Hastings v. Barbee, 2011 WL 2610132, *2 (D. Colo. 2011), report and recommendation adopted, 2011 WL 2610194 (D. Colo. 2011) (internal quotation marks omitted).

In an action brought under the Age Discrimination and Employment Act, the plaintiff bears the burden of establishing a prima facie case in order to withstand a motion to dismiss or, alternatively, for summary judgment. Rutland v. Office of Atty. Gen., State of Miss., 851 F. Supp. 793 (S.D. Miss. 1994), judgment aff'd, 54 F.3d 226 (5th Cir. 1995).

See also

"When a defendant invokes qualified immunity, the burden shifts to the plaintiff to demonstrate the inapplicability of the defense." Club Retro, L.L.C. v. Hilton, 568 F.3d 181, 194 (5th Cir. 2009).

Namer v. Scottsdale Insurance Company, 314 F.R.D. 392, 394 n.11 (E.D. La. 2016) (since Rule 12 does not require opposition to be filed in response to

motion to dismiss, district courts cannot grant motion based on plaintiff's failure to oppose).

A motion to dismiss should not be granted merely because it was unopposed. The court still must investigate the legal sufficiency of the complaint. Bennerson v. City of New York, 2004 WL 902166 (S.D. N.Y. 2004).

17 **Rule 12(d)**
See § 1366.

Adams v. Crystal City Marriott Hotel, 2004 WL 744489 (S.D. N.Y. 2004) ("certification" resembling affidavit or declaration submitted by plaintiff in response to motion to dismiss was unusual filing and since it was not attached to or incorporated in complaint, court would not consider it on Rule 12(b)(6) motion).

United States Fire Ins. Co. v. United Limousine Service, Inc., 303 F. Supp. 2d 432 (S.D. N.Y. 2004) (although not relying on materials in affidavit to resolve Rule 12(b)(6) motion, court considered such materials for sole purpose of determining whether to grant leave to amend complaint).

See also
"The Sixth Circuit has held that the failure to convert the motion to a motion for summary judgment is not reversible error if the court's rationale in no way hinged on the additional information provided there. In other words, if the appellate court can justify the dismissal without reference to any extraneous matters, it can treat the error as harmless." Hawk Technology Systems, LLC v. Castle Retail, LLC, 60 F.4th 1349, 1360 (Fed. Cir. 2023) (quoting Bates v. Green Farms Condo. Ass'n, 958 F.3d 470, 484 (6th Cir. 2020)) (internal quotation marks omitted), **citing Wright & Miller**.

18 **Matters considered**
Supreme Court
In discussing the standard by which courts should evaluate whether a complaint has stated a "strong inference" of scienter with the requisite particularity, the Court stated: "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 127 S. Ct. 2499, 2509, 168 L. Ed. 2d 179 (2007), **citing Wright & Miller.**

First Circuit

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"[E]ven within the Rule 12(b)(6) framework, a court may consider matters of public record and facts susceptible to judicial notice." United States ex rel. Winkelman v. CVS Caremark Corporation, 827 F.3d 201, 208 (1st Cir. 2016).

Second Circuit

Kaplan v. Lebanese Canadian Bank, SAL, 999 F.3d 842, 854 (2d Cir. 2021) ("[W]e 'must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.' The proper question is whether there is a permissible relevant inference from 'all of the facts alleged, taken collectively,' not whether an inference is permissible based on 'any individual allegation, scrutinized in isolation.'" (quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)), **citing Wright & Miller**.

Third Circuit

Leisten v. CBS Broadcasting Inc., 2023 WL 6890733, *3 (3d Cir. 2023) ("Exhibit A to Leisten's complaint shows that the news reports naming Leisten were published on May 19, 2020. * * * Leisten does not explain why the District Court should not have relied on his exhibit. Thus, we discern no error in the District Court's finding of the date of publication for adjudicating the CBS Parties' motion to dismiss."), **quoting Wright & Miller**.

Geness v. Administrative Office of Pennsylvania Courts, 974 F.3d 263, 276 (3d Cir. 2020) ("We will take judicial notice of the Pennsylvania Rules of Judicial Administration, as they are 'matters of public record,' which the District Court considered as well."), **quoting Wright & Miller**.

Fourth Circuit

Penegar v. Liberty Mutual Insurance Company, 115 F.4th 294, 300 n.6 (4th Cir. 2024) ("The relevant factual allegations are not always confined to the four corners of the complaint. * * * Because the parties here properly rely on exhibits integral to the complaint, we consider those exhibits in this appeal."), **quoting Wright & Miller**.

The district court should not have considered documents filed with the SEC in ruling on a Rule 12(b)(6) motion to dismiss stockholders' complaint for failure to state claim because the documents were not explicitly referenced in, or an integral part of, the stockholders' securities fraud complaint against corporation and its officers. Zak v. Chelsea Therapeutics Intern., Ltd., 780 F.3d 597, 607 (4th Cir. 2015).

Fifth Circuit

"Because the deeds and the filings from prior lawsuits that BANA attached to its dismissal motion were public record, the district court was permitted to consider

them in deciding the motion to dismiss. Accordingly, to the extent the district court considered the documents, that consideration did not convert the dismissal motion into one for summary judgment." Krystal One Acquisitions, L.L.C. v. Bank of America, N.A., 805 Fed. Appx. 283, 287 (5th Cir. 2020) (citing Cinel v. Connick, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994)).

Funk v. Stryker Corp., 631 F.3d 777, 782 (5th Cir. 2011) (incorporation of matters outside complaint by judicial notice did not convert motion to summary judgment when no facts were in dispute and matters were in public record).

Sixth Circuit

"[I]t is black-letter law that * * * a court evaluating a motion for judgment on the pleadings (or a motion to dismiss) must focus only on the allegations in the pleadings. This rule applies just as much when the plaintiff attaches evidence to its opposition as when (as is more common) the defendant attaches evidence to its motion. * * * If plaintiffs believe that they need to supplement their complaint with additional facts to withstand a motion for judgment on the pleadings (or a motion to dismiss), they have a readily available tool: a motion to amend the complaint under Rule 15." Bates v. Green Farms Condominium Association, 958 F.3d 470, 483 (6th Cir. 2020), **citing Wright & Miller**.

Seventh Circuit

Burke v. 401 N. Wabash Venture, LLC, 714 F.3d 501 (7th Cir. 2013) ("In general, a court may only consider the plaintiff's complaint when ruling on a Rule 12(b)(6) motion. However, Federal Rule of Civil Procedure 10(c) provides that '[a] copy of any written instrument which is an exhibit to a pleading is part thereof for all purposes.' We have concluded that this rule includes a limited class of attachments to motions to dismiss pursuant to Rule 12(b)(6)."), citing Rosenblum v. Travelbyus.com Ltd., 299 F.3d 657, 661 (7th Cir. 2002).

Eighth Circuit

In an action against a hospital alleging violations of the Telephone Consumer Protection Act (TCPA), a hospital questionnaire and consent form signed by the plaintiff in purchasing a medical device were embraced by the patient's complaint. Therefore, the questionnaire and consent form were properly considered by the district court in deciding the hospital's motion to dismiss for failure to state a claim. The plaintiff alleged violation of the TCPA arising out of a contractual relationship, i.e., the purchase of a device from the hospital. The plaintiff alleged in conclusory fashion that he did not give the hospital express consent to make the calls, and documents reflecting a contractual relationship refuted the allegation. Zean v. Fairview Health Services, 858 F.3d 520, 526 (8th Cir. 2017), **quoting Wright & Miller**.

Ninth Circuit

Sams v. Yahoo! Inc., 713 F.3d 1175, 1179 (9th Cir. 2013) ("However, we are permitted to consider documents that were not physically attached to the complaint where the documents' authenticity is not contested, and the plaintiff's complaint necessarily relies on them."), citing Lee v. City of Los Angeles, 250 F.3d 668, 688-689 (9th Cir. 2001).

Tenth Circuit

In re Overstock Securities Litigation, 119 F.4th 787 (10th Cir. 2024) ("We consider the complaint in its entirety, including documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.") (citation and internal quotation marks omitted) **citing Wright & Miller**.

Brokers' Choice of America, Inc. v. NBC Universal, Inc., 861 F.3d 1081, 1103-1104 (10th Cir. 2017) (stating that the "district court did not abuse its discretion and properly considered [the defendant's] motion as a Rule 12(b)(6) motion to dismiss" when the district court considered "the pleadings, [a] seminar recording, and [a TV] episode" and the "seminar recording and the episode were (1) attached to or referenced in the amended complaint, (2) central to BCA's claim, and (3) undisputed as to their accuracy and authenticity").

D.C. Circuit

Covad Communications Co. v. Bell Atlantic Corp., 407 F.3d 1220, 366 (D.C. Cir. 2005) (court may take judicial notice of facts on public record).

Federal Circuit

Zulueta v. U.S., 553 Fed. Appx. 983, 986 (Fed. Cir. 2014) (public record), **citing Wright & Miller**.

Sebastian v. U.S., 185 F.3d 1368 (Fed. Cir. 1999) (superseded military regulations were matter of public record), **citing Wright & Miller.**

See also §§ 1327, 1364, 1366.

Federal Claims Court

A.Y. by J.Y. v. Secretary of Health & Human Services, 152 Fed. Cl. 588, 599 (2021) ("To the extent that the Gershon Article effectively incorporated other articles by reference to support is analysis, the Court cannot conclude that the Chief Special Master improperly reviewed those cited articles as well."), **quoting Wright & Miller**.

Compare

Unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, it cannot consider material outside of the complaint, such as facts presented in briefs, affidavits, or discovery materials. A court may, however, consider exhibits submitted with the complaint and matters subject to judicial

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notice. RDF Media Ltd. v. Fox Broadcasting Co., 372 F. Supp. 2d 556 (C.D. Cal. 2005).

The court may consider documents attached to the complaint, but the court may not consider other documents outside the pleadings. Lee v. Plummer, 2005 WL 91380 (N.D. Cal. 2005).

Maharishi Hardy Blechman Ltd. v. Abercrombie & Fitch Co., 220 F.R.D. 39 (S.D. N.Y. 2004) (court rejected motion opposing plaintiff's request to amend complaint since points in opposition motion all argued futility of amendment based on extra-pleading materials).

Norm Thompson Outfitters, Inc. v. Starcrest Products of California, Inc., 2004 WL 957774 (D. Or. 2004) (court considered catalog whose authenticity was unquestioned and to which complaint referred multiple times but refused to consider website whose authenticity was unquestioned because it was not central to complaint).

Columbia Hosp. at Medical City Dallas subsidiary, L.P. v. Legend Asset Management Corp., 2004 WL 769253 (N.D. Tex. 2004) (court refused to consider document whose authenticity was in dispute).

McNeal v. Cook County Sheriff's Dept., 282 F. Supp. 2d 865 (N.D. Ill. 2003) (facts or admissions from original complaint not incorporated into amended complaint cannot be considered on motion to dismiss).

But see

The court is not always limited to the four corners of the complaint and "may take judicial notice of matters of public record without converting a Rule 12(b)(6) motion into a Rule 56 motion." Halmos v. Bomardier Aerospace Corp., 404 Fed. Appx. 376, 377 (11th Cir. 2010) (per curiam).

City of Portland v. Homeaway.com, Inc., 191 F. Supp. 3d 1157, 1161 (D. Or. 2016) (two exceptions to the rule that courts may not consider matters beyond the pleadings permit the consideration of matters of public record, and material submitted as part of complaint provided plaintiff's complaint necessarily relies on them).

Union Street Corridor-Community Development Corporation v. Santander Bank, N.A., 191 F. Supp. 3d 147, 149 n.1 (D. Mass. 2016) (court reviewed extra-pleading submissions central to plaintiff's claim whose authenticity was not disputed and that were sufficiently referred to in complaint).

"Typically on a motion to dismiss, the deciding court cannot consider information outside the four corners of the complaint. The First Circuit recognizes narrow exceptions to this rule for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiff's claim;

or for documents sufficiently referred to in the complaint." Alharbi v. Beck, 62 F. Supp. 3d 202, 205 (D. Mass. 2014) (internal citations omitted).

"When ruling on a motion to dismiss a pro se complaint, however, a district court is required to look beyond the plaintiff's formal complaint and to consider as amendments to the complaint those materials subsequently filed." Val-Com Acquisitions Trust v. Wells Fargo Bank, N.A., 2011 WL 1344176, *2 (E.D. Tex. 2011), report and recommendation adopted, 2011 WL 1344168 (E.D. Tex. 2011), aff'd, 428 Fed. Appx. 313 (5th Cir. 2011) (internal quotation marks omitted).

"When ruling on a motion to dismiss a pro se complaint, however, a district court is required to look beyond the plaintiff's formal complaint and to consider as amendments to the complaint those materials subsequently filed." Anderson v. CitiMortgage, Inc., 2011 WL 1113494, *3 (E.D. Tex. 2011) (internal quotation marks omitted).

Cardew v. New York State Dept. of Correctional Services, 2004 WL 943575 (S.D. N.Y. 2004) (since plaintiff was entitled to have all facts assumed in his favor, court rejected defendant's argument that substance of grievance forms mentioned in complaint should be considered because they were incorporated).

But compare
Adams v. Crystal City Marriott Hotel, 2004 WL 744489 (S.D. N.Y. 2004) ("certification" resembling affidavit or declaration submitted by plaintiff in response to motion to dismiss was unusual filing and since it was not attached to or incorporated in complaint, court would not consider it on Rule 12(b)(6) motion).

United States Fire Ins. Co. v. United Limousine Service, Inc., 303 F. Supp. 2d 432 (S.D. N.Y. 2004) (although not relying on materials in affidavit to resolve Rule 12(b)(6) motion, court considered such materials for sole purpose of determining whether to grant leave to amend complaint).

19 **Rule 12(h)(2)**
See § 1392.

See also
A Rule 60(b) motion is made after trial, and is therefore an inappropriate means by which to assert a failure to state a claim defense. Rule 12(h)(2) only preserves the defense through trial. Eberhardt v. Integrated Design & Const., Inc., 167 F.3d 861 (4th Cir. 1999).

Hayes v. Allstate Ins. Co., 95 F. Supp. 2d 832 (W.D. Tenn. 2000), **citing Wright & Miller**.

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Puckett v. U.S., 82 F. Supp. 2d 660 (S.D. Tex. 1999), aff'd, 213 F.3d 636 (5th Cir. 2000), **citing Wright & Miller.**

Mullis v. Mechanics & Farmers Bank, 994 F. Supp. 680 (M.D. N.C. 1997), **citing Wright & Miller.**

20 **Untimely Rule 12(b)(6) motion**

"Although Rule 12(h)(2) preserves Rule 12(b)(6) in certain instances, this case is not one of those instances. The second Motion to Dismiss is not in response to any pleading allowed or ordered under Rule 7(a); rather, it is in response to the Court's Ruling and Order granting in part and denying in part Dr. Blanche's first motion to dismiss. Additionally, the second Motion to Dismiss is not raised by a Rule 12(c) motion for judgment on the pleadings, and it is not being raised at trial. See Fed. R. Civ. P. 12(h)(2). Therefore, Dr. Blanche is not permitted to make another Rule 12(b)(6) motion raising his defenses or objections because they were readily available to him, but omitted from his first motion. For this reason, the second motion is denied." Colbert v. City of Baton Rouge/Parish of East Baton Rouge, 2018 WL 3430689 (M.D. La. 2018).

Northstar Battery Company, LLC v. EnXergy, LLC, 2018 WL 5284618 (W.D. Mo. 2018) (granting, based on Rule 12(g)(2), plaintiff's motion to strike the defendant's motion under Rule 12(b)(6) because it was omitted from the defendant's previous motion under Rule 12 seeking dismissal for lack of jurisdiction and improper venue).

21 **Some other vehicle**

"We note that [defendants] filed answers in the District Court on June 22, 2009, thus generally barring the filing of a motion to dismiss under Rule 12(b)(6)." Balintulo v. Daimler AG, 727 F.3d 174, 188 n.20 (2d Cir. 2013).

Patrick v. Rivera-Lopez, 708 F.3d 15, 18 (1st Cir. 2013) (district court should have treated Rule 12(b)(6) motion as motion for judgment on pleadings under Rule 12(c), although court's reliance on wrong rule was inconsequential).

ClearOne Communications, Inc. v. Biamp Systems, 653 F.3d 1163, 1172 (10th Cir. 2011).

Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004) (district court should not have considered motion to dismiss made after answer under Rule 12(b)(6) but instead should have considered it under Rule 12(c) or Rule 12(h)(2)).

CNSP, Inc. v. City of Santa Fe, 2018 WL 813409 (D.N.M. 2018) ("Rules 12(g)(2) and 12(h)(2) * * * do not preclude the Court from considering Defendant's successive Rule 12(b)(6) assertions raised in Motion to Dismiss Two and Motion to Dismiss Three so long as the Court evaluates those assertions under Rule 12(c).").

A party is not required to assert the defense of failure to state a claim in a motion; such a defense may also be asserted in an answer. Therefore, the defense is not waived if a Rule 12(b)(6) motion is not filed before the answer. Rule 12(b)(6) motions, however, are untimely if filed after an answer. The similarity between Rule 12(b)(6) motions to dismiss for failure to state a claim and Rule 12(c) motions for judgment on the pleadings has led to the "common practice" to treat an untimely Rule 12(b)(6) motion as a Rule 12(c) motion. In re Breedlove, 545 B.R. 359, 365-366 (Bankr. M.D. Ga. 2016).

But see
In re Apple iPhone Antitrust Litigation, 846 F.3d 313, 318-320 (9th Cir. 2017), judgment aff'd, 139 S. Ct. 1514, 203 L. Ed. 2d 802 (2019).

"Under Seventh Circuit law, however, 'it is well established that the amended pleading supersedes the original pleading * * * Once an amended pleading is interposed, the original pleading no longer performs any function in the case * * *.' * * * Defendants filed their Motion to Dismiss in lieu of an answer to the Second Amended Complaint, thus the Rule 12(b)(6) motion is proper." Wellness Community-National v. Wellness House, 70 F.3d 46, 49 (7th Cir. 1995), quoting Panwar v. Access Therapies, Inc., 975 F. Supp. 2d 948 (S.D. Ind. 2013), **quoting Wright & Miller**.

22 **Appellate leniency**
Johnson v. Farmers New World Life Insurance Company, 2024 WL 4157896, *2, (10th Cir. 2024) ("Because WNIC had already filed an answer to the complaint when it joined in the motion to dismiss, the district court construed WNIC's joinder as a motion for judgment on the pleadings pursuant to Rule 12(c). However, a motion under Rule 12(c) is treated as a motion to dismiss under Rule 12(b)(6)."), **citing Wright & Miller**.

In re Apple iPhone Antitrust Litigation, 846 F.3d 313 (9th Cir. 2017), judgment aff'd, 139 S. Ct. 1514, 203 L. Ed. 2d 802 (2019).

Leyse v. Bank of America Nat. Ass'n, 804 F.3d 316 (3d Cir. 2015) ("So long as the district court accepts all of the allegations in the complaint as true, the result is the same as if the defendant had filed an answer admitting these allegations and then filed a Rule 12(c) motion for judgment on the pleadings, which Rule 12(h)(2)(B) expressly permits.").

Albers v. Board of County Com'rs of Jefferson County, Colo., 771 F.3d 697 (10th Cir. 2014) ("[W]hether the district court dismissed the complaint based on a motion under Rule 12(b)(6) or rule 12(c) makes no difference for purposes of our review. Therefore, any procedural error that may have been committed would be harmless and does not prevent us from reaching the merits of the district court's decision.").

23 **Courts cannot grant motion to dismiss merely based on lack of response**

Marcure v. Lynn, 992 F.3d 625, 633 (7th Cir. 2021) ("Rule 12(b)(6) prevents courts from granting unopposed motions solely because there is no response.").

Giummo v. Olsen, 701 Fed. Appx. 922, 924-925 (11th Cir. 2017) (holding that the district court abused its discretion by "grant[ing] the defendants' motion to dismiss based solely on the plaintiffs' failure to respond in opposition," and explaining that "the district court must address the merits of the defendants' motion to dismiss").

Wiggins v. MacManiman, 698 Fed. Appx. 42, 43 (3d Cir. 2017) ("District Courts may not grant a Rule 12(b)(6) motion as unopposed and dismiss a complaint 'solely on the basis of [a] local rule without any analysis of whether the complaint failed to state a claim upon which relief can be granted, as provided in [Rule] 12(b)(6).'"), quoting Stackhouse v. Mazurkiewicz, 951 F.2d 29, 30 (3d Cir. 1991).

Fournerat v. Wisconsin Law Review, 420 Fed. Appx. 816 (10th Cir. 2011) ("'[A] district court may not grant a motion to dismiss for failure to state a claim merely because a party failed to file a response.' If the plaintiff does not file a response, 'the district court must still examine the allegations in the plaintiff's complaint and determine whether the plaintiff has stated a claim upon which relief can be granted.'"), quoting Issa v. Comp USA, 354 F.3d 1174, 1177-1178 (10th Cir. 2003).

Issa v. Comp USA, 354 F.3d 1174, 1177 (10th Cir. 2003).

McCall v. Pataki, 232 F.3d 321, 322-323 (2d Cir. 2000) ("If a complaint is sufficient to state a claim on which relief can be granted, the plaintiff's failure to respond to a Rule 12(b)(6) motion does not warrant dismissal.").

Carver v. Bunch, 946 F.2d 451, 453-455 (6th Cir. 1991).

Ramsey v. Signal Delivery Service, Inc., 631 F.2d 1210, 1214 (5th Cir. 1980).

Patton v. Turner, 2022 WL 1161434, *2 (E.D. Tenn. 2022) ("[I]n the context of a motion to dismiss under Rule 12(b)(6), a moving party must meet its initial burden under the Federal Rules, even if an adverse party fails to respond."), citing Carver v. Bunch, 946 F.2d 451, 455 (6th Cir. 1991).

Swinson v. City of New York, 2022 WL 142407, *3 (S.D. N.Y. 2022) ("'[T]he plaintiff's failure to respond to a Rule 12(b)(6) motion does not [itself] warrant dismissal,' and the district court must determine whether dismissal of the complaint is appropriate on the merits."), quoting McCall v. Pataki, 232 F.3d 321, 322-323 (2d Cir. 2000).

Chowdury v. Wal-Mart Stores Texas, LLC, 2019 WL 13190677, *2 (S.D. Tex. 2019) ("[W]here a party does not respond to a motion to dismiss, such failure does not warrant a severe measure, such as dismissal with prejudice."), citing Ramsey v. Signal Delivery Service, Inc., 631 F.2d 1210, 1213-1214 (5th Cir. 1980).

See also

Land v. International Business Machines, Inc., 485 Fed. Appx. 830 (7th Cir. 2012) ("Our review of the court's decision dismissing a case under Federal Rule of Civil Procedure 12(b)(6) is, however, de novo, and so we will overlook [plaintiff's] failure properly to raise before the district court any arguments opposing the motion to dismiss.").

Branch Banking and Trust Co. v. Howard, 2013 WL 172903 (S.D. Ala. 2013) (explaining that a non-movant's failure to oppose a Rule 12(b)(6) motion, "does not trigger the kneejerk granting of such Motion on an abandonment theory" (quoting Gailes v. Marengo County Sheriff's Dept., 916 F. Supp. 2d 1238, 1243 (S.D. Ala. 2013) ("If * * * the defendant's presentation is adequate to satisfy its initial burden, the Court will not deny the motion based on arguments the plaintiff could have made but by silence elected not to raise."))).

But see

Cohen v. Board of Trustees of the University of the Dist. of Columbia, 819 F.3d 476, 480-481 (D.C. Cir. 2016) (permitting, "reluctantly," district courts to grant unopposed 12(b)(6) motions to dismiss—but only when done without prejudice—because it is permissible "[u]nder [D.C. Circuit] precedent," but expressing "concerns about that precedent").

Pomerleau v. West Springfield Public Schools, 362 F.3d 143, 145 (1st Cir. 2004) (acknowledging that "the mere fact that a motion to dismiss is unopposed does not relieve the district court of the obligation to examine the complaint itself," but holding that Rule 12(b)(6)'s requirement can nevertheless be overridden by local rules if "the result does not clearly offend equity").

24 **Court's own initiative**

"Generally, a district court may dismiss a plaintiff's claim for failure to state a claim sua sponte, 'as long as the procedure employed is fair to the parties.' A litigant must have the opportunity to be heard before a claim is dismissed, except where the claim is patently frivolous. Fairness requires both notice of the court's intention and an opportunity to respond." Alexander v. Trump, 753 Fed. Appx. 201 (5th Cir. 2018) (dismissing claims against the defendant before the defendant had been served) (citations and internal quotation marks omitted)**, quoting Wright & Miller**.

Futura Development of Puerto Rico, Inc. v. Estado Libre Asociado de Puerto Rico, 144 F.3d 7 (1st Cir. 1998) (sua sponte dismissal for failure to state claim

is erroneous unless party has been afforded notice and opportunity to amend complaint or otherwise respond).

Goodwin v. Castille, 465 Fed. Appx. 157, 163 (3d Cir. 2012) ("This is the rare case where sua sponte dismissal was appropriate. The District Court had sufficient facts to determine that legislative immunity was an absolute bar to Appellants' action.").

"A district court may consider the sufficiency of a complaint on its own initiative, as long as the procedure employed is fair. Fairness in this context requires both notice of the court's intention and an opportunity to respond. Hager was aware of the court's concern about the viability of his claim and that the defendant had asked the court to dismiss the case with prejudice, albeit in a perfunctory filing. Moreover, Hager had the opportunity to make his case for a remedy to the district court. In any event, Hager has forfeited any challenge to the district court's sua sponte dismissal by failing to raise the issue on appeal." Hager v. DBG Partners, Incorporated, 903 F.3d 460 (5th Cir. 2018).

The district court has the power to dismiss the complaint sua sponte for failure to state a claim and there is no reason why the same rule should not apply to dismissal on statute of limitations grounds, at least when the facts supporting the statute of limitations defense are set forth in the papers the plaintiff himself submitted. Leonhard v. U.S., 633 F.2d 599, 609 n.11 (2d Cir. 1980), **citing Wright & Miller**.

"Generally, res judicata must be pled as an affirmative defense. Two limited exceptions to this rule exist. The first exception permits '[d]ismissal by the court sua sponte on res judicata grounds * * * in the interest of judicial economy where both actions were brought before the same court.' The second exception applies 'where all of the relevant facts are contained in the record * * * and all are uncontroverted.' Both McIntyre's Civil Rights Act and FLSA actions were brought before the same federal district court. The relevant facts are contained in McIntyre's complaint, which is nearly identical to the complaint filed in the earlier action. Thus, the district court did not err in raising the issue of res judicata sua sponte under Rule 12(b)(6)." McIntyre v. Ben E. Keith Company, 754 Fed. Appx. 262 (5th Cir. 2018) (citations omitted).

Robertson v. Anderson Mill Elementary School, 989 F.3d 282, 290-291 (4th Cir. 2021) ("[A]s our sister circuits have recognized, there are instances in which 'sua sponte dismissals of complaints under Rule 12(b)(6) are appropriate.' * * * Importantly, district courts may only exercise their authority to sua sponte dismiss inadequate complaints if 'the procedure employed is fair to the parties.'") (citations omitted), **citing Wright & Miller**.

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It was error for the court to dismiss the plaintiff's complaint sua sponte without affording him notice and an opportunity to respond. Wyatt v. City of Boston, 35 F.3d 13 (1st Cir. 1994), **citing Wright & Miller.**

See also
Rampersad v. Deutsche Bank Securities, Inc., 2004 WL 616132 (S.D. N.Y. 2004) (although court acknowledged that falsity and sham were grounds for granting motion to strike, it denied motion because falsity had not been sufficiently established).

Compare
Even if the plaintiff does not oppose a Rule 12(b)(6) motion, the court should conduct an independent inquiry to determine whether the motion to dismiss has merit. Such an inquiry is especially important when the parties do not agree on whether any disposition should be made with or without prejudice. Seaweed, Seaweed, Inc. v. DMA Product & Design & Marketing LLC., 219 F. Supp. 2d 551 (S.D. N.Y. 2002).

But see
Lindley v. City of Birmingham, Ala., 452 Fed. Appx. 878, 880-881 (11th Cir. 2011) (sua sponte dismissal of plaintiff's claim as time-barred reversed because court did not give plaintiff notice and opportunity to be heard on question of dismissal for failure to state claim).

"Whether the court had the authority sua sponte to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is unclear." Holbrook v. Castle Key Ins. Co., 405 Fed. Appx. 459, 460 n.1 (11th Cir. 2010) (per curiam).

25 **In forma pauperis**
"Secondly, plaintiff's lawsuit is subject to dismissal as being frivolous because his claim that he is Jesus Christ is delusional." Falconer v. United States Government, 2019 WL 1651314 (E.D. Mich. 2019) (dismissing complaint of the plaintiff under 28 U.S.C.A. § 1915).

26 **Magistrates Act**
28 U.S.C.A. § 636(b)(1)(B).

27 **Limitations on magistrates**
Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985) ("[A] district court may refer dispositive motions to a magistrate for a recommendation so long as 'the entire process takes place under the district court's total control and jurisdiction,' and the judge 'exercises the ultimate authority to issue an appropriate order.'" (quoting U.S. v. Raddatz, 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980))).

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Freeman v. County of Bexar, 142 F.3d 848 (5th Cir. 1998) ("There is no doubt that district courts may, both constitutionally and by statute, assign magistrate judges to work on dispositive motions in a case, but the Article III judge must retain final decisionmaking authority.").

TPO, Inc. v. McMillen, 460 F.2d 348 (7th Cir. 1972) ("We conclude that magistrates have no power to decide motions to dismiss or motions for summary judgment, both of which involve ultimate decision making, and the district courts have no power to delegate such duties to magistrates.").

28 **Magistrate recommendation**

Rule 72(b) is discussed in §§ 3068 to 3070.2.

See also

"Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6). The magistrate judge, exercising jurisdiction by consent under 28 U.S.C. § 636(c), granted the motion." Sanders v. Werner, 2022 WL 1052055, *1 (10th Cir. 2022).

"The magistrate judge, exercising jurisdiction over the case by consent of the parties, see 28 U.S.C. § 636(c), granted Winn-Dixie's motion to dismiss under Rule 12(b)(6)." Reed v. Winn Dixie, Inc., 677 Fed. Appx. 607, 611 (11th Cir. 2017).

"This lawsuit is before the court on the United States Magistrate Judge's recommendation to grant SPLC's and the Amazon defendants' motions to dismiss filed pursuant to Rule 12(b)(6) of the Federal Rules on Civil Procedure. After an independent and de novo review of the record, and for reasons that follow, the court overrules Coral Ridge's objections to the recommendation and adopts the recommendation that this case should be dismissed in its entirety, albeit for reasons, in some instances, different from the magistrate judge's." Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 406 F. Supp. 3d 1258 (M.D. Ala. 2019), aff'd, 6 F.4th 1247 (11th Cir. 2021), cert. denied, 142 S. Ct. 2453, 213 L. Ed. 2d 1102 (2022).

29 **Issue of law**

Neitzke v. Williams, 490 U.S. 319, 326, 109 S. Ct. 1827, 1832, 104 L. Ed. 2d 338 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law.").

Seismic Reservoir 2020, Inc. v. Paulsson, 785 F.3d 330, 335 (9th Cir. 2015) ("'Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law.'"), quoting Neitzke v. Williams, 490 U.S. 319, 326, 109 S. Ct. 1827, 1832, 104 L. Ed. 2d 338 (1989).

Sons of Confederate Veterans, Virginia Div. v. City of Lexington, Va., 722 F.3d 224, 228 (4th Cir. 2013) ("'Rule 12(b)(6) authorizes a court to dismiss a claim

on the basis of a dispositive issue of law.'"), quoting Neitzke v. Williams, 490 U.S. 319, 326, 109 S. Ct. 1827, 1832, 104 L. Ed. 2d 338 (1989).

Barefoot Architect, Inc. v. Bunge, 54 V.I. 948, 632 F.3d 822, 835 (3d Cir. 2011) (Rule 12(b)(6) motion presents purely legal question; evidence is irrelevant).

Public Health Equipment & Supply Co., Inc. v. Clarke Mosquito Control Products, Inc., 410 Fed. Appx. 738, 741 (5th Cir. 2010).

Club Retro, L.L.C. v. Hilton, 568 F.3d 181, 194 (5th Cir. 2009) ("Our jurisdiction, however, is severely curtailed: 'we are restricted to determinations of question[s] of law and legal issues, and we do not consider the correctness of the plaintiff's version of the facts.'"), quoting Atteberry v. Nocona General Hosp., 430 F.3d 245, 251-252 (5th Cir. 2005).

See also
Bilbo v. Thigpen, 647 So. 2d 678 (Miss. 1994), **citing Wright & Miller.**

30 **No discretion**
Moore v. Carwell, 168 F.3d 234 (5th Cir. 1999) (under Prison Litigation Reform Act).

A motion to dismiss for failure to state a claim allows no discretion in the usual sense, since the complaint is either good or not good. Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126 (5th Cir. 1959).

Yuba Consol. Gold Fields v. Kilkeary, 206 F.2d 884 (9th Cir. 1953).

Frontline Test Equipment, Inc. v. Greenleaf Software, Inc., 10 F. Supp. 2d 583 (W.D. Va. 1998).

Singer v. Bulk Petroleum Corp., 9 F. Supp. 2d 916 (N.D. Ill. 1998).

If it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations, a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one. Township of West Orange v. Whitman, 8 F. Supp. 2d 408 (D.N.J. 1998).

A motion to dismiss invokes a form of legal triage, a paring of viable claims from those doomed by law. Lebron v. Ashford Presbyterian Community Hosp., 995 F. Supp. 241 (D.P.R. 1998).

Gray v. Petoseed Co., Inc., 985 F. Supp. 625 (D.S.C. 1996), aff'd, 129 F.3d 1259 (4th Cir. 1997).

Erie City Retirees Ass'n v. City of Erie, 838 F. Supp. 1048 (W.D. Pa. 1993).

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Bender v. CenTrust Mortg. Corp., 833 F. Supp. 1525 (S.D. Fla. 1992).

See also
Environmental Ass'n of St. Thomas and St. John v. Department of Planning and Natural Resources, 44 V.I. 218, 2002 WL 655506 (Terr. Ct. 2002), **citing Wright & Miller.**

31 **Considerable discretion**
Pro se litigants held to less stringent pleading requirements than lawyers when the court is determining whether the pleading fails to state a cause of action. Jourdan v. Jabe, 951 F.2d 108 (6th Cir. 1991).

In general the court has broad discretion in ruling on a motion to dismiss, but dismissal should be granted with care to avoid improperly denying the plaintiff the opportunity to have his claim adjudicated on the merits. Beenken v. Chicago & N.W.R. Co., 367 F. Supp. 1337 (N.D. Iowa 1973).

Compare
State v. Watson Pharmaceuticals Inc., 2019 UT App 31, 440 P.3d 727 (Utah Ct. App. 2019) (upholding a trial court's dismissal with prejudice in the face of the plaintiff-State's multiple failures to amend its complaint to state a claim), **citing Wright & Miller**.

32 **Review de novo**
Animal Legal Defense Fund, Inc. v. Perdue, 872 F.3d 602, 610 (D.C. Cir. 2017) ("We review de novo the District Court's dismissal for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6).").

"This court reviews de novo a district court's order on a 12(b)(6) motion to dismiss for failure to state a claim." Hunter v. Berkshire Hathaway, Incorporated, 829 F.3d 357, 361 (5th Cir. 2016).

Stevens v. Bank of America, N.A., 587 Fed. Appx. 130, 132 (5th Cir. 2014) ("We review de novo the res judicata effect of a prior judgment and a Rule 12(b)(6) dismissal.") (citing Bass v. Stryker Corp., 669 F.3d 501 (5th Cir.2012); Test Masters Educ. Servs., Inc. v. Singh, 428 F.3d 559, 571 (5th Cir.2005)).

"We review de novo the district court's dismissal of a complaint for failure to state a claim based on statute of limitations grounds." Santana-Castro v. Toledo-Davila, 579 F.3d 109, 113 (1st Cir. 2009).

Compare
Solar Somohano v. Coca-Cola Company, 859 Fed. Appx. 581, 582 (Fed. Cir. 2021) (dismissals pursuant to Rule 12(b)(6) by the Trademark Trial and Appeal

Board are reviewed de novo by the Federal Circuit) (citing Sunrise Jewelry Mfg. Corp. v. Fred S.A., 175 F.3d 1322, 1324 (Fed. Cir. 1999)).

But compare

Crosby v. Hariel, 673 Fed. Appx. 397, 400 (5th Cir. 2016) (stating that although the court "review[s] de novo a district court's dismissal of a complaint for failure to state a claim," the court reviews the district court's "decision to grant a motion to dismiss with or without prejudice only for abuse of discretion" (citation and internal quotation marks omitted)).

33 **More deferential standard**

"'We review de novo a district court's dismissal of [a complaint] for failure to state a claim under Rule 12(b)(6).' Prodanova v. H.C. Wainwright & Co., LLC, 993 F.3d 1097, 1105 (9th Cir. 2021). Questions involving the application of legal principles to established facts are also reviewed de novo. Flores v. City of San Gabriel, 824 F.3d 890, 905 (9th Cir. 2016). However, a district court's determination of likelihood of confusion is reviewed for clear error. Pom Wonderful LLC v. Hubbard, 775 F.3d 1118, 1123 (9th Cir. 2014)." Arizona Board of Regents for and on behalf of Arizona State University v. Doe, 2022 WL 1514649, *1 (9th Cir. 2022).

34 **Final judgment**

"Ordinarily, appellate jurisdiction is lacking to hear an appeal from an order denying a Rule 12(b)(6) motion to dismiss since such an order is interlocutory in nature." Turi v. Main Street Adoption Services, LLP, 633 F.3d 496, 500-501 (6th Cir. 2011) (abrogated by, Henry Schein, Inc. v. Archer and White Sales, Inc., 139 S. Ct. 524, 202 L. Ed. 2d 480 (2019)), quoting Michigan Bell Telephone Co. v. Climax Telephone Co., 202 F.3d 862, 866 (6th Cir. 2000), as amended on denial of reh'g and reh'g en banc, (Feb. 16, 2000).

The denial of a Rule 12(b)(6) motion is not normally an appealable decision, but a district court's rejection of qualified immunity on a motion to dismiss is a final decision and thus, appealable. Higgenbotham v. Connatser, 420 Fed. Appx. 466 (5th Cir. 2011).

35 **Superseded complaints and abandoned claims**

"Anand mentions the Rule 12(b)(6) dismissal of his federal claims under ERISA, RICO, the Sherman Act, and the Controlled Substances Act. Anand has forfeited appellate review of his ERISA claim because he did not replead it in his second amended complaint after the court dismissed it without prejudice." Anand v. Independence Blue Cross, 2022 WL 2339476, *3 n.3 (3d Cir. 2022).

"Grayson's challenges to the dismissal of his claims of invasion of privacy, cyberstalking, and fraudulent transfer are not properly before us. '[A]n amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against

his adversary.' Pintando v. Miami-Dade Housing Agency, 501 F.3d 1241, 1243 (11th Cir. 2007) (quoting Dresdner Bank AG, Dresdner Bank AG in Hamburg v. M/V OLYMPIA VOYAGER, 463 F.3d 1210, 1215 (11th Cir. 2006)). Grayson abandoned his claims of cyberstalking and fraudulent transfer by failing to replead them in his amended complaint. And Grayson abandoned his claim of invasion of privacy by omitting it from his second amended complaint." Grayson v. No Labels, Inc., 2022 WL 12144181, *3 (11th Cir. 2022).

36 **Accept as true, light most favorable**

Supreme Court

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 163, 113 S. Ct. 1160, 1161, 122 L. Ed. 2d 517 (1993).

First Circuit

French v. Bank of New York Mellon, 729 F.3d 17 (1st Cir. 2013).

Garcia-Monagas v. De Arellano, 674 F.3d 45, 47 (1st Cir. 2012).

Sutliffe v. Epping School Dist., 584 F.3d 314 (1st Cir. 2009).

Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10 (1st Cir. 2009).

Citibank Global Markets, Inc. v. Rodriguez Santana, 573 F.3d 17 (1st Cir. 2009).

U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220 (1st Cir. 2004).

Rossiter v. Potter, 357 F.3d 26 (1st Cir. 2004).

Vega-Encarnacion v. Babilonia, 344 F.3d 37 (1st Cir. 2003) (since court is obligated to accept facts of nonmoving party as true on motion to dismiss, mere fact that motion is unopposed does not relieve district court of obligation to examine complaint itself to see whether it is formally sufficient).

Lebron-Rios v. U.S. Marshal Service, 341 F.3d 7 (1st Cir. 2003).

Cogan v. Phoenix Life Ins. Co., 310 F.3d 238 (1st Cir. 2002).

Arruda v. Sears, Roebuck & Co., 310 F.3d 13 (1st Cir. 2002).

Petricca Development Ltd. Partnership v. Pioneer Development Co., 214 F.3d 216 (1st Cir. 2000).

Tompkins v. United Healthcare of New England, Inc., 203 F.3d 90 (1st Cir. 2000).

Serpa Corp. v. McWane, Inc., 199 F.3d 6 (1st Cir. 1999).

Clarke v. Kentucky Fried Chicken of California, Inc., 57 F.3d 21 (1st Cir. 1995).

Heno v. F.D.I.C., 996 F.2d 429 (1st Cir. 1993), withdrawn and superseded on reh'g, 20 F.3d 1204 (1st Cir. 1994).

Washington Legal Foundation v. Massachusetts Bar Foundation, 993 F.2d 962 (1st Cir. 1993).

Second Circuit

Teichmann v. New York, 769 F.3d 821, 825 (2d Cir. 2014).

Rinehart v. Akers, 722 F.3d 137 (2d Cir. 2013), cert. granted, judgment vacated, 573 U.S. 956, 134 S. Ct. 2900, 189 L. Ed. 2d 853 (2014).

Anderson News, L.L.C. v. American Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012).

Kitchen v. Phipps Houses Group of Companies, 380 Fed. Appx. 99, 100 (2d Cir. 2010).

Vodopia v. Koninklijke Philips Electronics, N.V., 398 Fed. Appx. 659 (2d Cir. 2010) (abrogated by, Nielsen v. AECOM Technology Corp., 762 F.3d 214 (2d Cir. 2014)).

Zavalidroga v. Cote, 395 Fed. Appx. 737 (2d Cir. 2010).

Spagnola v. Chubb Corp., 574 F.3d 64 (2d Cir. 2009).

Rescuecom Corp. v. Google Inc., 562 F.3d 123 (2d Cir. 2009).

West Virginia Inv. Management Bd. v. Doral Financial Corp., 344 Fed. Appx. 717 (2d Cir. 2009).

Peker v. Steglich, 324 Fed. Appx. 38 (2d Cir. 2009).

Roman v. Donelli, 347 Fed. Appx. 662 (2d Cir. 2009).

Panther Partners Inc. v. Ikanos Communications, Inc., 347 Fed. Appx. 617 (2d Cir. 2009).

Oneida Indian Nation of New York v. City of Sherrill, New York, 337 F.3d 139 (2d Cir. 2003), rev'd and remanded, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005).

Cicio v. Does, 321 F.3d 83 (2d Cir. 2003), cert. granted, judgment vacated, 542 U.S. 933, 124 S. Ct. 2902, 159 L. Ed. 2d 808 (2004).

Taylor v. Vermont Dept. of Educ., 313 F.3d 768 (2d Cir. 2002).

Cantor Fitzgerald Inc. v. Lutnick, 313 F.3d 704 (2d Cir. 2002).

Law Offices of Curtis V. Trinko v. Bell Atlantic Corp., 294 F.3d 307 (2d Cir. 2002), opinion amended and superseded, 305 F.3d 89 (2d Cir. 2002), as amended, (Aug. 14, 2002) and as amended, (Aug. 30, 2002) and rev'd and remanded, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004).

Chambers v. Time Warner, Inc., 282 F.3d 147 (2d Cir. 2002).

Primetime 24 Joint Venture v. National Broadcasting, Co., Inc., 219 F.3d 92 (2d Cir. 2000).

Charles W. v. Maul, 214 F.3d 350 (2d Cir. 2000).

Tarshis v. Riese Organization, 211 F.3d 30 (2d Cir. 2000) (abrogated by, Swierkiewicz v. Sorema N. A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)).

Koehler v. Bank of Bermuda (New York) Ltd., 209 F.3d 130 (2d Cir. 2000), opinion amended, 229 F.3d 424 (2d Cir. 2000).

Boyd v. Nationwide Mut. Ins. Co., 208 F.3d 406 (2d Cir. 2000).

E.E.O.C. v. Staten Island Sav. Bank, 207 F.3d 144 (2d Cir. 2000).

Cruz v. Gomez, 202 F.3d 593 (2d Cir. 2000).

Cruz v. Coach Stores, Inc., 202 F.3d 560 (2d Cir. 2000).

Strom v. Goldman, Sachs & Co., 202 F.3d 138 (2d Cir. 1999).

X-Men Sec., Inc. v. Pataki, 196 F.3d 56 (2d Cir. 1999).

Still v. DeBuono, 101 F.3d 888 (2d Cir. 1996).

Powers v. British Vita, P.L.C., 57 F.3d 176 (2d Cir. 1995).

Villager Pond, Inc. v. Town of Darien, 56 F.3d 375 (2d Cir. 1995).

G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762 (2d Cir. 1995).

Acito v. IMCERA Group, Inc., 47 F.3d 47 (2d Cir. 1995).

Hill v. City of New York, 45 F.3d 653 (2d Cir. 1995).

Annis v. County of Westchester, N.Y., 36 F.3d 251 (2d Cir. 1994).

Rent Stabilization Ass'n of City of New York v. Dinkins, 5 F.3d 591 (2d Cir. 1993).

Kopec v. Coughlin, 922 F.2d 152 (2d Cir. 1991).

Third Circuit

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Doe v. Princeton University, 30 F.4th 335, 340 (3d Cir. 2022) ("On a motion to dismiss, a court must 'accept all factual allegations in the complaint as true and view them in the light most favorable to the plaintiff.'").

Bruni v. City of Pittsburgh, 824 F.3d 353, 360 (3d Cir. 2016) ("[O]ur standard of review of a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) is plenary."), **quoting Wright & Miller**.

Fleisher v. Standard Ins. Co., 679 F.3d 116 (3d Cir. 2012).

DelRio-Mocci v. Connolly Properties Inc., 672 F.3d 241, 245 (3d Cir. 2012).

Mayer v. Belichick, 605 F.3d 223, 229 (3d Cir. 2010) ("We must accept all factual allegations in the complaint as true, construe the complaint in the light favorable to the plaintiff, and ultimately determine whether plaintiff may be entitled to relief under any reasonable reading of the complaint.").

Snyder v. Baxter Healthcare, Inc., 393 Fed. Appx. 905 (3d Cir. 2010).

Institutional Investors Group v. Avaya, Inc., 564 F.3d 242 (3d Cir. 2009).

Gattis v. Phelps, 344 Fed. Appx. 801 (3d Cir. 2009).

Miles v. Township of Barnegat, 343 Fed. Appx. 841 (3d Cir. 2009).

Beightler v. Office of Essex County Prosecutor, 342 Fed. Appx. 829 (3d Cir. 2009).

Banks v. Court of Common Pleas FJD, 342 Fed. Appx. 818 (3d Cir. 2009).

McSpadden v. Wolfe, 325 Fed. Appx. 134 (3d Cir. 2009).

Guirguis v. Movers Specialty Services, Inc., 346 Fed. Appx. 774 (3d Cir. 2009).

Carpenter v. Ashby, 351 Fed. Appx. 684 (3d Cir. 2009).

General Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297 (3d Cir. 2003).

In re Rockefeller Center Properties, Inc. Securities Litigation, 311 F.3d 198 (3d Cir. 2002).

Lake v. Arnold, 232 F.3d 360 (3d Cir. 2000).

In re Warfarin Sodium Antitrust Litigation, 214 F.3d 395 (3d Cir. 2000).

Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994).

Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994).

In re Donald J. Trump Casino Securities Litigation-Taj Mahal Litigation, 7 F.3d 357 (3d Cir. 1993).

Kost v. Kozakiewicz, 1 F.3d 176 (3d Cir. 1993).

Blaw Knox Retirement Income Plan v. White Consolidated Industries, Inc., 998 F.2d 1185 (3d Cir. 1993).

University of Maryland at Baltimore v. Peat, Marwick, Main & Co., 996 F.2d 1534 (3d Cir. 1993).

City of Philadelphia v. Lead Industries Ass'n, Inc., 994 F.2d 112 (3d Cir. 1993).

Holder v. City of Allentown, 987 F.2d 188 (3d Cir. 1993).

Hayes v. Gross, 982 F.2d 104 (3d Cir. 1992).

Zilich v. Lucht, 981 F.2d 694 (3d Cir. 1992).

Colantuno v. Aetna Ins. Co., 980 F.2d 908 (3d Cir. 1992).

Fourth Circuit

Wallace v. Maryland, 585 Fed. Appx. 30 (4th Cir. 2014).

Sons of Confederate Veterans, Virginia Div. v. City of Lexington, Va., 722 F.3d 224, 226 n.2 (4th Cir. 2013).

Robertson v. Sea Pines Real Estate Companies, Inc., 679 F.3d 278 (4th Cir. 2012).

Warren v. Sessoms & Rogers, P.A., 676 F.3d 365, 373 (4th Cir. 2012), as amended, (Feb. 1, 2012) and (abrogated by, Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016)).

CGM, LLC v. BellSouth Telecommunications, Inc., 664 F.3d 46, 51 (4th Cir. 2011).

Francis v. Giacomelli, 588 F.3d 186, 192 (4th Cir. 2009).

Monroe v. City of Charlotesville, Va., 579 F.3d 380 (4th Cir. 2009).

Matrix Capital Management Fund, LP v. BearingPoint, Inc., 576 F.3d 172 (4th Cir. 2009).

In re Mutual Funds Investment Litigation, 566 F.3d 111 (4th Cir. 2009), rev'd, 564 U.S. 135, 131 S. Ct. 2296, 180 L. Ed. 2d 166 (2011).

Andrew v. Clark, 561 F.3d 261 (4th Cir. 2009).

Pollard v. Pollard, 325 Fed. Appx. 270 (4th Cir. 2009).

Eastern Shore Markets, Inc. v. J.D. Associates Ltd. Partnership, 213 F.3d 175 (4th Cir. 2000).

Anita's New Mexico Style Mexican Food, Inc. v. Anita's Mexican Foods Corp., 201 F.3d 314 (4th Cir. 2000).

Mayes v. Rapoport, 198 F.3d 457 (4th Cir. 1999).

Richmond, Fredericksburg & Potomac R. Co. v. Forst, 4 F.3d 244 (4th Cir. 1993).

Fifth Circuit

Franklin v. United States, 49 F.4th 429, 435 (5th Cir. 2022) ("We review a district court's ruling on a motion to dismiss de novo, 'accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs.'").

Sinclair v. Petco Animal Supplies Stores, Inc., 581 Fed. Appx. 369, 370 (5th Cir. 2014).

Ioppolo v. Rumana, 581 Fed. Appx. 321, 325 (5th Cir. 2014).

Wiley v. Deutsche Bank Nat. Trust Co., 539 Fed. Appx. 533 (5th Cir. 2013) (per curiam), citing Toy v. Holder, 714 F.3d 881, 883 (5th Cir. 2013).

Atchafalaya Basinkeeper v. Chustz, 682 F.3d 356, 357 (5th Cir. 2012).

Brockman v. Texas Dept. of Criminal Justice, 397 Fed. Appx. 18 (5th Cir. 2010).

Gonzalez v. Kay, 577 F.3d 600 (5th Cir. 2009).

True v. Robles, 571 F.3d 412 (5th Cir. 2009).

Club Retro, L.L.C. v. Hilton, 568 F.3d 181 (5th Cir. 2009).

Lexington Ins. Co. v. S.H.R.M. Catering Services, Inc., 567 F.3d 182 (5th Cir. 2009).

Severance v. Patterson, 566 F.3d 490 (5th Cir. 2009), certified question accepted, (May 15, 2009) and certified question answered, 345 S.W.3d 18 (Tex. 2010), republished at, 2010 WL 8366839 (Tex. 2010), opinion withdrawn and superseded, 370 S.W.3d 705 (Tex. 2012) and withdrawn from bound volume and certified question answered, 370 S.W.3d 705 (Tex. 2012).

Achee Holdings, LLC v. Silver Hill Financial, LLC, 342 Fed. Appx. 943 (5th Cir. 2009).

Dunn v. Prince, 327 Fed. Appx. 452 (5th Cir. 2009).

Quinn v. Roach, 326 Fed. Appx. 280 (5th Cir. 2009).

Puente v. Ridge, 324 Fed. Appx. 423 (5th Cir. 2009).

U.S. ex rel. Riley v. St. Luke's Episcopal Hosp., 355 F.3d 370 (5th Cir. 2004).

Rosborough v. Management & Training Corp., 350 F.3d 459 (5th Cir. 2003).

Whitehead v. Zurich American Ins. Co., 348 F.3d 478 (5th Cir. 2003).

Thompson v. Goetzmann, 337 F.3d 489 (5th Cir. 2003).

U.S. ex rel. Willard v. Humana Health Plan of Texas Inc., 336 F.3d 375 (5th Cir. 2003).

Calhoun v. Hargrove, 312 F.3d 730 (5th Cir. 2002).

Hamilton v. United Healthcare of Louisiana, Inc., 310 F.3d 385 (5th Cir. 2002).

Shipp v. McMahon, 199 F.3d 256 (5th Cir. 2000), vacated and superseded on reh'g, 234 F.3d 907 (5th Cir. 2000) (overruled by, McClendon v. City of Columbia, 305 F.3d 314 (5th Cir. 2002)).

Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999).

Crowe v. Henry, 43 F.3d 198 (5th Cir. 1995) (appellate court applies same standard as district court).

Kansa Reinsurance Co., Ltd. v. Congressional Mortg. Corp. of Texas, 20 F.3d 1362 (5th Cir. 1994).

Shushany v. Allwaste, Inc., 992 F.2d 517 (5th Cir. 1993).

In re Burzynski, 989 F.2d 733 (5th Cir. 1993).

Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278 (5th Cir. 1993).

Giddings v. Chandler, 979 F.2d 1104 (5th Cir. 1992).

Sixth Circuit

Product Solutions International, Inc. v. Aldez Containers, LLC, 46 F.4th 454, 458 (6th Cir. 2022) ("[W]e construe the complaint in the light most favorable to the plaintiff, draw all reasonable inferences in its favor, and accept all well-pleaded allegations in the complaint as true.").

Laborers' Local 265 Pension Fund v. iShares Trust, 769 F.3d 399, 403 (6th Cir. 2014).

Haviland v. Metropolitan Life Ins. Co., 730 F.3d 563, 579 (6th Cir. 2013) ("[P]laintiffs alleged that they were unaware of the true facts and for purposes of Rule 12(b)(6), we must accept that allegation as true.").

Cataldo v. U.S. Steel Corp., 676 F.3d 542, 547 (6th Cir. 2012).

Segal v. Fifth Third Bank, N.A., 581 F.3d 305 (6th Cir. 2009).

Hensley Mfg. v. ProPride, Inc., 579 F.3d 603 (6th Cir. 2009).

In re Cardizem CD Antitrust Litigation, 332 F.3d 896 (6th Cir. 2003).

Wallin v. Norman, 317 F.3d 558 (6th Cir. 2003).

Schlenk v. Ford Motor Credit Co., 308 F.3d 619 (6th Cir. 2002).

Perry v. McGinnis, 209 F.3d 597 (6th Cir. 2000).

Prince v. Hicks, 198 F.3d 607 (6th Cir. 1999).

Pinney Dock & Transport Co. v. Penn Cent. Corp., 196 F.3d 617 (6th Cir. 1999).

Sistrunk v. City of Strongsville, 99 F.3d 194 (6th Cir. 1996).

Miller v. Currie, 50 F.3d 373 (6th Cir. 1995).

Gazette v. City of Pontiac, 41 F.3d 1061 (6th Cir. 1994).

Jones v. City of Carlisle, Ky., 3 F.3d 945 (6th Cir. 1993).

In re DeLorean Motor Co., 991 F.2d 1236 (6th Cir. 1993).

Mayer v. Mylod, 988 F.2d 635 (6th Cir. 1993).

Mertik v. Blalock, 983 F.2d 1353 (6th Cir. 1993).

Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991).

G.M. Engineers and Associates, Inc. v. West Bloomfield Tp., 922 F.2d 328 (6th Cir. 1990).

Seventh Circuit

Levy v. West Coast Life Insurance Company, 44 F.4th 621, 626 (7th Cir. 2022) ("We review 'a district court's dismissal under Rule 12(b)(6) de novo, construing the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts. * * *'").

Chicago Bldg. Design, P.C. v. Mongolian House, Inc., 770 F.3d 610, 612 (7th Cir. 2014).

Bogie v. Rosenberg, 705 F.3d 603, 608 (7th Cir. 2013).

Geinosky v. City of Chicago, 675 F.3d 743, 746 (7th Cir. 2012).

Booker-El v. Superintendent, Indiana State Prison, 668 F.3d 896, 899 (7th Cir. 2012).

Sharp Electronics Corp. v. Metropolitan Life Ins. Co., 578 F.3d 505 (7th Cir. 2009).

Justice v. Town of Cicero, 577 F.3d 768 (7th Cir. 2009).

Rujawitz v. Martin, 561 F.3d 685 (7th Cir. 2009).

White v. Monohan, 326 Fed. Appx. 385 (7th Cir. 2009) (pro se plaintiff's complaint construed more liberally with all inferences in his favor).

Flannery v. Recording Industry Ass'n of America, 354 F.3d 632 (7th Cir. 2004).

Schlosser v. Fairbanks Capital Corp., 323 F.3d 534 (7th Cir. 2003).

Albany Bank & Trust Co. v. Exxon Mobil Corp., 310 F.3d 969 (7th Cir. 2002).

Looper Maintenance Service Inc. v. City of Indianapolis, 197 F.3d 908 (7th Cir. 1999).

Klug v. Chicago School Reform Bd. of Trustees, 197 F.3d 853 (7th Cir. 1999).

Ledford v. Sullivan, 105 F.3d 354 (7th Cir. 1997).

Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F.3d 623 (7th Cir. 1995).

Murphy v. Walker, 51 F.3d 714 (7th Cir. 1995).

Propst v. Bitzer, 39 F.3d 148 (7th Cir. 1994).

Bernard v. United Tp. High School Dist. No. 30, 5 F.3d 1090 (7th Cir. 1993).

Cushing v. City of Chicago, 3 F.3d 1156 (7th Cir. 1993).

Arazie v. Mullane, 2 F.3d 1456 (7th Cir. 1993).

Badger Pharmacal, Inc. v. Colgate-Palmolive Co., 1 F.3d 621 (7th Cir. 1993).

Northwest Tissue Center v. Shalala, 1 F.3d 522 (7th Cir. 1993).

Bowman v. City of Franklin, 980 F.2d 1104 (7th Cir. 1992).

Eighth Circuit

Smithrud v. City of St. Paul, 746 F.3d 391, 397 (8th Cir. 2014).

Freitas v. Wells Fargo Home Mortg., Inc., 703 F.3d 436, 438 (8th Cir. 2013).

E-Shops Corp. v. U.S. Bank Nat. Ass'n, 678 F.3d 659, 662 (8th Cir. 2012).

Shipp v. GfK NOP, LLC, 325 Fed. Appx. 481 (8th Cir. 2009).

Holden Farms, Inc. v. Hog Slat, Inc., 347 F.3d 1055 (8th Cir. 2003).

Coleman v. Watt, 40 F.3d 255 (8th Cir. 1994).

Sharps v. U.S. Forest Service, 28 F.3d 851 (8th Cir. 1994) (disapproved of by, Inland Empire Public Lands Council v. U.S. Forest Service, 88 F.3d 754 (9th Cir. 1996)).

Kohl v. Casson, 5 F.3d 1141 (8th Cir. 1993).

Ninth Circuit

Arizona Students' Association v. Arizona Board of Regents, 824 F.3d 858, 864 (9th Cir. 2016).

Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1018 (9th Cir. 2014).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Sylvia Landfield Trust v. City of Los Angeles, 729 F.3d 1189, 1191 (9th Cir. 2013), quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

Jewel v. National Sec. Agency, 673 F.3d 902, 907 (9th Cir. 2011).

William O. Gilley Enterprises, Inc. v. Atlantic Richfield Co., 588 F.3d 659 (9th Cir. 2009).

al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009), rev'd and remanded, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

Movsesian v. Victoria Versicherung AG, 578 F.3d 1052 (9th Cir. 2009), reh'g granted, withdrawn, 629 F.3d 901 (9th Cir. 2010), on reh'g en banc, 670 F.3d 1067 (9th Cir. 2012).

North County Community Alliance, Inc. v. Salazar, 573 F.3d 738 (9th Cir. 2009).

Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009).

Cousins v. Lockyer, 568 F.3d 1063 (9th Cir. 2009).

Northern Highlands I, II, LLC v. Comerica Bank, 328 Fed. Appx. 358 (9th Cir. 2009).

Karam v. City of Burbank, 352 F.3d 1188 (9th Cir. 2003).

Shaver v. Operating Engineers Local 428 Pension Trust Fund, 332 F.3d 1198 (9th Cir. 2003).

Morales v. City of Los Angeles, 214 F.3d 1151 (9th Cir. 2000).

Loyd v. Paine Webber, Inc., 208 F.3d 755 (9th Cir. 2000).

Johnson v. State of Cal., 207 F.3d 650 (9th Cir. 2000).

LSO, Ltd. v. Stroh, 205 F.3d 1146 (9th Cir. 2000).

Estate of Brooks ex rel. Brooks v. U.S., 197 F.3d 1245 (9th Cir. 1999), as amended, (Dec. 9, 1999).

WMX Technologies, Inc. v. Miller, 197 F.3d 367 (9th Cir. 1999).

Hughes Salaried Retirees Action Committee v. Administrator of Hughes Non-Bargaining Retirement Plan, 39 F.3d 1002 (9th Cir. 1994), as amended, (Feb. 13, 1995) and vacated on reh'g, 72 F.3d 686 (9th Cir. 1995).

Keams v. Tempe Technical Institute, Inc., 39 F.3d 222 (9th Cir. 1994).

American Intern. Enterprises, Inc. v. F.D.I.C., 3 F.3d 1263 (9th Cir. 1993).

Pack v. U.S., 992 F.2d 955 (9th Cir. 1993).

Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C., 992 F.2d 932 (9th Cir. 1993).

Tenth Circuit

Davis v. Bear, 537 Fed. Appx. 785 (10th Cir. 2013), citing Commonwealth Property Advocates, LLC v. Mortgage Electronic Registration Systems, Inc., 680 F.3d 1194, 1201 (10th Cir. 2011).

Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1178 (10th Cir. 2012).

Bixler v. Foster, 596 F.3d 751, 756 (10th Cir. 2010).

Mecca v. U.S., 389 Fed. Appx. 775, 778 (10th Cir. 2010).

Edge v. Payne, 342 Fed. Appx. 395 (10th Cir. 2009).

Larsen v. Johnston, 327 Fed. Appx. 53 (10th Cir. 2009).

Reed v. State Farm Mut. Auto. Ins. Co., 324 Fed. Appx. 717 (10th Cir. 2009).

Pirraglia v. Novell, Inc., 339 F.3d 1182 (10th Cir. 2003).

Clark v. State Farm Mut. Auto. Ins. Co., 319 F.3d 1234 (10th Cir. 2003).

County of Santa Fe, N.M. v. Public Service Co. of New Mexico, 311 F.3d 1031 (10th Cir. 2002).

MacArthur v. San Juan County, 309 F.3d 1216 (10th Cir. 2002).

Gonzales v. City of Castle Rock, 307 F.3d 1258 (10th Cir. 2002), on reh'g en banc, 366 F.3d 1093 (10th Cir. 2004), rev'd, 545 U.S. 748, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005).

Janke v. Price, 43 F.3d 1390 (10th Cir. 1994).

Housley v. Dodson, 41 F.3d 597 (10th Cir. 1994).

Industrial Constructors Corp. v. U.S. Bureau of Reclamation, 15 F.3d 963 (10th Cir. 1994).

Swoboda v. Dubach, 992 F.2d 286 (10th Cir. 1993), quoting Miller v. Glanz, 948 F.2d 1562, 1565 (10th Cir. 1991).

Lafoy v. HMO Colorado, 988 F.2d 97 (10th Cir. 1993).

Monument Builders of Greater Kansas City, Inc. v. American Cemetery Assn. of Kansas, 891 F.2d 1473 (10th Cir. 1989).

Eleventh Circuit

Holland v. Carnival Corporation, 50 F.4th 1088 (11th Cir. 2022) ("Because the procedural posture of this case involves a Federal Rule of Civil Procedure 12(b)(6) motion, we must accept the allegations of plaintiff's complaint as true and construe them in the light most favorable to the plaintiff.").

Piedmont Office Realty Trust, Inc. v. XL Speciality Ins. Co., 769 F.3d 1291, 1293 (11th Cir. 2014), certified question answered, 297 Ga. 38, 771 S.E.2d 864 (2015).

Dyer v. Wal-Mart Stores, Inc., 535 Fed. Appx. 839 (11th Cir. 2013).

Butler v. Sheriff of Palm Beach County, 685 F.3d 1261, 1265 (11th Cir. 2012).

Virgilio v. Ryland Group, Inc., 680 F.3d 1329, 1334 (11th Cir. 2012).

Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1275 (11th Cir. 2012).

Speaker v. U.S. Dept. of Health and Human Services Centers for Disease Control and Prevention, 623 F.3d 1371, 1379 (11th Cir. 2010).

Azar v. National City Bank, 382 Fed. Appx. 880, 884 (11th Cir. 2010).

Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009) (abrogated by, Mohamad v. Palestinian Authority, 566 U.S. 449, 132 S. Ct. 1702, 182 L. Ed. 2d 720 (2012)).

Redland Co., Inc. v. Bank of America Corp., 568 F.3d 1232 (11th Cir. 2009).

Peart v. Shippie, 345 Fed. Appx. 384 (11th Cir. 2009).

Novoneuron Inc. v. Addiction Research Institute, Inc., 326 Fed. Appx. 505 (11th Cir. 2009).

Bell v. Florida Highway Patrol, 325 Fed. Appx. 758 (11th Cir. 2009).

Serpentfoot v. Rome City Com'n, 322 Fed. Appx. 801 (11th Cir. 2009).

O'Halloran v. First Union Nat. Bank of Florida, 350 F.3d 1197 (11th Cir. 2003).

Chappell v. Rich, 340 F.3d 1279 (11th Cir. 2003).

Flint v. ABB, Inc., 337 F.3d 1326 (11th Cir. 2003).

Hoffman-Pugh v. Ramsey, 312 F.3d 1222 (11th Cir. 2002).

Spain v. Brown & Williamson Tobacco Corp., 230 F.3d 1300 (11th Cir. 2000), certified question answered, 872 So. 2d 101 (Ala. 2003).

Grossman v. Nationsbank, N.A., 225 F.3d 1228 (11th Cir. 2000).

Duke v. Cleland, 5 F.3d 1399 (11th Cir. 1993).

Peterson v. Atlanta Housing Authority, 998 F.2d 904 (11th Cir. 1993).

Marshall County Bd. of Educ. v. Marshall County Gas Dist., 992 F.2d 1171 (11th Cir. 1993).

Fortner v. Thomas, 983 F.2d 1024 (11th Cir. 1993).

Gonzalez v. McNary, 980 F.2d 1418 (11th Cir. 1993).

D.C. Circuit

DuBerry v. District of Columbia, 824 F.3d 1046, 1051 (D.C. Cir. 2016).

Howard R.L. Cook & Tommy Shaw Foundation ex rel. Black Employees of Library of Congress, Inc. v. Billington, 737 F.3d 767 (D.C. Cir. 2013).

Kingman Park Civic Ass'n v. Williams, 348 F.3d 1033, 358 (D.C. Cir. 2003).

Holy Land Foundation for Relief and Development v. Ashcroft, 333 F.3d 156, 357 (D.C. Cir. 2003).

Johnson v. Executive Office for U.S. Attorneys, 310 F.3d 771, 354 (D.C. Cir. 2002).

Kowal v. MCI Communications Corp., 16 F.3d 1271, 305 (D.C. Cir. 1994).

Moore v. Agency for Intern. Development, 994 F.2d 874, 301 (D.C. Cir. 1993).

Partovi v. Matuszewski, 647 F. Supp. 2d 13 (D.D.C. 2009), aff'd, 2010 WL 3521597 (D.C. Cir. 2010).

Federal Circuit

K-Tech Telecommunications, Inc. v. Time Warner Cable, Inc., 714 F.3d 1277, 1282 (Fed. Cir. 2013), citing Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002).

Laguna Hermosa Corp. v. U.S., 671 F.3d 1284, 1287 (Fed. Cir. 2012).

Polymer Industrial Products Co. v. Bridgestone/Firestone, Inc., 347 F.3d 935 (Fed. Cir. 2003) (rehearing en banc denied).

Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc., 988 F.2d 1157 (Fed. Cir. 1993).

Compare

Lormand v. US Unwired, Inc., 565 F.3d 228, 239 (5th Cir. 2009) ("Usually, under Rule 12(b)(6), we must draw all reasonable inferences in the plaintiff's favor. However, for scienter only, as required by the PSLRA, 'a court must take into account plausible inferences opposing as well as supporting a strong inference of scienter.'"), quoting Indiana Elec. Workers' Pension Trust Fund IBEW v. Shaw Group, Inc., 537 F.3d 527, 533 (5th Cir. 2008).

37 **Conjure up**

Williams v. Hall, 2022 WL 2966395, *2 (6th Cir. 2022) ("[W]e may not 'conjure up unpleaded facts to support conclusory allegations.'").

Daunt v. Benson, 999 F.3d 299, 309 (6th Cir. 2021) ("At th[e pleading] stage, it is the factual allegations in Plaintiffs' complaint that we must consider—it is not for us to conjure up facts that Plaintiffs declined to plead and then to draw inferences therefrom.").

Kenney v. AG Equipment Co., 462 Fed. Appx. 841, 844 (10th Cir. 2012), **citing Wright & Miller**.

Modelist v. Miller, 445 Fed. Appx. 737 (5th Cir. 2011).

Gregory v. Dillard's, Inc., 565 F.3d 464 (8th Cir. 2009).

Fleet Credit Corp. v. Sion, 893 F.2d 441 (1st Cir. 1990).

Moody-Williams v. LipoScience, 953 F. Supp. 2d 677, 688 (E.D. N.C. 2013).

Schreiber v. Dunabin, 938 F. Supp. 2d 587, 594 (E.D. Va. 2013).

Aguiar-Serrano v. Puerto Rico Highways and Transp. Authority, 916 F. Supp. 2d 223, 230 (D.P.R. 2013).

38 **Not accept arguments**

Askins v. Doe No. 1, 727 F.3d 248, 252 (2d Cir. 2013).

O'Connell v. Marrero-Recio, 724 F.3d 117, 126 (1st Cir. 2013).

Estate of Barney v. PNC Bank, Nat. Ass'n, 714 F.3d 920, 925 (6th Cir. 2013) ("In general, we will not review arguments or issues that a party raises for the first time on appeal.").

Raj v. Louisiana State University, 714 F.3d 322, 330 (5th Cir. 2013).

Ecological Rights Foundation v. Pacific Gas and Elec. Co., 713 F.3d 502, 511 (9th Cir. 2013).

Alam v. Miller Brewing Co., 709 F.3d 662, 669 (7th Cir. 2013) ("As [Defendants] point out, however, [Plaintiff] raises this argument for the first time on appeal, which precludes us from considering it.").

Alioto v. Town of Lisbon, 651 F.3d 715 (7th Cir. 2011) (argument waived below may not be raised on appeal).

U.S., ex rel. Pilecki-Simko v. Chubb Institute, 443 Fed. Appx. 754 (3d Cir. 2011) (arguments not raised at district court level are waived for appeal when appellant can provide no explanation for failure to raise them below).

Zurawski v. Southeastern Pennsylvania Transp. Authority, 441 Fed. Appx. 133 (3d Cir. 2011) (absent compelling circumstances, court will not consider arguments raised for first time on appeal).

The Constitution Party Of Pennsylvania v. Cortes, 433 Fed. Appx. 89 (3d Cir. 2011).

Homeless Patrol v. Joseph Volpe Family, 425 Fed. Appx. 60 (2d Cir. 2011) (court will not consider arguments raised for first time on appeal unless necessary to remedy obvious injustice).

Stokes v. Lusker, 425 Fed. Appx. 18 (2d Cir. 2011).

Montoya v. FedEx Ground Package System, Inc., 614 F.3d 145, 148-149 (5th Cir. 2010).

The court followed " 'the general rule * * * that a federal appellate court does not consider an issue not passed on below.'" Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 962 (9th Cir. 2009), on reh'g en banc, 614 F.3d 1070 (9th Cir.

2010), quoting Singleton v. Wulff, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976).

Movsesian v. Victoria Versicherung AG, 578 F.3d 1052 (9th Cir. 2009), reh'g granted, withdrawn, 629 F.3d 901 (9th Cir. 2010), on reh'g en banc, 670 F.3d 1067 (9th Cir. 2012).

Peart v. Shippie, 345 Fed. Appx. 384 (11th Cir. 2009).

The appellate court can affirm the district court's decision on any grounds that was raised below. Puente v. Ridge, 324 Fed. Appx. 423 (5th Cir. 2009).

Karpel v. Inova Health System Services, 134 F.3d 1222 (4th Cir. 1998) (racial harassment claim).

Dorothy J. v. Little Rock School Dist., 7 F.3d 729 (8th Cir. 1993).

Compare
Brooks v. Ross, 578 F.3d 574 (7th Cir. 2009).

But compare
"This Court may affirm on any basis evident from the record." Collins v. West Hartford Police Dept., 324 Fed. Appx. 137, 138 (2d Cir. 2009).

39 **Seventh Circuit**
Wilson v. Career Educ. Corp., 729 F.3d 665, 679 n.1 (7th Cir. 2013), citing Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 555 (7th Cir. 2012).

Geinosky v. City of Chicago, 675 F.3d 743, 745 n.1 (7th Cir. 2012) ("A party appealing a Rule 12(b)(6) dismissal may elaborate on his factual allegations so long as the new elaborations are consistent with the pleadings.").

Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 555 (7th Cir. 2012) ("A party who appeals from a Rule 12(b)(6) dismissal may elaborate on her allegations so long as the elaborations are consistent with the pleading.").

Veazey v. Communications & Cable of Chicago, Inc., 194 F.3d 850 (7th Cir. 1999) (court will consider new factual allegations raised for first time on appeal provided they are consistent with complaint).

A plaintiff is not held to the factual allegations of his complaint when he is faced with a motion to dismiss. Smith v. Boyle, 144 F.3d 1060 (7th Cir. 1998).

An appellate court will allow a plaintiff to make additional factual allegations for the first time on appeal, but it will not entertain new issues. Kyle v. Morton High School, 144 F.3d 448 (7th Cir. 1998).

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Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247 (7th Cir. 1994), as amended on denial of reh'g, (Jan. 11, 1995).

When reviewing a Rule 12(b)(6) motion, an appellate court will consider factual allegations raised on appeal for the first time as long as they are consistent with the complaint. Highsmith v. Chrysler Credit Corp., 18 F.3d 434 (7th Cir. 1994).

American Inter-Fidelity Exchange v. American Re-Insurance Co., 17 F.3d 1018 (7th Cir. 1994).

Harrell v. U.S., 13 F.3d 232 (7th Cir. 1993).

Hrubec v. National R.R. Passenger Corp., 981 F.2d 962 (7th Cir. 1992) (plaintiff can add essential facts in brief on appeal).

In order to give a plaintiff the benefit of a broad standard for surviving a Rule 12(b)(6) challenge, the Seventh Circuit will permit a plaintiff to present an unsubstantiated version of the events for the first time on appeal as long as it is consistent with the complaint. Dawson v. General Motors Corp., 977 F.2d 369 (7th Cir. 1992).

Early v. Bankers Life and Cas. Co., 959 F.2d 75 (7th Cir. 1992).

Orthmann v. Apple River Campground, Inc., 757 F.2d 909 (7th Cir. 1985).

Newman v. Gagan LLC, 939 F. Supp. 2d 883, 892 (N.D. Ind. 2013), citing Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1428 (7th Cir. 1996).

The plaintiff can raise an unsubstantiated version of facts that was not included in the complaint in defending against a Rule 12(b)(6) motion. Travis v. Boulevard Bank N.A., 880 F. Supp. 1226 (N.D. Ill. 1995).

E.E.O.C. v. Park Ridge Public Library, 856 F. Supp. 477 (N.D. Ill. 1994).

See also
Hensley Mfg. v. ProPride, Inc., 579 F.3d 603 (6th Cir. 2009) (appellate court can affirm on any grounds, even those not raised by district court).

But see
Alam v. Miller Brewing Co., 709 F.3d 662, 669 (7th Cir. 2013) ("As [Defendants] point out, however, [Plaintiff] raises this argument for the first time on appeal, which precludes us from considering it.").

40 **Rule 8 standard**
See § 1216.

41 **Heightened pleading requirements**

In re Financial Oversight and Management Board for Puerto Rico, 54 F.4th 42 (1st Cir. 2022) (applying particularity requirements of Rule 9(b) to consideration of whether complaint could withstand motion to discuss under Rule 12(b)(6)).

United States ex rel. Nicholson v. MedCom Carolinas, Inc., 42 F.4th 185, 194 (4th Cir. 2022) ("Normally when considering Rule 12(b)(6) motions to dismiss, we look to our familiar plausibility standard, but because False Claims Act claims are fraud claims, a higher standard applies: Fraud-based claims must be pleaded with particularity.") (citations omitted).

See §§ 1296 to 1301 for a discussion of the pleading standards under Rule 9(b).

42 **Twombly Case**
550 U.S. 544 (2007).

43 **Quotation**
550 U.S. 544, 570 (2007) ("[Rule 8(a)] do[es] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

See also
Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) ("[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. * * *. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'").

44 **Universal application**
"Our decision in Twombly expounded the pleading standard for 'all civil actions.'" Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1953, 173 L. Ed. 2d 868 (2009).

Center for Bio-Ethical Reform, Inc. v. Napolitano, 648 F.3d 365, 369 (6th Cir. 2011).

Henderson v. JP Morgan Chase Bank, N.A., 436 Fed. Appx. 935 (11th Cir. 2011).

Kivisto v. Miller, Canfield, Paddock and Stone, PLC, 413 Fed. Appx. 136, 138 (11th Cir. 2011).

45 **Conley case**
355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). The Conley case is discussed in greater detail in § 1216.

46 **Quotation**
355 U.S. at 45-46 (Black, J.).

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47 **Viewed with disfavor**

A motion to dismiss under Rule 12(b)(6) is disfavored and rarely granted. Nuchols v. Berrong, 141 Fed. Appx. 451 (6th Cir. 2005).

"Dismissal of a claim on the basis of barebone pleadings is a precarious disposition with a high mortality rate." International Erectors, Inc. v. Wilhoit Steel Erectors and Rental Service, 400 F.2d 465, 471 (5th Cir. 1968).

"This is another case proving that final disposition of a civil action on the basis of bare bones pleadings is a tortuous thing. How a standard so simply expressed, so often repeated, is apparently so often overlooked without ever so much as a deferential mention of it is hard to understand." Arthur H. Richland Co. v. Harper, 302 F.2d 324, 325 (5th Cir. 1962).

Peacock v. AARP, Inc., 181 F. Supp. 3d 430, 433 (S.D. Tex. 2016) ("A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is viewed with disfavor and is rarely granted.").

Coleman v. Bank of New York Mellon, 969 F. Supp. 2d 736 (N.D. Tex. 2013) ("Motions to dismiss under Rule 12(b)(6) are disfavored and rarely granted."), citing Sosa v. Coleman, 646 F.2d 991, 993 (5th Cir. 1981).

Desperado Motor Racing & Motorcycles, Inc. v. Robinson, 2010 WL 2757523, *1 (S.D. Tex. 2010) ("Traditionally, courts hold that a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim is viewed with disfavor and is rarely granted.").

"As a result, '[a] motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.'" City of Clinton, Ark. v. Pilgrim's Pride Corp., 653 F. Supp. 2d 669, 671 (N.D. Tex. 2009), aff'd, 632 F.3d 148 (5th Cir. 2010).

"Granting a motion to dismiss is a harsh remedy which must be exercised with caution to protect the liberal rules of pleading and the interests of justice. Thus, the Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim." Effkay Enterprises v. J.H. Cleaners, Inc., 2008 WL 2357698 (D. Colo. 2008) (internal citations omitted) (Babcock, J.), citing Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1359 (10th Cir. 1989).

Syncsort Inc. v. Innovative Routines Intern., Inc., 2005 WL 1076043 (D.N.J. 2005) (Rule 12(b)(6) motions should be granted sparingly in antitrust cases), **citing Wright & Miller.**

Belen Consol. Schools v. Otten, 259 F. Supp. 2d 1203 (D.N.M. 2003) (motion to dismiss is "harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of

justice"), quoting Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357 (10th Cir. 1989).

A Rule 12(b)(6) motion to dismiss for failure to state a claim is disfavored, and may be granted only in extraordinary circumstances. Gallardo v. DiCarlo, 203 F. Supp. 2d 1160 (C.D. Cal. 2002).

City of Merced v. Fields, 997 F. Supp. 1326 (E.D. Cal. 1998) (granted only in extraordinary cases).

When a motion to dismiss is made prior to any discovery or the filing of an answer, the court is loath to dismiss the complaint. Proctor v. Vadlamudi, 992 F. Supp. 156 (N.D. N.Y. 1998).

Casaburro v. Giuliani, 986 F. Supp. 176 (S.D. N.Y. 1997) (civil rights violations).

Spurlock v. NYNEX, 949 F. Supp. 1022 (W.D. N.Y. 1996) (proper only in extraordinary cases).

Branch v. F.D.I.C., 825 F. Supp. 384 (D. Mass. 1993) ("[C]ourts should generally be reluctant to grant a motion to dismiss when the claim in question asserts a novel theory of recovery.").

Motions to dismiss generally are viewed with disfavor and rarely granted; they may be granted only in the clearest of cases and must be denied when additional facts obviously are required before an ultimate judgment may be formed. Wrenn v. State of Kan., 561 F. Supp. 1216 (D. Kan. 1983).

See also

Judge Shedd noted that the leading commentators have recognized that a federal court may not use a stricter pleading standard on a motion to dismiss a disfavored action. Hatfill v. New York Times Co., 416 F.3d 320 (4th Cir. 2005), **quoting Wright & Miller.**

" 'Sua sponte dismissals are strong medicine, and should be dispensed sparingly. * * * If it is crystal clear that the plaintiff cannot prevail and that amending the complaint would be futile, then a sua sponte dismissal may stand.' " Sua sponte dismissals are erroneous unless the parties have been afforded notice and an opportunity to amend the complaint or otherwise respond. Chute v. Walker, 281 F.3d 314, 319 (1st Cir. 2002) (Lynch, J.) (quoting Gonzalez-Gonzalez v. U.S., 257 F.3d 31, 33-37 (1st Cir. 2001)).

Rule 12(b)(6) dismissals are particularly disfavored in fact-intensive antitrust cases. Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272 (11th Cir. 2002), cert. granted, judgment vacated, 540 U.S. 1147, 124 S. Ct. 1143, 157 L. Ed. 2d 1040 (2004).

Pena v. U.S., 157 F.3d 984 (5th Cir. 1998) (dismissals of pro se complaints for failure to state claim are disfavored and court should grant pro se party every reasonable opportunity to amend).

Shetiwy v. Midland Credit Management, 980 F. Supp. 2d 461 (S.D. N.Y. 2013) (dismissal of pro-se complaints disfavored).

In the securities context, Rule 12(b)(6) dismissals are difficult to obtain because the cause of action deals primarily with fact-specific inquiries such as materiality. Schwartz v. Celestial Seasonings, Inc., 178 F.R.D. 545 (D. Colo. 1998).

The plaintiff's burden in resisting a motion to dismiss for failure to state a claim is a relatively light one. Williams v. Wheeling Steel Corp., 266 F. Supp. 651 (N.D. W. Va. 1967).

Compare

Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 690 (7th Cir. 2012) ("[C]ourts should usually refrain from granting Rule 12(b)(6) motions on affirmative defenses.").

Knight v. American Guard & Alert, Inc., 714 P.2d 788, 791 (Alaska 1986), **quoting Wright & Miller.**

Fogarty v. State, 5 Haw. App. 616, 705 P.2d 72, 77 (1985), **citing Wright & Miller.**

Giuliani v. Chuck, 1 Haw. App. 379, 620 P.2d 733, 737 (1980), **citing Wright & Miller.**

Dobbs v. Guenther, 846 S.W.2d 270 (Tenn. Ct. App. 1992), **citing Wright & Miller.**

Association of Haystack Property Owners, Inc. v. Sprague, 145 Vt. 443, 494 A.2d 122, 125 (1985), **citing Wright & Miller.**

But see

A motion to dismiss for failure to state a claim can serve a useful purpose by disposing of the legal issues with a minimum of time and expense to the interested parties. Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968 (8th Cir. 1968).

This principle is contrary to the very purpose of Rule 12(b)(6), conserving public and private resources. "[I]f the standard for a Rule 12(b)(6) motion is met, 'a claim *must be dismissed,* without regard to whether it is based on an outlandish theory or on a close but ultimately unavailing one.' " Gray v. Petoseed Co., Inc., 985 F. Supp. 625 (D.S.C. 1996), aff'd, 129 F.3d 1259 (4th Cir. 1997), quoting Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 1832, 104 L. Ed. 2d 338 (1989).

48 **Quotation**
Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

49 **Quotation**
550 U.S. 544, 563 (2007).

50 **Twombly standard**
550 U.S. 544, 555 (2007), **citing Wright & Miller**.

"* * * Twombly and Iqbal make clear that a claim is not plausible when the 'complaint pleads facts that are "merely consistent with" a defendant's liability.'" Manning v. Boston Medical Center Corp., 725 F.3d 34 (1st Cir. 2013) (Stahl, J., concurring in part and dissenting in part) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)).

Walters v. McMahen, 684 F.3d 435, 439 (4th Cir. 2012) ("As this Court has noted, those decisions [Twombly and Iqbal] require that complaints in civil actions be alleged with greater specificity than previously was required.") (citing Robertson v. Sea Pines Real Estate Companies, Inc., 679 F.3d 278, 288 (4th Cir. 2012)).

51 **Conclusory statements**
Ashcroft v. Iqbal, 556 U.S. 662, 686, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ("[T]he Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context.").

Giammatteo v. Newton, 452 Fed. Appx. 24, 29 (2d Cir. 2011) ("Notwithstanding conclusory labels and naked assertions that defendants violated her constitutional rights, Giammatteo does not allege facts that, taken as true, would permit the court to draw the reasonable inference that defendants deprived her of any federally-protected right.").

52 **Common sense and judicial experience**
Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ("[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.")

Fabian v. Fulmer Helmets, Inc., 628 F.3d 278, 281 (6th Cir. 2010) (common sense helps determine which inferences reasonably may be drawn).

" 'Determining whether a complaint states a plausible claim for relief will * * * be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'", South Cherry Street, LLC v. Hennessee Group LLC, 573 F.3d 98, 110 (2d Cir. 2009).

"Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing

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court to draw on its judicial experience and common sense." Howard v. City of Girard, Ohio, 346 Fed. Appx. 49 (6th Cir. 2009).

See generally
Miller, From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure, 60 Duke L.J. 1 (2010).

Spencer, Understanding Pleading Doctrine, 108 Mich. L. Rev. 1 (2009).

53 **Iqbal reiterated**
Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

See also
Lavalais v. Village of Melrose Park, 734 F.3d 629, 632-633 (7th Cir. 2013), citing Alam v. Miller Brewing Co., 709 F.3d 662, 666 (7th Cir. 2013).

"To render their explanation plausible, plaintiffs must do more than allege facts that are merely consistent with both their explanation and defendants' competing explanation." In re Century Aluminum Co. Securities Litigation, 729 F.3d 1104, 1105 (9th Cir. 2013).

Somers v. Apple, Inc., 729 F.3d 953, 960 (9th Cir. 2013).

"While '[t]he plausibility standard is not akin to a "probability requirement,"' it demands 'more than a sheer possibility that a defendant has acted unlawfully.' * * * Unless the alleged facts push a claim 'across the line from conceivable to plausible,' the complaint must be dismissed." Massachusetts Retirement Systems v. CVS Caremark Corp., 716 F.3d 229, 237 (1st Cir. 2013), quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 680, 129 S. Ct. 1937, 1949-1951, 173 L. Ed. 2d 868 (2009), quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1973-1974, 167 L. Ed. 2d 929 (2007).

Kampuries v. American Honda Motor Co., Inc., 204 F. Supp. 3d 484 (E.D. N.Y. 2016).

Guggenberger v. Minnesota, 198 F. Supp. 3d 973 (D. Minn. 2016), **quoting Wright & Miller**.

Moseley v. King, 197 F. Supp. 3d 210 (D.D.C. 2016).

Budik v. Howard University Hospital, 986 F. Supp. 2d 1 (D.D.C. 2013) ("[R]aising a 'sheer possibility that a defendant has acted unlawfully' fails to satisfy the facial plausibility requirement."), quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

54 **Sixth Circuit opinion**

16630 Southfield Ltd. Partnership v. Flagstar Bank, F.S.B., 727 F.3d 502, 505 (6th Cir. 2013).

55 **Seventh Circuit opinion**

Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010).

See also

"Finding the Twombly/Iqbal urge irresistible, many lawyers fail to appreciate the distinction between determining whether a claim for relief is 'plausibly stated,' the inquiry required by Twombly/Iqbal, and divining whether actual proof of that claim is 'improbable,' a feat impossible for a mere mortal, even a federal judge." Barker ex rel. U.S. v. Columbus Regional Healthcare System, Inc., 977 F. Supp. 2d 1341 (M.D. Ga. 2013).

56 **More plausible**

Anderson News, L.L.C. v. American Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012).

57 **Code pleading**

Clark, The Complaint in Code Pleading, 35 Yale L.J. 259, 259-60 (1926) ("The codifiers [of the New York Code of Pleading and Practice of 1848] concluded that for the blended system they proposed, the evidential facts should be omitted, the *ultimate facts*, rather than the legal conclusions, should be stated * * *.").

58 **Federal Rules supplanted code pleading**

Spencer, Plausibility Pleading, 49 B.C. L. Rev. 431, 434 (2008) ("Supplanting the cumbersome and inelegant code pleading system that required the pleading of 'ultimate facts' rather than mere 'evidentiary facts' or 'conclusions,' the Federal Rules ushered in a simplified pleading system * * *.") (citations omitted).

59 **Bald statement**

"[W]hen considering the viability of a claim in the face of a Rule 12(b)(6) challenge, we may reject sheer speculation, bald assertions, and unsupported conclusory statements." Taha v. International Brotherhood of Teamsters, Local 781, 947 F.3d 464, 469 (7th Cir. 2020).

While the plaintiff need not state a prima facie case in his or her complaint, "no plaintiff is exempt from her obligation to 'allege facts sufficient to state all the elements of her claim.'" Puente v. Ridge, 324 Fed. Appx. 423, 428 (5th Cir. 2009), quoting Mitchell v. Crescent River Port Pilots Ass'n, 265 Fed. Appx. 363, 370 (5th Cir. 2008).

U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220 (1st Cir. 2004).

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In re Colonial Mortgage Bankers Corp., 324 F.3d 12 (1st Cir. 2003) (bald assertions, unsupportable conclusions, and opprobrious epithets woven into fabric of complaint).

In re Rockefeller Center Properties, Inc. Securities Litigation, 311 F.3d 198 (3d Cir. 2002) (bald assertions).

Arruda v. Sears, Roebuck & Co., 310 F.3d 13 (1st Cir. 2002) (no weight given to bald assertions, unsupportable conclusions, and opprobrious epithets).

Krantz v. Prudential Investments Fund Management LLC, 305 F.3d 140 (3d Cir. 2002).

Virtual Countries, Inc. v. Republic of South Africa, 300 F.3d 230 (2d Cir. 2002) (rejected by, Orient Mineral Co. v. Bank of China, 506 F.3d 980 (10th Cir. 2007)) ("bald assertions" of harm not enough to defeat Rule 12(b)(6) motion).

Tarshis v. Riese Organization, 211 F.3d 30 (2d Cir. 2000) (abrogated by, Swierkiewicz v. Sorema N. A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)).

Abbott v. U.S., 144 F.3d 1 (1st Cir. 1998).

LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507 (1st Cir. 1998).

A reviewing court need not swallow the plaintiff's invective hook, line, and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited. Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, 142 F.3d 26 (1st Cir. 1998).

Cooper v. Parsky, 140 F.3d 433 (2d Cir. 1998) (bald assertions).

Beddall v. State Street Bank and Trust Co., 137 F.3d 12 (1st Cir. 1998) (bald assertions).

Morse v. Lower Merion School Dist., 132 F.3d 902 (3d Cir. 1997), **citing Wright & Miller.**

Doyle v. Hasbro, Inc., 103 F.3d 186 (1st Cir. 1996).

Resolution Trust Corp. v. Driscoll, 985 F.2d 44, 48 (1st Cir. 1993) (dismissing action since, after two years of litigation, complaint still lacks "a single, coherent, specific description" of wrongdoing by defendant).

Colle v. Brazos County, Tex., 981 F.2d 237 (5th Cir. 1993).

The lower court properly dismissed a civil rights complaint for failure to state a claim for relief when the complaint contained a series of broad conclusory

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statements and contained no reference to individual defendants other than in the title to the action. Jackson v. Nelson, 405 F.2d 872 (9th Cir. 1968).

"No claim for relief is stated if the complaint pleads facts insufficient to show that a legal wrong has been committed, or omits an averment necessary to establish the wrong or fails so to link the parties with the wrong as to entitle the plaintiff to redress." Sutton v. Eastern Viavi Co., 138 F.2d 959, 960 (C.C.A. 7th Cir. 1943) (Lindley, J.).

"The admonishment to construe the plaintiff's claim liberally when evaluating a motion to dismiss does not relieve a plaintiff of his obligation to satisfy federal notice pleading requirements and allege more than bare assertions of legal conclusions." Waldon v. Cincinnati Public Schools, 941 F. Supp. 2d 884, 887 (S.D. Ohio 2013), **citing Wright & Miller**.

Copeland v. Home and Community Health Services, Inc., 285 F. Supp. 2d 144 (D. Conn. 2003) (bald assertions and conclusions of law will not suffice).

DeRay v. Larson, 283 F. Supp. 2d 706 (D. Conn. 2003) (bald assertions and conclusions of law will not suffice to state claim).

Bowens v. Aftermath Entertainment, 254 F. Supp. 2d 629 (E.D. Mich. 2003) (although pleading standard is liberal, bald assertions and conclusions of law will not enable complaint to survive).

When the allegations are so baldly conclusory that they fail to give notice of the basic events and circumstances of which the plaintiff complains, they are meaningless as a practical matter and legally insufficient to state a claim. Parisi v. Coca-Cola Bottling Co. of New York, 995 F. Supp. 298 (E.D. N.Y. 1998), aff'd, 172 F.3d 38 (2d Cir. 1999).

A court need not accept a plaintiff's bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like. Lebron v. Ashford Presbyterian Community Hosp., 995 F. Supp. 241 (D.P.R. 1998).

Individual allegations that are so baldly conclusory that they fail to give notice of the basic events and circumstances of which the plaintiff complains are meaningless as a practical matter and, as a matter of law, insufficient to state a claim. Stordeur v. Computer Associates Intern., Inc., 995 F. Supp. 94 (E.D. N.Y. 1998).

The court cannot assume that the plaintiff can prove facts that it has not alleged or that the defendants have violated the laws in ways that have not been alleged. Whayne v. State of Kan., 980 F. Supp. 387 (D. Kan. 1997).

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"To survive a motion to dismiss, a plaintiff may not merely 'label' his or her claims." Dr. Fred Hatfield's Sportstrength Training Equipment Co. v. Balik, 174 F.R.D. 496, 497 (M.D. Fla. 1997).

Kmart Corp. v. Rivera-Alejandro Architects and Engineers, 174 F.R.D. 242 (D.P.R. 1997).

DeLaurentis v. Job Shop Technical Services, Inc., 912 F. Supp. 57 (E.D. N.Y. 1996) ("baldly conclusory statements").

Heideman v. Wirsing, 840 F. Supp. 1285 (W.D. Wis. 1992), judgment aff'd, 7 F.3d 659 (7th Cir. 1993) (dismissing claim because it made only bare allegations of conspiracy).

McCrum v. Elkhart County Dept. of Public Welfare, 806 F. Supp. 203 (N.D. Ind. 1992) ("bare legal conclusions attached to narrated facts will not suffice").

Johnson v. KSIR Principal Adm'r and Staff, 804 F. Supp. 173 (D. Kan. 1992) (inmate's broad assertion of racial discrimination failed to specify what acts or omissions give rise to the claim).

A general allegation of conspiracy without a statement of the facts constituting that conspiracy is only an allegation of a legal conclusion and is insufficient to constitute a claim for relief. Stewart v. Hevelone, 283 F. Supp. 842 (D. Neb. 1968).

In holding that the complaint failed to state a civil rights claim under Section 1985(3), Judge Will stated that "although pleadings are given a liberal construction in the federal courts, the Rules contemplate some factual statement in support of the claim. General allegations of this kind unsupported by any factual statements have usually been rejected as insufficient." Huey v. Barloga, 277 F. Supp. 864 (N.D. Ill. 1967).

L. S. Good & Co. v. H. Daroff & Sons, Inc., 263 F. Supp. 635 (N.D. W. Va. 1967).

Sinchak v. Parente, 262 F. Supp. 79 (W.D. Pa. 1966).

See also

In order to avoid dismissal for failure to state a claim a plaintiff must plead specific facts, not mere conclusory allegations. Global Marine Shipping (No. 10) Ltd. v. Finning Intern. Inc., 2002 WL 31246548 (E.D. La. 2002).

Sticklen v. Kittle, 168 W. Va. 147, 287 S.E.2d 148, 158 n.12 (1981), **quoting Wright & Miller.**

Willging, The Use of Rule 12(b)(6) in Two Federal District Courts (Federal Judicial Center, 1989).

60 **Allegations contradicted**

Waste Management, Incorporated v. AIG Specialty Insurance Company, 974 F.3d 528, 534 (5th Cir. 2020) ("We need not resolve this dispute because, even assuming that an adjuster can be held liable under [the Texas Insurance Code] Waste did not allege facts that, taken as true, demonstrate a violation of [the Texas Insurance Code]. * * * The[] threadbare factual allegations, along with Waste's conclusory recitation of the elements under the Texas Insurance Code, are insufficient to state a plausible claim for relief.") (citations omitted), **citing Wright & Miller**.

Hegab v. Long, 716 F.3d 790, 799 (4th Cir. 2013), **citing Wright & Miller**.

Bogie v. Rosenberg, 705 F.3d 603, 609 (7th Cir. 2013) ("When an exhibit incontrovertibly contradicts the allegations in the complaint, the exhibit ordinarily controls, even when considering a motion to dismiss. * * * When an exhibit contradicts the allegations in the complaint, ruling against the non-moving party on a motion to dismiss is consistent with our obligation to review all facts in the light most favorable to the non-moving party.").

New Albany Tractor, Inc. v. Louisville Tractor, Inc., 650 F.3d 1046 (6th Cir. 2011) (conclusory legal allegations should not be credited without specific supporting facts).

Seidl v. American Century Companies, Inc., 427 Fed. Appx. 35 (2d Cir. 2011) (pleadings that are conclusions are not entitled to presumption of truth).

Steckman v. Hart Brewing, Inc., 143 F.3d 1293 (9th Cir. 1998) (conclusory allegations contradicted by documents referred to in complaint).

The court need not accept plaintiff's allegation as to the intent of the parties to a contract when the meaning of the contract is unambiguous. Hoosier Energy Rural Elec. Co-op., Inc. v. Amoco Tax Leasing IV Corp., 34 F.3d 1310, 1318 n.4 (7th Cir. 1994).

Salahuddin v. Jones, 992 F.2d 447 (2d Cir. 1993) ("wholly conclusory and inconsistent allegations" are insufficient).

The district court could withdraw sua sponte an earlier order denying the defendants' motion to dismiss for failure to state a claim and grant said motion, without allowing the plaintiff ten days notice and opportunity to respond since there was no indication that the district court considered matters outside the pleadings and the plaintiffs had notice and an opportunity to respond when the defendants initially filed the motion. Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278 (5th Cir. 1993).

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In re Lane, 937 F.2d 694, 698 (1st Cir. 1991), judgment aff'd, 171 B.R. 1 (D. Mass. 1994), judgment aff'd, 50 F.3d 1 (1st Cir. 1995), **quoting Wright & Miller.**

The court must accept as true the factual allegations in the complaint and any inferences reasonably deductible therefrom, but it need not accept mere legal conclusions or factual claims at variance with the express terms of an instrument attached to the complaint as an exhibit. Olpin v. Ideal Nat. Ins. Co., 419 F.2d 1250 (10th Cir. 1969).

Cambron v. Starwood Vacation Ownership, Inc., 945 F. Supp. 2d 1133, 1139 (D. Haw. 2013) ("The Court need not accept as true allegations that contradict matters properly subject to judicial notice or allegations contradicting the exhibits attached to the complaint."), citing Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001), opinion amended on denial of reh'g, 275 F.3d 1187 (9th Cir. 2001).

Reginella Const. Co., Ltd. v. Travelers Cas and Sur. Co. of America, 971 F. Supp. 2d 470 (W.D. Pa. 2013), judgment aff'd, 568 Fed. Appx. 174 (3d Cir. 2014) ("If the Court were required to accept contradictory inferences and conclusory allegations as well-pleaded facts, then Rule 12(b)(6) review would be nothing more than the Court alchemizing legally insufficient statements into a plausible cause of action. Such a standard of review is akin to no review at all, and most importantly, is not the law.").

Williams v. Rickard, 2010 WL 2640102, *3 (D. Haw. 2010) ("Additionally, the court need not accept as true allegations that contradict matters properly subject to judicial notice or allegations contradicting the exhibits attached to the complaint.").

Richard v. Wal-Mart Stores, Inc., 2007 WL 855357 (W.D. La. 2007), **citing Wright & Miller.**

Doron Precision Systems, Inc. v. FAAC, Inc., 423 F. Supp. 2d 173 (S.D. N.Y. 2006).

When the plaintiff's conclusory allegations were contradicted by exhibits attached to the complaint, dismissal under Rule 12(b)(6) was appropriate. Kennedy v. Victoria's Secret Stores, Inc., 2004 WL 414808 (E.D. La. 2004).

The court may disregard allegations in the complaint if they are contradicted by facts established by reference to any documents attached as exhibits, or upon which it necessarily relies; the court also need not accept as true allegations that contradict facts judicially noticed by the court. Ileto v. Glock, Inc., 194 F. Supp. 2d 1040 (C.D. Cal. 2002), aff'd in part, rev'd in part and remanded, 349 F.3d 1191 (9th Cir. 2003).

International Broth. of Teamsters Local 734 Health and Welfare Trust Fund v. Phillip Morris, Inc., 34 F. Supp. 2d 656 (N.D. Ill. 1998), aff'd, 196 F.3d 818 (7th Cir. 1999) (court not bound by facts in complaint contradicting plaintiff's claim).

Dames & Moore v. Baxter & Woodman, Inc., 21 F. Supp. 2d 817 (N.D. Ill. 1998) (if certain allegations are inconsistent with terms of written document that is attached to or otherwise considered part of complaint, those inconsistent allegations are not accepted as true and terms of written document, fairly construed, prevail).

The court need not ignore facts set out in the complaint that undermine the plaintiff's claims. Coats v. Kraft Foods, Inc., 12 F. Supp. 2d 862 (N.D. Ind. 1998).

Waters v. Brown, 5 F. Supp. 2d 654 (N.D. Ind. 1998), judgment aff'd, 175 F.3d 1022 (7th Cir. 1999).

Zimmerman v. Hoard, 5 F. Supp. 2d 633 (N.D. Ind. 1998).

If the allegations in a complaint are contradicted by documents made a part thereof, the document controls and the court need not accept as true the allegations of the complaint. Honess 52 Corp. v. Town of Fishkill, 1 F. Supp. 2d 294 (S.D. N.Y. 1998).

Balcerzak v. City of Milwaukee, 980 F. Supp. 983 (E.D. Wis. 1997).

Jackson Nat. Life Ins. Co. v. Gofen & Glossberg, Inc., 882 F. Supp. 713 (N.D. Ill. 1995) (court need not accept allegations as true if they conflict with the written terms of contract).

In re Century 21-RE/MAX Real Estate Advertising Claims Litigation, 882 F. Supp. 915 (C.D. Cal. 1994).

Maywalt v. Parker & Parsley Petroleum Co., 808 F. Supp. 1037 (S.D. N.Y. 1992) (when allegations in complaint are contradicted by documents that have been made part of that complaint, documents control).

On a motion to dismiss, facts well pleaded must be taken as true, but unsupported conclusions of the pleader may be disregarded, especially when they are negated by the substance of the facts pleaded. Van Daele v. Vinci, 294 F. Supp. 71 (N.D. Ill. 1968).

See also

Thompson v. Illinois Dept. of Professional Regulation, 300 F.3d 750 (7th Cir. 2002).

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In re Metricom Securities Litigation, 2004 WL 966291 (N.D. Cal. 2004), aff'd, 182 Fed. Appx. 714 (9th Cir. 2006) (court may disregard factual allegations contradicted by exhibits attached to complaint).

Hunt-Golliday v. Metropolitan Water Reclamation District of Greater Chicago, 27 Nat'l Disability Law Rep. P 285, 2004 WL 407012 (N.D. Ill. 2004), aff'd, 390 F.3d 1032 (7th Cir. 2004), **citing Wright & Miller** (court refused to accept allegations contradicted by matters in public record).

Herbage v. Meese, 747 F. Supp. 60 (D.D.C. 1990), aff'd, 946 F.2d 1564 (D.C. Cir. 1991) (conclusory allegations of unconstitutional motive are insufficient).

Compare

It is not proper for the court to assume that the plaintiff "can prove facts which [he or she] has not alleged, or that the defendants have violated the * * * laws in ways that have not been alleged." Anderson v. Continental Casualty Co., 258 F. Supp. 2d 1127 (E.D. Cal. 2003), quoting Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983).

61 **Conclusory allegation**

Painter's Mill Grille, LLC v. Brown, 716 F.3d 342, 350 (4th Cir. 2013) ("It is now well established that mere conclusory and speculative allegations are not sufficient to withstand a motion to dismiss.").

Heller v. Roberts, 386 F.2d 832 (2d Cir. 1967).

Phillips v. World Pub. Co., 822 F. Supp. 2d 1114 (W.D. Wash. 2011) ("conclusory legal allegation").

Manestar v. JP Morgan Chase Bank, N.A., 2011 WL 686252, *1 (C.D. Cal. 2011) ("[A] court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations.").

62 **Illustrative case**

Stewart v. Hevelone, 283 F. Supp. 842 (D. Neb. 1968).

63 **Courts vary**

Krainski v. Nevada ex rel. Bd. of Regents of Nevada System of Higher Educ., 616 F.3d 963, 969 (9th Cir. 2010) (allegation that police officers "knew, or should have known, that the allegations [which warranted probable cause] * * * were false" was deemed conclusory).

Great Western Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 178 (3d Cir. 2010) (rejecting assertions of "corrupt conspiracy," "an agreement," or

"an understanding in place between the Defendants and the Philadelphia judicial system" as conclusory).

"The difference between a conclusory statement and a pure factual allegation is not entirely clear, but Craig's narrative of the alleged incident at her home [individuals forced their way in without identifying themselves as police officers and damaged home] does not in any way resemble a legal conclusion undeserving of an assumption of truth." Craig v. Hawkins, 2010 WL 2350582, *2 (N.D. Ill. 2010).

Darrow v. WKRP Management, LLC, 2010 WL 1416799, *2 (D. Colo. 2010) (allegation that defendants failed to pay for cost of purchase, maintenance, and cleaning of uniforms was deemed conclusory without additional facts that uniforms required "special treatment, i.e., dry-cleaning" as required for FLSA claim).

Delgado-O'Neil v. City of Minneapolis, 2010 WL 330322, *6 (D. Minn. 2010) (allegations that plaintiff was subjected to excessive discipline, frequent investigations, and poor performance evaluations after she complained about discriminatory actions and that she was passed over for promotion because she filed charges of discrimination did not warrant assumption of truth), aff'd, 435 Fed. Appx. 582 (8th Cir. 2011).

64 **Iqbal and Twombly divide over conclusory characterization**

Ashcroft v. Iqbal, 556 U.S. 662, 699, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (Souter, J., dissenting) ("[T]he majority's holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory.").

Spencer, Pleading and Access to Civil Justice: A Response to Twiqbal Apologists, 60 U.C.L.A. L. Rev. 1710 (1736 (2013) ("Justice Kennedy [in Iqbal] saw conclusions (the allegation of policy design and approval) where Justice Souter saw facts; Justice Souter [in Twombly] saw conclusions (the allegation of an agreement) where Justice Stevens saw facts. Who is right? What will the judge in your next case see?") (citations omitted).

65 **Any legal theory**

Bowers v. Hardwick, 478 U.S. 186, 202, 106 S. Ct. 2841, 2849, 92 L. Ed. 2d 140 (1986) (overruled by, Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)), **citing Wright & Miller.**

U.S. ex rel. Bias v. Tangipahoa Parish School Bd., 816 F.3d 315, 321 (5th Cir. 2016) ("Dismissal [under Rule 12(b)(6)] is improper if the allegations support relief on any possible theory.").

Topchian v. JPMorgan Chase Bank, N.A., 760 F.3d 843, 848-849 (8th Cir. 2014) ("[A] complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory.").

Mack v. City of High Springs, 486 Fed. Appx. 3 (11th Cir. 2012) (per curiam) ("To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must plead 'either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.'"), quoting Financial Sec. Assur., Inc. v. Stephens, Inc., 500 F.3d 1276, 1282-1283 (11th Cir. 2007)

"To state a valid claim, a complaint must contain direct or inferential allegations respecting all the material elements under some viable legal theory." Crawford v. JP Morgan Chase Bank, NA, 425 Fed. Appx. 445, 447 (6th Cir. 2011), quoting Commercial Money Center, Inc. v. Illinois Union Ins. Co., 508 F.3d 327, 336-337 (6th Cir. 2007).

"A complaint need not identify legal theories, and specifying an incorrect theory is not a fatal error." Rabe v. United Air Lines, Inc., 636 F.3d 866, 872 (7th Cir. 2011).

Barrett v. Tallon, 30 F.3d 1296 (10th Cir. 1994) (district court erred in dismissing complaint without considering whether it gave rise to other claims for relief), **citing Wright & Miller**.

Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073 (7th Cir. 1992) (complaint does not have to state legal theory and specification of incorrect theory is not fatal).

The plaintiff did not waive the right to assert two unargued theories when the argued theory was dismissed, because the complaint clearly supported the others. Edmond v. U.S. Postal Service General Counsel, 949 F.2d 415, 431 (D.C. Cir. 1991), **citing Wright & Miller.**

Pratt v. KSE Sportsman Media, Inc., 586 F. Supp. 3d 666, 670 (E.D. Mich. 2022) ("Under Rule 12(b)(6), a pleading fails to state a claim if it does not contain allegations that support recovery under any recognizable theory.").

Schwartz v. Anthem Insurance Companies, Inc., 526 F. Supp. 3d 365, 373 (S.D. Ind. 2021) ("At the motion to dismiss stage, the court's duty 'is to consider whether a plaintiff's allegations could provide relief under any available legal theory.' * * * '[T]he complaint need not identify a legal theory, and specifying an incorrect legal theory is not fatal.'").

Zurbriggen v. Twin Hill Acquisition Company, Inc., 338 F. Supp. 3d 875 (N.D. Ill. 2018) ("[A] complaint * * * asserting [a] single claim * * * survives [a motion to dismiss for failure to state a claim] if it is supported by any single recognized legal theory. That includes theories that are not expressly identified in the complaint.").

Bryant v. Silverman, 284 F. Supp. 3d 458, 468 (S.D. N.Y. 2018) ("any facially plausible claims"), citing Virgil v. Town of Gates, 455 Fed. Appx. 36, 37 (2d Cir. 2012).

The fact that the plaintiffs captioned their claim for violation of their ballot access rights under the Due Process Clause of the Fourteenth Amendment rather than under the First Amendment was not grounds for dismissal because both the First and Fourteenth Amendments protect ballot access rights, and, regardless, plaintiffs need not accurately state the proper legal theory as long as they make allegations sufficient to state a claim for relief. Better Broadview Party v. Walters, 159 F. Supp. 3d 885, 892-893 (N.D. Ill. 2016).

Szubielski v. Pierce, 152 F. Supp. 3d 227, 231 (D. Del. 2016) (complaint may not be dismissed for imperfect statements of legal theory supporting claim asserted).

Granting a Rule 12(b)(6) motion is proper only if there is no viable theory under which a plaintiff can recover. MacFarlane v. Smith, 947 F. Supp. 572 (D.N.H. 1996), aff'd, 129 F.3d 1252 (1st Cir. 1997).

See also

When the plaintiff fails to rely on the proper section of the Civil Rights Act, the court should examine the complaint in light of the proper section. Robertson v. Johnston, 376 F.2d 43 (5th Cir. 1967).

McLaughlin v. Chicago Transit Authority, 243 F. Supp. 2d 778 (N.D. Ill. 2003) (plaintiff need not cite case law at Rule 12(b)(6) stage).

But see

Stubblefield v. C.I.R., 2002-1 U.S. Tax Cas. (CCH) P 50382, 89 A.F.T.R.2d 2002-2084, 2002 WL 850196 (S.D. Tex. 2002).

To survive a motion to dismiss, the complaint must state sufficient allegations to establish the necessary elements for recovery under whatever legal theory the plaintiff has chosen. Thomas v. L'Eggs Products, Inc., 13 F. Supp. 2d 806 (C.D. Ill. 1998).

But compare

Adams v. American Family Mut. Ins. Co., 813 F.3d 1151, 1155 (8th Cir. 2016) (motion to dismiss was properly granted because plaintiff did not raise breach of contract claim until opposition to motion to dismiss).

"A complaint containing a statement of facts that merely creates a suspicion of a legally cognizable right of action is insufficient." Bishop v. Lucent Technologies, Inc., 520 F.3d 516 (6th Cir. 2008) (McKeague, J.), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 550, 167 L. Ed. 2d 929 (2007). For further discussion of the Twombly case, see the Pocket Part for § 1216.

Johnson v. Riverside Healthcare System, LP, 516 F.3d 759 (9th Cir. 2008), withdrawn and superseded on reh'g, 534 F.3d 1116 (9th Cir. 2008).

In re American Funds Securities Litigation, 556 F. Supp. 2d 1100 (C.D. Cal. 2008), vacated and remanded, 395 Fed. Appx. 485 (9th Cir. 2010).

"Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Hawkins v. San Mateo County Law Library, 2007 WL 1795749, *3 (N.D. Cal. 2007), citing Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988).

"When opposing a Rule 12(b)(6) motion, 'a plaintiff cannot expect a trial court to do his homework for him.' Plaintiff is responsible for putting his best foot forward in an effort to present a legal theory that will support his claim." The plaintiff must set forth factual allegations with respect to each material element of some actionable theory. Viera-Marcano v. Ramirez-Sanchez, 224 F. Supp. 2d 397 (D.P.R. 2002) (Garcia-Gregory, J.), quoting McCoy v. Massachusetts Institute of Technology, 950 F.2d 13, 22 (1st Cir. 1991).

66 **Johnson case**
574 U.S. 10, 135 S. Ct. 346, 347, 190 L. Ed. 2d 309 (2014).

67 **Factual plausibility only**
Johnson v. City of Shelby, Miss., 574 U.S. 10, 135 S. Ct. 346, 347, 190 L. Ed. 2d 309 (2014) (failure to invoke § 1983 while pleading sufficient facts for plausibility is not grounds for dismissal), **citing Wright & Miller**.

68 **Relief may be granted**
Neitzke v. Williams, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989).

" 'Rule 12(b)(6) does not countenance * * * dismissals based on a judge's disbelief of a complaint's factual allegations. * * * A court ruling on * * * a [Rule 12(b)(6)] motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible.' In fact, 'a well-pleaded complaint may proceed if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely.'" Evergreen Partnering Group, Inc. v. Pactiv Corp., 720 F.3d 33, 45 (1st Cir. 2013), quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007); Anderson News, L.L.C. v. American Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012).

Boyle v. U.S., 200 F.3d 1369 (Fed. Cir. 2000).

Indest v. Freeman Decorating, Inc., 164 F.3d 258 (5th Cir. 1999) (dismissal appropriate because plaintiff failed to set forth any facts upon which relief could be granted).

Webb v. Lawrence County, 144 F.3d 1131 (8th Cir. 1998).

Pack v. U.S., 992 F.2d 955 (9th Cir. 1993).

Edmond v. U.S. Postal Service General Counsel, 949 F.2d 415, 292 (D.C. Cir. 1991).

Doe v. U.S. Dept. of Justice, 753 F.2d 1092, 1104 (D.C. Cir. 1985), **quoting Wright & Miller.**

Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

U.S. v. Howell, 318 F.2d 162 (9th Cir. 1963).

Although part of the relief demanded by the plaintiffs could not possibly be granted, the complaint should not have been dismissed, since the question was not whether all of the relief asked for could be granted, but whether the plaintiffs could be accorded any relief. Lada v. Wilkie, 250 F.2d 211 (8th Cir. 1957).

A Rule 12(b)(6) motion is not the proper vehicle to challenge a particular prayer for relief. A Rule 12(b)(6) motion challenges the sufficiency of the claim under Rule 8(a)(2), not the prayer for relief under Rule 8(a)(3). AG Spectrum Company v. Elder, 181 F. Supp. 3d 615, 617 (S.D. Iowa 2016).

Charles v. Front Royal Volunteer Fire and Rescue Dept., Inc., 21 F. Supp. 3d 620 (W.D. Va. 2014) ("[T]he nature of the relief included in the demand for judgment is immaterial to the question of whether a complaint adequately states a claim upon which relief can be granted.").

Celebrity Chefs Tour, LLC v. Macy's, Inc., 16 F. Supp. 3d 1159 (S.D. Cal. 2014) (claims for punitive damages under Lanham Act are inappropriate but not grounds for Rule 12(b)(6) dismissal).

Kerr v. Wanderer & Wanderer, 211 F.R.D. 625 (D. Nev. 2002).

Even if the punitive, consequential, and mental suffering damages prayed for by an insured suing an insurer for breach of contract were impermissible forms of recovery, a motion to dismiss the complaint would have to be denied because some form of relief, such as compensatory damages, certainly would be available

to remedy a breach of contract. Asher v. Reliance Ins. Co., 308 F. Supp. 847 (N.D. Cal. 1970).

Asphaltic Enterprises, Inc. v. Baldwin-Lima-Hamilton Corp., 39 F.R.D. 574 (E.D. Pa. 1966).

A court will not dismiss the entire action because the plaintiff has asked for more than that to which he may be entitled. McHugh v. Reserve Min. Co., 27 F.R.D. 505 (N.D. Ohio 1961).

69 **Discussion elsewhere**
See § 1216.

See also
Laguna Hermosa Corp. v. U.S., 671 F.3d 1284, 1287 (Fed. Cir. 2012) ("A complaint must be dismissed under Rule 12(b)(6) when the facts asserted do not give rise to a legal remedy * * *.").

Bazan v. White, 275 Fed. Appx. 312 (5th Cir. 2008) (dismissal is proper if complaint fails to allege required element of offense).

Wittstock v. Mark A. Van Sile, Inc., 330 F.3d 899 (6th Cir. 2003).

Tahfs v. Proctor, 316 F.3d 584 (6th Cir. 2003).

Arruda v. Sears, Roebuck & Co., 310 F.3d 13 (1st Cir. 2002) (court cannot uphold complaint that fails to establish essential nexus between underlying events and theory of relief).

General Star Indem. Co. v. Vesta Fire Ins. Corp., 173 F.3d 946 (5th Cir. 1999).

Lepelletier v. F.D.I.C., 164 F.3d 37, 334 (D.C. Cir. 1999) (dismissal appropriate because plaintiff failed to set forth any facts upon which relief could be granted).

To survive a motion to dismiss, the plaintiff must allege facts that if proved would result in the requested relief. The complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. Jersevic v. Kuhl, 2002 WL 84624 (E.D. Mich. 2002) (unpublished).

"In practice, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." Edwards v. Physician's Credit Bureau, 2001 WL 1678783, *2 (S.D. Ohio 2001) (unpublished) (Smith, J.).

70 **Doubtful case**
Supreme Court

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007) ("Of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable").

Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).

Neitzke v. Williams, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989).

First Circuit

Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 12-13 (1st Cir. 2011) (reasonableness of inference of liability should be focus of court, not likelihood of claim's ultimate success).

Tri-State Rubbish, Inc. v. Waste Management, Inc., 998 F.2d 1073 (1st Cir. 1993).

Developmental Disabilities Advocacy Center, Inc. v. Melton, 689 F.2d 281 (1st Cir. 1982), **quoting Wright & Miller.**

Miranda v. Deloitte LLP, 922 F. Supp. 2d 210, 217 (D.P.R. 2013) (non-conclusory factual allegations must be taken as true even if "seemingly incredible"), quoting R.G. Financial Corp. v. Vergara-Nunez, 446 F.3d 178, 182 (1st Cir. 2006).

Rios DaSilva v. One, Inc., 980 F. Supp. 2d 148 (D.P.R. 2013).

Second Circuit

Phelps v. Kapnolas, 308 F.3d 180 (2d Cir. 2002).

Chance v. Armstrong, 143 F.3d 698 (2d Cir. 1998).

Alzheimer's Disease Resource Center, Inc. v. Alzheimer's Disease and Related Disorders Ass'n, Inc., 981 F. Supp. 2d 153 (E.D. N.Y. 2013) ("The issue on a motion to dismiss is 'not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'"), quoting Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001).

Third Circuit

Baldwin v. University of Pittsburgh Medical Center, 636 F.3d 69, 74 (3d Cir. 2011).

Renfro v. Unisys Corp., 671 F.3d 314 (3d Cir. 2011) (determination is not whether plaintiff ultimately will prevail but whether complaint is sufficient to pass court's threshold).

Nami v. Fauver, 82 F.3d 63 (3d Cir. 1996).

No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to attempt to prove it. Melo-Sonics Corp. v. Cropp, 342 F.2d 856 (3d Cir. 1965).

Continental Collieries v. Shober, 130 F.2d 631 (C.C.A. 3d Cir. 1942).

Raul v. Rynd, 929 F. Supp. 2d 333, 341 (D. Del. 2013), quoting In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1420 (3d Cir. 1997).

Logue v. West Penn Multi-List, Inc., 2010 WL 2720787, *1 (W.D. Pa. 2010).

Tatsch-Corbin v. Feathers, 561 F. Supp. 2d 538 (W.D. Pa. 2008).

Fourth Circuit
McLean v. U.S., 566 F.3d 391 (4th Cir. 2009) (abrogated by, Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 207 L. Ed. 2d 132 (2020)).

Moore v. Life Ins. Co. of North America, 278 Fed. Appx. 238 (4th Cir. 2008) (dismissal motion does not resolve contests surrounding facts or merits of claim).

Jordan by Jordan v. Jackson, 15 F.3d 333 (4th Cir. 1994) (court expressed skepticism that plaintiff ultimately could prevail on claim but reversed lower court's grant of Rule 12(b)(6) motion).

Revene v. Charles County Com'rs, 882 F.2d 870 (4th Cir. 1989) (dismissal improper even if factual assertions are equally consistent with conclusion contrary to plaintiff's).

Adams v. Bain, 697 F.2d 1213, 1216 (4th Cir. 1982), **citing Wright & Miller.**

Alston v. North Carolina A & T State University, 304 F. Supp. 2d 774 (M.D. N.C. 2004).

Rhee Bros., Inc. v. Han Ah Reum Corp., 178 F. Supp. 2d 525 (D. Md. 2001), **quoting Wright & Miller.**

Bryant v. Clevelands, Inc., 193 F.R.D. 486 (E.D. Va. 2000).

Brandsasse v. City of Suffolk, Va., 72 F. Supp. 2d 608 (E.D. Va. 1999).

Fifth Circuit
Sherrod v. United Way Worldwide, 821 Fed. Appx. 311, 315 (5th Cir. 2020) ("On appeal, we are not concerned with whether the plaintiff was likely to succeed on the claims but only whether the complaint contains any legally cognizable claims that are plausible.").

The court must accept all the factual allegations as true even if they are doubtful in fact. Lexington Ins. Co. v. S.H.R.M. Catering Services, Inc., 567 F.3d 182 (5th Cir. 2009).

Even when it appears almost a certainty to the court that the facts alleged cannot be proved to support a legal claim, the motion to dismiss for failure to state a claim must be overruled. Boudeloche v. Grow Chemical Coatings Corp., 728 F.2d 759 (5th Cir. 1984).

Sixth Circuit

Mediacom Southeast LLC v. BellSouth Telecommunications, Inc., 672 F.3d 396, 399 (6th Cir. 2012) ("This very well may be the proper question of law on a motion for summary judgment-assuming there are no genuine issues of material fact-but it is not the proper inquiry for a motion to dismiss. At this stage, the single question is whether plaintiff's complaint includes 'enough facts to state a claim to relief that is plausible on its face.'"), quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1973, 167 L. Ed. 2d 929 (2007).

Montesi v. Nationwide Mut. Ins. Co., 970 F. Supp. 2d 784 (W.D. Tenn. 2013) ("While plausibility requires relief to be more than speculative, it need not be probable; rather, " 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely.'"), quoting Erie County, Ohio v. Morton Salt, Inc., 702 F.3d 860, 867 (6th Cir. 2012).

Compare

Jones v. City of Cincinnati, 521 F.3d 555 (6th Cir. 2008).

Seventh Circuit

Arnett v. Webster, 658 F.3d 742, 752 (7th Cir. 2011).

Walker v. National Recovery, Inc., 200 F.3d 500 (7th Cir. 1999).

"Pressure from the flux of cases makes early disposition of weak claims attractive, freeing judicial time for others that appear to have superior prospects. Matters that formerly were tried now are resolved by summary judgment. But the next time-saving step—resolving under Rule 12(b)(6) matters that formerly were handled by summary judgment—is incompatible with the Rules of Civil Procedure." Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998) (Easterbrook, J.).

"Although it appears highly unlikely that plaintiff will be able prove his claim against defendants * * *, that is not the standard for determining a motion to dismiss." Williams v. Doyle, 494 F. Supp. 2d 1019, 1029 (W.D. Wis. 2007), citing Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)

(abrogated by, Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)).

Deloughery v. City of Chicago, 2002 WL 31654942 (N.D. Ill. 2002) (although court was skeptical of plaintiffs' ability to prove delegation they claimed, amended complaint entitled them to opportunity to try).

"Ultimately plaintiffs may not be able to prove the Complaint's allegations. Ultimately the Class may not be entitled to exactly the type of relief the Complaint seeks. But such ultimate possibilities are not the stuff of which a Rule 12(b)(6) motion is fashioned." Quinones v. Coler, 651 F. Supp. 1028 (N.D. Ill. 1987) (Shadur, J.).

Eighth Circuit
Ring v. First Interstate Mortg., Inc., 984 F.2d 924 (8th Cir. 1993).

Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974).

Thomason v. Hospital T. V. Rentals, Inc., 272 F.2d 263 (8th Cir. 1959).

Grover-Tsimi v. Minnesota, 2010 WL 2732508, *4 (D. Minn. 2010), report and recommendation adopted, 2010 WL 2732227 (D. Minn. 2010), aff'd, 449 Fed. Appx. 529 (8th Cir. 2011).

Ninth Circuit
Starr v. Baca, 652 F.3d 1202, 1215 (9th Cir. 2011).

A Rule 12(b)(6) motion does not inquire into whether or not the plaintiff will ultimately prevail on the merits. Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009), on reh'g en banc, 614 F.3d 1070 (9th Cir. 2010).

Williams v. Gerber Products Co., 523 F.3d 934 (9th Cir. 2008), amended and superseded on denial of reh'g, 552 F.3d 934 (9th Cir. 2008).

Although the court was highly incredulous, the plaintiff's complaint sufficiently stated a claim for relief under the Civil Rights Act. Allison v. California Adult Authority, 419 F.2d 822 (9th Cir. 1969).

Although allegations in the complaint "could be said to tax a reader's credulity," the court reversed a dismissal for failure to state a claim under the Civil Rights Act. Brown v. Brown, 368 F.2d 992, 993 (9th Cir. 1966).

Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F.2d 1 (9th Cir. 1963).

Baca ex rel. Nominal Defendant Insight Enterprises, Inc. v. Crown, 2010 WL 2812712, *3 (D. Ariz. 2010), aff'd, 458 Fed. Appx. 694 (9th Cir. 2011).

Buick v. World Savings Bank, 637 F. Supp. 2d 765 (E.D. Cal. 2008), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007).

Tenth Circuit
Tyler v. Tsurumi (America), Inc., 425 Fed. Appx. 702 (10th Cir. 2011).

MacArthur v. San Juan County, 309 F.3d 1216 (10th Cir. 2002).

Lymon v. Aramark Corp., 728 F. Supp. 2d 1207, 1215 (D.N.M. 2010), aff'd, 499 Fed. Appx. 771 (10th Cir. 2012) ("A motion to dismiss is a request to dismiss a case before discovery has taken place and thus permits only an assessment whether a complaint is sufficient on its face. In adjudicating a motion to dismiss, a court may neither grant the motion because it believes it is unlikely the plaintiff can prove the allegations, nor may it 'weigh potential evidence that the parties might present at trial' in assessing the motion's merit.") (internal citations omitted), quoting Duran v. Carris, 238 F.3d 1268, 1270 (10th Cir. 2001).

Eleventh Circuit
Jackam v. Hospital Corp. of America Mideast, Ltd., 800 F.2d 1577, 1579-1580 (11th Cir. 1986).

BTG Patent Holdings, LLC v. Bag2Go, GmbH, 193 F. Supp. 3d 1310 (S.D. Fla. 2016).

Carley Capital Group v. Deloitte & Touche, L.L.P., 27 F. Supp. 2d 1324 (N.D. Ga. 1998).

The prospect of recovery is irrelevant. Miccosukee Tribe of Indians of Florida v. U.S., 6 F. Supp. 2d 1346 (S.D. Fla. 1998).

D.C. Circuit
ACLU Foundation of Southern California v. Barr, 952 F.2d 457, 472 (D.C. Cir. 1991), **citing Wright & Miller.**

Marshall v. Honeywell Technology Solutions, Inc., 536 F. Supp. 2d 59 (D.D.C. 2008).

U.S. ex rel. Harris v. Bernad, 275 F. Supp. 2d 1 (D.D.C. 2003).

See also
Olvera v. Blitt & Gaines, P.C., 2004 WL 887372 (N.D. Ill. 2004).

Martin v. Mears, 602 P.2d 421, 429 n.21 (Alaska 1979), **citing Wright & Miller.**

Senay v. Meehan, 5 Mass. App. Ct. 854, 364 N.E.2d 1085 (1977), **citing Wright & Miller.**

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71 **Case determined on proof**

Saeger v. Pacific Life Ins. Co., 94 Fed. Appx. 544 (9th Cir. 2004).

Burstein v. Retirement Account Plan For Employees of Allegheny Health Educ. and Research Foundation, 334 F.3d 365 (3d Cir. 2003), as amended, (Aug. 1, 2003).

Desiano v. Warner-Lambert Co., 326 F.3d 339 (2d Cir. 2003).

Garbini v. Protection One, Inc., 49 Fed. Appx. 169 (9th Cir. 2002).

Bonham v. District of Columbia Library Admin., 989 F.2d 1242, 300 (D.C. Cir. 1993).

Rule 12(b)(6) is not a tool for testing the truth of allegations or for determining whether a plaintiff has evidence to back up those allegations. ACLU Foundation of Southern California v. Barr, 952 F.2d 457, 293 (D.C. Cir. 1991).

Miller v. Glanz, 948 F.2d 1562 (10th Cir. 1991) (court's role is not to examine evidence, but rather to determine whether complaint alone is legally sufficient to state claim for relief).

The office of a motion to dismiss is merely to assess the legal feasibility of the complaint, and not to assay the weight of the evidence that might be offered in support. Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980).

Van Praagh v. Gratton, 993 F. Supp. 2d 293 (E.D. N.Y. 2014) (declining to consider on Rule 12(b)(6) motion matters requiring resolution of facts more appropriate for jury).

Preston v. Seterus, Inc., 931 F. Supp. 2d 743, 749 (N.D. Tex. 2013) ("[D]enial of a 12(b)(6) motion has no bearing on whether a plaintiff ultimately establishes the necessary proof to prevail on a claim that withstands a 12(b)(6) challenge.").

"The strength of plaintiffs' claims is not at issue in a motion to dismiss for failure to state a claim and [the court] therefore will not address those matters." Sanderson v. Nipe, 2007 WL 675488, *2 (D.S.D. 2007).

See also

McBryde v. Amoco Oil Co., 404 A.2d 200, 203 (D.C. 1979), **citing Wright & Miller.**

Compare

Cochran v. Quest Software, Inc., 328 F.3d 1 (1st Cir. 2003) (standards applicable at summary judgment stage are far more demanding than standards at Rule 12(b)(6) stage).

But see

Dismissal of the action is appropriate when the allegations contained in the plaintiff's complaint are beyond credulity. Dickinson v. French, 416 F. Supp. 429 (S.D. Ala. 1976).

72 **Presumptions**

Dorce v. City of New York, 2022 WL 2286381, *14 n.9 (S.D. N.Y. 2022) (declining to consider the presumption of regularity at the motion to dismiss stage "since presumptions are evidentiary standards that are inappropriate for evaluation at the pleadings stage").

In re Humira (Adalimumab) Antitrust Litigation, 465 F. Supp. 3d 811, 832 n.15 (N.D. Ill. 2020) (declining to apply presumption of patentees' good-faith patent enforcement because "that presumption is evidentiary, and evidentiary presumptions do not overcome plausible allegations at the pleading stage"), aff'd, 42 F.4th 709 (7th Cir. 2022).

Silvas v. County of Riverside, 2020 WL 4919733, *9 (C.D. Cal. 2020) (declining to apply presumption that a prosecutor exercises independent judgment).

Davis v. Primero Services, Inc., 2020 WL 474864, *3 (E.D. La. 2020) (declining to apply the "presumption that government notices are mailed on the date stated in the notice and received within seven days" becuase it "is an evidentiary presumption" that "is inapposite for a motion to dismiss under 12(b)(6)").

Morris v. Bank of America, 2010 WL 761318, *4 (N.D. Cal. 2010) (declining to apply 15 U.S.C.A. § 1635(c)'s presumption of delivery on a motion to dismiss because it requires the consideration of evidence), **citing Wright & Miller.**

Glucksman v. First Franklin Financial Corp., 601 F. Supp. 2d 511, 514 (E.D. N.Y. 2009) (same).

In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litigation, 312 F. Supp. 2d 1165 (D. Minn. 2004).

73 **Novel or "extreme" theory**

"Mr. Moore alleges a violation of his constitutional rights based on a theory that appears to be an issue of first impression in our circuit. * * * Significantly, there is emerging disagreement among district and circuit courts about what impact, if any, Graham has on the rights of life-sentenced juvenile offenders with respect to parole. * * * That some courts agree with Mr. Moore, while others do not, renders his claim at this stage-at the very least-plausible." Moore v. Georgia Board of Pardons & Paroles, 2024 WL 1765706, *4 (11th Cir. 2024), **quoting Wright & Miller**.

Berndsen v. North Dakota University System, 7 F.4th 782, 790 n.7 (8th Cir. 2021) ("Four circuits have cautioned against Rule 12(b)(6) dismissals when, as here,

complaints include novel legal theories.") (citations omitted), **quoting Wright & Miller**.

Metts v. Murphy, 363 F.3d 8 (1st Cir. 2004) (in case dealing with major variant from precedent, plaintiff should have chance to develop evidence before merits are resolved and motion to dismiss is inappropriate).

Baker v. Cuomo, 58 F.3d 814 (2d Cir. 1995), vacated in part on reh'g en banc, 85 F.3d 919 (2d Cir. 1996), **citing Wright & Miller.**

Electrical Const. & Maintenance Co., Inc. v. Maeda Pacific Corp., 764 F.2d 619, 623 (9th Cir. 1985), **quoting Wright & Miller.**

"It is perhaps ironic that the more extreme or even far-fetched is the asserted theory of liability, the more important it is that the conceptual legal theories be explored and assayed in the light of actual facts, not a pleader's supposition." Shull v. Pilot Life Ins. Co., 313 F.2d 445, 447 (5th Cir. 1963) (Brown, J.).

Soriano v. Sealy Mattress Manufacturing Co. LLC., 471 F. Supp. 3d 1155, 1170 (D. Colo. 2020) ("Given the apparently novel nature of this theory of liability and the absence of any contrary authority, the Court is not inclined to dismiss the claim at this stage of the proceedings. As numerous courts have recognized, courts should generally be reluctant to grant a motion to dismiss when the claim in question asserts a novel theory of recovery, because novel theories of recovery are best tested for legal sufficiency in light of actual, rather than alleged facts.") (citations and internal quotation marks omitted), **quoting Wright & Miller**, report and recommendation adopted, 2020 WL 5505884 (D. Colo. 2020).

Doe v. Piper, 165 F. Supp. 3d 789, 808 (D. Minn. 2016) (court declined motion to dismiss because briefing was insufficient on novel constitutional claims, but it invited motion for judgment on pleadings or for summary judgment).

In light of the commercial importance of this case, the district court concluded that resolution of the novel legal questions presented should await the development of a full factual record. Google Inc. v. American Blind & Wallpaper Factory, Inc., 2005 WL 832398 (N.D. Cal. 2005).

Reed v. Monahan's Landscape Co., Inc., 2004 WL 422686 (N.D. Ill. 2004) (since issue in case has not been subject of any holding, motion to dismiss denied so that court of appeals can address issue on fully developed factual record).

Compare

"[W]e do not think that it is legally appropriate (or for that matter wise) for a district court to issue a *Lone Pine* order requiring factual support for the plaintiffs' claims before it has determined that those claims survive a motion to dismiss under *Twombly*. It is one thing to demand that plaintiffs come forward with some evidence supporting certain basic elements of their claims as a way of organizing

(and maybe bifurcating) the discovery process once a case is at issue, and dealing with discrete issues or claims by way of partial summary judgment motions. It is quite another to begin compiling, analyzing, and addressing evidence (pro and con) concerning the plaintiffs' allegations without reciprocal discovery before those allegations have been determined to be legally sufficient under Rule 12(b)(6)." Adinolfe v. United Technologies Corp., 768 F.3d 1161, 1168 (11th Cir. 2014) district court reversed).

But see
Lieberman v. A&W Restaurants, Inc., 2003 WL 21252008 (D. Minn. 2003) (although recognizing importance of allowing new legal theories to be explored, court dismissed claim, stating "however, even creative and inventive legal theories must comport with Rule 12 standards"), **citing Wright & Miller.**

Ileto v. Glock, Inc., 194 F. Supp. 2d 1040 (C.D. Cal. 2002), aff'd in part, rev'd in part and remanded, 349 F.3d 1191 (9th Cir. 2003) (court in diversity jurisdiction applying forum state substantive law).

But compare
In one case, although applying the same standard as for a Rule 12(b)(6) motion, the district court granted judgment on the pleadings despite the fact that the claim was a matter of first impression. Mueller v. Gallina, 311 F. Supp. 2d 606 (E.D. Mich. 2004), aff'd, 137 Fed. Appx. 847 (6th Cir. 2005).

74 **Pro se plaintiffs**
Supreme Court
Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (overturning dismissal of pro se complaint).

First Circuit
Rockwell v. Cape Cod Hosp., 26 F.3d 254 (1st Cir. 1994).

Complaints drafted by pro se plaintiffs will be held to less stringent standards than those made by lawyers, but "[e]ven pro se litigants must do more than make mere conclusory statements regarding constitutional claims." Norton v. Cross Border Initiative, 2007 WL 1657387, *3 (D.N.H. 2007) (not for publication), quoting Brown v. Zavaras, 63 F.3d 967, 972 (10th Cir. 1995).

Travers-Sheik v. Habit Management, Inc., 2006 WL 3775957 (D. Mass. 2006).

Rivera Borrero v. Rivera Correa, 93 F. Supp. 2d 122 (D.P.R. 2000).

Second Circuit
Ackerman v. Ackerman, 549 Fed. Appx. 45, 46 (2d Cir. 2014) ("[W]hile pro se complaints contain sufficient factual allegations to meet the [Twombly]

plausibility standard, we interpret them "to raise the strongest arguments that they suggest.").

Hogan v. Fischer, 738 F.3d 509, 515 (2d Cir. 2013).

McGarry v. Pallito, 687 F.3d 505 (2d Cir. 2012).

Zuckman v. Department of Treasury, 448 Fed. Appx. 160 (2d Cir. 2012) (per curiam).

Lopez v. Jet Blue Airways, 662 F.3d 593, 596 (2d Cir. 2011) ("[A] pro se complaint is entitled to a particularly liberal reading.").

Okoh v. Sullivan, 441 Fed. Appx. 813, 814 (2d Cir. 2011).

Baptista v. Hartford Bd. of Educ., 427 Fed. Appx. 39 (2d Cir. 2011).

Bennett v. City of New York, 425 Fed. Appx. 79 (2d Cir. 2011) (liberal construction given to pro se complaints especially appropriate when plaintiff uses boilerplate complaint provided by court).

Mohammad v. New York State Higher Educ. Services Corp., 422 Fed. Appx. 61 (2d Cir. 2011).

Kevilly v. New York, 410 Fed. Appx. 371, 374 (2d Cir. 2010).

Kitchen v. Phipps Houses Group of Companies, 380 Fed. Appx. 99, 100 (2d Cir. 2010).

"While pro se complaints must contain sufficient factual allegations to meet the plausibility standard, we read them with 'special solicitude' and interpret them 'to raise the strongest arguments that they suggest.'" Roman v. Donelli, 347 Fed. Appx. 662 (2d Cir. 2009).

Flaherty v. Lang, 199 F.3d 607 (2d Cir. 1999) (reluctance to dismiss applies with greater force when complaint is submitted pro se).

Hahn v. Star Bank, 190 F.3d 708 (6th Cir. 1999) (pro se complaint held to less stringent standard).

Gomez v. USAA Federal Sav. Bank, 171 F.3d 794 (2d Cir. 1999) (pro se party should be given leave to replead at least one time when it appears from complaint that there may be valid claim).

Courts must construe a pro se plaintiff's complaints liberally and interpret them to raise the strongest possible arguments they suggest. Moreover, the court may consider materials outside the pro se litigant's complaint (for instance, in the plaintiff's papers opposing the motion to dismiss) to the extent they are consistent

with the complaint. Martinez v. Aycock-West, 164 F. Supp. 3d 502, 508 (S.D. N.Y. 2016).

Hernandez v. Coughlin, 18 F.3d 133 (2d Cir. 1994) (greater deference for pro se and civil rights plaintiffs).

Greater caution is needed for pro se and civil rights plaintiffs. Sykes v. James, 13 F.3d 515 (2d Cir. 1993).

Ferran v. Town of Nassau, 11 F.3d 21 (2d Cir. 1993).

Moran v. Pallito, 2010 WL 5648722 (D. Vt. 2010), report and recommendation adopted, 2011 WL 282398 (D. Vt. 2011).

Fowlkes v. Parker, 2010 WL 5490739 (N.D. N.Y. 2010), report and recommendation adopted, 2011 WL 13726 (N.D. N.Y. 2011).

Derisme v. Hunt Leibert Jacobson, PC, 2010 WL 4683916, *1 (D. Conn. 2010) ("Even after Twombly, however, the Court must construe the pleadings of pro se litigants liberally, because '[i]mplicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training.'"), quoting Abbas v. Dixon, 480 F.3d 636, 639 (2d Cir. 2007) (quotation marks omitted).

Hudson Valley Black Press v. I.R.S., 307 F. Supp. 2d 543 (S.D. N.Y. 2004), aff'd, 409 F.3d 106 (2d Cir. 2005) (Rule 12(b)(6) motion granted despite liberal construction for pro se plaintiff).

Third Circuit

Huertas v. Galaxy Asset Management, 641 F.3d 28, 32 (3d Cir. 2011).

Zurawski v. Southeastern Pennsylvania Transp. Authority, 441 Fed. Appx. 133 (3d Cir. 2011).

Winslow v. Prison Health Services, 406 Fed. Appx. 671, 674 (3d Cir. 2011).

Brookhart v. Rohr, 385 Fed. Appx. 67 (3d Cir. 2010).

Washam v. Stesis, 321 Fed. Appx. 104 (3d Cir. 2009) (prosecutorial and judicial immunity).

Schneller ex rel. Schneller v. Fox Subacute at Clara Burke, 317 Fed. Appx. 135 (3d Cir. 2008).

Paylor v. Allegheny County Family Division/Domestic Relations, 2017 WL 4235944, *3-6 (W.D. Pa. 2017) (construing the pro se plaintiff's pleadings liberally but still finding the plaintiff's "claims in his amended complaint * * *

meritless or otherwise not subject to review by this court for a variety of reasons," including the Younger abstention doctrine, the fact that "federal suits against the state are barred by the Eleventh Amendment," and the possible individual defendants having judicial or quasi-judicial immunity" (footnote and citation omitted)).

A court reluctant to dismiss pro se complaints for pleading deficiencies may alternatively grant a motion for a more definite statement so that the complaint sets forth facts with sufficient particularity. Parson v. Phelps, 193 F. Supp. 3d 353 (D. Del. 2016).

Mack v. Yost, 979 F. Supp. 2d 639 (W.D. Pa. 2013), aff'd in part, vacated in part, remanded, 839 F.3d 286 (3d Cir. 2016) (prisoner pro se complaint), citing U.S. ex rel. Walker v. Fayette County, Pa., 599 F.2d 573, 575 (3d Cir. 1979).

King v. Doe, 2011 WL 2669221 (D. Del. 2011), subsequent determination, 2011 WL 4351797 (D. Del. 2011).

Pumphrey v. Smith, 2010 WL 4983675 (W.D. Pa. 2010).

Chambers v. Hathaway, 2010 WL 2804516, *2 (W.D. Pa. 2010), aff'd, 406 Fed. Appx. 571 (3d Cir. 2011) ("If the court can reasonably read pleadings to state a valid claim on which the litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with pleading requirements.").

Boggi v. Medical Review and Accrediting Council, 39 Nat'l Disability Law Rep. P 256, 2009 WL 2951022 (E.D. Pa. 2009), aff'd on other grounds, 415 Fed. Appx. 411 (3d Cir. 2011).

Jones v. Williams, 2007 WL 1723674 (D. Del. 2007) (pro se plaintiff's amended complaint bringing § 1983 claim dismissed by judge applying Rule 12(b)(6) standards).

Brown v. Peoples Sec. Ins., 158 F.R.D. 350 (E.D. Pa. 1994) (before dismissing pro se complaint, court must inform plaintiff with notice of deficiencies so he can amend effectively).

Fourth Circuit

King v. Rubenstein, 825 F.3d 206 (4th Cir. 2016) (court construed pro se inmate's complaint liberally and found one defendant liable under 42 U.S.C.A. § 1983, but stopped short of doing so for complaint's less robust allegations against other defendants).

Miller v. Carolinas Healthcare System, 561 Fed. Appx. 239 (4th Cir. 2014).

Spencer v. Earley, 278 Fed. Appx. 254 (4th Cir. 2008).

Foster v. Howard Community College, 2014 WL 758027, *2 (D. Md. 2014).

Adler v. Anchor Funding Services, LLC, 2011 WL 1843226 (W.D. N.C. 2011) (court will construe pro se pleadings liberally, but plaintiff still must allege facts sufficient to state all elements of claim).

Taylor v. Ozmint, 2011 WL 286133, *2 (D.S.C. 2011), report and recommendation adopted, 2011 WL 285876 (D.S.C. 2011), order vacated, (Feb. 1, 2011) ("[I]f the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so; however, a district court may not rewrite a complaint to include claims that were never presented.").

Burnley v. Norwood, 2010 WL 3063779, *5 (E.D. Va. 2010) ("Though incorporating the Twombly and Iqbal pleading standards, the Court is mindful that a pro se plaintiff's complaint is to be construed liberally and held to a less stringent standard than a pleading drafted by an attorney.").

Gardner v. Hawks, 2010 WL 2990108, *2 (W.D. Va. 2010) ("Although the court liberally construes pro se complaints, the court does not act as the inmate's advocate, sua sponte developing statutory and constitutional claims the inmate failed to clearly raise on the face of his complaint.") (internal citations omitted).

Wood v. Wood, 2010 WL 2813760, *3 (S.D. W. Va. 2010), aff'd, 426 Fed. Appx. 197 (4th Cir. 2011).

Adams v. Montgomery College, 2010 WL 2813346 (D. Md. 2010).

Young Bok Song v. Welch, 2010 WL 2813305 (E.D. N.C. 2010), aff'd, 410 Fed. Appx. 648 (4th Cir. 2011).

Smith v. Commonwealth of Virginia, 2009 WL 2175759, *2 (E.D. Va. 2009), aff'd, 353 Fed. Appx. 790 (4th Cir. 2009) ("The Iqbal/Twombly standard applies to pro se litigants as well as represented parties, with the caveat that, as always, pro se pleadings are to be liberally construed.").

Robinson v. Federal Bureau of Prisons, 2007 WL 692048 (N.D. W. Va. 2007) (court dismissed complaint even though it liberally construes pro se civil rights complaints).

Taylor v. Barnett, 105 F. Supp. 2d 483 (E.D. Va. 2000).

Peck v. Merletti, 64 F. Supp. 2d 599 (E.D. Va. 1999).

Ragins v. Gilmore, 48 F. Supp. 2d 566 (E.D. Va. 1999) (dismissal of pro se civil rights complaint because overbroad is improper).

Fifth Circuit

Rogers v. Boatright, 709 F.3d 403, 407 (5th Cir. 2013).

Adams v. Bank of America, 475 Fed. Appx. 526 (5th Cir. 2012) (per curiam).

Muhammed v. Lone Star College System, 460 Fed. Appx. 341, 342 (5th Cir. 2012) (per curiam).

Hale v. King, 642 F.3d 492, 499 (5th Cir. 2011).

Lowery v. Capital One Mortg., 429 Fed. Appx. 377 (5th Cir. 2011).

Amanduron v. American Airlines, 416 Fed. Appx. 421, 423 (5th Cir. 2011).

Pena v. U.S., 157 F.3d 984 (5th Cir. 1998) (dismissals of pro se complaints for failure to state claim are disfavored and court should grant pro se party every reasonable opportunity to amend).

"Because she appears pro se, Edmond's pleadings are entitled to more lenient scrutiny than pleadings drafted by lawyers. But no amount of liberal construction could manufacture a coherent statement from within Edmond's Complaint, much less a viable legal claim. The rambling Complaint lacks an arguable basis in law because the facts alleged are 'clearly baseless, a category encompassing allegations that are fanciful, fantastic, and delusional.' As such, Edmond's claims are frivolous. Accordingly, Judge Pittman should dismiss this case sua sponte for failure to state a claim on which relief can be granted." Edmond v. Brap, LLC, 2021 WL 5969294, *2 (N.D. Tex. 2021) (citations omitted) (Ray, Magistrate Judge), report and recommendation adopted, 2021 WL 5967561 (N.D. Tex. 2021).

Shaunfield v. Experian Information Solutions, Inc., 991 F. Supp. 2d 786 (N.D. Tex. 2014).

Peppers v. Graves, 2011 WL 1775736 (M.D. La. 2011).

Even when accounting for a plaintiff's pro se status, not even the most liberal construction of a complaint that consists of conclusory statements without supporting facts can survive a motion to dismiss. Myers v. Kaufman County, 2010 WL 5480651 (N.D. Tex. 2010), report and recommendation adopted, 2011 WL 9055 (N.D. Tex. 2011).

Lowe v. American Eurocopter, LLC, 24 A.D. Cas. (BNA) 40, 2010 WL 5232523 (N.D. Miss. 2010).

Jones v. First Bank and Trust, 2010 WL 2836150, *3 (E.D. La. 2010) ("Complaints drafted by pro se litigants are not held to the standard of complaints drafted by a professional attorney, but legal conclusions are not sufficient to prevent a motion to dismiss."), vacated, 2010 WL 11494062 (E.D. La. 2010).

Ivy v. U.S. Dept. of Agriculture (FSA), 2010 WL 2559885, *4 (N.D. Miss. 2010) ("Despite the liberality with which the Court construes a pro se plaintiff's pleadings, conclusory allegations or legal conclusions dressed as factual conclusions will not circumvent a motion to dismiss.").

Sixth Circuit

Bridge v. Ocwen Federal Bank, FSB, 681 F.3d 355, 358 (6th Cir. 2012).

Davis v. Prison Health Services, 679 F.3d 433, 437 (6th Cir. 2012).

Frengler v. General Motors, 482 Fed. Appx. 975, 977 (6th Cir. 2012) ("[Plaintiff's] amended complaint consists of eighty-one pages of medical bills, medical records, and workers' compensation proceeding records, without any suggestion of a cause of action. Even a pro se pleading must provide the opposing party with notice of the relief sought, and it is not within the purview of the district court to conjure up claims never presented.").

Agramonte v. Shartle, 491 Fed. Appx. 557 (6th Cir. 2012) (Moore, J., dissenting) ("Given the more lenient pleading standard afforded pro se litigants, however, I believe that a few of the plaintiffs' claims should have been permitted to move forward.").

Brown v. Matauszak, 415 Fed. Appx. 608, 613 (6th Cir. 2011) ("The court will consider documents filed after the complaint as part of the pleadings.") (internal quotation marks omitted).

Montgomery v. Huntington Bank, 346 F.3d 693 (6th Cir. 2003).

Herron v. Harrison, 203 F.3d 410 (6th Cir. 2000).

Jourdan v. Jabe, 951 F.2d 108 (6th Cir. 1991).

Berry v. Main Street Bank, 977 F. Supp. 2d 766 (E.D. Mich. 2013) ("The leniency with which courts construe pro se plaintiffs' complaints, however, does not abrogate the basic pleading requirements designed to ensure that courts do "not have to guess at the nature of the claim asserted. * * * Pro se plaintiffs still must provide more than bare assertions of legal conclusions to survive a motion to dismiss."), citing Grinter v. Knight, 532 F.3d 567, 577 (6th Cir. 2008); Wells v. Brown, 891 F.2d 591, 594 (6th Cir. 1989).

Although the pleading standard for a pro se plaintiff is less stringent than for plaintiffs whose pleadings are drafted by lawyers, that lenience has a limit: "'[T]o survive a motion to dismiss, the complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory.'" Baker v. County of Missaukee, 2011 WL 1670953, *2 (W.D. Mich. 2011), report and recommendation adopted, 2011 WL 1670949

(W.D. Mich. 2011), quoting Bishop v. Lucent Technologies, Inc., 520 F.3d 516, 519 (6th Cir. 2008).

Henton v. Wells Fargo Bank, N.A., 2011 WL 111362 (E.D. Tenn. 2011) (pro se pleading will be construed more liberally than pleading drafted by lawyers but still must be comprehensible and adhere to basic pleading essentials).

Shoucair v. Williams, 2010 WL 5015348, *3 (E.D. Mich. 2010), report and recommendation adopted, 2010 WL 5014378 (E.D. Mich. 2010) ("[T]he Court must still read plaintiff's pro se complaint indulgently and accept plaintiff's allegations as true, unless they are clearly irrational or wholly incredible.").

Nelson v. Shelton, 2010 WL 2803956, *2 (M.D. Tenn. 2010), report and recommendation adopted, 2010 WL 3211122 (M.D. Tenn. 2010) ("A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed under the standard that the Court must accept as true all of the allegations contained in the complaint, resolve all doubts in the plaintiff's favor, and construe the complaint liberally in favor of the pro se plaintiff.").

El v. I.R.S., 2008-1 U.S. Tax Cas. (CCH) P 50379, 101 A.F.T.R.2d 2008-2503, 2008 WL 2338621 (E.D. Mich. 2008).

Aaron v. Bob Evans Restaurant, 477 F. Supp. 2d 853 (N.D. Ohio 2007) (discrimination claim fails because plaintiff did not identify protected class within Title VII and claim does not provide basis affording relief).

Zolman v. I.R.S., 87 F. Supp. 2d 763 (W.D. Mich. 1999).

Ashiegbu v. Purviance, 76 F. Supp. 2d 824 (S.D. Ohio 1998), judgment aff'd, 194 F.3d 1311 (6th Cir. 1999).

Anderson v. Office of Atty. Gen., Dept. of Justice, 890 F. Supp. 648 (E.D. Mich. 1995) (dismissing pro se complaint).

Seventh Circuit

Arnett v. Webster, 658 F.3d 742, 751 (7th Cir. 2011).

Swanson v. Citibank, N.A., 614 F.3d 400 (7th Cir. 2010).

White v. Monohan, 326 Fed. Appx. 385 (7th Cir. 2009) (pro se plaintiff's complaint construed more liberally with all inferences in his favor).

Henderson v. Sheahan, 196 F.3d 839 (7th Cir. 1999) (court can dismiss pro se complaint for failure to state claim only if it appears that plaintiff can prove no set of facts in support of claim that would entitle him to relief).

"A document filed pro se is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal

pleadings drafted by lawyers." Bey v. Finch, 2022 WL 394699, *1 (N.D. Ind. 2022) (quoting Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)).

Hart v. Amazon.com, Inc., 191 F. Supp. 3d 809 (N.D. Ill. 2016), aff'd, 845 F.3d 802 (7th Cir. 2017).

Quarles v. Merrillville Community School Corp., 2010 WL 4904466, *2 (N.D. Ind. 2010).

Shepard v. Mikulich, 2010 WL 2719107 (N.D. Ind. 2010) ("The Court will review the pro se Plaintiff's Complaint more liberally than it would one that was drafted by a trained attorney.").

James v. Illinois Sexually Dangerous Persons Act, 2009 WL 2567910 (S.D. Ill. 2009), aff'd, 373 Fed. Appx. 619 (7th Cir. 2010).

Perry v. Scaible, 2008 WL 2324641 (E.D. Wis. 2008).

Elizzar v. Meyers, 2004 WL 539986 (N.D. Ill. 2004).

Morgan v. Centers for New Horizons, Inc., 2004 WL 524441 (N.D. Ill. 2004).

Reed v. McBride, 96 F. Supp. 2d 845 (N.D. Ind. 2000).

Craig v. Cohn, 80 F. Supp. 2d 944 (N.D. Ind. 2000).

Moore v. Speybroeck, 74 F. Supp. 2d 850 (N.D. Ind. 1999).

Cleaves v. City of Chicago, 68 F. Supp. 2d 963 (N.D. Ill. 1999).

Johnson v. Collins, 58 F. Supp. 2d 890 (N.D. Ill. 1999), judgment vacated, 5 Fed. Appx. 479 (7th Cir. 2001) (pro se complaint not required to identify correct legal theory).

Lewis v. Cook County Dept. of Corrections, 28 F. Supp. 2d 1073 (N.D. Ill. 1998) (courts must insure pro se complaint given fair and meaningful consideration).

Jones v. Detella, 12 F. Supp. 2d 824 (N.D. Ill. 1998).

Waters v. Brown, 5 F. Supp. 2d 654 (N.D. Ind. 1998), judgment aff'd, 175 F.3d 1022 (7th Cir. 1999).

Zimmerman v. Hoard, 5 F. Supp. 2d 633 (N.D. Ind. 1998).

Jackson v. DeTella, 998 F. Supp. 901 (N.D. Ill. 1998).

Freeman v. Godinez, 996 F. Supp. 822 (N.D. Ill. 1998) (considering allegations outside of pro se plaintiff's complaint).

McLaughlin v. Cook County Dept. of Corrections, 993 F. Supp. 661 (N.D. Ill. 1998).

Naguib v. Illinois Dept. of Professional Regulation, 986 F. Supp. 1082 (N.D. Ill. 1997) (pro se litigants should be given every opportunity to state cognizable claim, but courts need not permit unlimited amendments).

Copeland v. Northwestern Memorial Hosp., 984 F. Supp. 1182 (N.D. Ill. 1997).

Evans v. Allen, 981 F. Supp. 1102 (N.D. Ill. 1997).

Thomas v. Chicago Housing Authority, 981 F. Supp. 558 (N.D. Ill. 1997).

Oswalt v. Godinez, 894 F. Supp. 1181 (N.D. Ill. 1995).

Robinson v. Illinois State Correctional Center (Stateville) Warden, 890 F. Supp. 715 (N.D. Ill. 1995).

Simmons v. Honrath, 883 F. Supp. 371 (E.D. Wis. 1995).

Wilson v. Cook County Bd. of Commissioners, 878 F. Supp. 1163 (N.D. Ill. 1995).

Landfair v. Sheahan, 878 F. Supp. 1106 (N.D. Ill. 1995).

Taylor v. Anderson, 868 F. Supp. 1024 (N.D. Ill. 1994).

Marozsan v. U.S., 849 F. Supp. 617 (N.D. Ind. 1994), judgment aff'd, 90 F.3d 1284 (7th Cir. 1996).

Eighth Circuit

Smith v. St. Bernards Regional Medical Center, 19 F.3d 1254 (8th Cir. 1994).

Kramer v. America's Wholesale Lenders, 2011 WL 577390 (E.D. Mo. 2011).

Callaghan v. Department of Veterans Affairs, 2010 WL 4973731 (E.D. Ark. 2010).

Hollowell v. Hosto, 2010 WL 1416519, *2 (E.D. Ark. 2010), order aff'd as modified, 389 Fed. Appx. 583 (8th Cir. 2010) ("Although pro se complaints are to be liberally construed, 'they still must allege sufficient facts to support the claims advanced.'"), quoting Stone v. Harry, 364 F.3d 912, 914 (8th Cir. 2004).

DePugh v. Clemens, 966 F. Supp. 898 (W.D. Mo. 1997), aff'd, 129 F.3d 121 (8th Cir. 1997).

The complaint was dismissed for violation of Rule 8(a)(2). It was incomprehensible and plaintiff who had completed two years of law school had

capacity to plead correctly. Thomson v. Olson, 866 F. Supp. 1267 (D.N.D. 1994), aff'd, 56 F.3d 69 (8th Cir. 1995).

Ninth Circuit

Litmon v. Harris, 768 F.3d 1237, 1241 (9th Cir. 2014).

Engebretson v. Mahoney, 724 F.3d 1034, 1037 (9th Cir. 2013).

Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th Cir. 2012).

Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012).

Johnson v. Lucent Technologies Inc., 653 F.3d 1000 (9th Cir. 2011), as amended, (Aug. 19, 2011).

Hebbe v. Pliler, 611 F.3d 1202, 1205 (9th Cir. 2010), opinion amended and superseded, 627 F.3d 338 (9th Cir. 2010) ("Because Iqbal incorporated the Twombly pleading standard and Twombly did not alter courts' treatment of pro se filings, we continue to construe pro se filings liberally. This is particularly important where, as in the instant case, a petitioner is a pro se prisoner litigant in a civil rights matter.").

Bird v. Real Time Resolutions, Inc., 183 F. Supp. 3d 1058, 1061 (N.D. Cal. 2016) (court should not dismiss pro se complaint unless court is sure beyond doubt that plaintiff cannot prove claim).

Spreadbury v. Bitterroot Public Library, 2011 WL 4499043 (D. Mont. 2011), report and recommendation adopted, 2011 WL 4499030 (D. Mont. 2011).

Wendt v. Director of Dept. of Revenue and Taxation, 2011 WL 1559830 (D. Guam 2011).

Ellis v. GMAC Mortg., Inc., 2011 WL 1086530 (D. Or. 2011).

Zepeda v. Tate, 2010 WL 4977596 (E.D. Cal. 2010).

Cotton v. Cate, 2010 WL 2867099 (N.D. Cal. 2010), aff'd, 578 Fed. Appx. 712 (9th Cir. 2014) (First and Fourteenth Amendments).

Balthazor v. Union Pacific R.R. Co., 2010 WL 2836956 (D. Ariz. 2010).

Clark v. Sypolt, 2010 WL 2803084 (E.D. Wash. 2010).

Dauven v. U.S. Bank Nat. Ass'n, 2010 WL 2640119, *3 (D. Or. 2010), report and recommendation adopted, 2010 WL 2640115 (D. Or. 2010) ("In cases involving a plaintiff proceeding pro se, courts construe the pleadings liberally and afford the plaintiff the benefit of any doubt. Thus, a pro se litigant is entitled to notice of the

deficiencies in the complaint and an opportunity to amend, unless the complaint's deficiencies cannot be cured by amendment.") (internal citations omitted).

Carter v. Paynter, 2010 WL 430706, *1 (W.D. Wash. 2010) ("On a Rule 12(b)(6) motion to dismiss, the Court must accept all of the material allegations in plaintiff's complaint as true and liberally construe those facts in the light most favorable to plaintiff, as a pro se litigant.").

Anderson v. Fishback, 2009 WL 2423327 (E.D. Cal. 2009).

Hawkins v. San Mateo County Law Library, 2007 WL 1795749 (N.D. Cal. 2007), citing Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007).

Beusgens v. Galloway, 2007 WL 1674097 (D. Or. 2007) (court dismissed pro se complaint despite liberal review without leave to amend).

Swenson v. Bush, 2007 WL 1662363 (D. Idaho 2007) (pro se plaintiff's incoherent complaint was construed liberally but nevertheless was found inadequate; therefore, plaintiff was allowed time to file written response on why complaint should not be dismissed).

Consiglio v. Woodford, 2007 WL 1655496 (E.D. Cal. 2007), report and recommendation adopted, 2007 WL 2326082 (E.D. Cal. 2007).

Moore v. U.S., 193 F.R.D. 647 (N.D. Cal. 2000) (before district court can dismiss complaint of pro se litigant, it must provide notice of deficiencies and opportunity to amend complaint effectively).

Pesci v. I.R.S., 67 F. Supp. 2d 1189 (D. Nev. 1999), aff'd, 225 F.3d 663 (9th Cir. 2000).

Simson v. U.S., 56 F. Supp. 2d 1193 (D. Or. 1999).

Bailey v. I.R.S., 188 F.R.D. 346 (D. Ariz. 1999), aff'd, 232 F.3d 893 (9th Cir. 2000).

Ricotta v. State of Cal., 4 F. Supp. 2d 961 (S.D. Cal. 1998), aff'd, 173 F.3d 861 (9th Cir. 1999) (court must construe pleadings liberally but may not supply essential elements of claim that were not initially pled; vague and conclusory allegations of civil rights violations are not sufficient).

Diaz v. Carlson, 5 F. Supp. 2d 809 (C.D. Cal. 1997), aff'd, 142 F.3d 443 (9th Cir. 1998).

Brian v. Gugin, 853 F. Supp. 358 (D. Idaho 1994), decision aff'd, 46 F.3d 1138 (9th Cir. 1995).

Collins v. Palczewski, 841 F. Supp. 333 (D. Nev. 1993).

Tenth Circuit

Mayfield v. Bethards, 826 F.3d 1252 (10th Cir. 2016).

Childs v. Miller, 713 F.3d 1262, 1264 (10th Cir. 2013).

Kenney v. AG Equipment Co., 462 Fed. Appx. 841, 841 n.1 (10th Cir. 2012).

Watkins v. Craft, 455 Fed. Appx. 853, 854 (10th Cir. 2012) ("Because Mr. Watkins is proceeding pro se, this court reviews the record and construes his pleadings liberally.").

Harrison v. Morton, 490 Fed. Appx. 988 (10th Cir. 2012).

Jallali v. Secretary, U.S. Dept. of Educ., 437 Fed. Appx. 862 (11th Cir. 2011).

Mendia v. City of Wellington, 432 Fed. Appx. 796 (10th Cir. 2011).

McGinnis v. Freudenthal, 426 Fed. Appx. 625 (10th Cir. 2011).

Marshall v. Morton, 421 Fed. Appx. 832 (10th Cir. 2011).

Fournerat v. Wisconsin Law Review, 420 Fed. Appx. 816 (10th Cir. 2011).

Kenney v. Swift Trans. Inc., 410 Fed. Appx. 143, 144 (10th Cir. 2011).

Rocha v. CCCF Admin., 408 Fed. Appx. 141, 143 (10th Cir. 2011) (pro se plaintiff's materials entitled to solicitous construction).

Matthews v. LaBarge, Inc., 407 Fed. Appx. 277, 280 (10th Cir. 2011) (pro se pleadings construed liberally).

Hill v. City of Oklahoma City, 448 Fed. Appx. 814 (10th Cir. 2011).

Wideman v. Garcia, 382 Fed. Appx. 741, 742 (10th Cir. 2010).

Edge v. Payne, 342 Fed. Appx. 395 (10th Cir. 2009).

Castaldo v. Denver Public Schools, 276 Fed. Appx. 839 (10th Cir. 2008).

Beck v. City of Muskogee Police Dept., 195 F.3d 553 (10th Cir. 1999).

Malekzadeh v. Heideman Law Group PC, 185 F.3d 874 (10th Cir. 1999).

Smith v. Kitchen, 156 F.3d 1025 (10th Cir. 1997).

Brown v. Zavaras, 63 F.3d 967 (10th Cir. 1995) (pro se plaintiffs must do more than assert mere conclusions).

Janke v. Price, 43 F.3d 1390 (10th Cir. 1994).

"As to Defendants' first argument, they claim the proposed amendment 'contains only conclusory allegations which do not raise a right to relief above a speculative level.' But, the Court must afford Plaintiffs some leniency as pro se parties, and holds their pleadings to a 'less stringent standard than formal pleadings drafted by lawyers.'" Hirt v. Unified School District No. 287, 308 F. Supp. 3d 1157 (D. Kan. 2018) (citation omitted).

A pro se complaint will be construed more liberally than pleadings drafted by lawyers, but there are limits to that lenience: "A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged." Hastings v. Barbee, 2011 WL 2610132, *2 (D. Colo. 2011), report and recommendation adopted, 2011 WL 2610194 (D. Colo. 2011).

Brown v. Wal-Mart Stores, Inc., 2011 WL 1457950 (D. Kan. 2011), aff'd, 436 Fed. Appx. 835 (10th Cir. 2011).

Campbell v. Milyard, 2010 WL 3023360, *3 (D. Colo. 2010), judgment aff'd, 496 Fed. Appx. 774 (10th Cir. 2012) ("Where the Court 'can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so,' regardless of the [pro se] plaintiff's confusion of legal theories or unfamiliarity with pleading requirements."), quoting Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

White v. Ockey, 241 Fed. Appx. 462 (10th Cir. 2007) (dismissing pro se complaint).

Frank v. Bush, 2010 WL 1408405, *3 (D. Kan. 2010), aff'd, 391 Fed. Appx. 745 (10th Cir. 2010).

Lindsey v. Bowlin, 557 F. Supp. 2d 1225 (D. Kan. 2008).

Ledbetter v. City of Topeka, Kan., 112 F. Supp. 2d 1239 (D. Kan. 2000), aff'd, 61 Fed. Appx. 574 (10th Cir. 2003).

Overton v. U.S., 74 F. Supp. 2d 1034 (D.N.M. 1999), judgment aff'd, 202 F.3d 282 (10th Cir. 2000).

Banks v. Rubin, 72 F. Supp. 2d 1198 (D. Colo. 1999), also published at, 84 A.F.T.R.2d 99-5529, 1999 WL 674575 (D. Colo. 1999).

Marrie v. Nickels, 70 F. Supp. 2d 1252 (D. Kan. 1999).

Smith v. Plati, 56 F. Supp. 2d 1195 (D. Colo. 1999), aff'd, 258 F.3d 1167 (10th Cir. 2001) (if court reasonably can construe pro se complaint as stating claim, it should do so).

Van Deelen v. City of Eudora, Kan., 53 F. Supp. 2d 1223 (D. Kan. 1999) (court should allow pro se plaintiff reasonable opportunity to amend complaint but should not assume role of advocate).

Walton v. Shanelec, 19 F. Supp. 2d 1209 (D. Kan. 1998) (dismissing complaint).

Wesley v. Don Stein Buick, Inc., 996 F. Supp. 1299 (D. Kan. 1998) (if pro se plaintiff's complaint reasonably can be read to state claim upon which plaintiff could prevail, court should deny motion to dismiss despite plaintiff's failure to cite proper authority, confusion of various legal theories, or unfamiliarity with pleading requirements).

Dickerson v. Leavitt Rentals, 995 F. Supp. 1242 (D. Kan. 1998), aff'd, 153 F.3d 726 (10th Cir. 1998).

Moll v. Carter, 179 F.R.D. 609 (D. Kan. 1998) (court should dismiss pro se claims that are supported only by vague and conclusory allegations).

Roemer v. Security Bancshares, Inc., 978 F. Supp. 988 (D. Kan. 1997).

De Young v. State of Kan., 890 F. Supp. 949 (D. Kan. 1995), judgment aff'd, 69 F.3d 547 (10th Cir. 1995).

Dees v. Vendel, 856 F. Supp. 1531 (D. Kan. 1994).

George v. HEK America, Inc., 157 F.R.D. 489 (D. Colo. 1994).

Goss v. Sullivan, 839 F. Supp. 1532 (D. Wyo. 1993).

Eleventh Circuit

Lane v. Guaranty Bank, 552 Fed. Appx. 934, 936 (11th Cir. 2014).

Spaulding v. Woodall, 551 Fed. Appx. 984, 986 (11th Cir. 2014).

Tennyson v. ASCAP, 477 Fed. Appx. 608 (11th Cir. 2012) (per curiam).

McCauley v. Georgia, 466 Fed. Appx. 832, 835 (11th Cir. 2012).

Kendall v. Thaxton Road LLC, 443 Fed. Appx. 388 (11th Cir. 2011).

Serpentfoot v. Rome City Com'n, 426 Fed. Appx. 884 (11th Cir. 2011).

Martinez v. Ashtin Leasing, Inc., 417 Fed. Appx. 883, 884 (11th Cir. 2011).

Ausar-El ex rel. Small, Jr. v. BAC (Bank of America) Home Loans Servicing LP, 448 Fed. Appx. 1 (11th Cir. 2011).

Porter v. Duval County School Bd., 406 Fed. Appx. 460, 462 (11th Cir. 2010) (pleadings for pro se plaintiffs should be construed liberally but court should not rewrite otherwise deficient pleading to sustain action).

Carvel v. Godley, 404 Fed. Appx. 359, 361 (11th Cir. 2010).

Jemison v. Mitchell, 380 Fed. Appx. 904 (11th Cir. 2010) (allowing pro se plaintiff leave to amend his complaint).

Peart v. Shippie, 345 Fed. Appx. 384 (11th Cir. 2009).

Sarver v. Jackson, 344 Fed. Appx. 526 (11th Cir. 2009).

Bell v. Florida Highway Patrol, 325 Fed. Appx. 758 (11th Cir. 2009).

Hindman v. Healy, 278 Fed. Appx. 893 (11th Cir. 2008).

GJR Investments, Inc. v. County of Escambia, Fla., 132 F.3d 1359 (11th Cir. 1998) (courts should show leniency to pro se litigants but should not serve as de facto counsel or rewrite otherwise deficient pleadings).

"Courts afford a liberal construction to a pro se litigant's pleadings, holding them to a more lenient standard than those drafted by an attorney. Erickson v. Pardus, 551 U.S. 89, 94 (2007); Haines v. Kerner, 404 U.S. 519, 520 (1972). However, this liberal construction does not mean that courts have a duty to re-write the complaint. Snow v. DirecTV, Inc., 450 F.3d 1314, 1320 (11th Cir. 2006)." Denson v. Riley, 2023 WL 3856714, *1 (S.D. Ga. 2023), report and recommendation adopted, 2023 WL 3852808 (S.D. Ga. 2023).

Goodykoontz v. Diamond's Gentleman's Club, 187 F. Supp. 3d 1332 (S.D. Ala. 2016) (since plaintiff would be allowed to replead to include correct definition of employer under ADEA, court construed complaint liberally and found factual allegations qualified defendant as employer).

Ford v. Central Loan Admin., 2011 WL 4702912 (S.D. Ala. 2011) (pro se pleadings are entitled to deferential review).

Hennington v. Bank of America, 2010 WL 5860296 (N.D. Ga. 2010), report and recommendation adopted, 2011 WL 705173 (N.D. Ga. 2011).

Crim v. Manalich, 2010 WL 2757223, *1 (M.D. Fla. 2010) ("The Court may consider documents which are central to plaintiff's claim whose authenticity is not challenged, whether the document is physically attached to the complaint or not, without converting the motion into one for summary judgment.").

Holland v. Pilot Travel Centers, LLC, 2010 WL 2732047, *3 (M.D. Ga. 2010) ("The Court affords a pro se plaintiff wide latitude when construing his pleadings

and papers. Even so, a pro se litigant is not exempt from complying with relevant rules of procedural and substantive law.") (internal citations omitted).

Muhammad v. Option One Mortg. Corp., 2010 WL 2712250, *3 (S.D. Ala. 2010).

Washington v. Department of Children and Families, 2007 WL 1625799 (M.D. Fla. 2007), aff'd in part, vacated in part, 256 Fed. Appx. 326 (11th Cir. 2007).

Gibbs v. Republic Tobacco, L.P., 119 F. Supp. 2d 1288 (M.D. Fla. 2000).

Harris v. Bush, 106 F. Supp. 2d 1272 (N.D. Fla. 2000).

Although the pleadings of a pro se litigant should be construed liberally, the pro se litigant still must meet the minimal pleading standards. Mayoral-Amy v. BHI Corp., 180 F.R.D. 456 (S.D. Fla. 1998).

D.C. Circuit

Although a pro se complaint is read less stringently than a complaint prepared by lawyers, it still must plead factual matter that leads to an inference of misconduct above the merely possible. Jones v. Horne, 634 F.3d 588, 596 (D.C. Cir. 2011).

Razzoli v. Federal Bureau of Prisons, 230 F.3d 371, 343 (D.C. Cir. 2000) (overruled by, Davis v. U.S. Sentencing Com'n, 716 F.3d 660 (D.C. Cir. 2013)).

Henthorn v. Department of Navy, 29 F.3d 682, 308 (D.C. Cir. 1994).

Stewart v. Federal Communications Commission, 177 F. Supp. 3d 158 (D.D.C. 2016), order modified on reconsideration, 189 F. Supp. 3d 170 (D.D.C. 2016).

Hillware v. Snyder, 151 F. Supp. 3d 154, 158 (D.D.C. 2015) (court considered plaintiff's amended complaint as operative complaint on Rule 12(b)(6) motion, since plaintiff submitted amendment "to clarify" allegations in original complaint and "pleadings must be construed as to do justice").

Mizell v. SunTrust Bank, 26 F. Supp. 3d 80 (D.D.C. 2014).

Budik v. Howard University Hospital, 986 F. Supp. 2d 1 (D.D.C. 2013).

Morrow v. U.S., 723 F. Supp. 2d 71 (D.D.C. 2010).

Stoyanov v. Winter, 643 F. Supp. 2d 4 (D.D.C. 2009), aff'd, 2010 WL 605083 (D.C. Cir. 2010).

Keith v. U.S. Railroad Retirement Bd., 284 F. Supp. 2d 31 (D.D.C. 2003).

Croskey v. U.S. Office of Special Counsel, 9 F. Supp. 2d 8 (D.D.C. 1998), aff'd, 1999 WL 58614 (D.C. Cir. 1999).

Pro se complaints are held to a less exacting scrutiny than pleadings drafted by attorneys, but they must present claims upon which relief may be granted. Slaby v. Fairbridge, 3 F. Supp. 2d 22 (D.D.C. 1998).

Nicastro v. Clinton, 882 F. Supp. 1128 (D.D.C. 1995), aff'd, 84 F.3d 1446 (D.C. Cir. 1996).

Federal Circuit

Pieczenik v. Bayer Corp., 474 Fed. Appx. 766, 770 (Fed. Cir. 2012) ("In general, pro se litigants are held to a lesser standard than pleadings drafted by lawyers when determining whether a complaint should be dismissed for failure to state a claim.").

See also

Pro se complaints are treated more leniently by the courts on a Rule 12(b)(6) motion to dismiss. The standard in the Seventh Circuit for relatively straightforward, pro se pleadings is that they "can be dismissed for failure to state a claim only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Nikolic v. St. Catherine Hosp., 2011 WL 4537911, *3 (N.D. Ind. 2011) (internal quotation marks omitted), quoting Henderson v. Sheahan, 196 F.3d 839, 845-846 (7th Cir. 1999).

Massey v. Fischer, 2004 WL 1908220 (S.D. N.Y. 2004) (court should consider all of pro se plaintiff's papers and construe them liberally).

See §§ 1215 n.11 and 1217 n.12 (for further description of pro se pleading standards).

Compare

"Lastly, while the Court liberally construes pro se complaints * * * it does not act as the inmate's advocate, sua sponte developing statutory and constitutional claims the inmate failed to clearly raise on the face of his complaint." Starks v. Abbasi, 2009 WL 2959747, *1 (E.D. Va. 2009).

75 **Civil rights claims**

Tarshis v. Riese Organization, 211 F.3d 30 (2d Cir. 2000) (abrogated by, Swierkiewicz v. Sorema N. A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)).

Perry v. McGinnis, 209 F.3d 597 (6th Cir. 2000) (court of appeals will scrutinize with special care any dismissal of complaint filed under civil rights statute).

Cruz v. Gomez, 202 F.3d 593 (2d Cir. 2000).

Flaherty v. Lang, 199 F.3d 607 (2d Cir. 1999) (reluctance to dismiss applies with greater force when plaintiff alleges civil rights violations).

Vital v. Interfaith Medical Center, 168 F.3d 615 (2d Cir. 1999).

Chance v. Armstrong, 143 F.3d 698 (2d Cir. 1998).

Irish Lesbian and Gay Organization v. Giuliani, 143 F.3d 638 (2d Cir. 1998).

Odermatt v. Way, 188 F. Supp. 3d 198, 214 (E.D. N.Y. 2016), aff'd, 694 Fed. Appx. 842 (2d Cir. 2017) (to survive motion to dismiss First Amendment retaliation complaint, plaintiff must include alleged facts demonstrating (1) speech or conduct was protected, (2) defendant took adverse action against plaintiff, (3) there was causal connection between protected speech and adverse action).

Rauen v. City of Miami, 2007 WL 686609 (S.D. Fla. 2007).

Lilienthal v. City of Suffolk, 275 F. Supp. 2d 684 (E.D. Va. 2003) (when motion to dismiss tests sufficiency of civil rights complaint, court must be especially solicitous of wrongs alleged).

Mansoor v. County of Albemarle, 124 F. Supp. 2d 367 (W.D. Va. 2000).

Lugo v. Senkowski, 114 F. Supp. 2d 111 (N.D. N.Y. 2000).

Ericson v. City of Meriden, 113 F. Supp. 2d 276 (D. Conn. 2000), decision aff'd, 55 Fed. Appx. 11 (2d Cir. 2002).

Bendel v. Westchester County Health Care Corp., 112 F. Supp. 2d 324 (S.D. N.Y. 2000).

People United for Children, Inc. v. City of New York, 108 F. Supp. 2d 275 (S.D. N.Y. 2000).

Taylor v. Barnett, 105 F. Supp. 2d 483 (E.D. Va. 2000).

Niagra Mohawk Power Corp. v. Consolidated Rail Corp., 97 F. Supp. 2d 454 (N.D. N.Y. 2000).

Rivera Borrero v. Rivera Correa, 93 F. Supp. 2d 122 (D.P.R. 2000).

Schaefer v. Erie County Dept. of Social Services, 82 F. Supp. 2d 114 (W.D. N.Y. 2000).

Webb v. Goord, 197 F.R.D. 98 (S.D. N.Y. 2000).

McGrath v. Johnson, 67 F. Supp. 2d 499 (E.D. Pa. 1999), judgment aff'd, 35 Fed. Appx. 357 (3d Cir. 2002).

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Fernandez v. City of Poughkeepsie, 67 F. Supp. 2d 222 (S.D. N.Y. 1999).

Brown v. Stone, 66 F. Supp. 2d 412 (E.D. N.Y. 1999).

Bailey v. I.R.S., 188 F.R.D. 346 (D. Ariz. 1999), aff'd, 232 F.3d 893 (9th Cir. 2000).

Dockery v. Tucker, 73 F. Supp. 2d 224 (E.D. N.Y. 1998).

Ricotta v. State of Cal., 4 F. Supp. 2d 961 (S.D. Cal. 1998), aff'd, 173 F.3d 861 (9th Cir. 1999) (court must construe pleadings liberally but may not supply essential elements of claim that were not initially pled; vague and conclusory allegations of civil rights violations are not sufficient).

Alba v. Ansonia Bd. of Educ., 999 F. Supp. 687 (D. Conn. 1998).

Bender v. Suburban Hosp., 998 F. Supp. 631 (D. Md. 1998), aff'd, 159 F.3d 186 (4th Cir. 1998).

Alston v. Virginia High School League, Inc., 176 F.R.D. 220 (W.D. Va. 1997).

But see

Adams v. Franklin, 111 F. Supp. 2d 1255 (M.D. Ala. 2000) (Eleventh Circuit tightens pleading requirements in civil rights cases that implicate qualified immunity).

Taylor v. Alabama, 95 F. Supp. 2d 1297 (M.D. Ala. 2000) (Eleventh Circuit imposes tightened pleading requirements for fraud, and court should be guided by these requirements when ruling on Rule 12(b)(6) motion).

Pollack v. Nash, 58 F. Supp. 2d 294 (S.D. N.Y. 1999) (§ 1983 claims held to heightened pleading standard).

See generally

Section 1230 contains an extended discussion of the protections that civil rights claims receive under Rule 12(b)(6) as well as the attempts made by some courts to impose heightened scrutiny on such claims and their reaction to the Supreme Court's rejection of these practices in the Swierkiewicz case.

Spencer, Pleading Civil Rights Claims in the Post-Conley Era, 52 Howard L.J. 99 (2008) (discussing the pleading of civil rights claims in the wake of the Twombly decision).

See also

Metts v. Murphy, 363 F.3d 8 (1st Cir. 2004) (most cases brought under Section 2 of Voting Rights Act resolved by summary judgment or trial, not by motion to dismiss).

76 **Summary judgment**

Swierkiewicz v. Sorema N. A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).

The district court should give the plaintiff the full protection a federal court claim should receive at least until it can see what the real facts are; if, after the full development of the facts, the plaintiff obviously is not entitled to relief, the claim may be washed out on summary judgment, by motion for directed verdict, or by j.n.o.v. Reeves v. City of Jackson, Mississippi, 532 F.2d 491 (5th Cir. 1976).

In reversing a dismissal for failure to state a claim, Judge Brown stated that "the Trial Court failed to require the parties to exploit the marvelous tools now available by summary judgment or otherwise to demonstrate whether the facts, as distinguished from what the lawyers said the facts would be, would bear out a claim and if so to what extent." Barber v. Motor Vessel "Blue Cat", 372 F.2d 626, 629 (5th Cir. 1967).

Shull v. Pilot Life Ins. Co., 313 F.2d 445 (5th Cir. 1963).

Citizens for Honesty and Integrity in Regional Planning v. County of San Diego, 258 F. Supp. 2d 1132 (S.D. Cal. 2003), appeal dismissed and remanded, 399 F.3d 1067 (9th Cir. 2005) (question of whether federal spending law preempted local wetlands regulations was better handled in context of summary judgment rather than motion to dismiss).

Navarro v. F.D.I.C., 254 F. Supp. 2d 1013 (N.D. Ill. 2003), rev'd and remanded, 371 F.3d 979 (7th Cir. 2004) (notice pleading relies on liberal discovery rules and summary judgment motions to define disputes and to dispose of unmeritorious claims).

See §§ 2711 to 2742 for further discussion of summary judgment.

See also

Prier v. Steed, 85 Empl. Prac. Dec. (CCH) P 41665, 2004 WL 624971 (D. Kan. 2004).

McKenna v. City of Homewood, 295 Ala. 128, 324 So. 2d 770, 772 (1975), **quoting Wright & Miller.**

Trabits v. First Nat. Bank of Mobile, 295 Ala. 85, 323 So. 2d 353, 358 (1975), **quoting Wright & Miller.**

But see

Gray v. Petoseed Co., Inc., 985 F. Supp. 625 (D.S.C. 1996), aff'd, 129 F.3d 1259 (4th Cir. 1997).

77 **Insuperable bar to relief**

B & H Medical, L.L.C. v. ABP Admin., Inc., 526 F.3d 257 (6th Cir. 2008), subsequent determination, 534 F.3d 801 (6th Cir. 2008).

Benzman v. Whitman, 523 F.3d 119 (2d Cir. 2008) (CERCLA citizen-suit provision did not authorize judicial review of agency action).

Amadasu v. The Christ Hosp., 514 F.3d 504 (6th Cir. 2008) (Section 1985 claims barred by "intracorporate conspiracy" doctrine, which states that if two defendants are from same collective entity, no conspiracy is possible).

Windsor v. Whitman-Walker Clinic, Inc., 279 Fed. Appx. 9 (D.C. Cir. 2008) (firefighters cannot sue for injuries sustained in line of duty).

Public Utility Dist. No. 1 of Grays Harbor County Wash. v. IDACORP Inc., 379 F.3d 641 (9th Cir. 2004) (claims preempted).

Ontario Public Service Employees Union Pension Trust Fund v. Nortel Networks Corp., 369 F.3d 27 (2d Cir. 2004) (plaintiffs lacked standing).

Denny's, Inc. v. Cake, 364 F.3d 521 (4th Cir. 2004) (Anti-Injunction Act bars suit).

Spain v. Brown & Williamson Tobacco Corp., 363 F.3d 1183 (11th Cir. 2004) (state claims preempted by federal statute).

Thompson v. Illinois Dept. of Professional Regulation, 300 F.3d 750 (7th Cir. 2002).

Thomas v. Publishers Clearing House, Inc., 29 Fed. Appx. 319 (6th Cir. 2002), **quoting Wright & Miller**.

Schmedding v. Tnemec Co., Inc., 187 F.3d 862 (8th Cir. 1999).

Howell v. Father Maloney's Boys' Haven, Inc., 424 F. Supp. 3d 511, 515 (W.D. Ky. 2020), aff'd, 976 F.3d 750 (6th Cir. 2020).

78 **Clearly show no claim**

Kellogg Brown & Root Services, Inc. v. U.S., 728 F.3d 1348, 1365 (Fed. Cir. 2013), opinion corrected on denial of reh'g, 563 Fed. Appx. 769 (Fed. Cir. 2014).

The plaintiff "can unwittingly plead himself out of court by asserting facts that preclude relief." White v. Monohan, 326 Fed. Appx. 385, 386 (7th Cir. 2009).

Tamayo v. Blagojevich, 526 F.3d 1074 (7th Cir. 2008) (plaintiff pled herself out of court by including facts in her complaint that undermined her claims).

Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969 (9th Cir. 2008).

C.R. ex rel. Reilly v. Boy Scouts of America, Troop 223, 280 Fed. Appx. 669 (9th Cir. 2008).

Insomnia Inc. v. City of Memphis, Tennessee, 278 Fed. Appx. 609 (6th Cir. 2008).

MM&S Financial, Inc. v. National Ass'n of Securities Dealers, Inc., 364 F.3d 908 (8th Cir. 2004) (no private right of action exists against self-regulatory organization).

79 **Massey case**
464 F.3d 642 (7th Cir. 2006).

80 **Negligence action**
Smith v. Vincent, 109 F. Supp. 451 (S.D. Fla. 1952), judgment aff'd, 204 F.2d 945 (5th Cir. 1953).

Compare
Erie Insurance Company v. W.M. Barr & Company, Inc., 523 F. Supp. 3d 1 (D.D.C. 2021) ("[A]t the motion to dismiss stage, where 'it is not absolutely clear that the defendant's negligence *could not* have been a proximate cause of the harm asserted by the plaintiff * * * the court must deny [the plaintiff's] motion to dismiss.").

81 **Affirmative defense**
Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007), **citing Wright & Miller.**

Puri v. Khalsa, 844 F.3d 1152, 1158 (9th Cir. 2017) (stating that, "[a]s an affirmative defense, the ministerial exception can serve as the basis for dismissing a complaint at the pleadings stage under Rule 12(b)(6) only when the elements of the defense appear on the face of the complaint" but then finding that it was "not apparent on the face of the complaint that the disputed board positions [were] 'ministerial'" because "the pleadings [did] not allege the board members [had] any ecclesiastical duties or privileges," "the pleadings [did] not allege the board members [were] held out a religious leaders, either by their respective employers or by the board members themselves," and "the pleadings [did] not show the board positions [were] religious in substance, whether by requiring 'significant religious training,' by signifying ecclesiastical merit, or otherwise"), **citing Wright & Miller**, for additional opinion, see, 674 Fed. Appx. 679 (9th Cir. 2017).

Bohus v. Restaurant.com, Inc., 784 F.3d 918, 923 n.2 (3d Cir. 2015) (circuit court will affirm district court's dismissal of complaint under Rule 12(b)(6) on basis of affirmative defense only because defense was apparent on face of complaint).

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In cases in which the judicial estoppel defense appears on the face of the pleadings and in judicially noticeable facts, it may be considered on a motion to dismiss. U.S. ex rel. Long v. GSDMIdea City, L.L.C., 798 F.3d 265, 275 (5th Cir. 2015).

"The ministerial exception is an affirmative defense that plaintiffs should first assert in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 833 (6th Cir. 2015).

Moran v. Ocwen Loan Servicing, L.L.C., 560 Fed. Appx. 277, 280 n.1 (5th Cir. 2014), **citing Wright & Miller**.

Rivera v. Peri & Sons Farms, Inc., 735 F.3d 892, 901 (9th Cir. 2013), **citing Wright & Miller**.

Simmons v. Sabine River Authority Louisiana, 732 F.3d 469, 473 (5th Cir. 2013) (federal preemption).

Miller v. BAC Home Loans Servicing, L.P., 726 F.3d 717, 726 (5th Cir. 2013) (claim may be subject to Rule 12(b)(6) motion properly where complaint itself establishes applicability of affirmative defense), citing Fisher v. Halliburton, 667 F.3d 602, 608-609 (5th Cir. 2012).

Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc., 719 F.3d 498, 509 (6th Cir. 2013), vacated and remanded, 575 U.S. 175, 135 S. Ct. 1318, 191 L. Ed. 2d 253 (2015) ("loss causation," which refers to causal connection between defendant's material misrepresentation or omission and plaintiff's loss, is affirmative defense to claims under § 11 of Securities Act of 1933).

Lutz v. Chesapeake Appalachia, L.L.C., 717 F.3d 459 (6th Cir. 2013) (statute of limitations is affirmative defense).

Independent Trust Corp. v. Stewart Information Services Corp., 665 F.3d 930, 935 (7th Cir. 2012) ("[W]hen a plaintiff's complaint nonetheless sets out all of the elements of an affirmative defense, dismissal under Rule 12(b)(6) is appropriate.").

Cole v. Secretary Dept. of Corrections, 451 Fed. Appx. 827, 828 (11th Cir. 2011) ("Rule 12(b)(6) allows for dismissal when an affirmative defense appears on the face of the complaint * * *.").

Yarnell v. Transamerica Life Ins. Co., 447 Fed. Appx. 664 (6th Cir. 2011).

Surgenex, LLC v. Predictive Therapeutics, LLC, 462 F. Supp. 3d 1160, 1173 (D. Utah 2020), on reconsideration in part, 2020 WL 8514831 (D. Utah 2020), **quoting Wright & Miller**.

The notice requirement of the D.C. Whistleblower Act granted the defendant an affirmative defense that resulted with a dismissal under Rule 12(b)(6). Winder v. Erste, 566 F.3d 209 (D.C. Cir. 2009).

Martin v. Snyder, 329 F.3d 919 (7th Cir. 2003) (qualified immunity of state correctional officials).

Bullington v. United Air Lines, Inc., 186 F.3d 1301 (10th Cir. 1999) (rejected by, Raad v. Alaska State Com'n for Human Rights, 86 P.3d 899 (Alaska 2004)), **citing Wright & Miller.**

Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67 (2d Cir. 1998).

ALA, Inc. v. CCAIR, Inc., 29 F.3d 855 (3d Cir. 1994), **citing Wright & Miller.**

Kansa Reinsurance Co., Ltd. v. Congressional Mortg. Corp. of Texas, 20 F.3d 1362 (5th Cir. 1994).

Fortner v. Thomas, 983 F.2d 1024 (11th Cir. 1993).

Brown v. Crawford County, Ga., 960 F.2d 1002 (11th Cir. 1992) (absolute immunity of government officials engaged in legislative activity).

Trevino v. Union Pacific R. Co., 916 F.2d 1230, 1234 (7th Cir. 1990), **citing Wright & Miller.**

Tele-Communications of Key West, Inc. v. U.S., 757 F.2d 1330, 244 (D.C. Cir. 1985).

Miller v. Shell Oil Co., 345 F.2d 891 (10th Cir. 1965).

Williams v. Murdoch, 330 F.2d 745 (3d Cir. 1964).

A defense of privilege raised on the face of the complaint required its dismissal. Wallingford v. Zenith Radio Corp., 310 F.2d 693 (7th Cir. 1962).

Although Rule 8(c) requires affirmative defenses to be pleaded, there is general agreement that the defense of limitations or laches may be asserted by a motion to dismiss for failure to state a claim provided that the complaint shows affirmatively that the claim is barred. Herron v. Herron, 255 F.2d 589 (5th Cir. 1958).

The defense of res judicata usually should be pleaded, but when all the relevant facts are shown by the court's own records, an answer is not required and the defense may be raised by a motion to dismiss. W.E. Hedger Transp. Corp. v. Ira S. Bushey & Sons, 186 F.2d 236 (2d Cir. 1951).

Butcher v. United Elec. Coal Co., 174 F.2d 1003 (7th Cir. 1949).

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e-ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265, 1272 (M.D. Fla. 2016).

In re: Whole Foods Market, Inc., 163 F. Supp. 3d 385 (W.D. Tex. 2016) (federal preemption).

The plaintiff's RICO claims were dismissed because enforcement would intrude on "comprehensive regulatory schemes put into place by the states" to regulate the insurance industry, as prohibited by the McCarran-Ferguson Act. Ludwick v. Harbinger Group, Inc., 161 F. Supp. 3d 769, 775 (W.D. Mo. 2016), aff'd, 854 F.3d 400 (8th Cir. 2017).

Poirier v. Massachusetts Department of Corrections, 160 F. Supp. 3d 399, 404 (D. Mass. 2016), on reconsideration, 186 F. Supp. 3d 66 (D. Mass. 2016), aff'd, 2018 WL 11337451 (1st Cir. 2018).

Federal National Mortgage Association v. Quicksilver LLC, 155 F. Supp. 3d 535, 545 (M.D. N.C. 2015) (statute of limitations defense at pleading stage must demonstrate all facts necessary on face of complaint).

Taylor v. City of New York, 207 F. Supp. 3d 293 (S.D. N.Y. 2016).

Conklin v. Jefferson County Board of Education, 205 F. Supp. 3d 797 (N.D. W. Va. 2016).

Terry v. Chicago Police Department, 200 F. Supp. 3d 719 (N.D. Ill. 2016).

"Although affirmative defenses must generally be pled in the defendant's answer, not argued on a motion to dismiss, there are exceptions where: (i) the defendant asserts an immunity defense—the courts handle these cases differently than other motions to dismiss; and (ii) where the facts establishing the affirmative defense are apparent on the face of the complaint." Saenz v. Lovington Mun. School Dist., 105 F. Supp. 3d 1271, 1289 (D.N.M. 2015) (internal citations omitted), **citing Wright & Miller**.

"Unless the complaint sets forth conclusively that the elements of the affirmative defense exist, dismissal under 12(b)(6) is not appropriate." Rivas v. Levy, 2015 WL 718271, *9 (N.D. Ill. 2015).

"[W]hen it appears from the face of the complaint itself that the limitation period has run, a limitations defense may properly be asserted through a Rule 12(b)(6) motion to dismiss." Rollins v. City of Albert Lea, 79 F. Supp. 3d 946, 963 (D. Minn. 2014).

International Aerobatics Club Chapter 1 v. City of Morris, 76 F. Supp. 3d 767, 780-783 (N.D. Ill. 2014) (federal preemption).

"Complaints need not anticipate affirmative defenses, but a court may dismiss a suit on the basis of a valid affirmative defense that is obvious from the face of the complaint." Toney v. Quality Resources, Inc., 75 F. Supp. 3d 727, 734 (N.D. Ill. 2014) (internal citations omitted).

"A court may dismiss a claim under Rule 12(b)(6) on the basis of an affirmative defense only if the affirmative defense is apparent on the face of the complaint." Christenson v. Freeman Health System, 71 F. Supp. 3d 964, 967 (W.D. Mo. 2014) (official immunity is considered affirmative defense under Missouri law) (internal quotations omitted).

TIB—The Independent BankersBank v. Canyon Community Bank, 13 F. Supp. 3d 661 (N.D. Tex. 2014).

Franklin v. City of Slidell, 936 F. Supp. 2d 691, 716-718 (E.D. La. 2013) (declined to dismiss complaint under Americans with Disabilities Act on account of business-necessity exception).

Image Masters, Inc. v. Chase Home Finance, 489 B.R. 375, 391 (E.D. Pa. 2013) ("[A] complaint 'may be subject to dismissal under Rule 12(b)(6) when an affirmative defense * * * appears on its face.' * * * When facts or matters outside of the complaint are necessary to establish the affirmative defense, however, raising it under Rule 12(b)(6) is usually not permitted."), quoting Leveto v. Lapina, 258 F.3d 156, 161 (3d Cir. 2001); citing Worldcom, Inc. v. Graphnet, Inc., 343 F.3d 651, 657 (3d Cir. 2003).

Mills-Craddock v. Gates, 2012 WL 3594634, *2 (E.D. N.C. 2012), **citing Wright & Miller**.

Frees v. Duby, 2010 WL 4923535, *1 n.1 (W.D. Mich. 2010), **citing Wright & Miller**.

Ambulatory Infusion Therapy Specialists, Inc. v. Aetna Life Ins. Co., 2006 WL 2521411 (S.D. Tex. 2006), **citing Wright & Miller.**

Adams v. Crystal City Marriott Hotel, 2004 WL 744489 (S.D. N.Y. 2004), **quoting Wright & Miller**.

In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation, 289 F. Supp. 2d 429 (S.D. N.Y. 2003).

In re Estate of Molina-Velez v. R.J. Reynolds Tobacco Co., 286 F. Supp. 2d 185 (D.P.R. 2003).

In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation, 2003 WL 21036085 (S.D. N.Y. 2003) (preemption by Securities Litigation Uniform Standards Act).

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Ingram v. Rencor Controls, Inc., 217 F. Supp. 2d 141 (D. Me. 2002).

Hutchison v. Brookshire Bros., Ltd., 205 F. Supp. 2d 629 (E.D. Tex. 2002).

Gray v. Metts, 203 F. Supp. 2d 426 (D. Md. 2002), **citing Wright & Miller.**

Swedish Civil Aviation Admin. v. Project Management Enterprises, Inc., 190 F. Supp. 2d 785 (D. Md. 2002), **citing Wright & Miller.**

The individual defendants' affirmative defenses of absolute and qualified immunity were raised on, and thus reviewable on, a Rule 12(b)(6) motion. T.S. Haulers, Inc. v. Town of Riverhead, 190 F. Supp. 2d 455 (E.D. N.Y. 2002), **citing Wright & Miller.**

"Although a motion pursuant to Rule 12(b)(6) invites an inquiry into the legal sufficiency of the complaint, not an analysis of potential defenses to the claims set forth therein, dismissal nevertheless is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense." Eniola v. Leasecomm Corp., 214 F. Supp. 2d 520 (D. Md. 2002), **citing Wright & Miller** (Chasanow, J.).

U.S. ex rel. Coppock v. Northrop Grumman Corp., 2002 WL 1796979 (N.D. Tex. 2002).

Although a Rule 12(b)(6) dismissal ordinarily is determined by whether the facts alleged in the complaint give rise to a cause of action, a claim also may be dismissed if a successful affirmative defense appears clearly on the face of the pleadings. Taylor v. Maple Ave. Economic Development Corp., 2002 WL 1758189 (N.D. Tex. 2002).

CSR Ltd. v. Federal Ins. Co., 40 F. Supp. 2d 559 (D.N.J. 1998).

Myers v. Guardian Life Ins. Co. of America, Inc., 5 F. Supp. 2d 423 (N.D. Miss. 1998).

Hoopla Sports and Entertainment, Inc. v. Nike, Inc., 947 F. Supp. 347 (N.D. Ill. 1996).

Torrie By and Through Torrie v. Cwayna, 841 F. Supp. 1434 (W.D. Mich. 1994).

Three Crown Ltd. Partnership v. Caxton Corp., 817 F. Supp. 1033 (S.D. N.Y. 1993).

Kentucky Cent. Life Ins. Co. v. LeDuc, 814 F. Supp. 832 (N.D. Cal. 1992), **citing Wright & Miller.**

Coplin and Associates, Inc. v. U.S., 814 F. Supp. 643 (W.D. Mich. 1992), judgment aff'd, 27 F.3d 566 (6th Cir. 1994).

Morton v. City of Little Rock, 728 F. Supp. 543 (E.D. Ark. 1989), judgment aff'd, 934 F.2d 180 (8th Cir. 1991).

See also

Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 690 n.1 (7th Cir. 2012) ("Though district courts have granted Rule 12(b)(6) motions on the basis of affirmative defenses and this court has affirmed those dismissals, we have repeatedly cautioned that the proper heading for such motions is Rule 12(c), since an affirmative defense is external to the complaint.").

Lecrenski Bros. Inc. v. Johnson, 312 F. Supp. 2d 117 (D. Mass. 2004) (motion to dismiss granted because plaintiff lacked standing).

The procedures for raising affirmative defenses by motion are discussed in § 1277.

But see

The defense of laches must be made affirmatively under Rule 8(c), and Rule 12(b) requires that such an affirmative defense be made by a responsive pleading. Apex Liquors, Inc. v. District of Columbia, 303 F.2d 206, 112 (D.C. Cir. 1962).

82 **Clear indication necessary**

"Whether a particular ground for opposing a claim may be the basis for dismissal for failure to state a claim depends on whether the allegations in the complaint suffice to establish that ground, not on the nature of the ground in the abstract." Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 921, 166 L. Ed. 2d 798 (2007), citing Leveto v. Lapina, 258 F.3d 156, 161 (3d Cir. 2001).

"[F]ailure to exhaust is an affirmative defense that a defendant must raise. And while affirmative defenses, including non-exhaustion, can be appropriately asserted on a 12(b)(6) motion, dismissal on such a basis is appropriate only if the defense is evident on the face of the complaint." Luebano v. Office Depot, L.L.C., 2023 WL 4249268, *3 (5th Cir. 2023).

Rule 12(b)(6) dismissal may also "'be appropriate based on a successful affirmative defense,' provided that the affirmative defense 'appear[s] on the face of the complaint.'" Basic Cap. Mgmt. v. Dynex Cap., Inc., 976 F.3d 585, 588 (5th Cir. 2020) (quoting EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank, NA, 467 F.3d 466, 470 (5th Cir. 2006)).

Burton v. Ghosh, 961 F.3d 960, 964-965 (7th Cir. 2020), **citing Wright & Miller**.

"[A]lthough a plaintiff need not anticipate or overcome affirmative defenses such as those based on the statute of limitations, if a plaintiff alleges facts sufficient to establish a statute of limitations defense, the district court may dismiss the

complaint on that ground." O'Gorman v. City of Chicago, 777 F.3d 885, 889 (7th Cir. 2015).

"Dismissal under Rule 12(b)(6) on res judicata grounds is appropriate when the elements of res judicata are apparent on the face of the pleadings." Murry v. Gen. Servs. Admin., 553 Fed. Appx. 362, 364 (5th Cir. 2014) (citing Kansa Reinsurance Co. v. Cong. Mortg. Corp. of Tex., 20 F.3d 1362, 1366 (5th Cir. 1994)).

Waugh Chapel South, LLC v. United Food and Commercial Workers Union Local 27, 728 F.3d 354, 359-360 (4th Cir. 2013) ("The district court, however, purported to adjudicate the merits of the unions' Noerr-Pennington defense under Rule 12(b)(6), which is a procedure that tests only the sufficiency of a complaint and 'cannot reach the merits of an affirmative defense * * * [unless] all facts necessary to the affirmative defense clearly appear on the face of the complaint.'"), quoting Goodman v. Praxair, Inc., 494 F.3d 458, 464 (4th Cir. 2007) (en banc).

Miller v. BAC Home Loans Servicing, L.P., 726 F.3d 717, 726-727 (5th Cir. 2013) (defendant was permitted to raise statute of frauds as defense on Rule 12(b)(6) motion), citing Kansa Reinsurance Co., Ltd. v. Congressional Mortg. Corp. of Texas, 20 F.3d 1362, 1366 (5th Cir. 1994).

Harris v. Amgen, Inc., 717 F.3d 1042, 1060 (9th Cir. 2013) ("Because the existence of an exemption under § 1108(e) is an affirmative defense, we can dismiss Count VI based on the § 1108(e) exemption only if the defense is "clearly indicated" and "appear[s] on the face of the pleading."), **quoting Wright & Miller**, withdrawn and superseded on denial of reh'g en banc, 738 F.3d 1026 (9th Cir. 2013), cert. granted, judgment vacated, 573 U.S. 942, 134 S. Ct. 2870 (2014).

Ruiz-Sanchez v. Goodyear Tire & Rubber Co., 717 F.3d 249, 252 (1st Cir. 2013) ("Dismissal 'on the basis of an affirmative defense requires that (i) the facts establishing the defense are definitively ascertainable from the complaint and the other allowable sources of information, and (ii) those facts suffice to establish the affirmative defense with certitude.'"), quoting Nisselson v. Lernout, 469 F.3d 143, 150 (1st Cir. 2006).

Warren v. Sessoms & Rogers, P.A., 676 F.3d 365, 375 (4th Cir. 2012) (bona fide error was affirmative defense that must be proved by defendant, and district court erred in dismissing plaintiff's claim for failing to plead lack of bona fide error) (abrogated by, Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016)).

Fisher v. Halliburton, 667 F.3d 602, 609 (5th Cir. 2012) (complaint that establishes applicability of federal-preemption defense may be challenged under Rule 12(b)(6)).

Thomas v. Care Plus of New Jersey, Inc., 484 Fed. Appx. 692 (3d Cir. 2012) (per curiam) (court may dismiss on basis of statute of limitations under Rule 12(b)(6) only when defect is apparent from face of complaint).

Belrose v. Hartford Life & Acc. Ins. Co., 478 Fed. Appx. 21 (4th Cir. 2012).

King v. Barton, 455 Fed. Appx. 709, 710 (8th Cir. 2012) ("When presented in a Rule 12(b)(6) motion, a qualified immunity defense must appear on the complaint's face."), citing Mathers v. Wright, 636 F.3d 396, 399 (8th Cir. 2011).

Illig v. Union Elec. Co., 652 F.3d 971 (8th Cir. 2011).

Walker v. Barrett, 650 F.3d 1198, 1203 (8th Cir. 2011) (complaint itself must establish affirmative defense for that to be grounds for dismissal based on Rule 12(b)(6)).

Brockington v. Boykins, 637 F.3d 503, 506 (4th Cir. 2011).

Mathers v. Wright, 636 F.3d 396, 399 (8th Cir. 2011).

Colonial Medical Group, Inc. v. Catholic Health Care West, 444 Fed. Appx. 937 (9th Cir. 2011) (antitrust complaint may be dismissed if product market definition is unsustainable on its face).

Walburn v. Lockheed Martin Utility Services, Inc., 443 Fed. Appx. 43 (6th Cir. 2011).

Leak v. CIGNA Healthcare, 423 Fed. Appx. 53 (2d Cir. 2011).

Amorosa v. AOL Time Warner Inc., 409 Fed. Appx. 412, 417 (2d Cir. 2011).

Public Health Equipment & Supply Co., Inc. v. Clarke Mosquito Control Products, Inc., 410 Fed. Appx. 738, 741 (5th Cir. 2010).

CSX Transp., Inc. v. Gilkison, 406 Fed. Appx. 723, 728 (4th Cir. 2010).

Hunter v. Miller, 278 Fed. Appx. 887 (11th Cir. 2008).

Singleton v. Department of Corrections, 277 Fed. Appx. 921 (11th Cir. 2008).

Victaulic Co. v. Tieman, 499 F.3d 227 (3d Cir. 2007), as amended, (Nov. 20, 2007).

Xechem, Inc. v. Bristol-Myers Squibb Co., 372 F.3d 899 (7th Cir. 2004) (Rule 12(b)(6) dismissal is only appropriate based on affirmative defense if plaintiff's complaint admits all elements to impenetrable defense).

La Grasta v. First Union Securities, Inc., 358 F.3d 840 (11th Cir. 2004).

U.S. Gypsum Co. v. Indiana Gas Co., Inc., 350 F.3d 623 (7th Cir. 2003) (although litigant may plead itself out of court by alleging ingredients of defense, complaint need not anticipate or attempt to defuse potential defenses and failure to do so is not grounds for dismissal).

Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003) (although litigant may plead itself out of court by alleging ingredients of defense, it need not try to plead around defenses).

Worldcom, Inc. v. Graphnet, Inc., 343 F.3d 651 (3d Cir. 2003) (since facts necessary to establish affirmative defenses had to come from matters outside complaint and thus did not appear on face of complaint, neither affirmative defense could be adjudicated on Rule 12(b)(6) motion).

Cottone v. Jenne, 326 F.3d 1352 (11th Cir. 2003).

In re Colonial Mortgage Bankers Corp., 324 F.3d 12 (1st Cir. 2003) (res judicata defense does not have to be considered under summary judgment proceedings when affirmative defense appears clearly on face of complaint and other documents that can be considered under Rule 12(b)(6)).

Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147 (2d Cir. 2003), **citing Wright & Miller.**

Clark v. City of Braidwood, 318 F.3d 764 (7th Cir. 2003) (dismissal based on statute of limitations premature when plaintiff might have been able to prove that reasonable person would not have discovered injury earlier).

Robinson v. Johnson, 313 F.3d 128 (3d Cir. 2002).

Cervantes v. City of San Diego, 5 F.3d 1273 (9th Cir. 1993) (reversing dismissal based on statute of limitations because complaint alleges facts supporting equitable tolling of limitations period).

Richmond, Fredericksburg & Potomac R. Co. v. Forst, 4 F.3d 244 (4th Cir. 1993), **quoting Wright & Miller.**

Fortner v. Thomas, 983 F.2d 1024 (11th Cir. 1993).

McCalden v. California Library Ass'n, 919 F.2d 538, 543 (9th Cir. 1990), amended and superseded on denial of reh'g, 955 F.2d 1214 (9th Cir. 1990).

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Clark v. Amoco Production Co., 794 F.2d 967 (5th Cir. 1986).

Pennisi v. Alexander, 611 F.2d 566, 567 (5th Cir. 1980), **citing Wright & Miller.**

A dismissal with prejudice on the basis of collateral estoppel was improper when it was unclear whether the doctrine of res judicata was necessarily applicable to the facts of the case. Nickerson v. Kutschera, 390 F.2d 812 (3d Cir. 1968).

McNally v. American States Ins. Co., 382 F.2d 748 (6th Cir. 1967).

Miller v. Shell Oil Co., 345 F.2d 891 (10th Cir. 1965).

A wrongful death action against the District of Columbia should not have been dismissed for failure to state a claim on the ground that the defendant was immune from suit, since governmental immunity is an area of confusion and the issue was impossible to determine solely on the pleadings. Sass v. District of Columbia, 316 F.2d 366, 114 (D.C. Cir. 1963).

Continental Collieries v. Shober, 130 F.2d 631 (C.C.A. 3d Cir. 1942).

Leimer v. State Mut. Life Assur. Co. of Worcester, Mass., 108 F.2d 302 (C.C.A. 8th Cir. 1940).

Surgenex, LLC v. Predictive Therapeutics, LLC, 462 F. Supp. 3d 1160, 1173 (D. Utah 2020), on reconsideration in part, 2020 WL 8514831 (D. Utah 2020) ("Predictive's statute of limitations argument is an affirmative defense. To serve as a basis for a 12(b)(6) motion, the applicability of an affirmative defense must be clear from the face of the complaint. Applied to a statute of limitations defense, when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute. Here, however, the dates in the Complaint do not make clear that Surgenex's right to sue has been extinguished.") (citations and internal quotation marks omitted), **quoting Wright & Miller**.

In re Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Derivative Litigation, 190 F. Supp. 3d 1100, 1115 (S.D. Fla. 2016) (plaintiffs' complaints did not contain allegations clearly triggering application of exhaustion-of-local-remedies defense).

Collette v. Archdiocese of Chicago, 200 F. Supp. 3d 730 (N.D. Ill. 2016).

Macharia v. City of Revere, 848 F. Supp. 2d 74, 77 (D. Mass. 2012).

Reyes-Orta v. Highway and Transp. Authority, 843 F. Supp. 2d 216, 222 (D.P.R. 2012) ("Thus, even though a complaint need not plead facts to avoid potential affirmative defenses, plaintiffs could plead themselves 'out of court by alleging

facts that are sufficient to establish the defense.'"), quoting Hollander v. Brown, 457 F.3d 688, 691 n.1 (7th Cir. 2006).

Scott v. Bender, 893 F. Supp. 2d 963 (N.D. Ill. 2012) ("[W]hen the complaint 'sets out all of the elements of an affirmative defense' and plainly reveals that an action is untimely, dismissal under Rule 12(b)(6) is the appropriate remedy."), quoting Independent Trust Corp. v. Stewart Information Services Corp., 665 F.3d 930, 935 (7th Cir. 2012).

The motion to dismiss is not usually the appropriate stage at which to raise an affirmative defense. However, if that defense is based on facts alleged in the plaintiff's complaint, it is proper to raise it with a Rule 12(b)(6) motion. Graham Hanson Design LLC v. 511 9th LLC, 2011 WL 744801 (S.D. N.Y. 2011), **citing Wright & Miller**.

Flava Works, Inc. v. City of Miami, Fla., 559 F. Supp. 2d 1318 (S.D. Fla. 2008).

Doe v. Todd County School Dist., 2006 WL 3025855 (D.S.D. 2006).

Tao of Systems Integration, Inc. v. Analytical Services & Materials, Inc., 299 F. Supp. 2d 565 (E.D. Va. 2004).

Carlton v. City of Philadelphia, 2004 WL 633279 (E.D. Pa. 2004).

Digigan, Inc. v. Ivalidate, Inc., 2004 WL 203010 (S.D. N.Y. 2004).

Gulf Petro Trading Co., Inc. v. Nigerian Nat. Petroleum Corp., 288 F. Supp. 2d 783 (N.D. Tex. 2003), aff'd, 115 Fed. Appx. 201 (5th Cir. 2004).

Stephenson v. Deutsche Bank AG, 282 F. Supp. 2d 1032 (D. Minn. 2003), **quoting Wright & Miller.**

McNeal v. Cook County Sheriff's Dept., 282 F. Supp. 2d 865 (N.D. Ill. 2003) (although plaintiff is not required to negate affirmative defenses in complaint, he can plead himself out of court if he pleads facts demonstrating clear existence of affirmative defense).

Sensormatic Sec. Corp. v. Sensormatic Electronics Corp., 249 F. Supp. 2d 703 (D. Md. 2003), **citing Wright & Miller.**

Cloud v. Amquip Corp., 2003 WL 21037653 (D. Del. 2003), citing Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994).

For a Rule 12(b)(6) dismissal to be allowed on the basis of an affirmative defense, the facts establishing the defense must be clear on the face of the plaintiff's pleadings. Furthermore, review of the complaint, together with any other documents appropriately considered under Rule 12(b)(6), must leave no

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doubt that the plaintiff's action is barred by the asserted defense. Ingram v. Rencor Controls, Inc., 217 F. Supp. 2d 141 (D. Me. 2002).

Gray v. Metts, 203 F. Supp. 2d 426 (D. Md. 2002), **citing Wright & Miller.**

Swedish Civil Aviation Admin. v. Project Management Enterprises, Inc., 190 F. Supp. 2d 785 (D. Md. 2002), **citing Wright & Miller.**

Sullivan v. Equifax, Inc., 2002 WL 799856 (E.D. Pa. 2002), **citing Wright & Miller** (statute of limitations defense).

Deck v. American Hawaii Cruises, Inc., 121 F. Supp. 2d 1292 (D. Haw. 2000).

Allison v. Brooktree Corp., 999 F. Supp. 1342 (S.D. Cal. 1998).

Compton v. National League of Professional Baseball Clubs, 995 F. Supp. 554 (E.D. Pa. 1998), order aff'd, 172 F.3d 40 (3d Cir. 1998).

A Rule 12(b)(6) motion should not be granted on limitations grounds unless the complaint facially shows noncompliance with the limitations period. Giusto v. Ashland Chemical Co., 994 F. Supp. 587 (E.D. Pa. 1998).

Adamczyk v. Lever Bros. Co., Div. of Conopco, 991 F. Supp. 931 (N.D. Ill. 1997), **citing Wright & Miller.**

Papesh v. American Nat. Can Co., 177 F.R.D. 344 (D. Md. 1997), aff'd, 129 F.3d 117 (4th Cir. 1997).

Sloan v. West, 8 F. Supp. 2d 1207 (D. Haw. 1996).

Hoopla Sports and Entertainment, Inc. v. Nike, Inc., 947 F. Supp. 347 (N.D. Ill. 1996).

Turner and Boisseau, Inc. v. Nationwide Mut. Ins. Co., 944 F. Supp. 842 (D. Kan. 1996).

Forsyth v. Eli Lilly and Co., 904 F. Supp. 1153 (D. Haw. 1995).

Johnson v. Resources for Human Development, Inc., 860 F. Supp. 218 (E.D. Pa. 1994).

Cofield v. Randolph County Com'n, 844 F. Supp. 1499 (M.D. Ala. 1994).

Plessinger v. Castleman and Haskell, 838 F. Supp. 448 (N.D. Cal. 1993).

Oshiver v. Levin, Fishbein, Sedran and Berman, 818 F. Supp. 104 (E.D. Pa. 1993), judgment aff'd in part, rev'd in part, 38 F.3d 1380 (3d Cir. 1994).

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Clark v. Sears Roebuck & Co., 816 F. Supp. 1064 (E.D. Pa. 1993), **citing Wright & Miller.**

Kentucky Cent. Life Ins. Co. v. LeDuc, 814 F. Supp. 832 (N.D. Cal. 1992), **citing Wright & Miller.**

Airline Car Rental, Inc. v. Shreveport Airport Authority, 667 F. Supp. 293 (W.D. La. 1986), **quoting Wright & Miller.**

Cincinnati Gas & Elec. Co. v. General Elec. Co., 656 F. Supp. 49 (S.D. Ohio 1986), **citing Wright & Miller.**

Morgan v. Kobrin Securities, Inc., 649 F. Supp. 1023 (N.D. Ill. 1986), on reconsideration, 1987 WL 8992 (N.D. Ill. 1987).

The defendant's Rule 12(b)(6) motion based on the plaintiffs' supposed failure to exhaust their administrative remedies was denied since the plaintiffs' complaint alleged their compliance with the exhaustion requirements. Pueblo de Cochiti v. U.S., 647 F. Supp. 538 (D.N.M. 1986).

U.S. v. Gray, 582 F. Supp. 1559 (N.D. Ga. 1982).

Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 551 F. Supp. 580 (S.D. Ohio 1982), **citing Wright & Miller.**

Jacobs v. Pabst Brewing Co., 549 F. Supp. 1050 (D. Del. 1982), **citing Wright & Miller.**

Stratton Group, Ltd. v. Sprayregen, 458 F. Supp. 1216 (S.D. N.Y. 1978).

McDowell v. Union Mut. Life Ins. Co., 404 F. Supp. 136 (C.D. Cal. 1975).

Western Pennsylvania Nat. Bank v. U.S., 354 F. Supp. 373 (W.D. Pa. 1973).

A motion to dismiss based on res judicata and collateral estoppel would be denied since a reasonable doubt existed as to what was decided by the prior judgment. Travelers Indem. Co. v. Arbogast, 45 F.R.D. 87 (W.D. Pa. 1968).

Falsetti v. Local Union No. 2026, United Mine Workers of America, 34 F.R.D. 461 (W.D. Pa. 1964).

Day v. Walker, 206 F. Supp. 32 (W.D. N.C. 1962).

See also

On a motion to dismiss for failure to state a claim, when the district court considered matters outside of the pleadings because an affirmative defense did not appear on the face of the complaint, it converted the motion into one for summary judgment. Doing so without notifying the pro se plaintiff was error.

Youssef v. Department of Health and Senior Services, 423 Fed. Appx. 221 (3d Cir. 2011).

Compare
Jackson v. Borough of Haines, 441 P.3d 925 (Alaska 2019) (dismissal based on affirmative defense possible when the defense appears clearly on the face of the pleading), **citing Wright & Miller**.

But see
The ordinary requirement that a res judicata defense must appear on the face of the complaint is unnecessary when the plaintiff is bringing the same case before a court that was previously deemed a final decision for failure to amend within the time period provided by the court. Hoffman v. Nordic Naturals, Inc., 837 F.3d 272, 280 (3d Cir. 2016).

83 **Built-in defense**
See § 1226 for further discussion of built-in defenses.

See also
Estate of Barney v. PNC Bank, Nat. Ass'n, 714 F.3d 920, 926 (6th Cir. 2013), **citing Wright & Miller**.

Lockhart v. Holiday Inn Exp. Southwind, 531 Fed. Appx. 544 (6th Cir. 2013), **citing Wright & Miller**.

Garrett v. Commonwealth Mortg. Corp. of America, 938 F.2d 591, 594 (5th Cir. 1991), **quoting Wright & Miller.**

Miles v. Simmons University, 514 F. Supp. 3d 1070, 1075 (D. Minn. 2021) ("[D]eclining to hold a plaintiff to the plausibility standard with respect to the scope of employment would effectively treat that issue more like an affirmative defense, which can only support a dismissal when the complaint is 'self-defeating.'"), **citing Wright & Miller**.

City of Painesville, Ohio v. First Montauk Financial Corp., 178 F.R.D. 180 (N.D. Ohio 1998), **quoting Wright & Miller.**

Hirras v. National R.R. Passenger Corp., 826 F. Supp. 1062 (W.D. Tex. 1992), judgment aff'd, 10 F.3d 1142 (5th Cir. 1994), cert. granted, judgment vacated, 512 U.S. 1231, 114 S. Ct. 2732, 129 L. Ed. 2d 855 (1994).

Galvin v. Lloyd, 663 F. Supp. 1572 (D. Conn. 1987), **quoting Wright & Miller.**

84 **More appropriate device**
In re EpiPen Direct Purchaser Litigation, 2021 WL 147166, *6 (D. Minn. 2021) ("[T]he timelines of Plaintiffs' RICO claims cannot be resolved at the pleading stage. * * * [I]t would stretch both the standards governing Rule 12(b)(6) motions

and the Complaint's allegations too far to conclude that these sources triggered a duty of reasonable diligence as a matter of law here. * * * All of this is not to say that discovery won't reveal Plaintiffs' RICO claims are untimely. It may. It's just that dismissing Plaintiffs' RICO claims as untimely at this point would be premature.") (citations omitted), **quoting Wright & Miller**.

See §§ 2711 to 2742 for a discussion of summary judgment under Rule 56.

85 **Statute of limitations**

Supreme Court

"If the allegations, for example, show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim * * *." Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 920-921, 166 L. Ed. 2d 798 (2007).

First Circuit

Martinez-Rivera v. Commonwealth of Puerto Rico, 812 F.3d 69, 74-77 (1st Cir. 2016).

Abdallah v. Bain Capital LLC, 752 F.3d 114, 119 (1st Cir. 2014).

Warren Freedenfeld Associates, Inc. v. McTigue, 531 F.3d 38 (1st Cir. 2008).

Trans-Spec Truck Service, Inc. v. Caterpillar Inc., 524 F.3d 315 (1st Cir. 2008).

Young v. Lepone, 305 F.3d 1 (1st Cir. 2002).

LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507 (1st Cir. 1998) (motion to dismiss based on limitations defense is entirely appropriate when pleader's allegations leave no doubt that asserted claim is time-barred).

Abdallah v. Bain Capital LLC, 880 F. Supp. 2d 190 (D. Mass. 2012).

Reyes-Orta v. Highway and Transp. Authority, 843 F. Supp. 2d 216, 222 (D.P.R. 2012).

Hoff v. Popular, Inc., 727 F. Supp. 2d 77 (D.P.R. 2010).

In re Tyco Intern., Ltd. Multidistrict Litigation, 2004 WL 532193 (D.N.H. 2004).

In re Estate of Molina-Velez v. R.J. Reynolds Tobacco Co., 286 F. Supp. 2d 185 (D.P.R. 2003).

Estate of Alicano Ayala v. Philip Morris, Inc., 263 F. Supp. 2d 311 (D.P.R. 2003).

Greenier v. Pace, Local No. 1188, 201 F. Supp. 2d 172 (D. Me. 2002).

Reyes v. Municipality of Guaynabo, 59 F. Supp. 2d 305 (D.P.R. 1999), **citing Wright & Miller.**

Heinrich ex rel. Heinrich v. Sweet, 49 F. Supp. 2d 27 (D. Mass. 1999).

Deisenroth v. Numonics Corp., 997 F. Supp. 153 (D. Mass. 1998).

U.S. v. Rockland Trust Co., 860 F. Supp. 895 (D. Mass. 1994).

Gaudreault v. U.S., 835 F. Supp. 684 (D. Mass. 1993), aff'd, 7 F.3d 218 (1st Cir. 1993).

American Glue & Resin, Inc. v. Air Products & Chemicals, Inc., 835 F. Supp. 36 (D. Mass. 1993).

Delman v. Federal Products Corp., 136 F. Supp. 241 (D.R.I. 1955), judgment aff'd, 251 F.2d 123 (1st Cir. 1958).

Second Circuit
Muto v. CBS Corp., 668 F.3d 53, 56 (2d Cir. 2012).

Gonzalez v. Hasty, 651 F.3d 318 (2d Cir. 2011).

Lomako v. New York Institute of Technology, 440 Fed. Appx. 1 (2d Cir. 2011).

Harper v. City of New York, 424 Fed. Appx. 36 (2d Cir. 2011).

Corona Realty Holding, LLC v. Town of North Hempstead, 382 Fed. Appx. 70 (2d Cir. 2010).

LC Capital Partners, LP v. Frontier Ins. Group, Inc., 318 F.3d 148 (2d Cir. 2003) (although question of whether plaintiff had sufficient facts to place it on inquiry notice that started statute of limitations running is often fact-intensive and thus inappropriate for Rule 12(b)(6) adjudication, when facts are clear on face of complaint and other integral papers, Rule 12(b)(6) resolution is permissible).

Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67 (2d Cir. 1998).

Jackson Nat. Life Ins. Co. v. Merrill Lynch & Co., Inc., 32 F.3d 697 (2d Cir. 1994).

"Defendant's pre-answer motion to dismiss consists of a Memorandum of Law and a supporting declaration. Neither document identifies the precise rule or statute that governs the requested dismissal, and Defendant's motion papers do not comply with the local rule requiring a notice of motion setting forth the basis for the requested relief. Nevertheless, consistent with well-recognized practice, this Court will treat Defendant's motion as one made pursuant to Fed. R. Civ. P. 12(b)(6), because the statute of limitations in a social security action is an affirmative defense rather than a jurisdictional issue." Jeremy C. G. v.

Commissioner of Social Security, 2023 WL 4467125, *1 (N.D. N.Y. 2023) (citations omitted).

Taylor v. City of New York, 207 F. Supp. 3d 293 (S.D. N.Y. 2016).

"At the Rule 12(b)(6) stage, a plaintiff need only plead fraudulent concealment, as opposed to affirmatively proving it." Schenker AG v. Societe Air France, 102 F. Supp. 3d 418, 424 (E.D. N.Y. 2015) (plaintiff pled fraudulent concealment with enough particularity to withstand motion to dismiss) (internal quotations omitted).

Rosario v. Local 1106 Transport Works of America, 29 F. Supp. 3d 153 (E.D. N.Y. 2014).

Hemmerdinger Corp. v. Ruocco, 976 F. Supp. 2d 401 (E.D. N.Y. 2013).

Weisshaus v. Fagan, 2010 WL 2813490 (S.D. N.Y. 2010), judgment aff'd, 456 Fed. Appx. 32 (2d Cir. 2012).

Bacon v. Suffolk Legislature, 2007 WL 2288044 (E.D. N.Y. 2007).

Francis v. Blaikie Group, 372 F. Supp. 2d 741 (S.D. N.Y. 2005) (defenses based on statutes of limitations are brought properly as Rule 12(b)(6) motions), aff'd, 177 Fed. Appx. 121 (2d Cir. 2006).

Hason v. Office of Professional Medical Conduct, 314 F. Supp. 2d 241 (S.D. N.Y. 2004).

One district court has concluded that dismissal based on the statute of limitations normally is a more appropriate under a Rule 12(b)(6) standard than under a Rule 12(b)(1) standard. The court concluded that assertion that the claim is barred by the statute of limitations is an affirmative defense and that the procedures and standards of Rule 12(b)(6) are better than those of Rule 12(b)(1) for addressing affirmative defenses. Adams v. Crystal City Marriott Hotel, 2004 WL 744489 (S.D. N.Y. 2004).

TEG NY LLC v. Ardenwood Estates, Inc., 2004 WL 626802 (E.D. N.Y. 2004).

Rampersad v. Deutsche Bank Securities, Inc., 2004 WL 616132 (S.D. N.Y. 2004).

Haghpassand v. Reuters Consulting Group, 2004 WL 594576 (S.D. N.Y. 2004), aff'd, 120 Fed. Appx. 859 (2d Cir. 2005).

Oechsner v. Connell Ltd. Partnership, 283 F. Supp. 2d 926 (S.D. N.Y. 2003), judgment aff'd, 101 Fed. Appx. 849 (2d Cir. 2004).

In re Merrill Lynch & Co., Inc., 273 F. Supp. 2d 351 (S.D. N.Y. 2003), judgment aff'd, 396 F.3d 161 (2d Cir. 2005) (even at Rule 12(b)(6) stage, plaintiff should be on inquiry notice in shareholder class action suit based on publicly available, widely disseminated newspaper article), citing LC Capital Partners, LP v. Frontier Ins. Group, Inc., 318 F.3d 148 (2d Cir. 2003).

American Medical Ass'n v. United Healthcare Corp., 2002 WL 31413668 (S.D. N.Y. 2002), opinion adhered to on reconsideration, 2003 WL 348963 (S.D. N.Y. 2003).

Bolanos v. Norwegian Cruise Lines Ltd., 7 Wage & Hour Cas. 2d (BNA) 1703, 2002 WL 1465907 (S.D. N.Y. 2002), order aff'd, 2004 WL 769766 (S.D. N.Y. 2004) (magistrate judge).

Cetenich v. Alden, 11 F. Supp. 2d 238 (N.D. N.Y. 1998) (allegations in complaint).

Marbi Corp. of New York v. Puhekker, 9 F. Supp. 2d 425 (S.D. N.Y. 1998).

In re Merrill Lynch Ltd. Partnerships Litigation, 7 F. Supp. 2d 256 (S.D. N.Y. 1997), opinion aff'd, 154 F.3d 56 (2d Cir. 1998).

Sealy Connecticut, Inc. v. Litton Industries, Inc., 989 F. Supp. 120 (D. Conn. 1997).

Daniel v. American Bd. of Emergency Medicine, 988 F. Supp. 112 (W.D. N.Y. 1997).

Third Circuit

Pension Trust Fund for Operating Engineers v. Mortgage Asset Securitization Transactions, Inc., 730 F.3d 263 (3d Cir. 2013).

Brown v. Montgomery County, 470 Fed. Appx. 87, 90 (3d Cir. 2012) ("[U]nder the law of this Circuit (the so-called 'Third-Circuit Rule'), such a [statute of limitations] defense may be asserted by motion to dismiss if 'the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.'"), quoting Hanna v. U.S. Veterans' Administration Hospital, 514 F.2d 1092, 1094 (3d Cir. 1975).

Barefoot Architect, Inc. v. Bunge, 54 V.I. 948, 632 F.3d 822, 835 (3d Cir. 2011) (when pleading does not reveal when limitations period began, statute of limitations is not valid grounds for dismissal for failure to state claim).

Wiggins v. String, 428 Fed. Appx. 117 (3d Cir. 2011).

Emel v. Singleton, 427 Fed. Appx. 225 (3d Cir. 2011).

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Davis v. County of Allegheny, 411 Fed. Appx. 447, 449 (3d Cir. 2011).

Robinson v. County of Allegheny, 404 Fed. Appx. 670, 672 (3d Cir. 2010).

Fullman v. Pennsylvania Dept. of Corrections, 265 Fed. Appx. 44 (3d Cir. 2008).

Davis v. Grusemeyer, 996 F.2d 617 (3d Cir. 1993).

Bethel v. Jendoco Const. Corp., 570 F.2d 1168 (3d Cir. 1978).

In view of the provision in Rule 9(f) that averments of time and place are material, a Rule 12(b) motion can be utilized when the time alleged in the statement of a claim shows that the cause of action has not been brought within a statute of limitations. Hanna v. U.S. Veterans' Administration Hospital, 514 F.2d 1092 (3d Cir. 1975).

"Defendants' statute of limitations argument improperly shifts the burden of disproving the affirmative defense of the statute of limitations to Plaintiffs. This argument is not proper in a motion to dismiss under Rule 12(b)(6) where the statute of limitations cannot be determined from the face of the pleading. This argument by Defendants is therefore rejected." Price v. County of Salem, 2023 WL 4373217, *3 (D. N.J. 2023).

"In this Circuit, a limitations defense may be raised in a 12(b)(6) motion to dismiss, 'but only if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations. If the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6).'" Weiss v. Bank of America Corporation, 153 F. Supp. 3d 831, 837-838 (W.D. Pa. 2015).

Wilson v. Board of Control of City of Harrisburg School Dist., 2010 WL 4977056 (M.D. Pa. 2010).

Dupree v. Doe, 2010 WL 2719977 (D. Del. 2010), on reconsideration, 773 F. Supp. 2d 477 (D. Del. 2011).

Kreimer v. Philadelphia Inquirer, Inc., 2004 WL 1196258 (E.D. Pa. 2004) (motion to dismiss appropriate if apparent from face of complaint that action not filed within required time period).

Nellom v. Luber, 2004 WL 816922 (E.D. Pa. 2004).

Soppick v. Borough of West Conshohocken, 2004 WL 739945 (E.D. Pa. 2004), judgment aff'd, 118 Fed. Appx. 631 (3d Cir. 2004).

Kelly v. Eckerd Corp., 2004 WL 614822 (E.D. Pa. 2004).

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Rogan v. Giant Eagle, Inc., 113 F. Supp. 2d 777 (W.D. Pa. 2000), aff'd, 276 F.3d 579 (3d Cir. 2001), **citing Wright & Miller.**

Compton v. National League of Professional Baseball Clubs, 995 F. Supp. 554 (E.D. Pa. 1998), order aff'd, 172 F.3d 40 (3d Cir. 1998).

A Rule 12(b)(6) motion should not be granted on limitations grounds unless the complaint facially shows noncompliance with the limitations period. Giusto v. Ashland Chemical Co., 994 F. Supp. 587 (E.D. Pa. 1998).

Saylor v. Ridge, 989 F. Supp. 680 (E.D. Pa. 1998).

Fourth Circuit
Cruz v. Maypa, 773 F.3d 138, 148 (4th Cir. 2014).

Gemaehlich v. Johnson, 599 Fed. Appx. 473, 476 (4th Cir. 2014).

Agolli v. Office Depot, Inc., 548 Fed. Appx. 871, 875 (4th Cir. 2013).

Belrose v. Hartford Life & Acc. Ins. Co., 478 Fed. Appx. 21 (4th Cir. 2012).

McLeod v. PB Inv. Corp., 492 Fed. Appx. 379 (4th Cir. 2012).

Bonham v. Weinraub, 413 Fed. Appx. 615, 616 (4th Cir. 2011).

Brooks v. City of Winston-Salem, N.C., 85 F.3d 178 (4th Cir. 1996), **citing Wright & Miller.**

"Defendants may raise a statute of limitations issue as an affirmative defense in response to a plaintiff's cause of action pursuant to Rule 12(b)(6). Dean v. Pilgrim's Pride Corp., 395 F.3d 471, 475 (4th Cir. 2005). Dismissing a claim based on statute of limitations grounds pursuant to Rule 12(b)(6) is appropriate "only if the time bar is apparent on the face of the complaint." Manion v. North Carolina Medical Board, 693 Fed. Appx. 178, 180 (4th Cir. 2017)." Nomani v. Qarni, 2023 WL 4203438, *2 (E.D. Va. 2023).

Stack v. Abbott Laboratories, Inc., 979 F. Supp. 2d 658 (M.D. N.C. 2013), citing Goodman v. Praxair, Inc., 494 F.3d 458, 464 (4th Cir. 2007).

Topshelf Management, Inc. v. Campbell-Ewald Company, 203 F. Supp. 3d 608 (M.D. N.C. 2016).

Young Bok Song v. Welch, 2010 WL 2813305 (E.D. N.C. 2010), aff'd, 410 Fed. Appx. 648 (4th Cir. 2011).

Saunders v. Union Carbide Corp., 2010 WL 2720750 (S.D. W. Va. 2010), aff'd, 397 Fed. Appx. 908 (4th Cir. 2010).

U.S. v. Rawlings, 2010 WL 2292508, *2 (D. Md. 2010), **citing Wright & Miller**.

Leggat v. Equifax Information Services, Inc., 2009 WL 2432371 (E.D. Va. 2009).

Tao of Systems Integration, Inc. v. Analytical Services & Materials, Inc., 299 F. Supp. 2d 565 (E.D. Va. 2004), **quoting Wright & Miller.**

Thompson v. Potter, 2004 WL 725629 (M.D. N.C. 2004).

Spencer v. Town of Chapel Hill, 290 F. Supp. 2d 655 (M.D. N.C. 2003).

Verizon Maryland Inc. v. RCN Telecom Services, Inc., 232 F. Supp. 2d 539 (D. Md. 2002), aff'd in part, dismissed in part, 377 F.3d 355 (4th Cir. 2004), **citing Wright & Miller.**

When it appears on the face of the complaint that the limitation period has run, a defendant may properly assert a limitations defense through a Rule 12(b)(6) motion to dismiss. Miller v. Pacific Shore Funding, 224 F. Supp. 2d 977 (D. Md. 2002), aff'd, 92 Fed. Appx. 933 (4th Cir. 2004).

Eniola v. Leasecomm Corp., 214 F. Supp. 2d 520 (D. Md. 2002).

Gray v. Metts, 203 F. Supp. 2d 426 (D. Md. 2002).

Swedish Civil Aviation Admin. v. Project Management Enterprises, Inc., 190 F. Supp. 2d 785 (D. Md. 2002), **quoting Wright & Miller.**

Frye v. City of Kannapolis, 109 F. Supp. 2d 436 (M.D. N.C. 1999), **quoting Wright & Miller.**

Jones v. Saxon Mortg., Inc., 980 F. Supp. 842 (E.D. Va. 1997), order aff'd, 161 F.3d 2 (4th Cir. 1998), redesignated as opinion, 537 F.3d 320 (4th Cir. 1998) and publication ordered, (Oct. 8, 1998) and order aff'd, 537 F.3d 320 (4th Cir. 1998).

Papesh v. American Nat. Can Co., 177 F.R.D. 344 (D. Md. 1997), aff'd, 129 F.3d 117 (4th Cir. 1997).

Wamco, III, Ltd. v. First Piedmont Mortg. Corp., 856 F. Supp. 1076 (E.D. Va. 1994) (rejected by, Global Financial Services, Inc. v. Duttenhefner, 1998 ND 53, 575 N.W.2d 667 (N.D. 1998)).

Fifth Circuit

King-White v. Humble Independent School Dist., 803 F.3d 754, 762 (5th Cir. 2015).

Hoover v. SOS Staffing Services, Inc., 584 Fed. Appx. 190 (5th Cir. 2014).

Humphreys v. City of Ganado, Tex., 467 Fed. Appx. 252, 255 (5th Cir. 2012) (per curiam).

Newman v. Coffin, 464 Fed. Appx. 359, 362 (5th Cir. 2012) (per curiam).

Jaso v. The Coca Cola Co., 435 Fed. Appx. 346, 351-352 (5th Cir. 2011) (defendant has burden to establish statute of limitations defense and to sustain motion to dismiss, it must appear on face of complaint; plaintiff not required to plead facts that negate it), **citing Wright & Miller**.

Lowery v. Capital One Mortg., 429 Fed. Appx. 377 (5th Cir. 2011).

Miller v. Nationwide Life Ins. Co., 391 F.3d 698 (5th Cir. 2004).

Jones v. Alcoa, Inc., 339 F.3d 359 (5th Cir. 2003).

Taylor v. Books A Million, Inc., 296 F.3d 376 (5th Cir. 2002).

Gonzales v. Wyatt, 157 F.3d 1016 (5th Cir. 1998).

Kansa Reinsurance Co., Ltd. v. Congressional Mortg. Corp. of Texas, 20 F.3d 1362 (5th Cir. 1994).

Cross v. Lucius, 713 F.2d 153 (5th Cir. 1983).

Mann v. Adams Realty Co., Inc., 556 F.2d 288, 293 n.6 (5th Cir. 1977), **quoting Wright & Miller.**

Hepperle v. Johnston, 544 F.2d 201 (5th Cir. 1976).

White v. Padgett, 475 F.2d 79, 82 n.7 (5th Cir. 1973).

Joe E. Freund, Inc. v. Insurance Co. of North America, 370 F.2d 924 (5th Cir. 1967).

Peacock v. AARP, Inc., 181 F. Supp. 3d 430, 434 (S.D. Tex. 2016) (dismissal is proper when complaint demonstrates that claims are time-barred and also "fail to set forth or raise some basis for tolling the statute").

Janvey v. Suarez, 978 F. Supp. 2d 685 (N.D. Tex. 2013) ("Within the Fifth Circuit, it is well-settled that '[a] statute of limitations may support dismissal under Rule 12(b)(6) where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like.'"), quoting Jones v. Alcoa, Inc., 339 F.3d 359, 366 (5th Cir. 2003).

Dorest v. Piney Point Surgical Center, 2011 WL 2633575 (S.D. Tex. 2011).

Wilson v. Barcella, 2007 WL 963977 (S.D. Tex. 2007), aff'd, 284 Fed. Appx. 210 (5th Cir. 2008).

In re Enron Corp. Securities, Derivative & "ERISA" Litigation, 310 F. Supp. 2d 819 (S.D. Tex. 2004).

Anderson v. City of New Orleans, 2004 WL 1396325 (E.D. La. 2004).

Palma v. City of New Orleans, 2004 WL 612963 (E.D. La. 2004), order aff'd, 115 Fed. Appx. 191 (5th Cir. 2004).

Fields v. Stalder, 2002 WL 1611597 (E.D. La. 2002) (prescriptive period under Louisiana Civil Code).

Nickerson v. Texas, 35 F. Supp. 2d 512 (E.D. Tex. 1998), aff'd, 209 F.3d 718 (5th Cir. 2000) (dismissal pursuant to Rule 12(b)(6) is appropriate remedy when statute of limitations has run).

Askanase v. Fatjo, 828 F. Supp. 465 (S.D. Tex. 1993).

Sixth Circuit

Lutz v. Chesapeake Appalachia, L.L.C., 717 F.3d 459 (6th Cir. 2013) ("Generally, a motion under Rule 12(b)(6), which considers only the allegations in the complaint, is an 'inappropriate vehicle' for dismissing a claim based upon a statute of limitations. However, dismissal is warranted if 'the allegations in the complaint affirmatively show that the claim is time-barred.'"), quoting Cataldo v. U.S. Steel Corp., 676 F.3d 542, 547 (6th Cir. 2012).

Cataldo v. U.S. Steel Corp., 676 F.3d 542, 547 (6th Cir. 2012) (dismissal under Rule 12(b)(6) based upon statute of limitations appropriate only when allegations in complaint affirmatively show claim is time-barred).

Duff v. Kentucky Bd. of Medical Licensure, 472 Fed. Appx. 400 (6th Cir. 2012) (per curiam).

Walburn v. Lockheed Martin Utility Services, Inc., 443 Fed. Appx. 43 (6th Cir. 2011).

Bishop v. Lucent Technologies, Inc., 520 F.3d 516 (6th Cir. 2008).

New England Health Care Employees Pension Fund v. Ernst & Young, LLP, 336 F.3d 495 (6th Cir. 2003) (holding modified by, Merck & Co., Inc. v. Reynolds, 559 U.S. 633, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010)).

Rauch v. Day & Night Mfg. Corp., 576 F.2d 697, 702 (6th Cir. 1978), **quoting Wright & Miller.**

Ott v. Midland-Ross Corp., 523 F.2d 1367 (6th Cir. 1975).

"The Sixth Circuit has clarified that the Court may grant a Rule 12(b)(6) motion on statute of limitations grounds where 'the allegations in the

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complaint affirmatively show that the claim is time-barred.' Lutz v. Chesapeake Appalachia, LLC, 717 F.3d 459, 464 (6th Cir. 2013). 'Because the statute of limitations is an affirmative defense, the burden is on the defendant to show that the statute of limitations has run.' Campbell v. Grand Trunk W.R.R. Co., 238 F.3d 772, 775 (6th Cir. 2001). 'If the defendant meets this requirement, then the burden shifts to the plaintiff to establish an exception to the statute of limitations.' Campbell, 238 F.3d at 775." Williams v. Covington Police Department, 2023 WL 4468401, *2 (E.D. Ky. 2023).

Navarro-Teran v. Embraer Aircraft Maintenance Services, Inc., 184 F. Supp. 3d 612, 625 (M.D. Tenn. 2016) (allegations in complaint did not affirmatively show claim is time-barred because allegations were general and failure to identify specific incidents within statute of limitations span does not constitute dismissal for statutory bar defense).

Hanson Cold Storage Co. v. Chizek Elevator & Transport, Inc., 205 F. Supp. 3d 920 (W.D. Mich. 2016).

Conner v. U.S. Dept. of the Army, 6 F. Supp. 3d 717 (W.D. Ky. 2014).

Sanders v. Williams Equipment & Supply Co., Inc., 2010 WL 5575483 (W.D. Tenn. 2010), report and recommendation adopted, 2011 WL 111713 (W.D. Tenn. 2011).

Crawford v. U.S. Foodservice, Inc., 2010 WL 2901740 (M.D. Tenn. 2010).

Gibson v. American Bankers Ins. Co., 91 F. Supp. 2d 1037 (E.D. Ky. 2000), aff'd, 289 F.3d 943 (6th Cir. 2002).

Lawson v. Shelby County, Tenn., 7 F. Supp. 2d 985 (W.D. Tenn. 1998), rev'd, 211 F.3d 331 (6th Cir. 2000).

City of Painesville, Ohio v. First Montauk Financial Corp., 178 F.R.D. 180 (N.D. Ohio 1998).

Seventh Circuit

Ennenga v. Starns, 677 F.3d 766, 773 (7th Cir. 2012) (motion to dismiss on statute-of-limitations ground brought properly under Rule 12(b)(6) and therefore is not waived by failure to raise in answer).

Independent Trust Corp. v. Stewart Information Services Corp., 665 F.3d 930, 935 (7th Cir. 2012).

Estate of Davis v. Wells Fargo Bank, 633 F.3d 529, 535-536 (7th Cir. 2011) (when plaintiff did not allege claim not barred by statute of limitations, dismissal by district court was proper).

Grzanecki v. Bravo Cucina Italiana, 408 Fed. Appx. 993, 996 (7th Cir. 2011) (action properly dismissed as untimely if plaintiff includes allegations that plead her out of court by establishing untimeliness).

Brooks v. Ross, 578 F.3d 574 (7th Cir. 2009).

When facts alleged in the complaint lead to no other conclusion than that a complaint is untimely, a Rule 12(b)(6) dismissal may be appropriate, but when the record does not make it clear when the statute of limitations began to run, dismissal is premature. Del Korth v. Supervalu, Inc., 46 Fed. Appx. 846 (7th Cir. 2002) (unpublished).

If a plaintiff pleads facts that show its suit is barred by a statute of limitations, it may plead itself out of court. Kauthar SDN BHD v. Sternberg, 149 F.3d 659 (7th Cir. 1998) (abrogated by, Morrison v. National Australia Bank Ltd., 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010)).

Eison v. McCoy, 146 F.3d 468 (7th Cir. 1998).

Ashafa v. City of Chicago, 146 F.3d 459 (7th Cir. 1998).

Cook v. Winfrey, 141 F.3d 322 (7th Cir. 1998).

Hi-Lite Products Co. v. American Home Products Corp., 11 F.3d 1402 (7th Cir. 1993).

"A complaint can be dismissed as untimely at the pleadings stage only when the plaintiff pleads himself out of court by alleging facts sufficient to establish the complaint's tardiness." Wies v. Cavalry SPV I, L.L.C., 2015 WL 569897, *2 (N.D. Ind. 2015).

James v. Illinois Sexually Dangerous Persons Act, 2009 WL 2567910 (S.D. Ill. 2009), aff'd, 373 Fed. Appx. 619 (7th Cir. 2010).

Pettiford v. Sheahan, 2004 WL 626151 (N.D. Ill. 2004).

Lawrence E. Jaffe Pension Plan v. Household Intern., Inc., 2004 WL 574665 (N.D. Ill. 2004).

766347 Ontario Ltd. v. Zurich Capital Markets, Inc., 249 F. Supp. 2d 974 (N.D. Ill. 2003) (when statute of limitations begins running when potential plaintiff is on inquiry notice, Rule 12(b)(6) is inappropriate for adjudicating affirmative defense since question of inquiry notice is usually fact-based inquiry that cannot be resolved on based of complaint alone).

White v. Cooper, 55 F. Supp. 2d 848 (N.D. Ill. 1999).

Coats v. Kraft Foods, Inc., 12 F. Supp. 2d 862 (N.D. Ind. 1998).

Tabor v. City of Chicago, 10 F. Supp. 2d 988 (N.D. Ill. 1998).

McLaughlin v. Cook County Dept. of Corrections, 993 F. Supp. 661 (N.D. Ill. 1998).

Eighth Circuit
Smithrud v. City of St. Paul, 746 F.3d 391, 396 (8th Cir. 2014).

Illig v. Union Elec. Co., 652 F.3d 971 (8th Cir. 2011).

Joyce v. Armstrong Teasdale, LLP, 635 F.3d 364, 367 (8th Cir. 2011) (statute of limitations not proper ground for Rule 12(b)(6) dismissal unless defense appears on face of complaint).

Jessie v. Potter, 516 F.3d 709, 713 n.2 (8th Cir. 2008).

Guy v. Swift and Co., 612 F.2d 383 (8th Cir. 1980).

Horn v. Burns and Roe, 536 F.2d 251 (8th Cir. 1976).

Wilburn v. Pepsi-Cola Bottling Co. of St. Louis, 492 F.2d 1288, 1289 (8th Cir. 1974), **citing Wright & Miller.**

Kramer v. America's Wholesale Lenders, 2011 WL 577390 (E.D. Mo. 2011).

Morgan v. Craig, 2010 WL 2867828 (N.D. Iowa 2010).

Parler v. Hood Packaging, Inc., 2008 WL 2357052 (D. Minn. 2008), vacated, 329 Fed. Appx. 41 (8th Cir. 2009).

Russell v. City of Overland Police Dept., 838 F. Supp. 1350 (E.D. Mo. 1993).

F.D.I.C. v. Deloitte & Touche, 834 F. Supp. 1129 (E.D. Ark. 1992).

Teel v. American Steel Foundries, 529 F. Supp. 337 (E.D. Mo. 1981), **citing Wright & Miller.**

Bergstreser v. Mitchell, 448 F. Supp. 10 (E.D. Mo. 1977), judgment aff'd, 577 F.2d 22 (8th Cir. 1978).

Adams v. Greer, 114 F. Supp. 770 (W.D. Ark. 1953).

Ninth Circuit
Zamorano v. City of San Jacinto, 585 Fed. Appx. 397 (9th Cir. 2014).

Seven Arts Filmed Entertainment Ltd. v. Content Media Corp. PLC, 733 F.3d 1251, 1254 (9th Cir. 2013) ("A statute-of-limitations defense, if 'apparent from the face of the complaint,' may properly be raised in a motion to dismiss."), quoting Conerly v. Westinghouse Elec. Corp., 623 F.2d 117, 119 (9th Cir. 1980).

McOmie-Gray v. Bank of America Home Loans, 667 F.3d 1325 (9th Cir. 2012) (Truth in Lending Act).

Bone v. City of Los Angeles, 471 Fed. Appx. 620 (9th Cir. 2012).

Royal Crown Ins. Corp. v. Northern Mariana Islands, 447 Fed. Appx. 760 (9th Cir. 2011).

North County Community Alliance, Inc. v. Salazar, 573 F.3d 738 (9th Cir. 2009).

Northern Highlands I, II, LLC v. Comerica Bank, 328 Fed. Appx. 358 (9th Cir. 2009).

Platt Elec. Supply, Inc. v. EOFF Elec., Inc., 522 F.3d 1049 (9th Cir. 2008) (allowing amendment of complaint futile because statute of limitations had run).

TwoRivers v. Lewis, 174 F.3d 987 (9th Cir. 1999).

Lehman v. U.S., 154 F.3d 1010 (9th Cir. 1998).

Hernandez v. City of El Monte, 138 F.3d 393 (9th Cir. 1998).

Supermail Cargo, Inc. v. U.S., 68 F.3d 1204 (9th Cir. 1995).

Flynn v. Marriott Ownership Resorts, Inc., 165 F. Supp. 3d 955, 965 (D. Haw. 2016).

Amir v. Five Unnamed U.S.A. Immigration Enforcement and Custom Officials in Vancouver Intern. Airport, 2010 WL 2402910, *2 (W.D. Wash. 2010), report and recommendation adopted, 2010 WL 2402915 (W.D. Wash. 2010).

O'Dell v. Inyo County Sheriff's Dep., 2006 WL 3834397 (E.D. Cal. 2006).

Pooshs v. Altria Group, Inc., 331 F. Supp. 2d 1089 (N.D. Cal. 2004).

Moore v. Navarro, 2004 WL 783104 (N.D. Cal. 2004).

Gallardo v. DiCarlo, 203 F. Supp. 2d 1160 (C.D. Cal. 2002).

Coulter v. Bronster, 57 F. Supp. 2d 1028 (D. Haw. 1999), aff'd, 13 Fed. Appx. 661 (9th Cir. 2001).

Chavez v. I.N.S., 17 F. Supp. 2d 1141 (S.D. Cal. 1998).

Larramendy v. Newton, 994 F. Supp. 1211 (E.D. Cal. 1998).

Tenth Circuit

Schrock v. Wyeth, Inc., 727 F.3d 1273, 1280 (10th Cir. 2013).

National Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 727 F.3d 1246 (10th Cir. 2013), cert. granted, judgment vacated, 573 U.S. 914, 134 S. Ct. 2818, 189 L. Ed. 2d 783 (2014).

Bynum v. Municipality, City and County of Denver, 550 Fed. Appx. 560, 562 (10th Cir. 2013).

Young v. United Parcel Services, Inc. Employees' Short Term Disability Plan, 416 Fed. Appx. 734, 737 (10th Cir. 2011).

Wood v. Milyard, 414 Fed. Appx. 103, 105 (10th Cir. 2011).

Stone v. Whitman, 324 Fed. Appx. 726 (10th Cir. 2009) (for citations rules see Tenth Circuit Rule 32.1).

Ballen v. Prudential Bache Securities, Inc., 23 F.3d 335 (10th Cir. 1994).

Industrial Constructors Corp. v. U.S. Bureau of Reclamation, 15 F.3d 963 (10th Cir. 1994).

Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1041 (10th Cir. 1980), **citing Wright & Miller.**

American Mechanical Solutions, L.L.C. v. Northland Process Piping, Inc., 184 F. Supp. 3d 1030, 1048 (D.N.M. 2016) (plaintiff could counter statute of limitations defense on Rule 12(b)(6) motion to dismiss by asserting different statute of limitations or that equitable tolling doctrine applies; Tenth Circuit has not clarified if this assertion must include supporting facts from complaint).

Cabrera v. Perceptive Software, LLC, 147 F. Supp. 3d 1247, 1249 (D. Kan. 2015) (court resolved defendant's affirmative defense of statute of limitations bar on motion to dismiss since dates given in complaint demonstrated whether plaintiff had right to sue).

Konigsberg v. Mullikin, Larson & Swift LLC, 2011 WL 4929109 (D. Wyo. 2011).

Lymon v. Aramark Corp., 728 F. Supp. 2d 1207, 1215 (D.N.M. 2010), aff'd, 499 Fed. Appx. 771 (10th Cir. 2012) ("When a party has asserted a statute of limitations issue in a rule 12(b)(6) motion, the Court accepts all well-pleaded factual allegations in the complaint as true and views them in the light most favorable to the plaintiff to determine whether the statute of limitations has run.").

Savard v. JP Morgan Chase Bank, N.A., 2010 WL 2802543 (D. Colo. 2010).

Lewis ex rel. Lewis v. BHS College Meadows, 2004 WL 870818 (D. Kan. 2004), aff'd, 123 Fed. Appx. 885 (10th Cir. 2005).

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Ware v. Union Pacific R. Co. Omaha, 278 F. Supp. 2d 1263 (D. Kan. 2003), **citing Wright & Miller.**

Full Faith Church of Love West, Inc. v. Hoover Treated Wood Products, Inc., 224 F. Supp. 2d 1285 (D. Kan. 2002).

Ankers v. Rodman, 995 F. Supp. 1329 (D. Utah 1997).

Freeman v. Burlington Northern and Santa Fe Ry. Co., 176 F.R.D. 581 (D. Kan. 1997).

Eleventh Circuit

Beach Community Bank v. CBG Real Estate LLC, 674 Fed. Appx. 932, 934-935 (11th Cir. 2017) (stating that "at the Rule 12(b)(6) stage the district court may dismiss a claim on statute of limitations grounds 'only if it is apparent from the face of the complaint that the claim is time-barred'" and holding that the "district court * * * erred in dismissing [plaintiff's] fraud claims as time-barred" and then remanding the case back to the district court because "a more developed factual record" was needed "to determine whether and when [plaintiff] should have discovered [defendant's] fraud" (citation omitted)).

Perez v. Fedex Ground Package Systems, Inc., 587 Fed. Appx. 603 (11th Cir. 2014).

HealthPrime, Inc. v. Smith/Packett/Med-Com, LLC, 428 Fed. Appx. 937 (11th Cir. 2011).

Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment CSX Transp. Northern Lines v. CSX Transp., Inc., 522 F.3d 1190 (11th Cir. 2008).

Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275 (11th Cir. 2005).

Spain v. Brown & Williamson Tobacco Corp., 363 F.3d 1183 (11th Cir. 2004).

Beck v. Deloitte & Touche, Deloitte, Haskins & Sells, Ernest & Young, L.L.P., 144 F.3d 732 (11th Cir. 1998).

Arthur v. Thomas, 974 F. Supp. 2d 1340 (M.D. Ala. 2013) ("Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may raise a statute of limitations defense when the complaint shows on its face that the limitations period has run."), citing AVCO Corp. v. Precision Air Parts, Inc., 676 F.2d 494, 495 (11th Cir. 1982).

Luke v. Residential Elevators, Inc., 2011 WL 311370 (N.D. Fla. 2011).

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Omar ex rel. Cannon v. Lindsey, 243 F. Supp. 2d 1339 (M.D. Fla. 2003), aff'd, 334 F.3d 1246 (11th Cir. 2003).

Rowe v. City of Fort Lauderdale, 8 F. Supp. 2d 1369 (S.D. Fla. 1998) (heavy burden).

Florida Keys Citizens Coalition Inc. v. West, 996 F. Supp. 1254 (S.D. Fla. 1998).

City of Fort Lauderdale v. Ross, Saarinen, Bolton & Wilder, Inc., 815 F. Supp. 444 (S.D. Fla. 1992).

Stern v. Espirito Santo Bank of Florida, 791 F. Supp. 865 (S.D. Fla. 1992).

D.C. Circuit

Baird v. Gotbaum, 662 F.3d 1246, 1251 (D.C. Cir. 2011).

Kursar v. Transportation Sec. Admin., 442 Fed. Appx. 565, 567 (D.C. Cir. 2011).

Smith-Haynie v. District of Columbia, 155 F.3d 575, 332 (D.C. Cir. 1998).

Gordon v. National Youth Work Alliance, 675 F.2d 356, 366 n.38 (D.C. Cir. 1982), **citing Wright & Miller** (concurring opinion).

Jones v. Rogers Memorial Hospital, 442 F.2d 773, 143 (D.C. Cir. 1971).

Although tort claims are generally subject to a three-year statute of limitations, the basis for the plaintiff's tort claims were so intertwined with the basis for his defamation claim that they were subject to the one-year statute of limitations associated with defamation claims. Nyambal v. Alliedbarton Security Services, LLC, 153 F. Supp. 3d 309, 314-315 (D.D.C. 2016), on reconsideration, 344 F. Supp. 3d 183 (D.D.C. 2018).

Hammel v. Marsh USA Inc., 79 F. Supp. 3d 234, 238 (D.D.C. 2015).

Mizell v. SunTrust Bank, 26 F. Supp. 3d 80 (D.D.C. 2014).

Floyd v. Lee, 968 F. Supp. 2d 308 (D.D.C. 2013) (statute of limitations defense denied when facts on face of complaint did not give rise to defense).

Coleman v. Potomac Elec. Power Co., 310 F. Supp. 2d 154 (D.D.C. 2004), aff'd, 2004 WL 2348144 (D.C. Cir. 2004).

U.S. ex rel. Purcell v. MWI Corp., 254 F. Supp. 2d 69 (D.D.C. 2003) (court can dismiss based on statute of limitations defense if complaint is time-barred on its face; if no person reasonably could disagree on date of claim's accrual, dismissal is warranted).

Artis v. Greenspan, 223 F. Supp. 2d 149 (D.D.C. 2002).

Campbell v. National R.R. Passenger Corp., 222 F. Supp. 2d 8 (D.D.C. 2002).

See also

Ennenga v. Starns, 677 F.3d 766, 773 (7th Cir. 2012) ("[A] statute-of-limitations defense is not waived if raised for the first time in a successive motion to dismiss.").

Although a statute of limitations defense normally may not be raised on a Rule 12(b)(6) motion, an exception is made when the defense appears on the face of the complaint. Mackin Engineering Co. v. American Exp. Co., 437 Fed. Appx. 100 (3d Cir. 2011).

Ritchie v. U.S., 210 F. Supp. 2d 1120 (N.D. Cal. 2002) (converted to summary judgment motion).

But see

"We will vacate the District Court's judgment and remand for further proceedings. A limitations defense raised in a Rule 12(b)(6) motion may be successful only if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations. Additionally, it is not incumbent upon the plaintiff to anticipate the defense and plead all facts necessary to beat it. Here, Buttolph's pleading on its face was sufficient to withstand dismissal on statute-of-limitations grounds at the Rule 12(b)(6) stage. Buttolph alleged that, before bringing his claims to federal court, he spent time attempting to exhaust available institutional remedies. That allegation is dispositive of this appeal, and the narrow issue it presents." Buttolph v. PrimeCare Medical Inc., 750 Fed. Appx. 168 (3d Cir. 2018) (citations and internal quotation marks omitted).

"[Rule 12(b)(6)], however, 'is generally an inappropriate vehicle for dismissing a claim based upon a statute of limitations.'" Engleson v. Unum Life Ins. Co. of America, 723 F.3d 611, 616 (6th Cir. 2013) (finding that district court decision was "functional equivalent" of summary judgment), quoting Cataldo v. U.S. Steel Corp., 676 F.3d 542, 547 (6th Cir. 2012).

Richards v. Mitcheff, 696 F.3d 635, 637 (7th Cir. 2012) (Easterbrook, C.J.) (because "complaints need not anticipate defenses," affirmative defense of statute of limitations must be challenged and dismissed under Rule 12(c), not Rule 12(b)(6)).

Xechem, Inc. v. Bristol-Myers Squibb Co., 372 F.3d 899 (7th Cir. 2004) (court held that only defect in claim, not presence of affirmative defense, was proper basis for Rule 12(b)(6) dismissal and Rule 12(b)(6) dismissal only appropriate if plaintiff's complaint admitted all elements of impenetrable defense).

U.S. v. Northern Trust Co., 372 F.3d 886 (7th Cir. 2004) (court held that statute of limitations defense was not appropriate basis for Rule 12(b)(6) dismissal because complaint stated claim for relief regardless of affirmative defense).

Scholl v. Rogers Ready Mix, 2004 WL 793552 (N.D. Ill. 2004) (statute of limitations defense cannot be resolved by Rule 12(b)(6) motion).

But compare
"A complaint will be dismissed under Rule 12(b)(6) as conclusively time-barred if a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency. Yet courts should hesitate to dismiss a complaint on statute of limitations grounds based solely on the face of the complaint because statute of limitations issues often depend on contested questions of fact." Momenian v. Davidson, 878 F.3d 381 (D.C. Cir. 2017).

Wiley v. City of Chicago, 361 F.3d 994 (7th Cir. 2004) (Rule 12(b)(6) dismissal inappropriate because unclear when statute of limitations began to run, and at this stage, plaintiff's allegations must be taken as true).

Akkerman v. Mecta Corp., 72 Fed. Appx. 652 (9th Cir. 2003) (when plaintiff sued based on permanent loss of memory caused by shock treatment, statute of limitations issue was not appropriately resolved at Rule 12(b)(6) stage since question of fact existed as to when plaintiff should have realized that memory loss was going to be permanent and thus as to when rule of discovery would have stopped tolling statute).

Although the court ruled on the defendant's motion to dismiss based on the defense of statute of limitations, it said in dictum that the defense is more appropriately raised in the responsive pleading than in a motion to dismiss. Patrick Media Group, Inc. v. City of Clearwater, 836 F. Supp. 833 (M.D. Fla. 1993).

86 **Allegations of time**
See §§ 1308 to 1309 for a discussion of Rule 9(f).

But see
Engleson v. Unum Life Ins. Co. of America, 723 F.3d 611, 616 (6th Cir. 2013), citing Cataldo v. U.S. Steel Corp., 676 F.3d 542, 547 (6th Cir. 2012).

See generally
Wilburn v. Pepsi-Cola Bottling Co. of St. Louis, 492 F.2d 1288, 1289 (8th Cir. 1974), **citing Wright & Miller.**

87 **Right extinguished**
"Where legislative enactment creates a new cause of action which did not exist under prior law and fixes the time within which the action may be commenced,

the commencing of the action within the time specified is an indispensable condition of the liability and the action created, and, upon the expiration of the time established, both the right and the remedy are destroyed." Chambliss v. Coca-Cola Bottling Corp., 274 F. Supp. 401 (E.D. Tenn. 1967), judgment aff'd, 414 F.2d 256 (6th Cir. 1969) (Wilson, J.).

When the claim is one that does not exist at common law but is created by a statute that makes the bringing of a suit within a specified time a condition precedent to the existence of a claim itself, the defense of limitations need not be affirmatively pleaded and can be raised by a motion to dismiss. Sikes v. U.S., 8 F.R.D. 34 (E.D. Pa. 1948).

88 **Guidotti case**
716 F.3d 764 (3d Cir. 2013).

89 **Motion-to-dismiss standard**
716 F.3d at 773–774.

See also
"Specifically, where the issue of whether the residual clause of § 1 of the FAA applies arises in a motion to compel arbitration, the motion to dismiss standard applies if the complaint and incorporated documents provide a sufficient factual basis for deciding the issue. But where those documents do not, or the plaintiff responds to the motion with additional facts that place the issue in dispute, the parties should be entitled to discovery on the question of arbitrability before a court entertains further briefing, with an application of the summary judgment standard to follow." Singh v. Uber Technologies Inc., 939 F.3d 210 (3d Cir. 2019) (internal quotation marks and citation omitted).

Valentin v. ADECCO, 777 Fed. Appx. 50 (3d Cir. 2019) (affirming grant of motion to dismiss under Rule 12(b)(6) based on arbitration agreement).

Wilson v. 5 Choices, LLC, 776 Fed. Appx. 320 (6th Cir. 2019) ("This Court has held that a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is a permissible way to enforce forum-selection and arbitration clauses.").

"The Court will consider Defendant's motion as a motion to dismiss under Rule 12(b)(6), rather than under Rule 12(b)(1). The arbitration agreement, if valid, would not deprive the Court of subject matter jurisdiction. Rather, the existence of an agreement to arbitrate is an equitable defense to litigation. A motion to dismiss may be based on a defense if the plaintiff's own allegations show that a defense exists that legally defeats the claim for relief. The existence of the arbitration agreement is alleged in Plaintiff's Verified Complaint; the ESA containing the arbitration agreement is attached as well; and the AAA Rules Defendant attaches to its motion are referred to in and integral to both documents. Because Plaintiff's Verified Complaint and the documents integral to it show

the existence of Defendant's arbitration defense, Rule 12(b)(6) is an appropriate procedural vehicle for assessing Defendant's motion." Jacobs Field Services North America, Inc. v. Wacker Polysilicon North America, LLC, 375 F. Supp. 3d 898 (E.D. Tenn. 2019).

90 **Summary-judgment standard**
Guidotti, 716 F.3d at 773–774.

See also
"Specifically, where the issue of whether the residual clause of § 1 of the FAA applies arises in a motion to compel arbitration, the motion to dismiss standard applies if the complaint and incorporated documents provide a sufficient factual basis for deciding the issue. But where those documents do not, or the plaintiff responds to the motion with additional facts that place the issue in dispute, the parties should be entitled to discovery on the question of arbitrability before a court entertains further briefing, with an application of the summary judgment standard to follow." Singh v. Uber Technologies Inc., 939 F.3d 210 (3d Cir. 2019) (internal quotation marks and citation omitted).

91 **Split of authority**
"Did the district court correctly dismiss the case under Civil Rule 12(b)(1) (for lack of jurisdiction) as opposed to Civil Rule 12(b)(6) (for failure to state a claim)? The union's motion to dismiss invoked both rules. Because an arbitration agreement presents a reason to dismiss under 12(b)(6), not under 12(b)(1), the court should have dismissed the case for failure to state a claim. See Teamsters Local Union 480 v. United Parcel Serv., Inc., 748 F.3d 281, 286 (6th Cir. 2014). We nonetheless may correct the label on our own and affirm all the same. Teamsters, 748 F.3d at 286." Baker v. Iron Workers Local 25 Vacation Pay Fund, 999 F.3d 394, 400 (6th Cir. 2021).

"[T]his circuit has consistently held that the existence of a valid arbitration agreement does not strip the court of jurisdiction. Regardless, there is a split in authority as to whether claims such as appellees' must be brought pursuant to Rule 12's section (b)(1) or section (b)(6), that is, for failure to state a claim on which relief may be granted; or perhaps considered with an analysis entirely separate from the Rule 12(b) rubric." Álvarez-Mauras v. Banco Popular of Puerto Rico, 919 F.3d 617 (1st Cir. 2019) (citations and internal quotation marks omitted).

"As an initial matter, the parties dispute whether the district court properly exercised subject-matter jurisdiction over the Union's suit. * * * Because a failure to pursue arbitration means that the Union has failed to state a claim under the CBA and the Settlement Agreement, UPS's motion is more properly construed as a motion to dismiss under Rule 12(b)(6)." Teamsters Local Union 480 v. United Parcel Service, Inc., 748 F.3d 281, 285–286 (6th Cir. 2014).

Ruiz v. Millennium Square Residential Association, 466 F. Supp. 3d 162, 175-177 (D.D.C. 2020) (cataloguing the split of authority and staying proceedings in accordance with the Third, Seventh, and Tenth Circuits).

See § 1250, which discusses the relationship between Rule 12(b)(1) and the assertion of arbitration rights.

See also
Palcko v. Airborne Express, Inc., 372 F.3d 588, 597–598 (3d Cir. 2004) (rejecting plaintiff's effort to recharacterize defendant's motion to compel arbitration as a motion to dismiss under Rule 12(b)(2) or Rule 12(b)(3)).

92 **Waiver of right to arbitrate**
"One Tech was fully aware of its right to compel arbitration when it filed its 12(b)(6) motion to dismiss. After all, it presented the right to arbitration as the reason it sought to transfer the case from Illinois to Texas. However, once in Texas, One Tech did not move to compel arbitration even in the alternative to its motion to dismiss. Rather, it pursued and partially obtained a dismissal with prejudice of Forby's claims. One Tech's action of moving to dismiss Forby's claims with no mention of compelling arbitration demonstrated a desire to resolve the dispute in litigation rather than arbitration." Forby v. One Technologies, L.P., 909 F.3d 780 (5th Cir. 2018).

See also
Morgan v. Sundance, Inc., 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022) (holding that courts cannot condition a waiver of the right to arbitrate on a showing of prejudice to the nonmoving party).

St. Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Products Co., Inc., 969 F.2d 585, 590 (7th Cir. 1992) ("[W]aiver [right to arbitration depends] depends on all the circumstances in a particular case rather than on any rigid rules").

National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 774 (D.C. Cir. 1987) ("[T]he question of whether there has been waiver in the arbitration agreement context should be analyzed in much the same way as in any other contractual context. The essential question is whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right.").

93 **Assumption of risk**
De Sole v. U.S., 947 F.2d 1169 (4th Cir. 1991).

Buchanan v. Santek Environmental of Virginia, LLC, 2021 WL 1866945, *1-3 (W.D. Va. 2021).

Sa v. Red Frog Events, LLC, 979 F. Supp. 2d 767 (E.D. Mich. 2013).

Baham v. Eagle Indem. Co., 78 F. Supp. 665 (W.D. La. 1948).

94 **Contributory negligence**

Biegas v. Quickway Carriers, Inc., 573 F.3d 365 (6th Cir. 2009).

Konig v. Ames, 2021 WL 1561518, *3-5 (D. Md. 2021).

Federal Ins. Co. v. J.K. Mfg. Co., 933 F. Supp. 2d 1065, 1075 (N.D. Ill. 2013).

Smith v. Vincent, 109 F. Supp. 451 (S.D. Fla. 1952), judgment aff'd, 204 F.2d 945 (5th Cir. 1953).

But see

Comparative negligence is an inappropriate issue on a Rule 12(b)(6) motion. F.D.I.C. v. Deloitte & Touche, 834 F. Supp. 1129 (E.D. Ark. 1992).

95 **Preemption**

Irizarry v. Abbott Laboratories, 833 Fed. Appx. 947, 950 (3d Cir. 2020) (affirming district court's dismissal under Rule 12(b)(6) because "express preemption under 21 U.S.C. § 360k(a) and implied preemption under 21 U.S.C. § 337(a) left only a 'narrow gap' for state law claims," and the plaintiffs did not state a claim within that gap).

Simmons v. Sabine River Authority Louisiana, 732 F.3d 469, 473 (5th Cir. 2013) (federal preemption is affirmative defense that defendants must plead and prove), citing Fisher v. Halliburton, 667 F.3d 602, 609 (5th Cir. 2012).

Public Utility Dist. No. 1 of Grays Harbor County Wash. v. IDACORP Inc., 379 F.3d 641 (9th Cir. 2004).

Spain v. Brown & Williamson Tobacco Corp., 363 F.3d 1183 (11th Cir. 2004).

Garrity v. Sun Life and Health Insurance Company (U.S.), 596 F. Supp. 3d 1111 (N.D. Ill. 2022) (granting 12(b)(6) motion because ERISA wholly preempted state-law claims).

Harris v. Topco Associates, LLC, 538 F. Supp. 3d 826, 830-833 (N.D. Ill. 2021) (granting Rule 12(b)(6) motion on FDCA preemption grounds).

Fast Access Specialty Therapeutics, LLC v. UnitedHealth Group, Inc., 532 F. Supp. 3d 956, 962-976 (S.D. Cal. 2021) (granting Rule 12(b)(6) motion on ERISA preemption grounds).

96 **Estoppel**

Slater v. U.S. Steel Corp., 820 F.3d 1193 (11th Cir. 2016), reh'g en banc granted, vacated, (Aug. 30, 2016) and on reh'g en banc, 871 F.3d 1174 (11th Cir. 2017) (judicial estoppel).

Pack v. Mt. Morris Consol. Schools, 487 Fed. Appx. 267 (6th Cir. 2012) (claim preclusion).

Gage v. Warren Tp. Committee & Planning Bd. Members, 463 Fed. Appx. 68, 72 (3d Cir. 2012) (per curiam) (claim preclusion).

Hausler v. Felton, 457 Fed. Appx. 727, 730 (10th Cir. 2012) (claim preclusion).

Lord v. International Marine Ins. Services, 420 Fed. Appx. 40 (2d Cir. 2011) (collateral estoppel proper to consider on Rule 12(b)(6) motion).

City of Clinton, Ark. v. Pilgrim's Pride Corp., 632 F.3d 148, 155 (5th Cir. 2010).

Colliton v. Donnelly, 399 Fed. Appx. 619 (2d Cir. 2010) (appellant "who neither appealed his state court conviction nor sought to withdraw his plea, is collaterally estopped from challenging the facts supporting his conviction").

Champagne v. Equitable Life Assur. Co., 849 F.2d 608 (6th Cir. 1988).

Parkinson v. California Co., 233 F.2d 432 (10th Cir. 1956).

Sidebotham v. Robison, 216 F.2d 816 (9th Cir. 1954).

Leimer v. State Mut. Life Assur. Co. of Worcester, Mass., 108 F.2d 302 (C.C.A. 8th Cir. 1940).

Deniece Design, LLC v. Braun, 953 F. Supp. 2d 765, 775 (S.D. Tex. 2013) ("Laches, estoppel and/or waiver can serve as an affirmative defense to patent infringement * * *.").

Robinson v. Deutsche Bank Nat. Trust Co., 932 F. Supp. 2d 95, 113 (D.D.C. 2013).

Thomas v. Venditto, 925 F. Supp. 2d 352, 360 (E.D. N.Y. 2013) (collateral estoppel).

Desmond v. Chicago Boxed Beef Distributors, Inc., 921 F. Supp. 2d 872, 876 (N.D. Ill. 2013).

Amr v. Moore, 2010 WL 3154575 (E.D. Va. 2010), report and recommendation adopted, 2010 WL 3154567 (E.D. Va. 2010), aff'd, 411 Fed. Appx. 584 (4th Cir. 2011).

Lipin v. National Union Fire Ins. Co. of Pittsburgh, Pa., 202 F. Supp. 2d 126 (S.D. N.Y. 2002) (collateral estoppel).

Dawson v. W. & H. Voortman, Ltd., 853 F. Supp. 1038 (N.D. Ill. 1994).

Westlands Water Dist. v. U.S. Dept. of Interior, Bureau of Reclamation, 850 F. Supp. 1388 (E.D. Cal. 1994).

But see
McGlasson v. Long Term Disability Coverage for All Active Full-Time and Part-Time Employees, 161 F. Supp. 3d 836 (D. Ariz. 2016) (factual disputes remained before issue of judicial estoppel could be resolved).

97 **Illegality**
Sensoria, LLC v. Kaweske, 581 F. Supp. 3d 1243, 1257-1260 (D. Colo. 2022).

Original Investments, LLC v. State, 542 F. Supp. 3d 1230, 1232-1237 (W.D. Okla. 2021), **citing Wight & Miller.**

Bradley v. American Radiator & Standard Sanitary Corp., 6 F.R.D. 37 (S.D. N.Y. 1946), judgment aff'd, 159 F.2d 39 (C.C.A. 2d Cir. 1947).

98 **Immunity**
Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007), **citing Wright & Miller.**

Goins v. Saint Elizabeth Medical Center, Inc., 2024 WL 229568, *6 (6th Cir. 2024) (rejecting motion to dismiss because providers' immunity under the PREP Act was not readily apparent from the face of the complaint), **quoting Wright & Miller**.

Loupe v. O'Bannon, 824 F.3d 534, 539 (5th Cir. 2016) (district attorney was absolutely immune from alleged malicious prosecution of plaintiff claim, but he was not immune on face of complaint for alleged warrantless arrest, since her conduct was not part of district attorney's prosecutorial function).

O'Brien v. Welty, 818 F.3d 920, 933 (9th Cir. 2016) (district court erred in dismissing plaintiff's First Amendment claims based on defendant's immunity, because court should have stopped analysis when it decided defendant did not violate plaintiff's constitutional right).

Hutto v. South Carolina Retirement System, 773 F.3d 536, 545 (4th Cir. 2014) (“we have often affirmed Rule 12(b)(6) motions to dismiss on the basis of Eleventh Amendment immunity”).

Castaneda v. Burton-Cahill, 586 Fed. Appx. 373, 374 (9th Cir. 2014).

Durham v. Jones, 737 F.3d 291, 297-298 (4th Cir. 2013).

Hager v. Arkansas Dept. of Health, 735 F.3d 1009 (8th Cir. 2013) (qualified immunity).

Ball v. Famiglio, 726 F.3d 448, 461 (3d Cir. 2013) (immunity for correction officers).

Hoffman v. Thaler, 539 Fed. Appx. 507 (5th Cir. 2013) (sovereign immunity, prosecutorial immunity, judicial immunity, and absolute immunity for parole officials).

Lacey v. Maricopa County, 693 F.3d 896 (9th Cir. 2012) (absolute and qualified immunity).

Backe v. LeBlanc, 691 F.3d 645, 649 (5th Cir. 2012) ("The district court doubly abused its discretion by (apparently) refusing to rule on LeBlanc's and Wiley's motions to dismiss and by failing to limit discovery to facts necessary to rule on their qualified immunity defense.").

Leech v. DeWeese, 689 F.3d 538 (6th Cir. 2012) (absolute judicial immunity).

Taylor v. Reilly, 685 F.3d 1110 (D.C. Cir. 2012) (qualified immunity).

Buckwalter v. Nevada Bd. of Medical Examiners, 678 F.3d 737, 740 (9th Cir. 2012) (absolute immunity).

Savoie v. Martin, 673 F.3d 488, 492 (6th Cir. 2012) (judicial immunity).

Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159, 1169 (10th Cir. 2012).

Di Ruzzo v. Tabaracci, 480 Fed. Appx. 796 (5th Cir. 2012) (per curiam).

Chiles v. Oklahoma Dept. of Corrections, 467 Fed. Appx. 801 (10th Cir. 2012) (qualified immunity).

Humphreys v. City of Ganado, Tex., 467 Fed. Appx. 252, 256 (5th Cir. 2012) (per curiam).

Fisher Sand & Gravel, Co. v. Giron, 465 Fed. Appx. 774, 779 (10th Cir. 2012) (qualified immunity).

Goodwin v. Castille, 465 Fed. Appx. 157, 163 (3d Cir. 2012) (legislative immunity).

Humphrey v. Sapp, 462 Fed. Appx. 528, 530 (6th Cir. 2012) (social worker acting as witness was not entitled to absolute prosecutorial immunity).

Addlespurger v. Corbett, 461 Fed. Appx. 82, 85-86 (3d Cir. 2012) (judicial immunity).

King v. Barton, 455 Fed. Appx. 709 (8th Cir. 2012) (qualified immunity).

Morgan v. Swanson, 659 F.3d 359, 401 (5th Cir. 2011).

"The qualified immunity doctrine protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Vance v. Rumsfeld, 653 F.3d 591, 605-606 (7th Cir. 2011), reh'g en banc granted, vacated, (Oct. 28, 2011) and on reh'g en banc, 701 F.3d 193 (7th Cir. 2012), quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

Braun v. Maynard, 652 F.3d 557 (4th Cir. 2011).

Doe ex rel. Magee v. Covington County School Dist. ex rel. Bd. of Educ., 649 F.3d 335 (5th Cir. 2011), on reh'g en banc, 675 F.3d 849 (5th Cir. 2012).

Kay Elec. Co-op. v. City of Newkirk, Okla., 647 F.3d 1039 (10th Cir. 2011) (municipal immunity).

J.W. v. Utah, 647 F.3d 1006 (10th Cir. 2011).

Rondigo, L.L.C. v. Township of Richmond, 641 F.3d 673 (6th Cir. 2011).

Lampton v. Diaz, 639 F.3d 223 (5th Cir. 2011).

"Officials will receive immunity unless the § 1983 claim satisfies a two-prong test: (1) the allegations, if true, substantiate a violation of a federal statutory or constitutional right and (2) the right was 'clearly established' such that a reasonable person would have known his acts or omissions violated that right." Brockington v. Boykins, 637 F.3d 503, 506 (4th Cir. 2011).

A self-regulatory organization "and its officers are entitled to absolute immunity from private damages suits in connection with the discharge of their regulatory responsibilities." Standard Inv. Chartered, Inc. v. National Ass'n of Securities Dealers, Inc., 637 F.3d 112, 115 (2d Cir. 2011).

Decotiis v. Whittemore, 635 F.3d 22, 36 (1st Cir. 2011).

Jones v. Horne, 634 F.3d 588 (D.C. Cir. 2011).

Heyde v. Pittenger, 633 F.3d 512, 517-519 (7th Cir. 2011).

Giammatteo v. Newton, 452 Fed. Appx. 24, 28 (2d Cir. 2011) (absolute immunity).

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Dollonne v. Ventura Unified School Dist. ex rel. its officials, 440 Fed. Appx. 533 (9th Cir. 2011).

"A prosecutor is absolutely immune from suit for all actions that he takes while performing his function as an advocate for the government. The prosecutorial function includes initiation of criminal prosecution, appearance in judicial proceedings, prosecutorial conduct before grand juries, statements made during trial, examination of witnesses, and presentation of evidence in support of a search warrant at a probable-cause hearing. * * * A prosecutor is not entitled to absolute immunity for fabricating evidence, as investigating and gathering evidence falls outside the prosecutorial function, though he may be entitled to qualified immunity for such conduct." Barr v. Gee, 437 Fed. Appx. 865, 876 (11th Cir. 2011) (internal citations omitted).

Charlotte v. Hansen, 433 Fed. Appx. 660 (10th Cir. 2011).

Allen v. Zavaras, 430 Fed. Appx. 709 (10th Cir. 2011).

Kaetz v. Mark, 429 Fed. Appx. 112 (3d Cir. 2011).

Alexander v. Brookhaven School Dist., 428 Fed. Appx. 303 (5th Cir. 2011) (burden on plaintiff to demonstrate inapplicability of immunity once invoked by defendant).

Rodriguez v. Lewis, 427 Fed. Appx. 352 (5th Cir. 2011).

Island City Lofts, L.L.C. v. U.S., 426 Fed. Appx. 777 (11th Cir. 2011).

Keisling v. Renn, 425 Fed. Appx. 106 (3d Cir. 2011).

"In moving to dismiss under Rule 12(b)(6) based on a claim of absolute immunity, the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." Borde v. Board of County Com'rs of Luna County, N.M., 423 Fed. Appx. 798 (10th Cir. 2011) (internal quotation marks omitted).

Ansell v. Ross Twp, Penn., 419 Fed. Appx. 209 (3d Cir. 2011).

Nails v. Pennsylvania Dept. of Transp., 414 Fed. Appx. 452, 455 (3d Cir. 2011).

Wood v. Milyard, 414 Fed. Appx. 103, 104 (10th Cir. 2011) (complaint that failed to show why sovereign immunity would not apply properly was dismissed).

Coleman v. Governor of Michigan, 413 Fed. Appx. 866, 872-873 (6th Cir. 2011) (absolute judicial immunity and quasi-judicial immunity may be raised in Rule 12(b)(6) motions).

Cleary v. County of Macomb, 409 Fed. Appx. 890, 899 (6th Cir. 2011).

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Kent v. Cardone, 404 Fed. Appx. 540 (2d Cir. 2011) (prosecutor can use absolute immunity as defense when alleged conduct is done as part of prosecutorial role as advocate).

Rivera v. Kalafut, 456 Fed. Appx. 325 (5th Cir. 2011).

Thurmond v. County of Wayne, 447 Fed. Appx. 643 (6th Cir. 2011).

Coleman v. Maryland Court of Appeals, 626 F.3d 187 (4th Cir. 2010), aff'd, 566 U.S. 30, 132 S. Ct. 1327, 182 L. Ed. 2d 296 (2012) (FMLA claim barred by sovereign immunity).

al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009), rev'd and remanded, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

Club Retro, L.L.C. v. Hilton, 568 F.3d 181 (5th Cir. 2009) (qualified immunity).

Sarver v. Jackson, 344 Fed. Appx. 526 (11th Cir. 2009).

Edge v. Payne, 342 Fed. Appx. 395 (10th Cir. 2009).

Quinn v. Roach, 326 Fed. Appx. 280 (5th Cir. 2009) (prosecutorial and qualified immunity).

McSpadden v. Wolfe, 325 Fed. Appx. 134 (3d Cir. 2009) (qualified immunity).

Peker v. Steglich, 324 Fed. Appx. 38 (2d Cir. 2009) (sovereign immunity).

Washam v. Stesis, 321 Fed. Appx. 104 (3d Cir. 2009).

Carpenter v. Ashby, 351 Fed. Appx. 684 (3d Cir. 2009).

Benzman v. Whitman, 523 F.3d 119 (2d Cir. 2008) (qualified immunity available to federal officials in action against EPA).

Chrzanowski v. Assad, 275 Fed. Appx. 661 (9th Cir. 2008) (judicial immunity).

Anderson v. Suiters, 499 F.3d 1228 (10th Cir. 2007) (affirming denial of defendant's motion to dismiss on qualified immunity grounds).

Lawson v. Curry, 244 Fed. Appx. 986 (11th Cir. 2007).

Rouse v. Colorado State Bd. of Parole, 242 Fed. Appx. 498 (10th Cir. 2007) (Eleventh Amendment immunity).

Ellibee v. Fox, 244 Fed. Appx. 839 (10th Cir. 2007).

White v. Ockey, 241 Fed. Appx. 462 (10th Cir. 2007).

Atteberry v. Nocona General Hosp., 430 F.3d 245 (5th Cir. 2005) (plaintiff's allegations were sufficient to overcome defendant's qualified immunity defense in § 1983 action).

Jackson v. Schultz, 429 F.3d 586 (6th Cir. 2005).

Shmueli v. City of New York, 424 F.3d 231 (2d Cir. 2005).

Brookings v. Clunk, 389 F.3d 614 (6th Cir. 2004) (judicial immunity).

Gonzales v. City of Castle Rock, 366 F.3d 1093 (10th Cir. 2004), rev'd, 545 U.S. 748, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005) (qualified immunity).

Montgomery v. City of Ardmore, 365 F.3d 926 (10th Cir. 2004) (district attorney entitled to tort immunity for acts within scope of prosecutorial duties).

Temple v. Celebrezze, 93 Fed. Appx. 802 (6th Cir. 2004).

Gean v. Hattaway, 330 F.3d 758 (6th Cir. 2003).

Cottone v. Jenne, 326 F.3d 1352 (11th Cir. 2003).

Gonzalez v. Reno, 325 F.3d 1228 (11th Cir. 2003) (courts generally accord official conduct presumption of legitimacy), citing U.S. Dept. of State v. Ray, 502 U.S. 164, 112 S. Ct. 541, 116 L. Ed. 2d 526 (1991).

In re Stock Exchanges Options Trading Antitrust Litigation, 317 F.3d 134 (2d Cir. 2003) (defense based on implied repeal doctrine is type of immunity that must be pleaded affirmatively rather than lack of subject matter jurisdiction that can be raised at any time).

Goad v. Mitchell, 297 F.3d 497 (6th Cir. 2002).

Kamplain v. Curry County Bd. of Com'rs, 159 F.3d 1248 (10th Cir. 1998).

Harbert Intern., Inc. v. James, 157 F.3d 1271 (11th Cir. 1998).

Turker v. Ohio Dept. of Rehabilitation and Corrections, 157 F.3d 453 (6th Cir. 1998).

Wilson v. Strong, 156 F.3d 1131 (11th Cir. 1998).

Dill v. City of Edmond, Okl., 155 F.3d 1193 (10th Cir. 1998).

Connell v. Signoracci, 153 F.3d 74 (2d Cir. 1998).

Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67 (2d Cir. 1998).

Graham v. Federal Emergency Management Agency, 149 F.3d 997 (9th Cir. 1998).

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Martinez v. Hooper, 148 F.3d 856 (7th Cir. 1998).

Santamorena v. Georgia Military College, 147 F.3d 1337 (11th Cir. 1998).

Breton v. Travelers Ins. Co., 147 F.3d 58 (1st Cir. 1998).

Jensen v. City of Oxnard, 145 F.3d 1078 (9th Cir. 1998).

Metro Display Advertising, Inc. v. City of Victorville, 143 F.3d 1191 (9th Cir. 1998).

Scotto v. Almenas, 143 F.3d 105 (2d Cir. 1998).

Autio v. AFSCME, Local 3139, 140 F.3d 802 (8th Cir. 1998), reh'g en banc granted, vacated, (July 7, 1998) and on reh'g en banc, 157 F.3d 1141 (8th Cir. 1998).

Flores v. Satz, 137 F.3d 1275 (11th Cir. 1998) (state and county attorneys).

GJR Investments, Inc. v. County of Escambia, Fla., 132 F.3d 1359 (11th Cir. 1998).

A defendant has the right to plead immunity at the dismissal stage; this helps shield litigants claiming immunity from the hardships of discovery. Barrett v. Harrington, 130 F.3d 246 (6th Cir. 1997).

Levin v. Childers, 101 F.3d 44 (6th Cir. 1996).

Government officials are entitled to assert claims of qualified immunity prior to discovery in a Rule 12(b)(6) motion. Vaughn v. U.S. Small Business Admin., 65 F.3d 1322 (6th Cir. 1995).

Weaver v. Clarke, 45 F.3d 1253 (8th Cir. 1995).

Gagan v. Norton, 35 F.3d 1473 (10th Cir. 1994).

Randall v. U.S., 30 F.3d 518 (4th Cir. 1994).

Hertz Corp. v. City of New York, 1 F.3d 121 (2d Cir. 1993).

Hinnen v. Kelly, 992 F.2d 140 (7th Cir. 1993), as amended on denial of reh'g, (June 18, 1993).

Sveeggen v. U.S., 988 F.2d 829 (8th Cir. 1993) (per curiam).

Gallegos v. City and County of Denver, 984 F.2d 358, 360-361 n.2 (10th Cir. 1993).

Fortner v. Thomas, 983 F.2d 1024 (11th Cir. 1993).

Carter by Carter v. Cornwell, 983 F.2d 52 (6th Cir. 1993) (immunity from liability justifies dismissal for failure to state claim).

Easton v. Sundram, 947 F.2d 1011 (2d Cir. 1991).

Green v. Maraio, 722 F.2d 1013 (2d Cir. 1983).

The plaintiff's claims of conspiracy by state officials properly were dismissed as to the district attorney on the ground of prosecutorial immunity. Kauffman v. Moss, 420 F.2d 1270 (3d Cir. 1970).

A complaint by a civilian golf pro alleging improper termination of employment at a military base was properly dismissed when it was clear that the military officers named as defendants acted within the scope of their duties and authority. Ward v. Hudnell, 366 F.2d 247 (5th Cir. 1966).

Carmack v. Gibson, 363 F.2d 862 (5th Cir. 1966).

O'Bryan v. Chandler, 352 F.2d 987 (10th Cir. 1965).

Hughes v. Johnson, 305 F.2d 67 (9th Cir. 1962).

Skinner v. Nehrt, 242 F.2d 573 (7th Cir. 1957).

Allstate Vehicle and Property Insurance Company v. Philadelphia Housing Authority, 394 F. Supp. 3d 535 (E.D. Pa. 2019) ("Immunity will be upheld on a 12(b)(6) motion only when the immunity is established on the face of the complaint. Thus, we may not consider facts beyond those alleged in the complaint."), **citing Wright & Miller**.

"In sum, the crucial element missing from Plaintiffs' narrative is a constitutionally protected interest—or, more to the point, a protected interest that was clearly established when these events transpired. * * * This * * * entitles the individual Defendants to qualified immunity." Castanon v. Cathey, 402 F. Supp. 3d 1240 (W.D. Okla. 2019), aff'd, 969 F.3d 1125 (10th Cir. 2020), withdrawn and superseded on denial of reh'g en banc, 976 F.3d 1136 (10th Cir. 2020) and aff'd, 976 F.3d 1136 (10th Cir. 2020) (dismissing the plaintiff's § 1983 claim under Rule 12(b)(6)).

"[T]he Defendant prosecutors' failure to provide the results of all forensic testing to the defense was done in violation of a court order. The court order left no room for the Defendant prosecutors to exercise prosecutorial judgment or evaluation. Instead, the allegations of the Complaint suggest that they had a non-discretionary duty to abide by the court's order and to truthfully answer the court's inquiry relating to that order. At this point, their duties became administrative, rather than advocative. Taking all of Plaintiff's allegations as true, as it must at this stage of the proceedings, the Court finds at the pleading stage that these

Defendant prosecutors are not protected by absolute immunity regarding their alleged violation of a court order to turn over all results relating to forensic testing in the case." Siehl v. City of Johnstown, 365 F. Supp. 3d 587 (W.D. Pa. 2019).

Birch v. City of New York, 184 F. Supp. 3d 21, 28 (E.D. N.Y. 2016), aff'd, 675 Fed. Appx. 43 (2d Cir. 2017).

Unlike other affirmative defenses, an immunity defense may be raised in a Rule 12(b)(6) motion to dismiss, regardless of whether the facts establishing the affirmative defense appear on the face of the complaint. Gerhardt v. Mares, 179 F. Supp. 3d 1006, 1026 (D.N.M. 2016).

Jiang v. Porter, 156 F. Supp. 3d 996, 1006 (E.D. Mo. 2015) (court found complaint alleged sufficient facts to demonstrate defendants acted with malice, in bad faith, and with intent to harm plaintiff, therefore disqualifying them for official immunity and eliminating dismissal on that ground).

"[I]n opposition to a motion to dismiss, the plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense". Doe v. Hagenbeck, 98 F. Supp. 3d 672, 683-684 (S.D. N.Y. 2015) (motion denied) (internal quotations omitted), rev'd in part and remanded, 870 F.3d 36 (2d Cir. 2017).

Kirby v. Health Care Service Corp., 88 F. Supp. 3d 717 (W.D. Tex. 2015) (sovereign immunity).

"Claims of absolute and qualified immunity may be raised in a Rule 12(b)(6) motion to dismiss." Nguyen v. Louisiana State Bd. of Cosmetology, 2015 WL 590006, *4 (M.D. La. 2015).

Hinton v. Amazon.com.dedc, LLC, 72 F. Supp. 3d 685, 692 (S.D. Miss. 2014) (immunity provision of Communications Decency Act).

Skokomish Indian Tribe v. Goldmark, 994 F. Supp. 2d 1168 (W.D. Wash. 2014) (sovereign immunity).

Deats v. Monroe County, 2014 WL 6769756, *3 (W.D. N.Y. 2014) (defendants exercising their duties as prosecutors were entitled to absolute immunity).

Perez v. School Bd. of Miami-Dade County, Fla., 917 F. Supp. 2d 1261, 1264 (S.D. Fla. 2013) ("[W]hen qualified immunity is raised on a motion to dismiss, as it is here, the facts of the complaint must set forth the violation of clearly-established constitutional right. If the complaint fails in this regard, the motion to dismiss will be granted."), citing Williams v. Alabama State University, 102 F.3d 1179, 1182 (11th Cir. 1997).

Marcavage v. National Park Service, 777 F. Supp. 2d 858, 867 (E.D. Pa. 2011), aff'd, 666 F.3d 856 (3d Cir. 2012).

Savoie v. Martin, 2010 WL 4982543 (M.D. Tenn. 2010), judgment aff'd, 673 F.3d 488 (6th Cir. 2012) (judicial immunity).

Burgess v. Clinton, 2010 WL 2802348 (D.S.C. 2010), report and recommendation adopted, 2010 WL 2812825 (D.S.C. 2010), aff'd, 403 Fed. Appx. 853 (4th Cir. 2010) (claims against defendant barred by doctrine of sovereign immunity).

Shepard v. Mikulich, 2010 WL 2719107, *2 (N.D. Ind. 2010) ("Thus, judges are not liable in civil actions for their judicial acts unless they have acted in the clear absence of jurisdiction. Moreover, a judge will not be deprived of immunity even if the action was in error, was done maliciously, was in excess of his authority, and even if his exercise of authority is flawed by the commission of grave procedural errors.") (internal citations omitted).

Chinn v. The City of Spokane, 2010 WL 2028084 (E.D. Wash. 2010), aff'd, 429 Fed. Appx. 673 (9th Cir. 2011).

Hasty v. Nebraska Dept. of Educ., 2010 WL 1552855 (D. Neb. 2010).

Smith v. Commonwealth of Virginia, 2009 WL 2175759, *2 (E.D. Va. 2009), aff'd, 353 Fed. Appx. 790 (4th Cir. 2009).

Gamble v. Department of Army, 557 F. Supp. 2d 151 (D.D.C. 2008), vacated on reconsideration, 567 F. Supp. 2d 150 (D.D.C. 2008) (sovereign immunity).

Anderson v. Blake, 2008 WL 2404040 (W.D. Okla. 2008) (qualified immunity).

Arguijo v. Owens, 2008 WL 2388903 (N.D. Tex. 2008) (sovereign immunity).

Hammond v. Plattsmier, 2008 WL 2358881 (W.D. La. 2008) (qualified and absolute immunity).

"A motion to dismiss for failure to state a claim under Rule 12(b)(6) is a valid means to raise a defense or bar to relief if the defense or bar clearly appears on the face of the complaint. A motion to dismiss is a proper vehicle to assert a claim of absolute immunity." Evans v. Suter, 2007 WL 1888308 (S.D. Tex. 2007), judgment aff'd, 260 Fed. Appx. 726 (5th Cir. 2007) (internal citation omitted).

Fisher v. Caruso, 2007 WL 1827395 (E.D. Mich. 2007).

Pienaar v. Young, 2007 WL 1797632 (S.D. Ind. 2007).

Smith v. Bell, 2007 WL 1702616 (S.D. Fla. 2007).

Merryman Excavation, Inc., v. International Union of Operating Engineers, 2007 WL 1232198 (N.D. Ill. 2007) (arbitral immunity).

Mosher v. New Jersey, 2007 WL 1101230 (D.N.J. 2007) (sovereign and judicial immunity).

"A motion to dismiss is also a proper vehicle to assert a claim of absolute immunity." Wilson v. Barcella, 2007 WL 963977, *9 (S.D. Tex. 2007), aff'd, 284 Fed. Appx. 210 (5th Cir. 2008) (lengthy discussion of prosecutorial immunity in Bivens action).

Wang v. County of Santa Clara, 2007 WL 518841 (N.D. Cal. 2007) (prosecutorial immunity).

Jones v. Wildgen, 320 F. Supp. 2d 1116 (D. Kan. 2004), on reconsideration in part, 349 F. Supp. 2d 1358 (D. Kan. 2004).

GE Capital Mortg. Services, Inc. v. Estate of Lugo, 319 F. Supp. 2d 127 (D. Mass. 2004) (sovereign immunity).

Donhauser v. Goord, 314 F. Supp. 2d 119 (N.D. N.Y. 2004) (qualified immunity shields state employees against claims for compensatory and punitive damages, although not against claims for declaratory or injunctive relief).

Joyner v. School Dist. of Philadelphia, 313 F. Supp. 2d 495 (E.D. Pa. 2004) (sovereign immunity not waived).

Algarin v. Town of Wallkill, 313 F. Supp. 2d 257 (S.D. N.Y. 2004), aff'd, 421 F.3d 137 (2d Cir. 2005) (absolute immunity).

Schroeder v. Kochanowski, 311 F. Supp. 2d 1241 (D. Kan. 2004) (qualified immunity, prosecutorial immunity, and judicial immunity).

Sawyer v. Michigan State Police, 310 F. Supp. 2d 876 (E.D. Mich. 2004) (witnesses have absolute immunity against claims based on their testimony).

Doe ex rel. Doe v. Detroit Bd. of Educ., 310 F. Supp. 2d 871 (E.D. Mich. 2004) (qualified immunity).

Burkhart v. Knepper, 310 F. Supp. 2d 734 (W.D. Pa. 2004).

Novak v. Overture Services, Inc., 309 F. Supp. 2d 446 (E.D. N.Y. 2004).

Kalodner v. Abraham, 309 F. Supp. 2d 100 (D.D.C. 2004) (sovereign immunity).

VanHorn v. Nebraska State Racing Com'n, 304 F. Supp. 2d 1151 (D. Neb. 2004).

Jones v. Pennsylvania Dept. of Public Welfare, 2004 WL 1175808 (E.D. Pa. 2004).

Hamrick v. Farmers Alliance Mut. Ins. Co., 2004 WL 955273 (D. Kan. 2004), aff'd, 129 Fed. Appx. 430 (10th Cir. 2005) (qualified immunity).

Vanderwall v. Peck, 2004 WL 944518 (E.D. La. 2004), aff'd, 129 Fed. Appx. 89 (5th Cir. 2005) (qualified immunity).

Dotson v. Velure, 2004 WL 793208 (D. Or. 2004), report and recommendation adopted, 2004 WL 816852 (D. Or. 2004) (judicial immunity).

Foley v. Marquez, 2004 WL 603566 (N.D. Cal. 2004) (judicial immunity).

McGee v. Hunter, 2004 WL 414807 (E.D. La. 2004).

Schultz v. Braga, 290 F. Supp. 2d 637 (D. Md. 2003), aff'd, 455 F.3d 470 (4th Cir. 2006).

Torres Ocasio v. Melendez, 283 F. Supp. 2d 505 (D.P.R. 2003).

Carlson v. Trans Union, LLC, 261 F. Supp. 2d 663 (N.D. Tex. 2003) (under § 1681h(e) of Fair Credit Reporting Act, credit reporting agencies have qualified immunity from state tort actions).

Mason v. Arizona, 260 F. Supp. 2d 807 (D. Ariz. 2003).

Negron v. Miller, 2003 WL 21251874 (E.D. La. 2003) (§ 1983 claim against defendants in their official capacities).

McGee v. Hunter, 2003 WL 21251869 (E.D. La. 2003) (§ 1983 claim against defendants in their official capacities).

Slade v. Gates, 2003 WL 21149789 (C.D. Cal. 2003) (prosecutor in official capacity has Eleventh Amendment immunity).

Gilmore v. Stone, 2003 WL 1923734 (N.D. N.Y. 2003) (court may dismiss claim based upon qualified immunity without first deciding substantive claims), subsequently aff'd, 115 Fed. Appx. 108 (2d Cir. 2004).

Abrahams v. DiBlasi, 2003 WL 1846305 (S.D. N.Y. 2003) (absolute judicial immunity).

Puccio v. Town of Oyster Bay, 229 F. Supp. 2d 173 (E.D. N.Y. 2002) (qualified immunity).

Dasrath v. Continental Airlines, Inc., 228 F. Supp. 2d 531 (D.N.J. 2002).

Viera-Marcano v. Ramirez-Sanchez, 224 F. Supp. 2d 397 (D.P.R. 2002).

Garlanger v. Verbeke, 223 F. Supp. 2d 596 (D.N.J. 2002).

Hutchison v. Brookshire Bros., Ltd., 205 F. Supp. 2d 629 (E.D. Tex. 2002).

Gallardo v. DiCarlo, 203 F. Supp. 2d 1160 (C.D. Cal. 2002) (qualified immunity of corrections officer).

T.S. Haulers, Inc. v. Town of Riverhead, 190 F. Supp. 2d 455 (E.D. N.Y. 2002) (absolute and qualified immunity).

Schultzen v. Woodbury Central Community School Dist., 187 F. Supp. 2d 1099 (N.D. Iowa 2002) (rejected by, E.N. v. Susquehanna Tp. School Dist., 2010 WL 4853700 (M.D. Pa. 2010)).

Stubblefield v. C.I.R., 2002-1 U.S. Tax Cas. (CCH) P 50382, 89 A.F.T.R.2d 2002-2084, 2002 WL 850196 (S.D. Tex. 2002).

Helton v. Hawkins, 12 F. Supp. 2d 1276 (M.D. Ala. 1998).

Cetenich v. Alden, 11 F. Supp. 2d 238 (N.D. N.Y. 1998).

Johnson v. City of Chester, 10 F. Supp. 2d 482 (E.D. Pa. 1998).

McCain v. Scott, 9 F. Supp. 2d 1365 (N.D. Ga. 1998).

Harris v. District Bd. of Trustees of Polk Community College, 9 F. Supp. 2d 1319 (M.D. Fla. 1998).

Rowe v. City of Fort Lauderdale, 8 F. Supp. 2d 1369 (S.D. Fla. 1998).

U.S. ex rel. Graber v. City of New York, 8 F. Supp. 2d 343 (S.D. N.Y. 1998).

African American Legal Defense Fund, Inc. v. New York State Dept. of Educ., 8 F. Supp. 2d 330 (S.D. N.Y. 1998).

Ortega v. Nguyen, 7 F. Supp. 2d 1178 (D. Kan. 1998).

Lawson v. Shelby County, Tenn., 7 F. Supp. 2d 985 (W.D. Tenn. 1998), rev'd, 211 F.3d 331 (6th Cir. 2000).

Prager v. LaFaver, 5 F. Supp. 2d 906 (D. Kan. 1998), aff'd, 180 F.3d 1185 (10th Cir. 1999).

Carter v. City of Philadelphia, 4 F. Supp. 2d 386 (E.D. Pa. 1998), rev'd, 181 F.3d 339 (3d Cir. 1999).

Cordova v. Vaughn Mun. School Dist. Bd. of Educ., 3 F. Supp. 2d 1216 (D.N.M. 1998).

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Ostrzenski v. Seigel, 3 F. Supp. 2d 648 (D. Md. 1998), aff'd, 177 F.3d 245 (4th Cir. 1999).

Bryant v. New Jersey Dept. of Transp., 1 F. Supp. 2d 426 (D.N.J. 1998).

Lopez v. U.S., 998 F. Supp. 1239 (D.N.M. 1998).

American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County, 997 F. Supp. 1481 (M.D. Fla. 1998).

Smith v. State of Alabama, 996 F. Supp. 1203 (M.D. Ala. 1998).

Gralike v. Cook, 996 F. Supp. 889 (W.D. Mo. 1998).

Stanley v. Cooper, 996 F. Supp. 316 (S.D. N.Y. 1998).

Eastridge v. Rhode Island College, 996 F. Supp. 161 (D.R.I. 1998).

Stein v. Kent State University Bd. of Trustees, 994 F. Supp. 898 (N.D. Ohio 1998), judgment aff'd, 181 F.3d 103 (6th Cir. 1999).

Young v. Pennsylvania House of Representatives, Republican Caucus, 994 F. Supp. 282 (M.D. Pa. 1998), judgment rev'd, 208 F.3d 207 (3d Cir. 2000).

Roemer v. Crow, 993 F. Supp. 834 (D. Kan. 1998), judgment aff'd, 162 F.3d 1174 (10th Cir. 1998).

Proctor v. Vadlamudi, 992 F. Supp. 156 (N.D. N.Y. 1998).

Bessman v. Powell, 991 F. Supp. 830 (S.D. Tex. 1998), aff'd in part, 189 F.3d 469 (5th Cir. 1999).

Meek v. Springfield Police Dept., 990 F. Supp. 598 (C.D. Ill. 1998).

Kinnison v. Mississippi Dept. of Wildlife, Fisheries, and Parks, 990 F. Supp. 481 (S.D. Miss. 1998).

Cetenich v. Alden, 177 F.R.D. 94 (N.D. N.Y. 1998) (judicial immunity).

Diaz v. Carlson, 5 F. Supp. 2d 809 (C.D. Cal. 1997), aff'd, 142 F.3d 443 (9th Cir. 1998).

Bernstein v. U.S., 990 F. Supp. 428 (D.S.C. 1997).

A government official's entitlement to qualified immunity is a question of law that appropriately is determined before trial in one of three ways: on a motion to dismiss for failure to state a claim, on a request for judgment on the pleadings, or on a motion for summary judgment. Goodman v. Town of Golden Beach, 988 F. Supp. 1450 (S.D. Fla. 1997).

See also

Wallin v. Norman, 317 F.3d 558 (6th Cir. 2003) (denial of motion to dismiss based on qualified immunity is immediately appealable since purpose of immunity is not just to protect from suit, but also to protect from litigation).

Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648 (10th Cir. 2002) (church autonomy doctrine; converted to summary judgment).

Compare

Hall v. New England Business Service, Inc., 2003 WL 2004375 (D.N.H. 2003) (employers are immune from negligence claims by their employees to extent that claims are covered by worker's compensation statute).

But see

The entitlement of officials of the state insurance department to rely on the defense of judicial or governmental immunity in a civil rights action was not determinable on a motion to dismiss for failure to state a claim. Safeguard Mut. Ins. Co. v. Miller, 472 F.2d 732 (3d Cir. 1973).

Mary's House, Inc. v. North Carolina, 976 F. Supp. 2d 691 (M.D. N.C. 2013) ("The Fourth Circuit has not conclusively established whether a dismissal based on Eleventh Amendment immunity is a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) or for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. * * * However, Defendants characterize their Eleventh Amendment argument as jurisdictional, so the court will treat it as such."), citing Andrews v. Daw, 201 F.3d 521, 524-525 n.2 (4th Cir. 2000).

Doe v. Franklin County, Mo., 2013 WL 2467926, *2-5 (E.D. Mo. 2013) (defendant commissioner who opened commission meeting with prayer was not subject to legislative immunity because prayer was not legislative act).

Russell v. Lazar, 300 F. Supp. 2d 716 (E.D. Wis. 2004) (Rule 12(b)(6) is almost always bad ground for adjudicating qualified immunity because it is essential to consider facts in addition to those in complaint).

Duncan v. Secretary of Defense, 2004 WL 1118300 (E.D. La. 2004) (in Fifth Circuit, sovereign immunity defense is appropriately asserted on Rule 12(b)(1) motion rather than Rule 12(b)(6) motion).

Yeomans v. Wallace, 291 F. Supp. 2d 70 (D. Conn. 2003) (court could not rule for defendant on qualified immunity issue without drawing inferences in his favor and thus Rule 12(b)(6) motion was improper).

Robbins v. Bureau of Land Management, 252 F. Supp. 2d 1286 (D. Wyo. 2003) (court said motion to dismiss based on qualified immunity is treated as motion to dismiss for lack of subject matter jurisdiction; however, unpublished case cited to by court referred to Eleventh Amendment sovereign immunity but instant

case dealt with qualified immunity from Bivens action and so court is almost certainly wrong since great weight of authority adjudicates qualified immunity from constitutional torts under Rule 12(b)(6)).

A Rule 12(b)(6) motion is not the preferred vehicle for resolving a qualified immunity defense; rather, immunity should be raised as an affirmative defense and be addressed on a motion for summary judgment or for judgment on the pleadings. Whiting v. Tunica County, 222 F. Supp. 2d 809 (N.D. Miss. 2002).

Deloughery v. City of Chicago, 2002 WL 31654942 (N.D. Ill. 2002) (qualified immunity is "almost always bad ground for dismissal" under Rule 12(b)(6) since plaintiffs are not required to plead around anticipated immunity defense under federal rules), citing Jacobs v. City of Chicago, 215 F.3d 758 (7th Cir. 2000).

Individual officers of the Commonwealth of Pennsylvania who were alleged knowingly to have denied a handicapped child a free appropriate education could not assert the doctrine of qualified immunity to bar the suit as the question of their good faith was an affirmative defense that could not be determined on a motion to dismiss. Stubbs v. Kline, 463 F. Supp. 110 (W.D. Pa. 1978).

99 **Statutory exceptions to liability**

Monsarrat v. Newman, 28 F.4th 314, 325 (1st Cir. 2022) (affirming 12(b)(6) dismissal based on the applicability of § 230 of the Communications Decency Act and the fair use exception, codified at § 107 of the Copyright Act).

Bell v. Eagle Mountain Saginaw Independent School District, 27 F.4th 313, 320-326 (5th Cir. 2022) (affirming 12(b)(6) dismissal based on the applicability the fair use exception, codified at § 107 of the Copyright Act), **citing Wright & Miller.**

Sams v. Yahoo! Inc., 713 F.3d 1175, 1183 (9th Cir. 2013) (affirming 12(b)(6) dismissal based on the applicability of § 2707(e) of the Stored Communications Act).

Marano v. Metropolitan Museum of Art, 472 F. Supp. 3d 76, 82 (S.D. N.Y. 2020) (dismissing based on the applicability of the fair use exception, codified at § 107 of the Copyright Act), aff'd, 844 Fed. Appx. 436 (2d Cir. 2021).

G.G. v. Salesforce.com, Inc., 603 F. Supp. 3d 626, 2022 WL 1541408, *4-11 (N.D. Ill. 2022) (dismissing based on the applicability of § 230 of the Communications Decency Act), rev'd and remanded, 76 F.4th 544 (7th Cir. 2023).

FirstEnergy Corp. v. Pircio, 524 F. Supp. 3d 732, 741-743 (N.D. Ohio 2021) (dismissing based on the applicability of § 1833(b) of the Defend Trade Secrets Act).

100 **Laches**

Leimer v. State Mut. Life Assur. Co. of Worcester, Mass., 108 F.2d 302 (C.C.A. 8th Cir. 1940).

Butt v. Zimmerman, 2021 WL 5822260, *6 (M.D. Ga. 2021) ("Although the issue of whether laches bars a claim generally should not be resolved on a motion to dismiss, there is at least one instance in which it is acceptable to resolve such a question. 'The defense of laches may be asserted by motion to dismiss for failure to state a claim—provided that the complaint shows affirmatively that the claim is barred.' And upon review, Plaintiff's claim * * * is barred, so the Court cannot provide the relief he seeks."), aff'd, 2022 WL 5237916 (11th Cir. 2022).

Acosta v. Jardon & Howard Technologies, Inc., 2018 WL 5779506 (E.D. N.C. 2018) ("Although courts can consider laches in the context of a motion to dismiss under Rule 12(b)(6), laches requires a fact-intensive analysis that is usually inappropriate to resolve on the face of the complaint.").

Deniece Design, LLC v. Braun, 953 F. Supp. 2d 765, 775 (S.D. Tex. 2013) ("Laches, estoppel and/or waiver can serve as an affirmative defense to patent infringement * * *.").

Lennon v. Seaman, 63 F. Supp. 2d 428 (S.D. N.Y. 1999), **citing Wright & Miller** (when defense of laches is clear on face of complaint and when it is clear that plaintiff can prove no set of facts to avoid insuperable bar, court may consider defense on motion to dismiss).

U.S. v. Kusche, 56 F. Supp. 201 (S.D. Cal. 1944).

But compare

Although a court may consider the defense of laches on a Rule 12(b)(6) motion, courts generally are not inclined to do so because application of the laches defense involves consideration of fact issues outside the pleadings. Bolanos v. Norwegian Cruise Lines Ltd., 7 Wage & Hour Cas. 2d (BNA) 1703, 2002 WL 1465907 (S.D. N.Y. 2002), order aff'd, 2004 WL 769766 (S.D. N.Y. 2004) (magistrate judge).

But see

Because laches requires a "fact intensive inquiry," the court held that resolution of the defense was premature at the motion to dismiss stage. Moreover, the court suggested that, in Lanham Act claims, dismissals based on laches are generally improper before a factual record has been developed. Champion Laboratories, Champion Laboratories, Inc. v. Central Illinois Manufacturing Co., 157 F. Supp. 3d 759, 766-765 (N.D. Ill. 2016).

101 **Privilege**

Ogbin v. Fein, Such, Kahn and Shepard, P.C., 414 Fed. Appx. 456 (3d Cir. 2011) (litigation privilege).

Schiavone Const. Co. v. Time, Inc., 847 F.2d 1069 (3d Cir. 1988).

In an action for slander, the defense of absolute privilege, based upon the defendant's status as a judge, could be raised by motion to dismiss. Owen v. Kronheim, 304 F.2d 957, 113 (D.C. Cir. 1962).

Ginsburg v. Black, 192 F.2d 823 (7th Cir. 1951).

Foltz v. Moore McCormack Lines, Inc., 189 F.2d 537 (2d Cir. 1951).

Fredin v. Kreil, 2020 WL 7427048 (D. Minn. 2020) (absolute litigation privilege).

Routh v. University of Rochester, 981 F. Supp. 2d 184 (W.D. N.Y. 2013) (common-interest privilege).

Deel v. Home Depot USA, Inc., 2010 WL 2179576 (D.S.C. 2010), report and recommendation adopted, 2010 WL 2196272 (D.S.C. 2010), aff'd, 399 Fed. Appx. 786 (4th Cir. 2010).

McFarland v. McFarland, 2010 WL 746878 (N.D. Iowa 2010) ("The court must also still 'construe the complaint liberally in the light most favorable to the plaintiff.'"), quoting Eckert v. Titan Tire Corp., 514 F.3d 801, 806 (8th Cir. 2008) (decided post-Twombly).

Grochocinski v. Mayer Brown Rowe & Maw LLP, 251 F.R.D. 316 (N.D. Ill. 2008) (attorney-client privilege).

Burnett v. Sharma, 2007 WL 1020782 (D.D.C. 2007).

Joyner v. School Dist. of Philadelphia, 313 F. Supp. 2d 495 (E.D. Pa. 2004) (since statements made during disciplinary hearing were privileged, defamation claim was dismissed).

Moore v. New York City Dept. of Educ., 2004 WL 691523 (S.D. N.Y. 2004) (defendant's limited internal dissemination of report on corporal punishment by plaintiff entitled to common law privilege).

Jones v. Hinton, 847 F. Supp. 41 (E.D. Pa. 1994).

Pure, Ltd. v. Shasta Beverages, Inc., 691 F. Supp. 1274 (D. Haw. 1988).

102 **Release**

Ruiz-Sanchez v. Goodyear Tire & Rubber Co., 717 F.3d 249, 252 (1st Cir. 2013).

Russell v. Harman Intern. Industries, Inc., 945 F. Supp. 2d 68, 73 (D.D.C. 2013), aff'd, 773 F.3d 253 (D.C. Cir. 2014).

Tim-Minn, Inc. v. Tim Hortons USA, Inc., 2020 WL 13413692, *4-6 (D. Minn. 2020).

Mechoopda Indian Tribe of Chico Rancheria, Cal. v. Schwarzenegger, 2004 WL 1103021 (E.D. Cal. 2004).

Wilson v. Western Oceanic, Inc., 540 F. Supp. 228 (S.D. Tex. 1982), **citing Wright & Miller.**

Cordaro v. Lusardi, 354 F. Supp. 1147 (S.D. N.Y. 1973).

Hoover v. Lacey, 80 F. Supp. 691 (D. D.C. 1943).

But see
Because release is an affirmative defense, the existence of a defense does not undercut the adequacy of the claim, and thus it is improperly raised on a Rule 12(b)(6) motion. Deckard v. General Motors Corp., 307 F.3d 556 (7th Cir. 2002).

103 **Res judicata**
Healy v. Fox, 46 F.4th 739 (8th Cir. 2022) (affirming district court's grant of a motion to dismiss for failure to state a claim on res judicata grounds).

"Generally, res judicata must be pled as an affirmative defense. Two limited exceptions to this rule exist. The first exception permits 'dismissal by the court sua sponte on res judicata grounds * * * in the interest of judicial economy where both actions were brought before the same court.' The second exception applies 'where all of the relevant facts are contained in the record * * * and all are uncontroverted.' Both McIntyre's Civil Rights Act and FLSA actions were brought before the same federal district court. The relevant facts are contained in McIntyre's complaint, which is nearly identical to the complaint filed in the earlier action. Thus, the district court did not err in raising the issue of res judicata sua sponte under Rule 12(b)(6)." McIntyre v. Ben E. Keith Company, 754 Fed. Appx. 262 (5th Cir. 2018) (citations omitted).

Duckett v. Fuller, 819 F.3d 740, 747 (4th Cir. 2016) (since district court erred in dismissing state defendants' claims under Rule 12(b)(6), defendant was not barred by judgment for pursuing similar claims).

"Although res judicata is not a defense under Rule 12(b), and generally should be raised as an affirmative defense under Rule 8(c), Fed.R.Civ.P., it may be raised in a Rule 12(b)(6) motion where the existence of the defense can be determined from the face of the complaint." Solis v. Global Acceptance Credit Co., L.P., 601 Fed. Appx. 767, 771 (11th Cir. 2015).

Davis v. Davis, 551 Fed. Appx. 991, 994 (11th Cir. 2014).

Stone v. Louisiana Dept. of Revenue, 590 Fed. Appx. 332 (5th Cir. 2014).

Arthur v. Thomas, 674 F.3d 1257, 1261 (11th Cir. 2012) ("For several reasons, we conclude that Arthur's Eighth Amendment allegations are not so similar to those presented in our previous cases that his complaint can be dismissed on a Rule 12(b)(6) motion.").

Garcia-Monagas v. De Arellano, 674 F.3d 45, 50 (1st Cir. 2012).

Keymarket of Ohio, LLC v. Keller, 483 Fed. Appx. 967 (6th Cir. 2012).

Associated Financial Corp. v. Kleckner, 480 Fed. Appx. 89 (2d Cir. 2012).

Dean v. Teeuwissen, 479 Fed. Appx. 629 (5th Cir. 2012) (per curiam).

Whitaker v. Nash-Rocky Mount Bd. of Educ., 474 Fed. Appx. 912 (4th Cir. 2012) (per curiam).

Manu v. National City Bank of Indiana, 471 Fed. Appx. 101 (3d Cir. 2012) (per curiam).

Handley v. Chase Bank USA, NA, 463 Fed. Appx. 65, 66 (3d Cir. 2012) (per curiam).

Czarniecki v. City of Chicago, 633 F.3d 545 (7th Cir. 2011).

Arlin-Golf, LLC v. Village of Arlington Heights, 631 F.3d 818 (7th Cir. 2011).

LaCroix v. Marshall County, Mississippi, 409 Fed. Appx. 794, 798-799 (5th Cir. 2011) (with two exceptions, res judicata must be pleaded, not raised by court).

Wainscott v. Dallas County, Tex., 408 Fed. Appx. 813, 815 (5th Cir. 2011).

Royal Crown Ins. Corp. v. Northern Mariana Islands, 447 Fed. Appx. 760 (9th Cir. 2011).

Amadasu v. The Christ Hosp., 514 F.3d 504 (6th Cir. 2008).

Austin v. Downs, Rachlin & Martin Burlington St. Johnsbury, 270 Fed. Appx. 52 (2d Cir. 2008) (res judicata and collateral estoppel).

Providence Health Plan v. McDowell, 385 F.3d 1168 (9th Cir. 2004) (claim preclusion).

Salguero v. City Of Clovis, 366 F.3d 1168 (10th Cir. 2004) (collateral estoppel).

Dryvit Systems, Inc. v. Great Lakes Exteriors, Inc., 96 Fed. Appx. 310 (6th Cir. 2004).

Ratcliff v. Rainwater, 93 Fed. Appx. 623 (5th Cir. 2004).

Berwind Corp. v. Commissioner of Social Security, 307 F.3d 222 (3d Cir. 2002).

Howard Carr Companies, Inc. v. Cumberland Farms, Inc., 456 F. Supp. 3d 462, 468 (N.D. N.Y. 2020), aff'd, 833 Fed. Appx. 922 (2d Cir. 2021).

Johnson v. Kaemingk, 381 F. Supp. 3d 1104 (D.S.D. 2019) (denying a motion to dismiss based on issue preclusion because the prior adjudication of the issue—the plaintiff's disability under the Americans with Disabilities Act—did not resolve the issue of whether the plaintiff is disabled five years hence).

Res judicata may be raised in a Rule 12(b)(6) motion for failure to state a claim if "the defense is premised on public records and no further information or discovery is required." Lechnir v. Wells, 157 F. Supp. 3d 804, 808 (E.D. Wis. 2016).

Vargas-Colon v. Fundacion Damas, Inc., 157 F. Supp. 3d 106, 120-124 (D.P.R. 2016), aff'd, 864 F.3d 14 (1st Cir. 2017).

Suggs v. Wichard, 2016 WL 6648168, *2-3 (D. Ariz. 2016) (issue precluded by prior arbitration proceedings).

Brewer v. District of Columbia, 105 F. Supp. 3d 74, 87 (D.D.C. 2015) ("Court concludes that each of the prerequisites for issue preclusion under D.C. law are clearly present in the instant case * * *.").

The doctrine of res judicata did not bar the defendants' proposed antitrust counterclaims in a patent infringement suit because the counterclaimants offered new factual allegations that the defendants could not have made in an earlier lawsuit in another district. Intellectual Ventures I LLC v. Capital One Financial Corp., 99 F. Supp. 3d 610, 619-620 (D. Md. 2015).

McFadden v. Fuller, 2015 WL 2412326, *11 (D.S.C. 2015).

Arrington v. Federal Public Defender for District of Columbia, 75 F. Supp. 3d 340, 345-347 (D.D.C. 2014) (four elements of res judicata met).

Communication Management Services, LLC v. Qwest Corp., 67 F. Supp. 3d 1159, 1169 (D. Or. 2014), aff'd in part, rev'd in part, 726 Fed. Appx. 538 (9th Cir. 2018).

Benisek v. Mack, 11 F. Supp. 3d 516 (D. Md. 2014), aff'd, 584 Fed. Appx. 140 (4th Cir. 2014), rev'd and remanded, 577 U.S. 39, 136 S. Ct. 450, 193 L. Ed. 2d 279 (2015).

"A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) may be entertained on the ground of res judicata, and in considering such a motion, the

court may take judicial notice of facts from a prior judicial opinion when the plaintiff does not dispute the factual accuracy of the record of the previous suit." Mills v. Duke University, 2014 WL 7150684, *3 n.2 (M.D. N.C. 2014).

Sczygelski v. U.S. Customs and Border Patrol Agency, 48 F. Supp. 3d 80 (D.D.C. 2014), judgment aff'd, 624 Fed. Appx. 1 (D.C. Cir. 2015).

Allstate Ins. Co. v. Elzanaty, 916 F. Supp. 2d 273, 299 (E.D. N.Y. 2013), subsequent determination, (2nd Circ. 13-4714)929 F. Supp. 2d 199 (E.D. N.Y. 2013).

Cottrell v. Vilsack, 915 F. Supp. 2d 81, 88 n.6 (D.D.C. 2013), order aff'd, 2013 WL 4711683 (D.C. Cir. 2013), citing Smalls v. U.S., 471 F.3d 186, 189 (D.C. Cir. 2006).

Marceline v. Town of Darien, 974 F. Supp. 2d 123 (D. Conn. 2013).

Amr v. Moore, 2010 WL 3154575 (E.D. Va. 2010), report and recommendation adopted, 2010 WL 3154567 (E.D. Va. 2010), aff'd, 411 Fed. Appx. 584 (4th Cir. 2011).

Deel v. Home Depot USA, Inc., 2010 WL 2179576 (D.S.C. 2010), report and recommendation adopted, 2010 WL 2196272 (D.S.C. 2010), aff'd, 399 Fed. Appx. 786 (4th Cir. 2010).

Bostic v. U.S. Capitol Police, 644 F. Supp. 2d 106 (D.D.C. 2009).

Carroll v. Welch, 2007 WL 1377654 (E.D. Pa. 2007).

Burnett v. Sharma, 2007 WL 1020782 (D.D.C. 2007).

Georgia Farm Bureau Mutual Ins. Co. v. Great American Excess and Surplus Ins.Co., 2007 WL 757816 (N.D. Ga. 2007) (denied because court could not determine issue on face of complaint).

Ashton v. City of Concord, N.C., 337 F. Supp. 2d 735 (M.D. N.C. 2004).

Baron v. Brackis, 312 F. Supp. 2d 808 (E.D. Va. 2004).

Hernandez v. Goord, 312 F. Supp. 2d 537 (S.D. N.Y. 2004).

Coleman v. Potomac Elec. Power Co., 310 F. Supp. 2d 154 (D.D.C. 2004), aff'd, 2004 WL 2348144 (D.C. Cir. 2004).

Langella v. Bush, 306 F. Supp. 2d 459 (S.D. N.Y. 2004).

Lewis ex rel. Lewis v. BHS College Meadows, 2004 WL 870818 (D. Kan. 2004), aff'd, 123 Fed. Appx. 885 (10th Cir. 2005).

Moore v. Navarro, 2004 WL 783104 (N.D. Cal. 2004).

Pergosky v. Pennsylvania Power & Light Co., 2004 WL 765108 (E.D. Pa. 2004), aff'd, 133 Fed. Appx. 827 (3d Cir. 2005) (collateral estoppel).

Chicago Dist. Council of Carpenters Pension Fund v. Marca Const., 2004 WL 725299 (N.D. Ill. 2004) (motion to dismiss denied because defendant cannot meet burden of showing that collateral estoppel exists).

Huntley v. City of Johnstown, 2004 WL 627157 (W.D. Pa. 2004) (collateral estoppel).

Wilson v. Bob Watson Chevrolet, Inc., 2004 WL 432493 (N.D. Ill. 2004).

In re HNRC Dissolution Co., 549 B.R. 469, 481 (Bankr. E.D. Ky. 2016), aff'd, 585 B.R. 837 (B.A.P. 6th Cir. 2018), aff'd, 761 Fed. Appx. 553 (6th Cir. 2019).

In re Stevens, 2004 WL 439250 (Bankr. D. Vt. 2004) (not reported in Bankruptcy Reporter).

DeNune v. Consolidated Capital of North America, Inc., 288 F. Supp. 2d 844 (N.D. Ohio 2003).

Doe v. Mann, 285 F. Supp. 2d 1229 (N.D. Cal. 2003), aff'd, 415 F.3d 1038 (9th Cir. 2005).

Logan Farms v. HBH, Inc. DE, 282 F. Supp. 2d 776 (S.D. Ohio 2003) (collateral estoppel).

Commer v. American Federation of State, County and Mun. Employees, 272 F. Supp. 2d 332 (S.D. N.Y. 2003), judgment aff'd, 390 F.3d 203 (2d Cir. 2004) (collateral estoppel).

Brown v. Quiniou, 2003 WL 1888743 (S.D. N.Y. 2003).

Verizon Maryland Inc. v. RCN Telecom Services, Inc., 232 F. Supp. 2d 539 (D. Md. 2002), aff'd in part, dismissed in part, 377 F.3d 355 (4th Cir. 2004).

Lipin v. National Union Fire Ins. Co. of Pittsburgh, Pa., 202 F. Supp. 2d 126 (S.D. N.Y. 2002).

Taylor v. Maple Ave. Economic Development Corp., 2002 WL 1758189 (N.D. Tex. 2002).

Trevino v. Boomtown Inc., 2002 WL 1363891 (E.D. La. 2002).

Inofast Mfg., Inc. v. Bardsley, 103 F. Supp. 2d 847 (E.D. Pa. 2000), aff'd, 265 F.3d 1055 (3d Cir. 2001).

Tyler v. O'Neill, 52 F. Supp. 2d 471 (E.D. Pa. 1999), order aff'd, 225 F.3d 650 (3d Cir. 2000).

Resource N.E. of Long Island, Inc. v. Town of Babylon, 28 F. Supp. 2d 786 (E.D. N.Y. 1998) (preclusion defenses appropriately raised on Rule 12(b)(6) motion).

Tonken v. Loving & Weintraub Inc., 22 F. Supp. 2d 86 (S.D. N.Y. 1998).

Clarkstown Recycling Center, Inc. v. Parker, Chapin Flattau & Klimpl, LLP, 1 F. Supp. 2d 327 (S.D. N.Y. 1998).

Kuhns v. CoreStates Financial Corp., 998 F. Supp. 573 (E.D. Pa. 1998).

Smith v. State of Alabama, 996 F. Supp. 1203 (M.D. Ala. 1998).

Kowalczyk v. Gilroy, 994 F. Supp. 410 (E.D. N.Y. 1998), judgment aff'd, 166 F.3d 1200 (2d Cir. 1998).

Clavin v. Post, 992 F. Supp. 359 (S.D. N.Y. 1998), judgment aff'd, 165 F.3d 13 (2d Cir. 1998).

Slavov v. Marriott Intern., Inc., 990 F. Supp. 566 (N.D. Ill. 1998).

Barth v. Kaye, 178 F.R.D. 371 (N.D. N.Y. 1998).

City of Painesville, Ohio v. First Montauk Financial Corp., 178 F.R.D. 180 (N.D. Ohio 1998).

State of Ark. ex rel. Bryant v. Dow Chemical Co., 981 F. Supp. 1170 (E.D. Ark. 1997).

Ramirez v. Brooklyn Aids Task Force, 175 F.R.D. 423 (E.D. N.Y. 1997), judgment aff'd, 164 F.3d 619 (2d Cir. 1998).

HBP Associates v. Marsh, 893 F. Supp. 271 (S.D. N.Y. 1995).

U.S. ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 860 F. Supp. 370 (S.D. Tex. 1994), aff'd, 53 F.3d 1282 (5th Cir. 1995).

Julian v. New York City Transit Authority, 857 F. Supp. 242 (E.D. N.Y. 1994), aff'd, 52 F.3d 312 (2d Cir. 1995).

Oregon Laborers-Employers Health & Welfare Trust Fund v. All State Indus. and Marine Cleaning, Inc., 850 F. Supp. 905 (D. Or. 1994).

Briggs v. Newberry County School Dist., 838 F. Supp. 232 (D.S.C. 1992), aff'd, 989 F.2d 491 (4th Cir. 1993).

Norals v. Schneider Bros., Inc., 651 F. Supp. 1324 (N.D. Ill. 1987).

Gilbert v. Bagley, 492 F. Supp. 714 (M.D. N.C. 1980), **citing Wright & Miller.**

Hammer v. Town of Greenburgh, 440 F. Supp. 27 (S.D. N.Y. 1977), aff'd, 578 F.2d 1368 (2d Cir. 1978).

Pyles v. Keane, 418 F. Supp. 269 (S.D. N.Y. 1976) (collateral estoppel).

Fleer Corp. v. Topps Chewing Gum, Inc., 415 F. Supp. 176 (E.D. Pa. 1976) (collateral estoppel).

Sorger v. Philadelphia Redevelopment Authority of City of Philadelphia, 401 F. Supp. 348 (E.D. Pa. 1975).

Lancaster County v. Philadelphia Elec. Co., 386 F. Supp. 934 (E.D. Pa. 1975).

Kaufman v. Somers Bd. of Ed., 368 F. Supp. 28 (D. Conn. 1973).

Keystone Ins. Co. v. U.S., 332 F. Supp. 74 (E.D. Pa. 1971).

Sylk v. U.S., 331 F. Supp. 661 (E.D. Pa. 1971).

Connelly Foundation v. School Dist. of Haverford Tp., 326 F. Supp. 241 (E.D. Pa. 1971), judgment aff'd, 461 F.2d 495 (3d Cir. 1972).

Butterman v. Walston & Co., 50 F.R.D. 189 (E.D. Wis. 1970).

Katz v. State of Conn., 307 F. Supp. 480 (D. Conn. 1969), judgment aff'd, 433 F.2d 878 (2d Cir. 1970).

Travelers Indem. Co. v. Arbogast, 45 F.R.D. 87 (W.D. Pa. 1968).

Haydu v. City of Billings, Mont., 258 F. Supp. 785 (D. Mont. 1966).

Lippmann v. Hydro-Space Technology, Inc., 235 F. Supp. 860 (D.N.J. 1964).

But compare
Dickson v. Township of Novesta, 2006 WL 3240695 (E.D. Mich. 2006), **citing Wright & Miller.**

See also
Hugel v. Southeast Louisiana Flood Protection Authority-East, 429 Fed. Appx. 364 (5th Cir. 2011) (court declined to decide whether res judicata can be raised on Rule 12(b)(6) motion), **quoting Wright & Miller**.

Slepian v. Slepian, 355 So. 2d 714, 716 (Ala. Civ. App. 1977), **citing Wright & Miller.**

Bickford v. American Interinsurance Exchange, 224 N.W.2d 450, 453 (Iowa 1974), **citing Wright & Miller.**

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Osserman v. Jacobs, 369 Mass. 200, 339 N.E.2d 193, 194 n.3 (1975), **citing Wright & Miller.**

But see
Test Masters Educational Services, Inc. v. Singh, 428 F.3d 559 (5th Cir. 2005) (generally res judicata contention cannot be asserted in motion to dismiss; it must be pleaded as affirmative defense).

Weizmann Institute of Science v. Neschis, 229 F. Supp. 2d 234 (S.D. N.Y. 2002) (although res judicata and collateral estoppel can sometimes be adjudicated pursuant to Rule 12(b)(6), issue of whether plaintiff had full and fair opportunity to participate in foreign adjudication was not appropriately litigated at early stage of case).

The defense of res judicata could not be raised on a motion to dismiss. Foye v. United A. G. Stores Co-op., Inc., 336 F. Supp. 82 (D. Neb. 1972).

104 **Failure to exhaust**
Williams v. Correction Officer Priatno, 829 F.3d 118, 122 (2d Cir. 2016).

Morris v. McCarthy, 825 F.3d 658, 667 (D.C. Cir. 2016) (district court properly dismissed wrongful termination claims for failure to exhaust administrative remedies).

Hopkins v. City of Bloomington, 774 F.3d 490, 492 (8th Cir. 2014) (plaintiff was required to exhaust available state administrative remedies before bringing post-deprivation procedural due process claim).

"But, though it generally must be affirmatively pled and proved, '[i]f an affirmative defense * * * is apparent on the face of the complaint * * * that [defense] can provide the basis for dismissal under Rule 12(b)(6).'" ABF Freight System, Inc. v. International Broth. of Teamsters, 728 F.3d 853, 861 (8th Cir. 2013), quoting C.H. Robinson Worldwide, Inc. v. Lobrano, 695 F.3d 758, 764 (8th Cir. 2012).

Slingland v. Donahoe, 542 Fed. Appx. 189 (3d Cir. 2013) (dismissal of Title VII and ADEA claims under Rule 12(b)(6) affirmed because plaintiff failed to exhaust administrative remedies), citing Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997).

Mendoza v. Lehigh Southwest Cement Co., 540 Fed. Appx. 813 (9th Cir. 2013) (failure to file timely complaint with Equal Employment Opportunity Commission).

Christiansen v. West Branch Community School Dist., 674 F.3d 927, 935 (8th Cir. 2012).

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Jech v. Department of Interior, 483 Fed. Appx. 555 (10th Cir. 2012).

Presbury v. Wenerowicz, 472 Fed. Appx. 100 (3d Cir. 2012) (per curiam).

Bell v. Skendall, 470 Fed. Appx. 65 (3d Cir. 2012) (per curiam).

Szemple v. Correctional Medical Services, Inc., 493 Fed. Appx. 238, 241 (3d Cir. 2012) (per curiam).

Spicer v. Ford Motor Co., 491 Fed. Appx. 543 (6th Cir. 2012).

Hull v. I.R.S., U.S. Dept. of Treasury, 656 F.3d 1174, 1181 n.5 (10th Cir. 2011).

Brooks v. Midwest Heart Group, 655 F.3d 796 (8th Cir. 2011).

Leak v. CIGNA Healthcare, 423 Fed. Appx. 53 (2d Cir. 2011).

Basso v. Willow Run Foods, Inc., 577 F. Supp. 3d 73, 83-85 (N.D. N.Y. 2022) (dismissing plaintiff's hostile work environment claim under the ADA because plaintiff failed to first file a timely charge with the EEOC).

Moreno v. Kansas City Steak Company, LLC, 2017 WL 2985748, *3 (D. Kan. 2017) (treating plaintiff's failure to exhaust administrative remedies as a jurisdictional defect to be considered under a Rule 12(b)(1) motion and not a Rule 12(b)(6) motion).

Gomez v. New York City Police Department, 191 F. Supp. 3d 293, 299-300 (S.D. N.Y. 2016) (plaintiff's failure to exhaust Title VII claims deemed clear from face of complaint).

Mecouch v. Pension Board of the Employees' Retirement System of the County of Milwaukee, 184 F. Supp. 3d 684, 690 (E.D. Wis. 2016) (plaintiff failed to exhaust all available state remedies since state certiorari review was still available and therefore plaintiff's due process claim was denied).

The United States only waives its sovereign immunity for tort claims under the Federal Tort Claims Act after administrative remedies are exhausted. Because the plaintiffs did not refuse (and thus conceded) that they did not exhaust their administrative remedies under the FTCA, the court was without jurisdiction. Emrit v. National Institutes of Health, 157 F. Supp. 3d 52, 54-55 (D.D.C. 2016).

Rosario v. Brennan, 197 F. Supp. 3d 406 (D. Conn. 2016).

Galvez v. I.R.S., 448 Fed. Appx. 880 (11th Cir. 2011).

Latson v. Holder, 82 F. Supp. 3d 377, 386 (D.D.C. 2015).

"The District of Columbia Circuit instructs that a FOIA plaintiff's failure to exhaust administrative remedies before filing a civil action is properly treated as

a failure to state a claim upon which relief may be granted under Fed.R.Civ.P. 12(b)(6)." Rachuy v. Director of Federal Bureau of Investigation, 79 F. Supp. 3d 147, 152 n.3 (D.D.C. 2015) (internal quotations omitted).

"In general, exhaustion arguments in FOIA [Freedom of Information Act] cases are analyzed under Rule 12(b)(6)." Pinson v. U.S. Department of Justice, 61 F. Supp. 3d 164, 172 (D.D.C. 2015).

"As an affirmative defense, the burden of proof for the exhaustion of administrative remedies in a suit governed by the PLRA [Prison Litigation Reform Act] lies with the defendant." Bernard v. Britton, 2015 WL 753527, *4 (D. Colo. 2015) (internal quotations omitted).

"The Court will apply the 12(b)(6) standard to both EPA's failure-to-exhaust argument and its failure-to-state-a-claim argument. Although FOIA cases typically and appropriately are decided on motions for summary judgment, where an agency argues that the requester has failed to exhaust his administrative remedies, courts analyze the matter under Rule 12(b)(6) for failure to state a claim." Hall & Associates v. U.S. Environmental Protection Agency, 77 F. Supp. 3d 40, 44 (D.D.C. 2014) (internal citations omitted).

"The Sixth Circuit has explained that the requirement that plaintiffs first exhaust their administrative remedies is not meant to be overly rigid, nor should it result in the restriction of subsequent complaints based on procedural technicalities or the failure of the charges to contain the exact wording which might be required in a judicial pleading." Ellis v. Morgan County Sheriff's Dept., 2014 WL 7408834, *2 (E.D. Tenn. 2014) (internal quotations omitted).

"Dismissal under Rule 12(b)(6) for failure to exhaust is appropriate if such failure is evidenced on the face of the complaint and incorporated documents." Lee v. O'Harer, 2014 WL 7343997, *3 (N.D. N.Y. 2014).

In light of recent Supreme Court decisions, "the Court concludes that if our Circuit [Tenth Circuit] were given the opportunity to consider directly whether an ERISA exhaustion argument is a jurisdictional requirement, it would conclude that it is not. ERISA's exhaustion requirement is not derived from statutory authority; rather, it is a judge-made rule." Richardson v. Kellogg Co., 2014 WL 7338844, *6 (D. Kan. 2014), subsequent determination, 2015 WL 474320 (D. Kan. 2015).

Reed v. Gorring, 2014 WL 7338713, *4 (W.D. Pa. 2014) (PLRA [Prison Litigation Reform Act] exhaustion).

The United States Supreme Court has ruled that an individual need not wait for the EEOC to take action before filing an ADEA [Age Discrimination in Employment Act] lawsuit." Frederick v. Sandusky Cent. Catholic School, 2014

WL 7335178, *2 (N.D. Ohio 2014) (motion denied; "EEOC guidelines do not require complete exhaustion; rather, plaintiffs need only wait sixty days after filing charges with the EEOC to initiate suit"), citing Federal Exp. Corp. v. Holowecki, 552 U.S. 389, 403-404, 128 S. Ct. 1147, 1158-1159, 170 L. Ed. 2d 10 (2008).

"As a general rule, a Title VII plaintiff cannot bring claims in a lawsuit that were not included in her EEOC charge. This rule is not jurisdictional but rather a condition precedent to bringing a case based on those claims." Richardson v. Metropolitan Family Services, 2014 WL 7205581, *4 (N.D. Ill. 2014).

Koch v. Walter, 935 F. Supp. 2d 164, 170-171 (D.D.C. 2013) ("[J]urisdictional exhaustion under the Rehabilitation Act is evaluated under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Prudential exhaustion under Title VII and the ADEA, by contrast, is evaluated either under Rule 12(b)(6) for failure to state a claim or, when a party asserts that there are genuine issues of material fact in dispute, and provides evidentiary materials in the record to support that assertion, under Rule 56.").

Jordan v. Forfeiture Support Associates, 928 F. Supp. 2d 588, 593 (E.D. N.Y. 2013) ("Defendant, however, mischaracterizes Title VII's statutory exhaustion requirement as a jurisdictional prerequisite and therefore erroneously invokes Rule 12(b)(1). * * * Accordingly, the court denies defendant's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and instead construes defendant's administrative exhaustion defense under Rule 12(b)(6) * * *.").

Gallentine v. Housing Authority of City of Port Arthur, Tex., 919 F. Supp. 2d 787, 793 n.3 (E.D. Tex. 2013) ("Because a decision concerning the exhaustion issue would be the same under either standard [Rule 12(b)(1) or Rule 12(b)(6)], the court will proceed by examining all of Defendants' arguments under the standard established by Rule 12(b)(6).").

Sanchez-Arroyo v. Department of Educ. of Puerto Rico, 842 F. Supp. 2d 416, 429 (D.P.R. 2012).

Michael v. Newton-Embry, 2011 WL 4007335 (W.D. Okla. 2011), report and recommendation adopted, 2011 WL 4006591 (W.D. Okla. 2011) (dismissal based on this affirmative defense only proper if it appears on face of plaintiff's pleading).

Harris v. Smith, 2011 WL 2413490 (N.D. Ohio 2011).

King v. Doe, 2011 WL 2669221 (D. Del. 2011), subsequent determination, 2011 WL 4351797 (D. Del. 2011).

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Hilson v. Maltese, 2011 WL 767696 (N.D. N.Y. 2011) (failure to exhaust must be apparent on face of complaint for Rule 12(b)(6) motion to be proper).

Gallina v. Potter, 2010 WL 5013844 (D.N.J. 2010).

See also

"[F]ailure to exhaust is an affirmative defense that a defendant must raise. And while affirmative defenses, including non-exhaustion, can be appropriately asserted on a 12(b)(6) motion, dismissal on such a basis is appropriate only if the defense is evident on the face of the complaint. Here, Luebano's purported failure to exhaust does not appear on the face of her complaint. Indeed, she affirmatively claims she has exhausted her administrative remedies. For its part, Office Depot did not attach any documentation supporting the application of exhaustion defenses when it moved for 12(b)(6) dismissal. Nor did it move in the alternative for summary judgment based on such evidence. So, the district court erred when it dismissed Luebano's ADA claim for lacking exhaustion pleading in her complaint." Luebano v. Office Depot, L.L.C., 2023 WL 4249268, *3 (5th Cir. 2023).

Ball v. Famiglio, 726 F.3d 448, 460 (3d Cir. 2013) ("[D]ismissal based on a prisoner's failure to exhaust administrative remedies does not constitute a [Prison Litigation Reform Act] strike, unless a court explicitly and correctly concludes that the complaint reveals the exhaustion defense on its face and the court then dismisses the unexhausted complaint for failure to state a claim.").

Cummings v. City of Newton, 164 F. Supp. 3d 227 (D. Mass. 2016) (court considered motion to dismiss based on plaintiff's alleged failure to exhaust contractual remedy of arbitration).

"Failure to exhaust is an affirmative defense that may be asserted in a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim only if the prisoner's failure to exhaust is clear from the face of the complaint and any public records subject to judicial notice." Warren v. Corizon Health, 2014 WL 6886154, *2 (D. Idaho 2014).

Compare

Ball v. Famiglio, 726 F.3d 448, 456-460 (3d Cir. 2013) (discussion of circuit split on whether failure to exhaust administrative remedies counts as failure to state claim under Rule 12(b)(6); majority approach is to treat failure to exhaust as affirmative defense).

Although the plaintiff, an inmate in state prison, did not specifically allege his compliance with the proper appeals process, a failure to exhaust administrative remedies nonetheless did not appear on the face of his complaint. Therefore, the

issue could not be decided on a motion to dismiss for failure to state a claim. Martinez v. Aycock-West, 164 F. Supp. 3d 502, 509 (S.D. N.Y. 2016).

But see

A failure to exhaust administrative remedies should be raised on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Luke v. Residential Elevators, Inc., 2011 WL 311370 (N.D. Fla. 2011).

105 **Improper joinder**

Davidson v. Georgia-Pacific, L.L.C., 819 F.3d 758, 765 (5th Cir. 2016) ("If a plaintiff can survive a Rule 12(b)(6) challenge for a failure to state a claim, there is ordinarily no improper joinder.").

"Improper joinder issues are ordinarily resolved by conducting a Rule 12(b)(6)-type analysis[.]" Harried v. Forman Perry Watkins Krutz & Tardy, 813 F. Supp. 2d 835 (S.D. Miss. 2011).

106 **Statute of frauds**

Miller v. BAC Home Loans Servicing, L.P., 726 F.3d 717, 726 (5th Cir. 2013) (district court did not err in ruling on statute of frauds).

Dow v. Shoe Corp. of America, 276 F.2d 165 (7th Cir. 1960).

Continental Collieries v. Shober, 130 F.2d 631 (C.C.A. 3d Cir. 1942).

Conceal City, L.L.C. v. Looper Law Enforcement, LLC, 917 F. Supp. 2d 611, 620 (N.D. Tex. 2013) ("[B]ecause reliance on the statute of frauds is an affirmative defense, the court can only dismiss a claim at the Rule 12(b)(6) stage if the 'affirmative defense appears clearly on the face of the pleadings.'"), quoting Rolls-Royce Corp. v. Heros, Inc., 576 F. Supp. 2d 765, 774 (N.D. Tex. 2008) (additional internal quotation marks omitted).

Hoopla Sports and Entertainment, Inc. v. Nike, Inc., 947 F. Supp. 347 (N.D. Ill. 1996).

Laker v. Freid, 854 F. Supp. 923 (D. Mass. 1994).

Atlantic Paper Box Co. v. Whitman's Chocolates, 844 F. Supp. 1038 (E.D. Pa. 1994), **citing Wright & Miller.**

Simmons Oil Corp. v. Bulk Sales Corp., 498 F. Supp. 457 (D.N.J. 1980).

Oppenheimer Gateway Properties Inc. v. National R. R. Passenger Corp. (AMTRAK), 494 F. Supp. 124 (E.D. Mo. 1980), **citing Wright & Miller.**

Price v. Reynolds Metals Co., 69 F. Supp. 82 (E.D. N.Y. 1946).

Kahn v. Cecelia Co., 40 F. Supp. 878 (S.D. N.Y. 1941).

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See also
Martin v. Mears, 602 P.2d 421, 428 n.14 (Alaska 1979), **citing Wright & Miller.**

107 **Capacity**
See the cases cited in § 1295 n.12.

Estate of Vaiselberg ex rel Vaiselberg v. Snow, 2003 WL 1878248 (S.D. N.Y. 2003) (voluntary administrator of estate lacked power to enforce claim for wrongful death).

Hutchison v. Brookshire Bros., Ltd., 205 F. Supp. 2d 629 (E.D. Tex. 2002).

108 **Standing**
Somers v. Apple, Inc., 729 F.3d 953, 962 (9th Cir. 2013) (purchaser of portable digital media player lacked standing to bring monopolization claim for damages based on diminution in device's value).

Painter's Mill Grille, LLC v. Brown, 716 F.3d 342, 347-349 (4th Cir. 2013) (principals of limited liability company who operated restaurant did not have standing to bring various claims against landlord).

Jackson v. National Ass'n for Advancement of Colored People, 546 Fed. Appx. 438, 442-444 (5th Cir. 2013) (employee lacked standing to bring RICO claim).

McLemore v. Regions Bank, 682 F.3d 414, 419 (6th Cir. 2012).

Ibrahim v. Department of Homeland Sec., 669 F.3d 983, 992 (9th Cir. 2012).

Time Warner Cable, Inc. v. Hudson, 667 F.3d 630, 634 (5th Cir. 2012).

Jewel v. National Sec. Agency, 673 F.3d 902, 907 (9th Cir. 2011).

CGM, LLC v. BellSouth Telecommunications, Inc., 664 F.3d 46, 52 (4th Cir. 2011) ("[T]he district court correctly focused on Civil Procedure Rule 12(b)(6) because the standing inquiry at the heart of this case is statutory standing-a concept distinct from Article III and prudential standing.").

"A dismissal for lack of statutory standing is effectively the same as a dismissal for failure to state a claim." Baldwin v. University of Pittsburgh Medical Center, 636 F.3d 69, 73 (3d Cir. 2011).

Compare
"Where, as here, a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element [of Article III standing]." Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), as revised, (May 24, 2016) (citation and internal quotation marks omitted) (standing challenge was raised via a motion to dismiss under Rule 12(b)(1)).

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109 **Ripeness**

Bowlby v. City of Aberdeen, Miss., 681 F.3d 215, 224 (5th Cir. 2012).

Bub v. Marine Tech, LLC, 2010 WL 2033331 (W.D. Wis. 2010).

General Auto Service Station v. City of Chicago, 2004 WL 442636 (N.D. Ill. 2004) (claims were not ripe because plaintiff had suffered no monetary loss).

110 **Wrong defendant**

Sanders v. St. Joseph County, Indiana, 806 Fed. Appx. 481, 485 (7th Cir. 2020) (affirming district court's 12(b)(6) dismissal because "[the plaintiff] sued the wrong defendant").

Childs v. Management Registry, Inc., 2018 WL 2009549 (E.D. Mich. 2018).

Mott v. IBM, 2011 WL 3846523 (E.D. N.Y. 2011), report and recommendation adopted, 2011 WL 3847176 (E.D. N.Y. 2011).

111 **Real party in interest**

Tennyson v. ASCAP, 477 Fed. Appx. 608 (11th Cir. 2012) (per curiam).

Whelan v. Abell, 953 F.2d 663, 293 (D.C. Cir. 1992).

Federal Ins. Co. v. J.K. Mfg. Co., 933 F. Supp. 2d 1065, 1070 (N.D. Ill. 2013).

Odhiambo v. Republic of Kenya, 930 F. Supp. 2d 17, 34 (D.D.C. 2013), aff'd, 764 F.3d 31 (D.C. Cir. 2014).

A'Gard v. Perez, 919 F. Supp. 2d 394, 409 (S.D. N.Y. 2013) (Eleventh Amendment).

Siemens USA Holdings, Inc. v. U.S., 960 F. Supp. 2d 221 (D.D.C. 2013).

Caribbean Petroleum Corp. v. New Hampshire Ins. Co., 2004 WL 540468 (S.D. N.Y. 2004) (denying motion because defendant was real party in interest).

New York State Dept. of Social Services v. Bowen, 684 F. Supp. 775 (E.D. N.Y. 1988).

Weisberg v. Louis Barasch, Inc., 1985 WL 1888 (N.D. Ill. 1985) (unpublished case).

Sedco Intern., S. A. v. Cory, 522 F. Supp. 254 (S.D. Iowa 1981), judgment aff'd, 683 F.2d 1201 (8th Cir. 1982).

Coopers & Lybrand v. Cocklereece, 506 F. Supp. 587 (S.D. N.Y. 1981).

Gluck v. Amicor, Inc., 487 F. Supp. 608 (S.D. N.Y. 1980).

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Willis v. Semmes, Bowen & Semmes, 441 F. Supp. 1235 (E.D. Va. 1977).

DeWitt v. Quarterback Sports Federation, Inc., 45 F.R.D. 252 (D. Minn. 1968).

112 **Plaintiff not required to negate affirmative defense**

Robinette v. ProMedica Pathology Laboratories, LLC, 2022 WL 4540192, *2 (6th Cir. 2022) ("[T]he plaintiff is not required to plead the absence of an affirmative defense to state a claim for relief.").

Sanders v. St. Joseph County, Indiana, 806 Fed. Appx. 481, 484 (7th Cir. 2020) ("A plaintiff is not required to plead around potential affirmative defenses.").

Owens-Benniefield v. BSI Financial Services, 806 Fed. Appx. 853, 856 (11th Cir. 2020) ("[A] plaintiff is not required to negate the affirmative defense in her complaint.").

Chen v. Major League Baseball Properties, Inc., 798 F.3d 72, 81 (2d Cir. 2015) ("[A]n affirmative defense * * * may be raised in a pre-answer Rule 12(b)(6) motion 'if the defense appears on the face of the complaint,' [but a] plaintiff is not required to plead the absence of such a defense.").

Independent Trust Corp. v. Stewart Information Services Corp., 665 F.3d 930, 935 (7th Cir. 2012) ("[A] plaintiff is not required to plead facts in the complaint to anticipate and defeat affirmative defenses. But when a plaintiff's complaint nonetheless sets out all of the elements of an affirmative defense, dismissal under Rule 12(b)(6) is appropriate.").

Jaso v. The Coca Cola Co., 435 Fed. Appx. 346, 351 (5th Cir. 2011) ("A plaintiff typically is not required to plead, in the complaint, facts that negate an affirmative defense.").

Bennett v. Louisiana Health Service & Indemnity Company, 450 F. Supp. 3d 686, 692 (M.D. La. 2020) ("Under Rule 12(b)(6), dismissal on the basis of an affirmative defense is only appropriate if 'an affirmative defense * * * appears on the face of the complaint.' A plaintiff is not required to plead the negation of an affirmative defense.").

113 **Jones case**

549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007).

114 **Quotation**

Jones, 549 U.S. at 217.

See also

"The Court notes that plaintiff's claims against defendants * * * were recommended for dismissal based on plaintiff's failure to exhaust administrative remedies against these defendants. After issuance of the Report and

Recommendation, the Supreme Court ruled in Jones v. Bock that exhaustion of administrative remedies is an affirmative defense, not an element of the action that must be specially pleaded in the complaint." Sims v. Johnson, 2007 WL 2381262 (N.D. Tex. 2007) (internal citations omitted).

The court granted the plaintiff's motion for relief from judgment because of Jones v. Bock, in which the Supreme Court "overturned the law of exhaustion in the Sixth Circuit upon which this court previously relied when it dismissed claims against certain named Defendants." Fisher v. Caruso, 2007 WL 1827395, *1 (E.D. Mich. 2007).

115 **Failure to exhaust as a basis for dismissal**

Jones v. Bock, 549 U.S. 199, 216, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007) (explaining that its holding "is not to say that failure to exhaust cannot be a basis for dismissal for failure to state a claim.").

Williams v. Correction Officer Priatno, 829 F.3d 118, 122 (2d Cir. 2016).

Morris v. McCarthy, 825 F.3d 658, 667 (D.C. Cir. 2016).

Hopkins v. City of Bloomington, 774 F.3d 490, 492 (8th Cir. 2014).

"But, though it generally must be affirmatively pled and proved, '[i]f an affirmative defense * * * is apparent on the face of the complaint * * * that [defense] can provide the basis for dismissal under Rule 12(b)(6).'" ABF Freight System, Inc. v. International Broth. of Teamsters, 728 F.3d 853, 861 (8th Cir. 2013), quoting C.H. Robinson Worldwide, Inc. v. Lobrano, 695 F.3d 758, 764 (8th Cir. 2012).

Slingland v. Donahoe, 542 Fed. Appx. 189 (3d Cir. 2013) (affirming dismissal of Title VII and ADEA claims under Rule 12(b)(6) because plaintiff failed to exhaust administrative remedies), citing Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997).

Mendoza v. Lehigh Southwest Cement Co., 540 Fed. Appx. 813 (9th Cir. 2013).

Christiansen v. West Branch Community School Dist., 674 F.3d 927, 935 (8th Cir. 2012).

Jech v. Department of Interior, 483 Fed. Appx. 555 (10th Cir. 2012).

Spicer v. Ford Motor Co., 491 Fed. Appx. 543 (6th Cir. 2012).

Hull v. I.R.S., U.S. Dept. of Treasury, 656 F.3d 1174, 1181 n.5 (10th Cir. 2011).

Brooks v. Midwest Heart Group, 655 F.3d 796 (8th Cir. 2011).

Leak v. CIGNA Healthcare, 423 Fed. Appx. 53 (2d Cir. 2011).

Feathers v. McFaul, 274 Fed. Appx. 467 (6th Cir. 2008).

Freeman v. Watkins, 479 F.3d 1257 (10th Cir. 2007).

Campbell v. Mullin, 251 Fed. Appx. 542 (10th Cir. 2007).

Basso v. Willow Run Foods, Inc., 577 F. Supp. 3d 73, 83-85 (N.D. N.Y. 2022) (dismissing plaintiff's hostile work environment claim under the ADA because plaintiff failed to first file a timely charge with the EEOC).

Gomez v. New York City Police Department, 191 F. Supp. 3d 293, 299-300 (S.D. N.Y. 2016).

Mecouch v. Pension Board of the Employees' Retirement System of the County of Milwaukee, 184 F. Supp. 3d 684, 690 (E.D. Wis. 2016) (dismissing plaintiff's due process claim because plaintiff failed to exhaust all available state remedies because state certiorari review was still available).

Emrit v. National Institutes of Health, 157 F. Supp. 3d 52, 54-55 (D.D.C. 2016).

Rosario v. Brennan, 197 F. Supp. 3d 406 (D. Conn. 2016).

"Failure to exhaust administrative remedies must be pled and proved by the defendant." Simpson v. CMS, 559 F. Supp. 2d 481, 483 (D. Del. 2008), citing Ray v. Kertes, 285 F.3d 287 (3d Cir. 2002).

"[T]he Supreme Court has recently held that the prior practice of some courts in requiring plaintiffs to plead exhaustion in their complaint, absent a specific statutory mandate to do so, is inconsistent with the liberal pleading requirements of Rule 8(a) * * *." Kimbrough v. U.S. Government, 2007 WL 2746672, *1 (N.D. Ga. 2007).

116 **Defamation traditionally disfavored**

Garrison v. Fastenal Company, 2017 WL 1001189, *2 (D. Kan. 2017) ("Because defamation constitutes a traditionally disfavored cause of action, defamation claims 'present a significant exception to general liberal pleading standards.'").

Carosella v. One World Translation & Associates, Inc., 2017 WL 11545379 (D. Colo. 2017) ("[D]efamation claims present a 'significant exception' to general liberal pleading standards because defamation constitutes a 'traditionally disfavored' cause of action."), report and recommendation adopted, 2017 WL 11545380 (D. Colo. 2017).

117 **National Bowl-O-Mat case**

264 F. Supp. 221 (D. N.J. 1967).

118 **Disfavored actions**

See §§ 1241, 1245 to 1246.

See also
Hatcher v. Moree, 133 Ga. App. 14, 209 S.E.2d 708, 711 (1974), **quoting Wright & Miller**.

Kersey v. Harbin, 531 S.W.2d 76, 79 (Mo. Ct. App. 1975), **citing Wright & Miller**.

Andrews v. Stallings, 119 N.M. 478, 1995-NMCA-015, 892 P.2d 611 (Ct. App. 1995), **quoting Wright & Miller**.

Weber v. Johnston Fuel Liners, Inc., 540 P.2d 535, 540 (Wyo. 1975), **citing Wright & Miller** (malicious prosecution).

But see
Schatz v. Republican State Leadership Committee, 669 F.3d 50, 58 (1st Cir. 2012) ("[M]alice is not a matter that requires particularity in pleading * * *.").

Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61 (1st Cir. 2004) (previous precedent requiring heightened pleading standard for civil rights actions overturned in light of Supreme Court's decision in Swierkiewicz).

119 **No special pleading requirements in state causes of action**
Pleading in federal court is governed by Federal Rules of Civil Procedure, not state pleading requirements. Under the Erie doctrine, however, it is long since settled that federal courts sitting in diversity apply state substantive law and federal procedural law. Moreover, the Federal Rules of Civil Procedure impose no special pleading requirements for defamation. A plaintiff asserting a state-law defamation claim in federal court need only satisfy Rule 8; a state's heightened pleading requirement does not apply. * * * [T]he basic philosophy of the Rule 8(a) requirement of a plain and concise statement of the claim for relief should not be sacrificed in order to follow state notions of pleading particularity or an antipathy toward certain claims for relief. Miller v. Sawant, 18 F.4th 328, 337 (9th Cir. 2021) (internal quotation marks and citations omitted), **citing Wright & Miller**.

120 **Courts applying state's heightened pleading standards**
Garrison v. Fastenal Company, 2017 WL 1001189, *2 (D. Kan. 2017) ("Because defamation constitutes a traditionally disfavored cause of action, defamation claims 'present a significant exception to general liberal pleading standards.'").

Carosella v. One World Translation & Associates, Inc., 2017 WL 11545379, *3 (D. Colo. 2017), report and recommendation adopted, 2017 WL 11545380 (D. Colo. 2017) ("[D]efamation claims present a 'significant exception' to

general liberal pleading standards because defamation constitutes a 'traditionally disfavored' cause of action.").

121 **Leatherman case**
507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993).

122 **Swierkiewicz case**
534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).

123 **Federal statute**
Since the PSLRA requires that a plaintiff "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," the district court correctly dismissed a complaint failing to meet this heightened standard. PR Diamonds, Inc. v. Chandler, 364 F.3d 671 (6th Cir. 2004).

Darby v. Century Business Services, Inc., 96 Fed. Appx. 277 (6th Cir. 2004).

In re Iso Ray, Inc. Securities Litigation, 189 F. Supp. 3d 1057 (E.D. Wash. 2016) (court identified equally compelling inference that defendants recklessly omitted information necessary to understand findings of medical journal study and denied motion to dismiss).

Damian v. Montgomery County Bankshares, Inc., 981 F. Supp. 2d 1368 (N.D. Ga. 2013) (heightened pleading standards of Private Securities Litigation Reform Act of 1995).

In re 2007 Novastar Financial, Inc., Securities Litigation, 2008 WL 2354367 (W.D. Mo. 2008), aff'd, 579 F.3d 878 (8th Cir. 2009) (heightened pleading standard under PSLRA for securities fraud claims).

In re Citigroup, Inc. Securities Litigation, 330 F. Supp. 2d 367 (S.D. N.Y. 2004), aff'd, 165 Fed. Appx. 928 (2d Cir. 2006) (complaint dismissed because it failed to meet PSLRA's pleading requirements).

In re Syncor Intern. Corp. Securities Litigation, 327 F. Supp. 2d 1149 (C.D. Cal. 2004), aff'd in part, rev'd in part and remanded, 239 Fed. Appx. 318 (9th Cir. 2007), as amended on denial of reh'g, (Oct. 9, 2007) (claim dismissed because it failed to meet heightened pleading requirements of PSLRA).

In re Global Crossing, Ltd. Securities Litigation, 322 F. Supp. 2d 319 (S.D. N.Y. 2004) (PSLRA requires heightened pleading of fraudulent intent).

In re Cable & Wireless, PLC, 321 F. Supp. 2d 749 (E.D. Va. 2004) (motion to dismiss granted because complaint did not meet heightened requirements of PSLRA).

In re QLT Inc. Securities Litigation, 312 F. Supp. 2d 526 (S.D. N.Y. 2004).

In re Copper Mountain Securities Litigation, 311 F. Supp. 2d 857 (N.D. Cal. 2004) (PSLRA requires more particular pleading of scienter).

Merzin v. Provident Financial Group, Inc., 311 F. Supp. 2d 674 (S.D. Ohio 2004) (motion to dismiss granted because PSLRA created "exacting requirements" for pleading securities fraud).

Osher v. JNI Corp., 308 F. Supp. 2d 1168 (S.D. Cal. 2004), aff'd in part, vacated in part, remanded, 183 Fed. Appx. 604 (9th Cir. 2006) (PSLRA requires heightened pleading of scienter).

Bosch v. Tessa Complete Health Care, Inc., 2004 WL 1278225 (S.D. Tex. 2004) (motion to dismiss granted because plaintiff failed to plead scienter with particularity required by PSLRA).

Frank v. Spielo Mfg. Inc., 2004 WL 1196813 (D. Minn. 2004) (court applied heightened pleading requirements of PSLRA to non-class action securities case).

In re Metricom Securities Litigation, 2004 WL 966291 (N.D. Cal. 2004), aff'd, 182 Fed. Appx. 714 (9th Cir. 2006) (PSLRA requires heightened pleading of scienter to survive motion to dismiss).

In re Blockbuster Inc. Securities Litigation, 2004 WL 884308 (N.D. Tex. 2004) (plaintiff failed to meet heightened pleading requirement for scienter under PSLRA).

Ato Ram, II, Ltd. v. SMC Multimedia Corp., 2004 WL 744792 (S.D. N.Y. 2004) (motion to dismiss granted because plaintiff failed to meet heightened pleading standard for scienter required under PSLRA).

In re Retek Inc. Securities, 2004 WL 741571 (D. Minn. 2004) (PSLRA has heightened pleading standard).

Piser v. Lunn Partners, LLC, 2004 WL 549444 (N.D. Ill. 2004) (plaintiff failed to plead sufficient facts required by PSLRA).

In re Federated Dept. Stores, Inc., Securities Litigation, 2004 WL 444559 (S.D. N.Y. 2004) (fraud claims under PSLRA require heightened pleading of scienter).

But compare

Although the PSLRA requires a strong inference of scienter, the inference need not be irrefutable as long as the complaint provides specific facts that allow a reasonable belief of scienter. In re Sepracor, Inc. Securities Litigation, 308 F. Supp. 2d 20 (D. Mass. 2004).

124 **Leatherman and Swierkiewicz philosophy**

Hager v. Arkansas Dept. of Health, 735 F.3d 1009 (8th Cir. 2013) (plaintiff relied on Swierkiewicz; however, her complaint had fewer factual allegations

than complaint in that case; it made only two conclusory allegations of gender discrimination).

Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010) ("The Supreme Court's explicit decision to reaffirm the validity of Swierkiewicz v. Sorema N.A., which was cited with approval in Twombly, indicates that in many straightforward cases, it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court's recent decisions.") (internal citations omitted).

Swann v. Southern Health Partners, Inc., 388 F.3d 834 (11th Cir. 2004) (court overturned precedent requiring heightened pleading for § 1983 suits in light of Leatherman).

Under the Swierkiewicz standard, a plaintiff in a discrimination case does not have to make out a prima facie case of discrimination, nor allege specific evidence, to survive a motion to dismiss. A plaintiff only must comply with the pleading requirements of Rule 8(a)(2). Maduka v. Sunrise Hosp., 375 F.3d 909 (9th Cir. 2004).

The First Circuit overturned its previous precedent requiring a heightened pleading standard for civil rights actions in light of the Supreme Court's decisions in Leatherman and Swierkiewicz. The district court had dismissed the case based on a line of First Circuit precedent. The court of appeals reversed, concluding that Swierkiewicz "sounded the death knell for the imposition of a heightened pleading standard" except as authorized by statute or federal rule. Instead, the court concluded that the only pleading requirement that applied to civil rights actions was that found in Rule 8(a). Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61 (1st Cir. 2004).

One court of appeals remanded to the district court because the district court had required heightened pleading from the plaintiff in response to the defendant's assertion of qualified immunity. The court of appeals said that its intervening precedent interpreting recent Supreme Court cases invalidated this heightened pleading requirement. Hughlett v. Romer-Sensky, 98 Fed. Appx. 360 (6th Cir. 2004).

A plaintiff does not have to make out a prima facie case under the ADA to survive a motion to dismiss. Under Swierkiewicz, the mandate of a prima facie case is an evidentiary standard, not a pleading requirement. To survive a motion to dismiss, a plaintiff only has to satisfy the simple standards of Rule 8. Jackson v. Iasis Healthcare Corp., 92 Fed. Appx. 763 (10th Cir. 2004).

"The Seventh Circuit has explained that [Rule 8(a)(2)] 'reflects a liberal notice pleading regime, which is intended to "focus litigation on the merits of a claim" rather than on technicalities that might keep plaintiffs out of court.'" Volodarskiy

v. Delta Air Lines, Inc., 987 F. Supp. 2d 784 (N.D. Ill. 2013), aff'd, 784 F.3d 349 (7th Cir. 2015), quoting Brooks v. Ross, 578 F.3d 574, 580 (7th Cir. 2009), quoting Swierkiewicz v. Sorema N. A., 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).

Coffin v. Safeway, Inc., 323 F. Supp. 2d 997 (D. Ariz. 2004) (court cited to Leatherman and Swierkiewicz to conclude that plaintiff only needed to satisfy requirements of Rule 8 and did not have to make out prima facie case to survive motion to dismiss).

A motion to dismiss is only appropriate when the pleadings fail to put the defendant on notice of the claims. Summary judgment is the appropriate procedure when the facts necessary to support the claim are lacking. In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litigation, 312 F. Supp. 2d 1165 (D. Minn. 2004).

Ashlee R. ex rel. Russell v. Oakland Unified School Dist. Financing Corp., 2004 WL 1878214 (N.D. Cal. 2004) (court cited Leatherman to support assertion that plaintiff did not need to set out all factual details of civil rights claim to survive motion to dismiss).

Bramlett v. Buell, 2004 WL 1243684 (E.D. La. 2004) (court rejected heightened pleading requirement in light of Leatherman).

Northstar Partners v. S & S Consultants, Inc., 2004 WL 963706 (S.D. Ind. 2004).

Atlas v. City of North Chicago, 2004 WL 816456 (N.D. Ill. 2004).

Bowles v. New York City Transit Authority, 93 Fair Empl. Prac. Cas. (BNA) 892, 2004 WL 548021 (S.D. N.Y. 2004) (under Swierkiewicz, plaintiff does not have to plead facts establishing prima facie case to survive motion to dismiss).

Some courts have interpreted Swierkiewicz to require that the complaint merely provide fair notice of what claims the plaintiff alleges. Moncivaiz v. DeKalb County, 2004 WL 539994 (N.D. Ill. 2004).

See also

Fletcher v. U.S. Department of Justice, 17 F. Supp. 3d 89 (D.D.C. 2014) (not necessary to plead all elements of prima facie case due to Swierkiewicz, but Twombly plausibility standard applies).

"[T]he Second Circuit has noted '[t]he pleading standard for employment discrimination complaints is somewhat of an open question in our circuit.' * * * Although 'an employment discrimination plaintiff need not plead a prima facie case of discrimination,' she must satisfy the standards set out in Twombly in Iqbal." Wang v. Phoenix Satellite Television US, Inc., 976 F. Supp. 2d 527 (S.D. N.Y. 2013) (internal citations omitted), quoting Hedges v. Town of Madison, 456

Fed. Appx. 22, 23 (2d Cir. 2012) (summary order); Swierkiewicz v. Sorema N. A., 534 U.S. 506, 515, 122 S. Ct. 992, 999, 152 L. Ed. 2d 1 (2002).

"For civil rights actions, a court 'must be especially solicitous of the wrongs alleged.'" Pettiford v. City of Greensboro, 556 F. Supp. 2d 512, 530 (M.D. N.C. 2008) (Schroeder, J.), quoting Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999).

Compare
One district court ordered a plaintiff to provide more than the short and plain statement mandated by Rule 8 and Swierkiewicz and dismissed the claim pursuant to Rule 41(b) for failure to comply with this order. However, the Second Circuit overturned this decision, ruling that a complaint only needs to put the defendant on notice of the claims. The court ruled that the judge could not supplement Rule 8's requirements by demanding legal theories, specific authority in the form of statutes and case law, detailed evidence, or separated claims as to each defendant. Wynder v. McMahon, 360 F.3d 73 (2d Cir. 2004).

But compare
One district court has interpreted Swierkiewicz to require a plaintiff to plead "minimal facts" establishing the claim rather than merely pleading a statement that provides "fair notice" that a claim exists. Timothy v. Our Lady of Mercy Medical Center, 2004 WL 503760 (S.D. N.Y. 2004).

See generally
Tesoriero, Pre-Twombly Precedent: Have Leatherman and Swierkiewicz Earned Retirement Too?, 65 Duke L.J. 1521, 1530 (2016).

Miller, From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure, 60 Duke L.J. 1 (2010).

125 **Gove case**
860 Fed. Appx. 446 (7th Cir. 2021).

126 **Tellabs case**
551 U.S. 308, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007), **citing Wright & Miller**.

127 **Quotation**
551 U.S. at 323, 127 S. Ct. at 2509.

128 **Quotation**
551 U.S. at 324, 127 S. Ct. at 2510.

129 **Leave to amend**
Supreme Court
The Supreme Court reversed the Sixth Circuit's "total exhaustion" rule, which required that prisoner complaints subject to the Prison Litigation Reform Act

be entirely dismissed "if any one claim is not properly exhausted" as required by the PLRA. The Court stated, "[W]e have never heard of an entire complaint being thrown out simply because one of several discrete claims was barred by the statute of limitations, and it is hard to imagine what purpose such a rule would serve." Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 923, 166 L. Ed. 2d 798 (2007).

First Circuit

Morgan v. Town of Lexington, MA, 823 F.3d 737, 742 (1st Cir. 2016) (court applied standard of plausibility to its assessment of plaintiff's futility to amend complaint).

Lebron-Rios v. U.S. Marshal Service, 341 F.3d 7 (1st Cir. 2003) (plaintiff should be allowed to refile after exhausting administrative remedies).

Ballou v. General Elec. Co., 393 F.2d 398 (1st Cir. 1968).

Boston & M. R. R. v. Bethlehem Steel Co., 311 F.2d 847 (1st Cir. 1963).

Williams v. Astra USA, Inc., 68 F. Supp. 2d 29 (D. Mass. 1999) (if plaintiff has at least colorable grounds for relief, justice requires leave to amend).

Nordica USA, Inc. v. Deloitte & Touche, 839 F. Supp. 1082 (D. Vt. 1993).

Mladen v. Gunty, 655 F. Supp. 455 (D. Me. 1987), **citing Wright & Miller.**

Sonus Corp. v. Matsushita Elec. Industrial Co., Ltd., 61 F.R.D. 644 (D. Mass. 1974).

Druker v. Sullivan, 334 F. Supp. 861 (D. Mass. 1971), judgment aff'd, 458 F.2d 1272 (1st Cir. 1972).

Bowles v. Schultz, 54 F. Supp. 708 (D.N.H. 1944).

Second Circuit

Morales v. Weiss, 569 Fed. Appx. 36, 37 (2d Cir. 2014) (pro se).

Baptista v. Hartford Bd. of Educ., 427 Fed. Appx. 39 (2d Cir. 2011) (leave to amend should be granted to pro se plaintiff unless amendment would be futile).

Porat v. Lincoln Towers Community Ass'n, 464 F.3d 274 (2d Cir. 2006) ("Without doubt, this circuit strongly favors liberal grant of an opportunity to replead after dismissal of a complaint under Rule 12(b)(6).").

Tarshis v. Riese Organization, 211 F.3d 30 (2d Cir. 2000) (abrogated by, Swierkiewicz v. Sorema N. A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)) (plaintiff is entitled to opportunity to show proof to support his claims

unless it can be said that plaintiff is entitled to no relief under any view of facts that could be produced in support of cause of action).

Cruz v. Gomez, 202 F.3d 593 (2d Cir. 2000) (court should allow plaintiff to amend complaint unless it can rule out any possibility that amended complaint would succeed in stating claim).

Austin v. Ford Models, Inc., 149 F.3d 148 (2d Cir. 1998) (abrogated by, Swierkiewicz v. Sorema N. A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)) (pro se plaintiff that brings civil rights claim should be freely afforded opportunity to amend her complaint).

Cortec Industries, Inc. v. Sum Holding L.P., 949 F.2d 42 (2d Cir. 1991).

Ricciuti v. N.Y.C. Transit Authority, 941 F.2d 119 (2d Cir. 1991).

Branum v. Clark, 927 F.2d 698 (2d Cir. 1991).

Ronzani v. Sanofi S.A., 899 F.2d 195 (2d Cir. 1990).

Brault v. Town of Milton, 527 F.2d 730, 744 (2d Cir. 1975) (disavowed by, Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977)), **quoting Wright & Miller.**

A court can deny leave to amend if it decides the amended complaint would fail on a future Rule 12(b)(6) motion. Bentley v. Greensky Trade Credit, LLC, 156 F. Supp. 3d 274, 283 (D. Conn. 2015).

Avins v. Mangum, 450 F.2d 932 (2d Cir. 1971).

Moran v. Pallito, 2010 WL 5648722 (D. Vt. 2010), report and recommendation adopted, 2011 WL 282398 (D. Vt. 2011).

Fowlkes v. Parker, 2010 WL 5490739, *5 (N.D. N.Y. 2010), report and recommendation adopted, 2011 WL 13726 (N.D. N.Y. 2011) ("In the event of a perceived deficiency in a pro se plaintiff's complaint, a court should not dismiss without granting leave to amend at least once if there is any indication that a valid claim might be stated.").

Chylinski v. Martin Rosol's Inc., 2010 WL 2794198, *2 (D. Conn. 2010), report and recommendation adopted, 2010 WL 2794101 (D. Conn. 2010) ("If a liberal reading of the complaint gives any indication that a valid claim might be stated, the court must grant the [pro se] plaintiff leave to amend the complaint rather than dismissing it.").

Bacon v. Suffolk Legislature, 2007 WL 2288044 (E.D. N.Y. 2007) (leave to amend granted to pro se plaintiff asserting civil rights claims).

Bonano v. Southside United Housing Development Corp., 363 F. Supp. 2d 559 (E.D. N.Y. 2005) (leave to amend will be denied as futile only if proposed new claim cannot withstand motion to dismiss for failure to state claim).

Morris v. Fordham University, 93 Fair Empl. Prac. Cas. (BNA) 1364, 2004 WL 906248 (S.D. N.Y. 2004).

Calcutti v. SBU, Inc., 224 F. Supp. 2d 691 (S.D. N.Y. 2002).

Torrico v. International Business Machines Corp., 213 F. Supp. 2d 390 (S.D. N.Y. 2002).

Rivera v. New York City Health & Hospitals Corp., 191 F. Supp. 2d 412 (S.D. N.Y. 2002).

T.S. Haulers, Inc. v. Town of Riverhead, 190 F. Supp. 2d 455 (E.D. N.Y. 2002).

Ross v. Mitsui Fudosan, Inc., 2 F. Supp. 2d 522 (S.D. N.Y. 1998).

Davis v. Goode, 995 F. Supp. 82 (E.D. N.Y. 1998).

Continental Orthopedic Appliances, Inc. v. Health Ins. Plan of Greater New York, 994 F. Supp. 133 (E.D. N.Y. 1998).

Barcher v. New York University School of Law, 993 F. Supp. 177 (S.D. N.Y. 1998), aff'd, 172 F.3d 37 (2d Cir. 1999).

Harrison v. NBD Inc., 990 F. Supp. 179 (E.D. N.Y. 1998).

Wilson v. Westmoreland Farm, Inc., 989 F. Supp. 451 (E.D. N.Y. 1998).

Bovi v. United Parcel Service, Inc., 992 F. Supp. 540 (E.D. N.Y. 1997).

Gadbois v. Rock-Tenn Co., Mill Div., Inc., 984 F. Supp. 811 (D. Vt. 1997).

Greene v. WCI Holdings Corp., 956 F. Supp. 509 (S.D. N.Y. 1997), aff'd, 136 F.3d 313 (2d Cir. 1998).

Aramony v. United Way of America, 949 F. Supp. 1080 (S.D. N.Y. 1996).

Spurlock v. NYNEX, 949 F. Supp. 1022 (W.D. N.Y. 1996).

Wallace v. Conroy, 945 F. Supp. 628 (S.D. N.Y. 1996).

Alie v. NYNEX Corp., 158 F.R.D. 239 (E.D. N.Y. 1994).

Shannon v. General Elec. Co., 812 F. Supp. 308 (N.D. N.Y. 1993), **citing Wright & Miller.**

Bilick v. Eagle Elec. Mfg. Co., Inc., 807 F. Supp. 243 (E.D. N.Y. 1992).

Posner v. Minnesota Min. & Mfg. Co., Inc., 697 F. Supp. 122 (E.D. N.Y. 1988).

Hemming v. Alfin Fragrances, Inc., 690 F. Supp. 239 (S.D. N.Y. 1988).

Lawrence v. McGuire, 651 F. Supp. 312 (S.D. N.Y. 1987).

Glusband v. Fittin Cunningham Lauzon, Inc., 582 F. Supp. 145 (S.D. N.Y. 1984).

The preferred remedy for a complaint alleging an antitrust violation that fails to indicate some nexus between the alleged antitrust violation and some demonstrable injury suffered by the plaintiff is to grant leave to amend the complaint, or alternatively, to order more definite statements. Car-Freshner Corp. v. Auto Aid Mfg. Corp., 438 F. Supp. 82 (N.D. N.Y. 1977).

Rego Trading Corp. v. Birns, 361 F. Supp. 1341 (S.D. N.Y. 1973).

O'Connor v. GCA Corp., 332 F. Supp. 1246 (S.D. N.Y. 1971).

U.S. for Use and Benefit of Pittsburgh-Des Moines Steel Co. v. Dauphin Steel & Engineering Co., 53 F.R.D. 382 (S.D. N.Y. 1971).

Karlinsky v. New York Racing Ass'n, Inc., 310 F. Supp. 937 (S.D. N.Y. 1970).

Sam S. Goldstein Industries, Inc. v. Botany Industries, Inc., 301 F. Supp. 728 (S.D. N.Y. 1969).

When a count of the plaintiffs' complaint was so sketchy that it was hard to tell just what the plaintiffs really claimed, the court dismissed the count for failure to state a claim with leave to serve an amended complaint in intelligible form. Dack v. Shanman, 227 F. Supp. 26 (S.D. N.Y. 1964).

To the extent that a claim based on fraud did not comply with Rule 9(b), a motion to dismiss was granted and the plaintiff was given leave to replead. Dudley v. Zappa, 24 F.R.D. 427 (S.D. N.Y. 1959).

Bascom Launder Corp. v. Farny, 10 F.R.D. 421 (S.D. N.Y. 1950).

Third Circuit

Comments made from the bench suggesting a complaint might need to plead more facts are not sufficient to provide notice that a suit is in danger of being dismissed with prejudice and that the plaintiff must move to amend its complaint immediately after argument, instead of after a decision is ultimately rendered. United States ex rel. Customs Fraud Investigations, LLC. v. Victaulic Company, 839 F.3d 242 (3d Cir. 2016).

Once the district court's time frame for leave to amend has elapsed, the plaintiff's filing of a subsequent action will be dismissed on res judicata grounds because

the second lawsuit will not be construed as an intention to not stand on the first complaint. Hoffman v. Nordic Naturals, Inc., 837 F.3d 272, 279 (3d Cir. 2016).

U.S. ex rel. Wilkins v. United Health Group, Inc., 659 F.3d 295, 314-315 (3d Cir. 2011) (when plaintiffs seek to amend, they must do so only in good faith and they must believe they can prove any new facts alleged).

Thomas v. Advance Housing, Inc., 440 Fed. Appx. 86 (3d Cir. 2011).

Island Green, LLC v. Querrard, 429 Fed. Appx. 90 (3d Cir. 2011).

Wilson v. City of Philadelphia, 415 Fed. Appx. 434, 437 (3d Cir. 2011) (leave to amend should be granted unless amendment would be inequitable or futile).

Great Western Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 174 (3d Cir. 2010).

Snyder v. Baxter Healthcare, Inc., 393 Fed. Appx. 905 (3d Cir. 2010) ("[W]e have held that 'it is hardly error for a district court to enter final judgment after granting a Rule 12(b)(6) motion to dismiss when the plaintiff has not properly requested leave to amend its complaint.'"), quoting Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 482 F.3d 247, 253 (3d Cir. 2007).

Alston v. Parker, 363 F.3d 229 (3d Cir. 2004) (dismissal without leave to amend is only allowed on grounds of bad faith, undue delay, prejudice, or futility).

Jame Fine Chemicals Co., Inc. v. Hi-Tech Pharmacal Co., Inc., 44 Fed. Appx. 602 (3d Cir. 2002) (unpublished).

In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410 (3d Cir. 1997).

Rosetti v. Shalala, 12 F.3d 1216 (3d Cir. 1993).

MacLaughlin v. Union Switch & Signal Co., 166 F.2d 46 (C.C.A. 3d Cir. 1948).

"[T]he amended complaint does not contain factual allegations to support the conclusion that the named Defendants acted in concert with CAA Sports and France in order to interfere with Plaintiffs' representation of Golladay. Finding it possible that such facts could be alleged, however, the Court will grant Defendants' motions to dismiss under Rule 12(b)(6) and dismiss the amended complaint without prejudice to Plaintiff's right to file a second amended complaint that clarifies whether Plaintiffs are asserting tortious interference claims as to existing or prospective contracts and that includes additional factual allegations as to the alleged concerted actions by Defendants." Clarity Sports International LLC v. Redland Sports, 400 F. Supp. 3d 161 (M.D. Pa. 2019).

David v. Neumann University, 187 F. Supp. 3d 554, 562 (E.D. Pa. 2016) (courts are required to offer amendment in civil rights cases when dismissing case for failure to state claim, irrespective of whether plaintiff requested it).

Priore v. Caravan Ingredients Inc., 2015 WL 570218, *6 (D.N.J. 2015) (court did not allow plaintiff to amend complaint because court already had permitted plaintiff to amend and current complaint largely mirrored original complaint).

Davis v. Holder, 994 F. Supp. 2d 719 (W.D. Pa. 2014).

Thomas v. Rijos, 780 F. Supp. 2d 376, 379 (D.V.I. 2011).

Wilson v. Board of Control of City of Harrisburg School Dist., 2010 WL 4977056 (M.D. Pa. 2010).

Wynn-Mason v. Levas Communications, LLC, 2010 WL 2816651 (E.D. Pa. 2010).

Baker v. James T. Vaughn Correctional Center, 2010 WL 2788200 (D. Del. 2010).

Dupree v. Doe, 2010 WL 2719977 (D. Del. 2010), on reconsideration, 773 F. Supp. 2d 477 (D. Del. 2011).

Walsh v. Krantz, 2008 WL 2329130 (M.D. Pa. 2008), aff'd, 386 Fed. Appx. 334 (3d Cir. 2010).

Price v. Schwan's Home Services, Inc., 2006 WL 897721 (W.D. Pa. 2006).

Zieper v. Reno, 111 F. Supp. 2d 484 (D.N.J. 2000).

Krantz v. Prudential Investments Fund Management LLC, 77 F. Supp. 2d 559 (D.N.J. 1999), aff'd, 305 F.3d 140 (3d Cir. 2002).

In its assessment of whether an amendment would be futile, a court applies the same standard of legal sufficiency as under Rule 12(b)(6). Florian Greenhouse, Inc. v. Cardinal IG Corp., 11 F. Supp. 2d 521 (D.N.J. 1998).

Keeley v. Loomis Fargo & Co., 11 F. Supp. 2d 517 (D.N.J. 1998).

Jean Anderson Hierarchy of Agents v. Allstate Life Ins. Co., 2 F. Supp. 2d 688 (E.D. Pa. 1998).

Pagano v. Bell Atlantic-New Jersey, Inc., 988 F. Supp. 841 (D.N.J. 1997).

Andrea L. by Judith B. v. Children and Youth Services of Lawrence County, 987 F. Supp. 418 (W.D. Pa. 1997).

Joe Hand Promotions, Inc. v. Rennard Street Enterprises, Inc., 954 F. Supp. 1046 (E.D. Pa. 1997).

Michaels v. State of N.J., 955 F. Supp. 315 (D.N.J. 1996).

Fair Housing Council of Suburban Philadelphia v. Boyertown Area Times, 945 F. Supp. 826 (E.D. Pa. 1996).

Loftus v. Southeastern Pennsylvania Transp. Authority, 843 F. Supp. 981 (E.D. Pa. 1994).

Kroungold v. Triester, 407 F. Supp. 414 (E.D. Pa. 1975).

Brown v. Farview State Hospital, 386 F. Supp. 607 (E.D. Pa. 1974).

Elliott & Frantz, Inc. v. Raygo Inc., 379 F. Supp. 498 (E.D. Pa. 1974).

Speed v. Transamerica Corp., 5 F.R.D. 56 (D. Del. 1945).

Fourth Circuit

Simmons v. United Mortg. and Loan Inv., LLC, 634 F.3d 754, 769 (4th Cir. 2011) (it was abuse of discretion for district court to deny plaintiffs leave to file second amended complaint without providing rationale).

Adams v. Montgomery College, 2010 WL 2813346 (D. Md. 2010).

Fanney v. Trigon Ins. Co., 11 F. Supp. 2d 829 (E.D. Va. 1998).

Valero Terrestrial v. McCoy, 36 F. Supp. 2d 724 (N.D. W. Va. 1997), vacated in part on denial of reconsideration, 50 F. Supp. 2d 564 (N.D. W. Va. 1999), aff'd in part, vacated in part, 211 F.3d 112 (4th Cir. 2000) and vacated in part on other grounds, 211 F.3d 112 (4th Cir. 2000).

Shaw v. Barr, 808 F. Supp. 461 (E.D. N.C. 1992), judgment rev'd, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993), **citing Wright & Miller.**

Miller v. Holiday Inns, Inc., 436 F. Supp. 460 (E.D. Va. 1977).

L. S. Good & Co. v. H. Daroff & Sons, Inc., 263 F. Supp. 635 (N.D. W. Va. 1967).

Fifth Circuit

Hale v. King, 642 F.3d 492, 503 (5th Cir. 2011) (pro se plaintiff should be granted leave to amend unless it is obvious that he already has pled his best case).

Gregory v. McKennon, 430 Fed. Appx. 306 (5th Cir. 2011) (error to dismiss pro se complaint without granting leave to amend if allegations could be developed into nonfrivolous claim; error may be ameliorated if plaintiff already has stated his best case).

Zidell v. Kanan, 428 Fed. Appx. 426 (5th Cir. 2011) (error to dismiss pro se complaint without granting leave to amend if allegations could be developed into nonfrivolous claim).

It will not be error for the district court to dismiss a pro se complaint without allowing leave to amend only when the plaintiff has asserted her best case or the dismissal was with prejudice. Amanduron v. American Airlines, 416 Fed. Appx. 421, 423 (5th Cir. 2011).

Hart v. Bayer Corp., 199 F.3d 239 (5th Cir. 2000).

Pena v. U.S., 157 F.3d 984 (5th Cir. 1998) (dismissals of pro se complaints for failure to state claim are disfavored and court should grant pro se party every reasonable opportunity to amend).

Bazrowx v. Scott, 136 F.3d 1053 (5th Cir. 1998).

Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278 (5th Cir. 1993).

The court should allow pleaders the opportunity to advance their best case. Thus, a pro se plaintiff should have been allowed to amend his pleading to meet the heightened requirements to overcome a qualified immunity defense after he obtained counsel. Jackson v. City of Beaumont Police Dept., 958 F.2d 616 (5th Cir. 1992).

Griggs v. Hinds Junior College, 563 F.2d 179 (5th Cir. 1977).

Hines v. Wainwright, 539 F.2d 433 (5th Cir. 1976).

If the information set forth in the complaint does not adequately apprise the defendant of the nature of the plaintiff's claim, the trial court should allow the plaintiff to amend the pleadings to delineate more plainly the cause of action rather than dismiss the complaint. Sarter v. Mays, 491 F.2d 675 (5th Cir. 1974).

Dowdy v. Procter & Gamble Mfg. Co., 267 F.2d 827 (5th Cir. 1959).

Even if the complaint fails to state a claim, a court ordinarily should not dismiss the complaint unless it affords every opportunity to the plaintiff to state a claim. Byrd v. Bates, 220 F.2d 480 (5th Cir. 1955).

John Walker & Sons v. Tampa Cigar Co., 197 F.2d 72 (5th Cir. 1952).

Watkins v. Gautreaux, 515 F. Supp. 3d 500, 518-519 (M.D. La. 2021) ("[T]he Court agrees that Plaintiff should be given leave to amend under the circumstances. * * * '[D]ismissal under Rule 12(b)(6) generally is not immediately final or on the merits because the district court normally will give the plaintiff leave to file an amended complaint to see if the shortcomings of the original document can be corrected.' * * * Failure to cure the deficiencies

will likely result in the dismissal of Plaintiff's case from this Court."), **quoting Wright & Miller**.

O'Neal v. Cargill, Inc., 178 F. Supp. 3d 408 (E.D. La. 2016) (amendment was denied because court decided any attempt to re-assert claims would be futile).

Tow v. Amegy Bank N.A., 498 B.R. 757, 765 (S.D. Tex. 2013) ("When a complaint fails to state a claim, the court should generally give the plaintiff at least one chance to amend before dismissing the action with prejudice unless it is clear that the defects in the complaint are incurable.").

Dorest v. Piney Point Surgical Center, 2011 WL 2633575 (S.D. Tex. 2011).

Whitney Nat. Bank v. Delfre, 2008 WL 2323237 (S.D. Tex. 2008).

In re Blockbuster Inc. Securities Litigation, 2004 WL 884308 (N.D. Tex. 2004).

Nabors Drilling U.S.A. L.P. v. Twister Exploration, L.L.C., 2002 WL 287728 (E.D. La. 2002).

Guilbeaux v. 3927 Foundation, Inc., 177 F.R.D. 387 (E.D. Tex. 1998).

Mills v. Injury Benefits Plan of Schepps-Foremost, Inc., 851 F. Supp. 804 (N.D. Tex. 1993) (court ordinarily should grant leave to replead rather than dismiss if it appears that more carefully drafted complaint would be sufficient).

Webber v. White, 422 F. Supp. 416 (N.D. Tex. 1976), **citing Wright & Miller.**

Although it appeared to the court that the plaintiff could not cure a complaint for negligence that showed on its face that the plaintiff's negligence was the cause of her injury, the court still preferred to grant the plaintiff leave to amend her complaint. Smith v. Vincent, 109 F. Supp. 451 (S.D. Fla. 1952), judgment aff'd, 204 F.2d 945 (5th Cir. 1953).

Sixth Circuit

Baxter v. Rose, 305 F.3d 486 (6th Cir. 2002) (abrogated by, Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007)).

Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Delta Refining Co., 277 F.2d 694 (6th Cir. 1960).

A court can deny leave to amend if the court decides the amended complaint would fail on a future Rule 12(b)(6) motion. CSX Transportation, Inc. v. Benore, 154 F. Supp. 3d 541, 547-548 (E.D. Mich. 2015).

Bordas v. Washtenaw County, 987 F. Supp. 979 (E.D. Mich. 1997).

Mario's Enterprises, Inc. v. Morton-Norwich Products, Inc., 487 F. Supp. 1308 (W.D. Ky. 1980).

O'Donel v. Great Lakes S. S. Co., 7 F.R.D. 501 (N.D. Ohio 1946).

Seventh Circuit

Smith v. Union Pacific R. Co., 474 Fed. Appx. 478 (7th Cir. 2012) (district court erred in dismissing complaint for untimeliness without granting leave to amend).

Paul v. Marberry, 658 F.3d 702 (7th Cir. 2011).

Prematurity may be raised on a Rule 12(b)(6) motion but a dismissal granted on that ground alone should be without prejudice. Schy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir. 1970).

Hy Cite Corp. v. Regal Ware, Inc., 2011 WL 1206768, *9 (W.D. Wis. 2011).

Phillips v. Hunter Marine Transport, Inc., 2010 WL 2745963 (S.D. Ill. 2010).

Bub v. Marine Tech, LLC, 2010 WL 2033331 (W.D. Wis. 2010).

Zimmerman v. Hoard, 5 F. Supp. 2d 633 (N.D. Ind. 1998).

Naguib v. Illinois Dept. of Professional Regulation, 986 F. Supp. 1082 (N.D. Ill. 1997) (pro se litigant).

Graham v. Gendex Medical X-Ray, Inc., 176 F.R.D. 288 (N.D. Ill. 1997).

In re Scattered Corp. Securities Litigation, 844 F. Supp. 416 (N.D. Ill. 1994), aff'd, 47 F.3d 857 (7th Cir. 1995).

Commercial Ins. Co. of Newark, New Jersey v. Krain, 843 F. Supp. 404 (N.D. Ill. 1994).

Eret v. Continental Holding, Inc., 838 F. Supp. 358 (N.D. Ill. 1993).

Powell Duffryn Terminals, Inc. v. CJR Processing, Inc., 808 F. Supp. 652 (N.D. Ill. 1992).

Smith-Victor Corp. v. Sylvania Elec. Products, Inc., 242 F. Supp. 302 (N.D. Ill. 1965).

In re Gilman, 2010 WL 2812735 (Bankr. N.D. Ill. 2010).

Eighth Circuit

Christiansen v. West Branch Community School Dist., 674 F.3d 927, 938 (8th Cir. 2012).

Parnes v. Gateway 2000, Inc., 122 F.3d 539 (8th Cir. 1997).

Frey v. City of Herculaneum, 44 F.3d 667 (8th Cir. 1995) (district court erred by not giving civil rights plaintiff leave to amend).

Rogers v. Bruntrager, 841 F.2d 853, 855 (8th Cir. 1988), **citing Wright & Miller.**

Williams v. Town of Okoboji, 606 F.2d 812 (8th Cir. 1979).

Holt v. Bose, 2011 WL 3679820 (D. Neb. 2011).

Hawkins v. County of Lincoln, 2010 WL 2039656 (D. Neb. 2010).

Iowa Health System v. Trinity Health Corp., 177 F. Supp. 2d 897 (N.D. Iowa 2001).

Spinks v. City of St. Louis Water Div., 176 F.R.D. 572 (E.D. Mo. 1997).

Upsher-Smith Laboratories, Inc. v. Mylan Laboratories, Inc., 944 F. Supp. 1411 (D. Minn. 1996).

Fairyland Amusement Co. v. Metromedia, Inc., 413 F. Supp. 1290 (W.D. Mo. 1976), **citing Wright & Miller.**

Ninth Circuit
U.S. ex rel. Tamanaha v. Furukawa America, Inc., 445 Fed. Appx. 992 (9th Cir. 2011).

Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment. Gompper v. VISX, Inc., 298 F.3d 893 (9th Cir. 2002).

Absent unusual circumstances, dismissal without leave to amend is improper unless it is clear upon de novo review that the complaint could not be saved by any amendment. Ochoa v. Housing Authority of City Los Angeles, 47 Fed. Appx. 484 (9th Cir. 2002) (unpublished).

Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000).

Udom v. Fonseca, 846 F.2d 1236, 1238 (9th Cir. 1988), **citing Wright & Miller.**

Conway v. Slaughter, 440 F.2d 1278 (9th Cir. 1971).

Hughes v. Johnson, 305 F.2d 67 (9th Cir. 1962).

Florentine v. Landon, 231 F.2d 452 (9th Cir. 1955).

Sidebotham v. Robison, 216 F.2d 816 (9th Cir. 1954).

French v. Idaho State AFL-CIO, 164 F. Supp. 3d 1205, 1212 (D. Idaho 2016) (dismissal without leave to amend is improper "unless it is beyond doubt" that no

amendment could save complaint), citing U.S. v. Ritchie, 342 F.3d 903, 907-908 (9th Cir. 2003).

Rojas-Lozano v. Google, Inc., 159 F. Supp. 3d 1101, 1108 (N.D. Cal. 2016) (unless "pleading could not possibly be cured by the allegation of other facts," courts should grant leave to amend even if pleader made no request to amend).

Meyer v. National Tenant Network, Inc., 10 F. Supp. 3d 1096 (N.D. Cal. 2014).

Cortez v. City of Porterville, 5 F. Supp. 3d 1160 (E.D. Cal. 2014).

Nguyen v. CTS Electronics Manufacturing Solutions Inc., 301 F.R.D. 337 (N.D. Cal. 2014).

Parker v. Barclays Bank Delaware, 2011 WL 2709407 (E.D. Wash. 2011).

Manestar v. JP Morgan Chase Bank, N.A., 2011 WL 686252 (C.D. Cal. 2011).

Lucas v. City of Visalia, 726 F. Supp. 2d 1149 (E.D. Cal. 2010).

Zepeda v. Tate, 2010 WL 4977596 (E.D. Cal. 2010) (improper to dismiss without leave to amend unless amendment clearly could not save complaint).

Herschelman v. New Century Mortg. Corp., 2010 WL 4448224, *3 (D. Haw. 2010).

Kingsburg Apple Packers, Inc. v. Ballantine Produce Co., Inc., 2010 WL 2817056, *3 (E.D. Cal. 2010).

Stringer v. Woolsey, 2010 WL 2776788 (D. Nev. 2010).

Brown v. Dillman, 2010 WL 2775842 (D. Nev. 2010).

Wheeler v. Terrible Herbst, 2010 WL 2775780 (D. Nev. 2010) (pro se plaintiff).

Edwards v. Aurora Loan Services, LLC, 2010 WL 2740173 (E.D. Cal. 2010) (pro se plaintiff).

Bauer v. Metropolitan Life Ins. Co., 2010 WL 2595291 (D. Idaho 2010).

Lee v. AFT-Yakima, 2010 WL 2243992 (E.D. Wash. 2010).

Austin v. Amazon.Com, Inc., 2010 WL 1875811 (W.D. Wash. 2010).

Chace v. M & T Mortg. Corp., 2010 WL 1816161 (D. Idaho 2010) ("The Ninth Circuit has held that, where a court finds dismissal under Rule 12(b)(6) is warranted, the court 'should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly

be cured by the allegation of other facts.'"), quoting Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000).

Court must "grant plaintiff leave to amend 'unless it clearly appears that the deficiency cannot be overcome by amendment.'" Anderson v. Fishback, 2009 WL 2423327, *3 (E.D. Cal. 2009).

Sconiers v. California Dept. of Social Services, 2008 WL 4196599 (E.D. Cal. 2008).

Walker v. City of Hayward, 2008 WL 2357249 (N.D. Cal. 2008).

"The Ninth Circuit has 'repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'" Setzler v. City and County of San Francisco, 2008 WL 2264481 (N.D. Cal. 2008) (Illston, J.), quoting Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

Elston v. Toma, 2004 WL 1048132 (D. Or. 2004).

Scherz v. South Carolina Ins. Co., 112 F. Supp. 2d 1000 (C.D. Cal. 2000).

Guerrero v. Gates, 110 F. Supp. 2d 1287 (C.D. Cal. 2000).

Wyatt v. Liljenquist, 96 F. Supp. 2d 1062 (C.D. Cal. 2000) (dismissal without leave to amend is appropriate only when court is satisfied that deficiencies of complaint could not possibly be cured by amendment).

Roe v. Unocal Corp., 70 F. Supp. 2d 1073 (C.D. Cal. 1999) (court should grant leave to amend if complaint possibly can be cured by inclusion of additional factual allegations).

Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013 (C.D. Cal. 1998) (leave to amend appropriate if plaintiff possibly can cure defect in complaint).

Films of Distinction, Inc. v. Allegro Film Productions, Inc., 12 F. Supp. 2d 1068 (C.D. Cal. 1998).

Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., 12 F. Supp. 2d 1035 (C.D. Cal. 1998).

A court must grant a pro se litigant leave to amend the complaint unless it is absolutely clear that the deficiencies of the complaint cannot be cured by amendment. Ricotta v. State of Cal., 4 F. Supp. 2d 961 (S.D. Cal. 1998), aff'd, 173 F.3d 861 (9th Cir. 1999).

Allison v. Brooktree Corp., 999 F. Supp. 1342 (S.D. Cal. 1998).

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Dunlap v. Association of Bay Area Governments, 996 F. Supp. 962 (N.D. Cal. 1998).

Larramendy v. Newton, 994 F. Supp. 1211 (E.D. Cal. 1998).

Edwards v. Ellsworth, May, Sudweeks, Stubbs, Ibsen and Perry, 10 F. Supp. 2d 1131 (D. Idaho 1997), aff'd, 152 F.3d 924 (9th Cir. 1998).

Diaz v. Carlson, 5 F. Supp. 2d 809 (C.D. Cal. 1997), aff'd, 142 F.3d 443 (9th Cir. 1998).

Qualcomm, Inc. v. Motorola, Inc., 989 F. Supp. 1048 (S.D. Cal. 1997).

Silicon Knights, Inc. v. Crystal Dynamics, Inc., 983 F. Supp. 1303 (N.D. Cal. 1997).

Meek v. County of Riverside, 982 F. Supp. 1410 (C.D. Cal. 1997), aff'd in part, dismissed in part, 183 F.3d 962 (9th Cir. 1999).

National Coalition Government of Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997).

Bloom v. Martin, 865 F. Supp. 1377 (N.D. Cal. 1994), aff'd, 77 F.3d 318 (9th Cir. 1996).

Kaufman and Broad-South Bay v. Unisys Corp., 822 F. Supp. 1468 (N.D. Cal. 1993) (disapproved of by, KFC Western, Inc. v. Meghrig, 49 F.3d 518 (9th Cir. 1995)).

McDonald v. General Mills, Inc., 387 F. Supp. 24 (E.D. Cal. 1974).

Buchler v. U.S., 384 F. Supp. 709 (E.D. Cal. 1974).

Anspach v. Bestline Products, Inc., 382 F. Supp. 1083 (N.D. Cal. 1974).

Nishiyama v. North Am. Rockwell Corp., 49 F.R.D. 288 (C.D. Cal. 1970).

Tenth Circuit

McCown v. Heidler, 527 F.2d 204 (10th Cir. 1975).

"With regard to futility, the court must analyze the proposed amendment as though it was before the court on a motion to dismiss under Fed.R.Civ.P. 12(b)(6)." Hawkins v. Mercy Kansas Communities, Inc., 2015 WL 728484, *2 (D. Kan. 2015).

Holgers v. South Salt Lake City, 2011 WL 98488 (D. Utah 2011).

Riggs v. Boeing Co., 12 F. Supp. 2d 1215 (D. Kan. 1998) (pro se complaint).

Bushnell Corp. v. ITT Corp., 973 F. Supp. 1276 (D. Kan. 1997).

Freeman v. Burlington Northern and Santa Fe Ry. Co., 176 F.R.D. 581 (D. Kan. 1997).

Gallardo v. Board of County Com'rs, Kearny County Kan., 857 F. Supp. 783 (D. Kan. 1994) (abrogated by, Burns v. Board of Com'rs of County of Jackson, Kansas, 197 F. Supp. 2d 1278 (D. Kan. 2002)), **citing Wright & Miller.**

Moten v. American Linen Supply Co., 155 F.R.D. 202 (D. Kan. 1994).

Eleventh Circuit

A district court " 'district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court.'" Novoneuron Inc. v. Addiction Research Institute, Inc., 326 Fed. Appx. 505, 507 (11th Cir. 2009), quoting Wagner v. Daewoo Heavy Industries America Corp., 314 F.3d 541, 542 (11th Cir. 2002).

Ford v. Central Loan Admin., 2011 WL 4702912 (S.D. Ala. 2011).

Campbell v. Grady's Bar, Inc., 2010 WL 2754328 (S.D. Fla. 2010).

Wise v. Heddell, 2010 WL 2688730 (M.D. Ga. 2010).

Hodges v. Buzzeo, 193 F. Supp. 2d 1279 (M.D. Fla. 2002).

Digiro v. Pall Aeropower Corp., 19 F. Supp. 2d 1304 (M.D. Fla. 1998) (pro se complaint).

U.S. v. One (1) 1980 Cessna 441 Conquest II Aircraft, 989 F. Supp. 1465 (S.D. Fla. 1997).

Underwood v. City of Fort Myers, 836 F. Supp. 823 (M.D. Fla. 1993).

Harrell v. Anderson, 294 F. Supp. 405 (S.D. Ga. 1968).

D.C. Circuit

O'Donnell v. Barry, 148 F.3d 1126, 331 (D.C. Cir. 1998), **citing Wright & Miller.**

Doe v. U.S. Dept. of Justice, 753 F.2d 1092, 1104 (D.C. Cir. 1985), **quoting Wright & Miller.**

Shapiro v. Secretary of State, 499 F.2d 527, 162 (D.C. Cir. 1974), judgment aff'd, 424 U.S. 614, 96 S. Ct. 1062, 47 L. Ed. 2d 278 (1976).

Douglas v. District of Columbia Housing Authority, 981 F. Supp. 2d 78 (D.D.C. 2013) (review for futility is identical to review of Rule 12(b)(6) motion to dismiss).

Morrow v. U.S., 723 F. Supp. 2d 71 (D.D.C. 2010).

Johnson v. Computer Technology Services, Inc., 670 F. Supp. 1036 (D.D.C. 1987).

See also
Stanley v. Harper Buffing Mach. Co., 28 F.R.D. 579 (D. Conn. 1961).

Calkins v. City of Fruitland, 97 Idaho 263, 543 P.2d 166, 167 (1975), **citing Wright & Miller.**

Capazzoli v. Holzwasser, 397 Mass. 158, 490 N.E.2d 420, 424 (1986), **citing Wright & Miller.**

But see
Nettles v. City of Leesburg—Police Dept., 415 Fed. Appx. 116, 120 (11th Cir. 2010) (court not required to grant leave to amend when plaintiff, represented by counsel, never requested to do so).

Spiller v. City of Texas City, Police Dept., 130 F.3d 162 (5th Cir. 1997).

A dismissal without leave to amend is proper when there was no request for leave to amend. Coates v. Illinois State Bd. of Ed., 559 F.2d 445 (7th Cir. 1977).

The district court dismissed the defendants' counterclaims with prejudice without mentioning any possibility of amendment. Sundance Services, Inc. v. Roach, 2011 WL 3608014 (D.N.M. 2011).

130 **Ability to correct doubtful**
Bausch v. Stryker Corp., 630 F.3d 546, 562 (7th Cir. 2010).

Silverstein v. Keynetics Inc., 192 F. Supp. 3d 1045, 1053 (N.D. Cal. 2016), aff'd, 727 Fed. Appx. 244 (9th Cir. 2018) (court granted leave to amend despite seriously doubting plaintiff's ability to plead claims to escape federal preemption).

Rolo v. City Investing Co. Liquidating Trust, 845 F. Supp. 182 (D.N.J. 1993), order aff'd, 43 F.3d 1462 (3d Cir. 1994), judgment vacated on reh'g, 66 F.3d 312 (3d Cir. 1995) and order vacated, 66 F.3d 312 (3d Cir. 1995), **citing Wright & Miller.**

Resolution Trust Corp. v. DiDomenico, 837 F. Supp. 623 (D.N.J. 1993), **quoting Wright & Miller.**

Napoli v. Sears, Roebuck and Co., 835 F. Supp. 1053 (N.D. Ill. 1993), vacated on reconsideration, 858 F. Supp. 101 (N.D. Ill. 1994) and opinion vacated, 926 F. Supp. 780 (N.D. Ill. 1996).

Jackson v. Culinary School of Washington, 788 F. Supp. 1233 (D.D.C. 1992).

St. Louis Home Insulators, Inc. v. Burroughs Corp., 597 F. Supp. 100 (E.D. Mo. 1984), judgment aff'd, 793 F.2d 954 (8th Cir. 1986).

Muhammad Ali v. Division of State Athletic Commission of Dept. of State of N. Y., 308 F. Supp. 11 (S.D. N.Y. 1969).

Although a defense of immunity raised by the complaint made the possibility of practical and effective amendment dubious, the court would allow the plaintiff to move to amend and would rule on the motion when tendered. Rhodes v. Van Steenberg, 225 F. Supp. 113 (D. Neb. 1963), aff'd, 334 F.2d 709 (8th Cir. 1964).

131 **Leave to amend refused**

"In the Ninth Circuit, although leave to amend should be given freely, a district court may dismiss without leave where a plaintiff's proposed amendments would fail to cure the pleading deficiencies and amendment would be futile. * * * we agree with the district court that Sanderling's proposed amendment * * * would have been futile. No amendment to a complaint can alter what a patent itself states." Sanderling Management Ltd. v. Snap Inc., 65 F.4th 698, 705–706 (Fed. Cir. 2023) (citing Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1041 (9th Cir. 2011)) (internal quotation marks omitted).

Arizona Board of Regents for and on behalf of Arizona State University v. Doe, 2022 WL 1514649, *1 (9th Cir. 2022) ("The district court did not err by dismissing ABR's complaint sua sponte without leave to amend and without providing notice because amendment would have been futile.") (citing Wong v. Bell, 642 F.2d 359, 361–362 (9th Cir. 1981)).

"While Appellants suggest error in the court's dismissal of their federal claims with prejudice without allowing leave to amend the complaint, the record shows that Appellants' requests for leave to amend were perfunctory, asserted only in their responses to the Rule 12(b)(6) motions, and without supporting pleadings. Accordingly, we discern no abuse of discretion in this regard." Babakaeva v. PTR Investments, Inc., 2022 WL 17103767, *1 (4th Cir. 2022) (citation omitted).

Lutz v. Portfolio Recovery Associates, LLC, 49 F.4th 323, 335 (3d Cir. 2022) ("Because the proposed amendments do not cure those deficient allegations, the amendments would be futile, and the District Court did not abuse its discretion in dismissing Lutz's claims with prejudice and denying Lutz leave to amend.").

Seale v. Peacock, 32 F.4th 1011, 1027 (10th Cir. 2022) ("[D]ismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile.").

Stewart v. IHT Insurance Agency Group, LLC, 990 F.3d 455, 457 (6th Cir. 2021).

Rand v. Midland National Life Insurance, 857 Fed. Appx. 343, 348 (9th Cir. 2021).

Orchard Hill Master Fund Ltd. v. SBA Communications Corporation, 830 F.3d 152, 160 (2d Cir. 2016).

Arizona Students' Association v. Arizona Board of Regents, 824 F.3d 858, 871 (9th Cir. 2016).

Moody v. Vozel, 771 F.3d 1093, 1096 (8th Cir. 2014).

Bogie v. Rosenberg, 705 F.3d 603, 608 (7th Cir. 2013), citing Garcia v. City of Chicago, Ill., 24 F.3d 966, 970 (7th Cir. 1994).

Glazer v. Chase Home Finance LLC, 704 F.3d 453, 458-459 (6th Cir. 2013) (abrogated by, Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029, 203 L. Ed. 2d 390 (2019)) (district court did not abuse its discretion in denying plaintiff leave to amend when plaintiff filed his motion to amend four months after discovery of "new" evidence, well after defendant's motion to dismiss had been filed and fully briefed, and one month after magistrate recommended granting it).

Saunders v. Philadelphia Dist. Attorney's Office, 546 Fed. Appx. 68, 73 (3d Cir. 2013) (per curiam) ("A dismissal of a civil rights complaint pursuant to Rule 12(b)(6) without leave to amend is 'justified only on the grounds of bad faith, undue delay, prejudice, or futility.'"), quoting Alston v. Parker, 363 F.3d 229, 236 (3d Cir. 2004).

Panther Partners Inc. v. Ikanos Communications, Inc., 681 F.3d 114, 119 (2d Cir. 2012) ("Futility is a determination, as a matter of law, that proposed amendments would fail to cure prior deficiencies or to state a claim under Rule 12(b)(6) * * *.").

Hettinga v. U.S., 677 F.3d 471, 480 (D.C. Cir. 2012) ("A district court may deny a motion to amend a complaint as futile if the proposed claim would not survive a motion to dismiss.").

Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 71 (2d Cir. 2012).

Rudder v. Williams, 666 F.3d 790, 794 (D.C. Cir. 2012) (district court erroneously responded to plaintiff concession that some claims were time-barred by dismissing all claims, including those not time-barred, with prejudice).

Hunt v. Klein, 476 Fed. Appx. 889, 891 (2d Cir. 2012) ("Although we generally disfavor the dismissal of pro se complaints without leave to replead, an opportunity to amend is not required if amendment would be futile.").

Wilcox v. Magill, 468 Fed. Appx. 849, 854 (10th Cir. 2012).

Chechele v. Scheetz, 466 Fed. Appx. 39, 40 (2d Cir. 2012).

"The court considers five factors in assessing the propriety of leave to amend-bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." U.S. v. Corinthian Colleges, 655 F.3d 984, 995 (9th Cir. 2011).

Nordyke v. King, 644 F.3d 776 (9th Cir. 2011) (amendment is futile and should be denied if amended complaint would be subject to immediate dismissal under Rule 12(b)(6) standard), on reh'g en banc, 681 F.3d 1041 (9th Cir. 2012).

Katyle v. Penn Nat. Gaming, Inc., 637 F.3d 462, 466 (4th Cir. 2011) (amendment may be refused when it would be futile).

Arlin-Golf, LLC v. Village of Arlington Heights, 631 F.3d 818, 823 (7th Cir. 2011) (proper to deny motion to amend when amendment would be futile).

Brule v. Blue Cross and Blue Shield of New Mexico, 455 Fed. Appx. 836, 840 (10th Cir. 2011) ("[E]ven if he were allowed to amend, Mr. Brule would be unable to establish a legal duty under New Mexico law.").

Jones v. HSBC Bank USA, N.A., 444 Fed. Appx. 640 (4th Cir. 2011) (in determining whether amendment is futile, court should look at substantive or procedural considerations).

Rocha v. Zavaras, 443 Fed. Appx. 316 (10th Cir. 2011) (refusal of amendment was proper when to do so would be futile).

Dollonne v. Ventura Unified School Dist. ex rel. its officials, 440 Fed. Appx. 533 (9th Cir. 2011) (amendment is futile and should be denied where all defendants are immune from suit).

"Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." Bootay v. KBR, Inc., 437 Fed. Appx. 140, 147 (3d Cir. 2011), quoting In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1434 (3d Cir. 1997).

Weston v. Illinois Dept. of Human Services, 433 Fed. Appx. 480 (7th Cir. 2011) (dismissal without leave to amend was proper when amendment would be futile as plaintiff could not state plausible claim).

Bennett v. City of New York, 425 Fed. Appx. 79 (2d Cir. 2011).

American Corporate Soc. v. Valley Forge Ins. Co., 424 Fed. Appx. 86 (3d Cir. 2011) (leave to amend properly refused when amendment would be futile).

Roth v. Wilder, 420 Fed. Appx. 804 (10th Cir. 2011).

Smith v. Arguello, 415 Fed. Appx. 57, 61 (10th Cir. 2011).

LaCroix v. Marshall County, Mississippi, 409 Fed. Appx. 794, 802 (5th Cir. 2011).

Rocha v. CCCF Admin., 408 Fed. Appx. 141, 144 (10th Cir. 2011).

Kundratic v. Thomas, 407 Fed. Appx. 625, 627 (3d Cir. 2011).

Hill v. City of Oklahoma City, 448 Fed. Appx. 814 (10th Cir. 2011) (amendment may be refused and case dismissed with prejudice when amendment would be futile).

Bausch v. Stryker Corp., 630 F.3d 546, 562 (7th Cir. 2010) (denial of motion to amend is disfavored).

In re Interbank Funding Corp. Securities Litigation, 629 F.3d 213, 218 (D.C. Cir. 2010) (leave to amend may be denied if amended pleading would not survive motion to dismiss).

Kevilly v. New York, 410 Fed. Appx. 371, 375 (2d Cir. 2010).

"[C]lear or explicit justifications, such as repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of amendment, and futility of amendment, can justify dismissal with prejudice." Carvel v. Godley, 404 Fed. Appx. 359, 361 (11th Cir. 2010) (internal quotation marks omitted).

Golod v. Bank of America Corp., 403 Fed. Appx. 699, 702 (3d Cir. 2010) (amendment futile after several failures by plaintiff to move complaint across line from conceivable to plausible).

Holmes v. Gates, 403 Fed. Appx. 670, 673 (3d Cir. 2010) (complaint properly dismissed after plaintiff failed three times to include facts beyond conclusory allegations).

Jewell v. Bell, 388 Fed. Appx. 435 (5th Cir. 2010) (upholding district court's refusal to grant plaintiff leave to amend on grounds that amendment would be futile).

Brookhart v. Rohr, 385 Fed. Appx. 67 (3d Cir. 2010) (dismissing plaintiff's appeal of district court's dismissal without leave to amend on grounds that appeal was frivolous).

Brown v. Hillsborough County Sheriff's Office, 342 Fed. Appx. 552 (11th Cir. 2009).

Because the plaintiff's second amendment did not alter the disposition of the case, the district court was correct to refuse amendment because the complaint would not pass a motion to dismiss and, therefore, was futile. Pollard v. Pollard, 325 Fed. Appx. 270 (4th Cir. 2009).

Cohen v. Clemens, 321 Fed. Appx. 739 (10th Cir. 2009).

In re NVE Corp. Securities Litigation, 527 F.3d 749 (8th Cir. 2008) (appellants did not articulate changes they wished to make, nor did they demonstrate how revision would address numerous pleading deficiencies identified by district court).

Airborne Beepers & Video, Inc. v. AT & T Mobility LLC, 499 F.3d 663 (7th Cir. 2007) (upholding district court's refusal to grant plaintiff leave to amend complaint for fourth time).

Crenshaw v. Antokol, 206 Fed. Appx. 560, 563 (7th Cir. 2006).

"Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." Kelly v. Provident Life & Acc. Ins., 245 Fed. Appx. 637, 639 (9th Cir. 2007) (finding district court erred in dismissing claim without leave to amend).

Lum v. Bank of America, 361 F.3d 217 (3d Cir. 2004) (allowing amendment would be futile because plaintiffs cannot allege sufficient facts to support fraud or RICO claim).

Donovan v. American Skandia Life Assur. Corp., 96 Fed. Appx. 779 (2d Cir. 2004).

Broam v. Bogan, 320 F.3d 1023 (9th Cir. 2003) ("dismissal without leave to amend is proper only in extraordinary cases").

Dismissal without leave to amend is proper only if the complaint cannot be cured by amendment. Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n, 298 F.3d 768 (9th Cir. 2002).

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Ochoa v. Housing Authority of City Los Angeles, 47 Fed. Appx. 484 (9th Cir. 2002) (unpublished).

Shane v. Fauver, 213 F.3d 113 (3d Cir. 2000) (court can deny leave to amend for reasons including undue delay, bad faith, dilatory motive, prejudice, and futility).

Koehler v. Bank of Bermuda (New York) Ltd., 209 F.3d 130 (2d Cir. 2000), opinion amended, 229 F.3d 424 (2d Cir. 2000) (court did not abuse its discretion in denying leave to amend complaint when any amendment would be futile because plaintiff could not plead elements of securities fraud claim).

Simon v. Value Behavioral Health, Inc., 208 F.3d 1073 (9th Cir. 2000), opinion amended, 234 F.3d 428 (9th Cir. 2000) and (overruled by, Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007)) (court properly denied plaintiff leave to amend complaint even though it theoretically was possible for him to allege more specific facts because fact that claims failed due to absence of direct injury, and that court already gave plaintiff three opportunities to amend claims suggested futility of amendment).

Looper Maintenance Service Inc. v. City of Indianapolis, 197 F.3d 908 (7th Cir. 1999) (district court did not abuse its discretion in denying plaintiff leave to file fourth amended complaint, when plaintiff was given three prior opportunities and made no appreciably substantive changes to complaint).

Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) (district court gave plaintiff several opportunities to amend complaint and provided plaintiff roadmap as to how to amend complaint, but plaintiff was unable to draft complaint that met minimum pleading requirements).

Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67 (2d Cir. 1998) (plaintiff failed to request leave to amend and failed to show any basis upon which the complaint could be amended).

Although a dismissal for the failure of a pleading to contain a short and plain statement of the claim showing that the pleader is entitled to relief is usually with leave to amend, the district court is justified in dismissing with prejudice if the plaintiff has "persisted" in violating the rule. Micklus v. Greer, 705 F.2d 314 (8th Cir. 1983).

The trial court did not err in dismissing the complaint without leave to amend when it was clear that leave to amend the complaint further would have served no purpose since the acts complained of could not constitute a claim for relief. Havas v. Thornton, 609 F.2d 372 (9th Cir. 1979).

Stebbins v. Weaver, 537 F.2d 939 (7th Cir. 1976).

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Prezzi v. Schelter, 469 F.2d 691 (2d Cir. 1972).

DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966).

The district court did not abuse its discretion by dismissing the complaint with prejudice when the plaintiff already had tried twice to state a claim and it appeared that no mere amendment could cure its defect and have it state a claim upon which relief could be granted. Feinberg v. Leach, 243 F.2d 64 (5th Cir. 1957).

Christine Asia Co., Ltd. v. Alibaba Group Holding Limited, 192 F. Supp. 3d 456, 482 (S.D. N.Y. 2016), vacated and remanded, 718 Fed. Appx. 20 (2d Cir. 2017).

Naperville Smart Meter Awareness v. City of Naperville, 114 F. Supp. 3d 606 (N.D. Ill. 2015), aff'd, 900 F.3d 521 (7th Cir. 2018).

Brooks v. Branch Banking and Trust Co., 107 F. Supp. 3d 1290 (N.D. Ga. 2015).

In re Sanofi Securities Litigation, 87 F. Supp. 3d 510, 549 (S.D. N.Y. 2015), judgment aff'd, 816 F.3d 199 (2d Cir. 2016) ("there is no realistic prospect of rehabilitating plaintiffs' federal claims").

Belcher v. W.C. English Inc., 125 F. Supp. 3d 544 (M.D. N.C. 2015).

Hancock v. Urban Outfitters, Inc., 32 F. Supp. 3d 26 (D.D.C. 2014), vacated and remanded, 830 F.3d 511 (D.C. Cir. 2016) (futile).

Polanco v. NCO Portfolio Management, Inc., 23 F. Supp. 3d 363 (S.D. N.Y. 2014) (futility under Rule 12(b)(6) standards prevents leave to amend).

Hanley v. Green Tree Servicing, LLC, 934 F. Supp. 2d 977, 986 (N.D. Ill. 2013), on reconsideration, (June 7, 2013), **quoting Wright & Miller**.

Macharia v. City of Revere, 848 F. Supp. 2d 74 (D. Mass. 2012).

Leave to amend "should be denied only when amending the complaint would prejudice the opposing party, reward bad faith on the part of the moving party, or would amount to futility." Hufford v. Bank United, FSB, 2011 WL 4985920, *4 (D. Md. 2011).

" 'Reasons for a proper denial of leave to amend include undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party.' " Consolmagno v. Hospital of St. Raphael, 94 Empl. Prac. Dec. (CCH) P 44292, 2011 WL 4804774, *4 (D. Conn. 2011), quoting State Teachers Retirement Bd. v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981).

Dorest v. Piney Point Surgical Center, 2011 WL 2633575 (S.D. Tex. 2011) (amendment should be refused when frivolous or futile).

Leave to amend should be denied mainly in three circumstances. First, if amendment would be futile, i.e. it would fail to withstand a Rule 12(b)(6) motion. Second, if it would be prejudicial to the opposing party. And finally, if the party seeking amendment has missed the set deadline to amend without good cause. Steel Institute of New York v. City of New York, 2010 WL 5060682 (S.D. N.Y. 2010).

Multiut Corp. v. Greenberg Traurig, LLP, 2010 WL 5018538 (N.D. Ill. 2010) (amendment futile if it would not survive motion to dismiss).

Abebe v. South Carolina Dept. of Corrections, 2010 WL 2991595 (D.S.C. 2010) (pro se plaintiff).

Ponder v. Bank of N.Y. Mellon, 2010 WL 2950681 (M.D. Ga. 2010) (pro se plaintiff).

CBS, Inc. v. Ahern, 108 F.R.D. 14, 19 (S.D. N.Y. 1985), **citing Wright & Miller.**

Ordinarily, the court should grant the plaintiff leave to amend when dismissing a complaint for failure to state a claim for which relief can be granted; however, when it appears certain that the plaintiffs will not be able to recover, as a matter of law, under any set of facts proved, leave to amend should be refused. Fairyland Amusement Co. v. Metromedia, Inc., 413 F. Supp. 1290 (W.D. Mo. 1976), **citing Wright & Miller.**

See also
Christiansen v. West Branch Community School Dist., 674 F.3d 927, 938 (8th Cir. 2012) (when district court dismisses claim on own motion, failure to give leave to amend not reversible error when "patently obvious" plaintiff could not prevail).

The court refused to allow the appellants to amend their complaint because they already had been given leave to amend their complaint once before. The appellants also had been given the opportunity to conduct discovery in order to discern the facts they needed to plead their claims. Kendall v. Visa U.S.A., Inc., 518 F.3d 1042 (9th Cir. 2008).

Storman v. Sacramento Regional Transit Dist., 70 Fed. Appx. 438 (9th Cir. 2003) (court should grant leave to amend pro se complaint even if no request to amend is made unless it is absolutely clear that no permissible amendment could cure defect).

Wang v. Palmisano, 157 F. Supp. 3d 306, 341 (S.D. N.Y. 2016) (dismissal with prejudice was appropriate because plaintiff received full notice of complaint's deficiencies and failed to remedy them).

Franklin v. City of Slidell, 936 F. Supp. 2d 691, 702 (E.D. La. 2013) (district courts should not dismiss pro se complaints for failure to state claim without first providing plaintiff opportunity to amend, unless it is obvious from record that plaintiff has pled best case), citing Taylor v. Books A Million, Inc., 296 F.3d 376, 378 (5th Cir. 2002).

Some courts have held that if the plaintiff already has had leave to amend and still has failed to state a claim, then leave to amend would be futile and should be denied. Rampersad v. Deutsche Bank Securities, Inc., 2004 WL 616132 (S.D. N.Y. 2004).

Compare
State v. Watson Pharmaceuticals Inc., 2019 UT App 31, 440 P.3d 727 (Utah Ct. App. 2019) (upholding a trial court's dismissal with prejudice in the face of the plaintiff-State's multiple failures to amend its complaint to state a claim), **citing Wright & Miller**.

But compare
The Sixth Circuit has upheld a district court's refusal to grant leave to amend because the motion to amend contained procedural defects. The court ruled that even if the motion was proper, leave to amend should be denied because it would frustrate the purposes of the PSLRA. PR Diamonds, Inc. v. Chandler, 364 F.3d 671 (6th Cir. 2004).

132 **Abuse of discretion regarding leave to amend**
Hammer v. Equifax Information Services, L.L.C., 974 F.3d 564, 570 (5th Cir. 2020) ("Hammer's claim is likely futile, and the district court did not abuse its discretion by dismissing the complaint with prejudice."), **quoting Wright & Miller**.

Sonner v. Premier Nutrition Corporation, 971 F.3d 834, 839 (9th Cir. 2020) ("We review the district court's decision to grant a motion to dismiss under Rule 12(b)(6) de novo, and to deny a request for leave to amend for abuse of discretion. We may affirm the district court's dismissal of the complaint on any basis supported by the record.").

Cresci v. Mohawk Valley Community College, 693 Fed. Appx. 21, 24-25 (2d Cir. 2017) (finding that when, "in a single order, the [district] court [1] granted the defendant's motion to dismiss [and identified] the flaws it found in [the plaintiff's] complaint, and [2] denied [the plaintiff] leave to replead, faulting [the plaintiff] for having failed to submit a proposed amended complaint in the time between the defendant's motion to dismiss and the court's ruling on it," the district court abused its discretion because "[t]he proper time for a plaintiff to move to amend the complaint is when the plaintiff learns from the District Court in what respect the complaint is deficient").

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Arizona Students' Association v. Arizona Board of Regents, 824 F.3d 858, 871 (9th Cir. 2016) (district court improperly held that amendment would be futile).

Cohen v. Board of Trustees of the University of the Dist. of Columbia, 819 F.3d 476 (D.C. Cir. 2016) (court affirmed district court's dismissal of complaint, but found that district court abused its discretion in dismissing with prejudice).

Starr v. Firstmark Corp., 563 Fed. Appx. 803 (2d Cir. 2014).

O'Connor v. City of Desert Hot Springs, 552 Fed. Appx. 703 (9th Cir. 2014).

Miller v. BAC Home Loans Servicing, L.P., 726 F.3d 717, 722 (5th Cir. 2013), quoting Pioneer Natural Resources USA, Inc. v. Paper, Allied Indus., Chemical and Energy Workers Intern. Union Local 4-487, 328 F.3d 818, 820 (5th Cir. 2003), modified on denial of reh'g, Pioneer Natural Resources USA, Inc. v. Paper, Allied Industrial, Chemical And Energy Workers Intern. Union Local 4-487, 338 F.3d 440 (5th Cir. 2003).

Nakahata v. New York-Presbyterian Healthcare System, Inc., 723 F.3d 192, 198 (2d Cir. 2013).

Agnew v. National Collegiate Athletic Ass'n, 683 F.3d 328, 334 (7th Cir. 2012).

Okwu v. McKim, 682 F.3d 841, 844 (9th Cir. 2012).

Panther Partners Inc. v. Ikanos Communications, Inc., 681 F.3d 114, 119 (2d Cir. 2012).

Anderson News, L.L.C. v. American Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012).

Public Pension Fund Group v. KV Pharmaceutical Co., 679 F.3d 972, 987 (8th Cir. 2012).

Wood v. City of San Diego, 678 F.3d 1075, 1080 (9th Cir. 2012).

Washington State Republican Party v. Washington State Grange, 676 F.3d 784, 797 (9th Cir. 2012).

Orton v. Johnny's Lunch Franchise, LLC, 668 F.3d 843, 850 (6th Cir. 2012).

AE ex rel. Hernandez v. County of Tulare, 666 F.3d 631, 636 (9th Cir. 2012).

McGarvey v. Penske Auto Group, Inc., 486 Fed. Appx. 276, 279 (3d Cir. 2012).

Johnson v. Epps, 479 Fed. Appx. 583, 588 (5th Cir. 2012) (per curiam).

Bangerter v. Roach, 467 Fed. Appx. 787, 789 (10th Cir. 2012).

Webb v. Morella, 457 Fed. Appx. 448 (5th Cir. 2012) (per curiam) (district court's dismissal with prejudice for failure to abide by local rules vacated because court failed to consider less severe sanctions).

Palm Beach Strategic Income, LP v. Salzman, 457 Fed. Appx. 40, 43-44 (2d Cir. 2012).

Metz v. U.S. Life Ins. Co. in City of New York, 662 F.3d 600, 602 (2d Cir. 2011) (per curiam).

Stanard v. Nygren, 658 F.3d 792, 796-797 (7th Cir. 2011) (denial of motion for leave to file second amended complaint is reviewed for abuse of discretion).

WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc., 655 F.3d 1039, 1058 (9th Cir. 2011) (abrogated by, Lorenzo v. Securities and Exchange Commission, 139 S. Ct. 1094, 203 L. Ed. 2d 484 (2019)) ("[d]istrict courts have broad discretion in deciding whether to grant leave to amend and whether to dismiss actions with or without prejudice").

Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1018 (9th Cir. 2011).

Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc., 637 F.3d 1047, 1058 (9th Cir. 2011).

Dutciuc v. Meritage Homes of Arizona, Inc., 462 Fed. Appx. 658, 659 (9th Cir. 2011).

Ruddy v. U.S. Postal Service, 455 Fed. Appx. 279, 283 (3d Cir. 2011).

Terra Securities ASA Konkursbo v. Citigroup, Inc., 450 Fed. Appx. 32, 34 (2d Cir. 2011).

U.S. ex rel. Tamanaha v. Furukawa America, Inc., 445 Fed. Appx. 992 (9th Cir. 2011).

Jones v. HSBC Bank USA, N.A., 444 Fed. Appx. 640 (4th Cir. 2011).

Lomako v. New York Institute of Technology, 440 Fed. Appx. 1 (2d Cir. 2011).

Bootay v. KBR, Inc., 437 Fed. Appx. 140 (3d Cir. 2011).

D'Agostino v. CECOM RDEC, 436 Fed. Appx. 70 (3d Cir. 2011).

Bennett v. City of New York, 425 Fed. Appx. 79 (2d Cir. 2011).

Perano v. Township Of Tilden, 423 Fed. Appx. 234 (3d Cir. 2011).

Brown v. Matauszak, 415 Fed. Appx. 608, 616 (6th Cir. 2011) (remand for abuse of discretion is proper when alleged offense is sufficiently serious and it is clear that information exists that will cure defect).

Smugglers Notch Homeowners' Ass'n, Inc. v. Smugglers' Notch Management Company, Ltd., 414 Fed. Appx. 372, 374 (2d Cir. 2011).

Matthews v. LaBarge, Inc., 407 Fed. Appx. 277, 280 (10th Cir. 2011) (not abuse of discretion to refuse third amended complaint when differences were immaterial and plaintiff did not seek consent before filing).

Phillips v. James, 403 Fed. Appx. 641, 643 n.1 (3d Cir. 2010) (per curiam).

Brown v. Hillsborough County Sheriff's Office, 342 Fed. Appx. 552 (11th Cir. 2009).

"[B]ecause the district court determined that the amended complaint would not survive a motion to dismiss, that legal conclusion is reviewed de novo." Pollard v. Pollard, 325 Fed. Appx. 270 (4th Cir. 2009),

Walker v. Zenk, 323 Fed. Appx. 144 (3d Cir. 2009).

Panther Partners Inc. v. Ikanos Communications, Inc., 347 Fed. Appx. 617 (2d Cir. 2009)

Platt Elec. Supply, Inc. v. EOFF Elec., Inc., 522 F.3d 1049 (9th Cir. 2008).

Fetterhoff v. Liberty Life Assur. Co., 282 Fed. Appx. 740 (11th Cir. 2008).

Airborne Beepers & Video, Inc. v. AT & T Mobility LLC, 499 F.3d 663 (7th Cir. 2007).

U.S. ex rel. Adrian v. Regents of University of California, 363 F.3d 398 (5th Cir. 2004).

U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220 (1st Cir. 2004).

Broudo v. Dura Pharmaceuticals, Inc., 339 F.3d 933 (9th Cir. 2003), judgment rev'd, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005).

General Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297 (3d Cir. 2003).

U.S. ex rel. Willard v. Humana Health Plan of Texas Inc., 336 F.3d 375 (5th Cir. 2003).

Shepherd v. Wellman, 313 F.3d 963 (6th Cir. 2002).

Franks v. Ross, 313 F.3d 184 (4th Cir. 2002).

Koehler v. Bank of Bermuda (New York) Ltd., 209 F.3d 130 (2d Cir. 2000), opinion amended, 229 F.3d 424 (2d Cir. 2000).

Simon v. Value Behavioral Health, Inc., 208 F.3d 1073 (9th Cir. 2000), opinion amended, 234 F.3d 428 (9th Cir. 2000) and (overruled by, Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007)) (court's discretion is particularly broad when plaintiff previously has been granted leave to amend, and key question is whether plaintiff could have saved his complaint through further amendment).

Looper Maintenance Service Inc. v. City of Indianapolis, 197 F.3d 908 (7th Cir. 1999).

Austin v. Ford Models, Inc., 149 F.3d 148 (2d Cir. 1998) (abrogated by, Swierkiewicz v. Sorema N. A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)).

Eison v. McCoy, 146 F.3d 468 (7th Cir. 1998).

Hudson United Bank v. LiTenda Mortg. Corp., 142 F.3d 151 (3d Cir. 1998).

Although the grant or denial of an opportunity to amend is within the discretion of the district court, an outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of that discretion but rather an abuse of discretion inconsistent with the spirit of the federal rules. Smith v. National Collegiate Athletic Ass'n, 139 F.3d 180 (3d Cir. 1998), vacated on other grounds, 525 U.S. 459, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999).

Price v. Pinnacle Brands, Inc., 138 F.3d 602 (5th Cir. 1998).

In re NationsMart Corp. Securities Litigation, 130 F.3d 309 (8th Cir. 1997).

A denial of leave to amend is reviewed under the abuse of discretion standard. In re American Continental Corporation/Lincoln Sav. & Loan Securities Litigation, 102 F.3d 1524 (9th Cir. 1996), rev'd, 523 U.S. 26, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998).

But see

Doe v. United States, 853 F.3d 792, 803 (5th Cir. 2017), as revised, (Apr. 12, 2017) ("Although we ordinarily review the denial of leave to amend for abuse of discretion. if the denial was predicated solely on futility, as here, 'we apply a de novo standard of review identical, in practice, to the standard used for reviewing a dismissal under Rule 12(b)(6).'" (footnotes omitted)).

Stengel v. Medtronic Inc., 704 F.3d 1224, 1227 (9th Cir. 2013) ("We ordinarily review for abuse of discretion a denial of a motion to amend a complaint. But here, where the district court denied the motion to amend because of its conclusion that the claim in the proposed complaint was preempted as a matter

of law, we review de novo."), citing Alvarez v. Chevron Corp., 656 F.3d 925, 931 (9th Cir. 2011).

Hintz v. JPMorgan Chase Bank, N.A., 686 F.3d 505, 511 (8th Cir. 2012) ("'[W]hen the court denies leave on the basis of futility, it means the district court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and appellate review of this legal conclusion is * * * de novo.'"), quoting Cornelia I. Crowell GST Trust v. Possis Medical, Inc., 519 F.3d 778, 781-782 (8th Cir. 2008).

Alhallaq v. Radha Soami Trading, LLC, 484 Fed. Appx. 293, 298 (11th Cir. 2012) (per curiam) ("However, we review the denial de novo when the district court denies leave to amend based on futility because it concludes that an amended complaint would necessarily fail as a matter of law."), citing Florida Evergreen Foliage v. E.I. DuPont De Nemours and Co., 470 F.3d 1036, 1040 (11th Cir. 2006).

Johnson v. Lucent Technologies Inc., 653 F.3d 1000 (9th Cir. 2011), as amended, (Aug. 19, 2011) (dismissal without leave to amend reviewed de novo).

"[W]hen the district court bases its denial on the futility of the proposed amendments, we review the underlying legal conclusions de novo." Walker v. Barrett, 650 F.3d 1198, 1210 (8th Cir. 2011) (internal quotation marks omitted).

"When the denial of leave to amend is based on a legal interpretation, such as a determination that amendment would be futile, a reviewing court conducts a de novo review." Hutchison v. Deutsche Bank Securities Inc., 647 F.3d 479, 490 (2d Cir. 2011).

When the denial of a motion to dismiss is based on rulings of law, appellate review is de novo. Papelino v. Albany College of Pharmacy of Union University, 633 F.3d 81, 88 (2d Cir. 2011).

"We review a denial of a motion for reconsideration for abuse of discretion, but we review the District Court's underlying legal determinations de novo and factual determinations for clear error." U.S., ex rel. Pilecki-Simko v. Chubb Institute, 443 Fed. Appx. 754 (3d Cir. 2011), quoting Howard Hess Dental Laboratories Inc. v. Dentsply Intern., Inc., 602 F.3d 237, 245 (3d Cir. 2010).

Jaso v. The Coca Cola Co., 435 Fed. Appx. 346, 351 (5th Cir. 2011) (when refusal to grant leave to amend is based solely on futility, standard of review is de novo).

"We review a district court's denial of leave to amend for 'abuse of discretion,' although we review any legal conclusions relevant to that decision de novo."

Gorham-DiMaggio v. Countrywide Home Loans, Inc., 421 Fed. Appx. 97, 101 (2d Cir. 2011).

"We review a denial of a motion for reconsideration for abuse of discretion, while reviewing the District Court's underlying legal determinations de novo and its factual determinations for clear error." Brown v. DiGuglielmo, 418 Fed. Appx. 99, 101 (3d Cir. 2011).

Hill v. City of Oklahoma City, 448 Fed. Appx. 814 (10th Cir. 2011) (when denial of amendment is based on futility, appellate court will review legal basis for futility de novo).

Although denial of a motion for leave to amend ordinarily is reviewed for abuse of discretion, when that denial is based solely on futility, review is de novo. City of Clinton, Ark. v. Pilgrim's Pride Corp., 632 F.3d 148, 152 (5th Cir. 2010).

In re Medtronic, Inc., Sprint Fidelis Leads Products Liability Litigation, 623 F.3d 1200, 1208 (8th Cir. 2010) ("We review denial of leave to amend for an abuse of discretion, but the legal conclusions underlying a determination of futility are reviewed de novo.").

"Ordinarily, the decision of whether to allow a plaintiff leave to amend a complaint is within the district court's discretion, however, when the court denies leave on the basis of futility, it means the district court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and appellate review of this legal conclusion is also de novo." Cornelia I. Cornelia I. Crowell GST Trust v. Possis Medical, Inc., 519 F.3d 778, 781-782 (8th Cir. 2008) (internal citations omitted) (Goldberg, J.).

Miller v. Champion Enterprises Inc., 346 F.3d 660 (6th Cir. 2003) (although denial of leave to amend is generally reviewed for abuse of discretion, when decision is based on legal conclusion that amendment would be futile, review is de novo).

But compare

Edwards v. Marin Park, Inc., 356 F.3d 1058 (9th Cir. 2004) (when plaintiff chose not to amend her complaint given chance by court, in part in order to attain an appealable final judgment of entire case more quickly, failure to amend was not sanctionable through conversion of dismissal into one under Rule 41(b), which is only reviewed for abuse of discretion, as opposed to de novo review for Rule 12(b)(6); such action would unjustly deny appeal of adequacy of complaint to plaintiffs exercising their right to stand on original complaint).

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Note 111 contains citations to cases supporting the proposition that the plaintiff can amend once as a matter of right under Rule 15(a) despite the dismissal if no responsive pleading has been served.

133 **Wise practice**

E.E.O.C. v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993) (proper course of action when plaintiff may have claim is to allow it to amend complaint).

Schlesinger Inv. Partnership v. Fluor Corp., 671 F.2d 739 (2d Cir. 1982).

When the plaintiff seeks an opportunity to amend his complaint to meet objections raised by a motion to dismiss for failure to state a claim, he should be accorded such an opportunity, since it cannot be determined whether the amended complaint will state a claim unless and until the amended complaint is filed and tested. Austin v. House of Vision, Inc., 385 F.2d 171 (7th Cir. 1967).

Empire Kosher Poultry, Inc. v. United Food and Commercial Workers Health and Welfare Fund of Northeastern Pennsylvania, 285 F. Supp. 2d 573 (M.D. Pa. 2003).

See also

"While a pro se litigant generally must be given at least one opportunity to amend his complaint, a district judge need not allow an amendment where amendment would be futile." Cornelius v. Bank of America, NA, 585 Fed. Appx. 996 (11th Cir. 2014).

U.S. ex rel. Adrian v. Regents of University of California, 363 F.3d 398 (5th Cir. 2004) (district court properly denied leave to amend because plaintiff already had one chance to amend).

Broam v. Bogan, 320 F.3d 1023 (9th Cir. 2003) (facts raised for first time in plaintiff's opposition papers should be considered by court in determining whether to grant leave to amend or to dismiss with or without prejudice).

Dean v. Westchester County P.R.C., 309 F. Supp. 2d 587 (S.D. N.Y. 2004) (court dismissed complaint with prejudice because plaintiff already had one chance to amend).

Compare

321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004) (court should grant leave to amend even if no request was made, unless pleading could not possibly be cured by amendment).

Foley v. Marquez, 2003 WL 22288160 (N.D. Cal. 2003) (Ninth Circuit advocates granting leave to amend even if no request to amend pleading was made, unless

pleading could not possibly be cured by amendment), citing Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000).

But compare

U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220 (1st Cir. 2004) (district court has no obligation to invite plaintiff to amend complaint when plaintiff has not sought amendment).

Wagner v. Daewoo Heavy Industries America Corp., 314 F.3d 541 (11th Cir. 2002) (overruling prior precedent that required giving plaintiff at least one opportunity to amend complaint before dismissing with prejudice and instituting new rule that district court is not required to grant leave to amend sua sponte when plaintiff, represented by counsel, never filed motion to amend nor requested leave to amend before district court).

134 **Leniency on first amendment attempt**

Amyndas Pharmaceuticals, S.A. v. Zealand Pharma A/S, 48 F.4th 18 (1st Cir. 2022) ("[In determining whether to grant leave to amend,] a court may consider whether a proposed amendment is a first attempt. Serial amendments may be given closer scrutiny.") (internal citations omitted).

Garcia v. City of Lubbock, Texas, 487 F. Supp. 3d 555, 564 (N.D. Tex. 2020) ("District courts 'often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal.'") (quoting Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002)), aff'd in part, rev'd in part, 2023 WL 4636896 (5th Cir. 2023).

Gray v. D.C. Public Schools, 688 F. Supp. 2d 1, 5-6 (D.D.C. 2010) (granting plaintiff's motion for leave to amend in part because "the Amendment submitted by Plaintiff [wa]s her first attempt to cure the deficiencies of the original Complaint").

Dean v. Westchester County P.R.C., 309 F. Supp. 2d 587 (S.D. N.Y. 2004) (court dismissed complaint with prejudice because plaintiff already had one chance to amend).

See also

"While a pro se litigant generally must be given at least one opportunity to amend his complaint, a district judge need not allow an amendment where amendment would be futile." Cornelius v. Bank of America, NA, 585 Fed. Appx. 996 (11th Cir. 2014).

135 **Moitie case**

452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981).

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136 **Moitie footnote**
452 U.S. at 399 n.3.

137 **Res judicata effect**
Beach Blitz Co. v. City of Miami Beach, Florida, 13 F.4th 1289 (11th Cir. 2021), **citing Wright & Miller.**

Kaswatuka v. Dallas/Fort Worth International Airport Board, 853 Fed. Appx. 916, 917-918 (5th Cir. 2021) ("[T]he district court dismissed [plaintiff's] claim with prejudice. * * * [T]hat constitutes 'a final judgment on the merits for res judicata purposes.'").

"Although res judicata is not a defense under Rule 12(b), it may be raised in a Rule 12(b)(6) motion where the existence of the defense can be determined from the face of the complaint." Johnson v. Girl Scouts of the USA, 596 Fed. Appx. 797, 798 (11th Cir. 2015).

Clark v. Callahan, 587 Fed. Appx. 1000, 1002 (8th Cir. 2014).

Stevens v. Bank of America, N.A., 587 Fed. Appx. 130 (5th Cir. 2014) ("It is well established that Rule 12(b)(6) dismissals are made on the merits.").

Goings v. Sumner County Dist. Attorney's Office, 571 Fed. Appx. 634 (10th Cir. 2014), **citing Wright & Miller**.

Davis v. Davis, 551 Fed. Appx. 991, 994 (11th Cir. 2014).

McLean v. U.S., 566 F.3d 391, 396 (4th Cir. 2009) (abrogated by, Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 207 L. Ed. 2d 132 (2020)) ("Courts have held that, unless otherwise specified, a dismissal for failure to state a claim under Rule 12(b)(6) is presumed to be both a judgment on the merits and to be rendered with prejudice.").

Drobnak v. Andersen Corp., 561 F.3d 778 (8th Cir. 2009).

U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220 (1st Cir. 2004) (in absence of clear statement to contrary, dismissal pursuant to Rule 12(b)(6) is presumed to be with prejudice, carrying claim preclusive effect).

Wilkins v. Jakeway, 183 F.3d 528 (6th Cir. 1999) (dismissal for failure to state claim is on merits).

Pabst Brewing Co., Inc. v. Corrao, 161 F.3d 434 (7th Cir. 1998).

Ahmed v. U.S., 147 F.3d 791 (8th Cir. 1998).

N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1560 (11th Cir. 1990) (holding that a "dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)

(6) is a 'judgment on the merits' " even where the district court does not state whether the claims were dismissed with or without prejudice) (quoting Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 399 n.3, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)).

Because leave to amend was given, when the plaintiff chose not to plead further and was barred from doing so by the statute of limitations, she waived her right to file an amended complaint, and the order of dismissal was final and appealable. Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975) (rejected by, Aronsen v. Crown Zellerbach, 662 F.2d 584 (9th Cir. 1981)).

When the court could not distinguish the claim alleged in the complaint from claims alleged in a former complaint that was dismissed for insufficiency, the prior action was dispositive of all issues raised in the present action and res judicata applied to it. Rhodes v. Jones, 351 F.2d 884 (8th Cir. 1965).

Dismissal with prejudice is res judicata and effectively bars any effort in any court at any time to find out what the true facts were. Shull v. Pilot Life Ins. Co., 313 F.2d 445 (5th Cir. 1963).

When an order of dismissal under Rule 12(b)(6) did not specify that it was not upon the merits, under Rule 41(b) it operated as an adjudication upon the merits. Bartsch v. Chamberlin Co. of America, 266 F.2d 357 (6th Cir. 1959). It is questionable whether this case is a valid precedent in light of the Supreme Court's Swierkiewicz decision, which is discussed at note 93, above.

Swaida v. Gentiva Health Services, 238 F. Supp. 2d 325 (D. Mass. 2002) (dismissal for failure to state claim is judgment on merits for res judicata purposes and there need be no specific notification that dismissal was on merits since it is presumed to be with prejudice unless order explicitly states otherwise).

Dismissal of an action under Rule 12(b)(6), as a final federal judgment on the merits, precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Lipin v. National Union Fire Ins. Co. of Pittsburgh, Pa., 202 F. Supp. 2d 126 (S.D. N.Y. 2002).

Ramirez v. Brooklyn Aids Task Force, 175 F.R.D. 423 (E.D. N.Y. 1997), judgment aff'd, 164 F.3d 619 (2d Cir. 1998).

Mennella v. Office of Court Admin., 938 F. Supp. 128 (E.D. N.Y. 1996), judgment aff'd, 164 F.3d 618 (2d Cir. 1998).

DeWit v. Firstar Corp., 904 F. Supp. 1476 (N.D. Iowa 1995).

Riddle v. National R.R. Passenger Corp., 869 F. Supp. 40 (D.D.C. 1994).

See also

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Restatement (Second), Judgments, § 19 (1982), and comment.

See § 2373 for a discussion of the effect of Rule 41(b) on a Rule 12(b)(6) dismissal and § 4439 for a discussion of res judicata following a dismissal on the pleadings.

Compare
"Vermont Rule 12(b)(6) mirrors Federal Rule of Civil Procedure 12(b)(6). The Vermont Supreme Court has held that 'the dismissal of [a] complaint under V.R.C.P. 12(b)(6) for failure to state a claim * * * operates as a final adjudication on the merits.'" Steuerwald v. Cleveland, 651 Fed. Appx. 49, 50–51 (2d Cir. 2016) (citing Judd v. State, 2012 WL 1305003, *2 (Vt. 2012)).

But compare
"In a previous appeal, Cirrus challenged the district court's dismissal of its defamation claim under Federal Rule of Civil Procedure 12(b)(6). We reversed. On remand, Adams moved for judgment on the pleadings on the defamation claim under Federal Rule of Civil Procedure 12(c). In support of his motion, he submitted a foreign legal expert's declaration for the district court's review pursuant to Federal Rule of Civil Procedure 44.1. Notwithstanding the submission of new evidence, the district court held that the Rule 12(c) motion was barred by our prior mandate and certified its order for interlocutory appeal. Adams appeals that ruling. Our mandate in the previous appeal considered only the facts set forth in the complaint. We did not address, or bar further consideration of, whether additional evidence might support Adams' argument for dismissal. Adams properly presented such additional evidence in his motion for judgment on the pleadings. Given the submission of new evidence, the Rule 12(c) motion was not barred by our mandate. The district court therefore erred in denying the motion on that basis." Cirrus Education, Inc. v. Adams, 2023 WL 3051833, *1 (9th Cir. 2023) (citations omitted).

138 **Res judicata rationale**
Restatement (Second), Judgments, § 19 (1982), and comment.

For further discussion, see § 4439.

139 **Not final determination**
Occupy Columbia v. Haley, 738 F.3d 107, 115 (4th Cir. 2013) ("Ordinarily, we do not possess appellate jurisdiction over interlocutory orders-such as the denial of a Rule 12(b)(6) motion to dismiss or the denial of a Rule 12(c) motion for judgment on the pleadings-because such decisions are not final judgments * * *.").

Linares v. McLaughlin, 423 Fed. Appx. 84 (2d Cir. 2011).

140 **Particular statement of claim**

Alfred v. Corrections Corp. of America, 437 Fed. Appx. 281 (5th Cir. 2011) (dismissal for failure to state claim does not mean claim necessarily is without merit).

U.S. v. Ritchie, 15 F.3d 592 (6th Cir. 1994).

Maldonado v. City of Pearsall, Tex., 977 F. Supp. 2d 646 (W.D. Tex. 2013) ("[T]he plaintiff should generally be given at least one chance to amend the complaint under Rule 15(a) before dismissing the action with prejudice."), citing Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002).

Abbott Laboratories v. Zenith Laboratories, Inc., 934 F. Supp. 925 (N.D. Ill. 1995), dismissed, 78 F.3d 603 (Fed. Cir. 1996), **quoting Wright & Miller.**

Judgments of dismissal or nonsuit are not sufficient to sustain a plea of res judicata because they do not constitute any final conclusion of the merits of the litigation; this is necessarily true, for were the rules otherwise a party might be precluded by some technical or trivial defect. Playa De Flor Land & Imp. Co. v. U.S., 70 F. Supp. 281 (D. C.Z. 1945), judgment modified, 160 F.2d 131 (C.C.A. 5th Cir. 1947).

But see
Restatement (Second), Judgments, § 19 (1982), comment (d).

141 **Semtek case**
531 U.S. 497, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001).

142 **Forum state preclusion law**
Semtek, 531 U.S. at 508.

143 **Rule 41(b)**
For a discussion of Rule 41(b) and its effects, §§ 2369, 2373.

144 **Federal common law**
Semtek, 531 U.S. at 501-08.

See also
Rollins v. Wackenhut Services, Inc., 703 F.3d 122, 132-133 (D.C. Cir. 2012) (Kavanaugh, J., concurring) ("Some of this Court's cases, without citing Rule 41(b), have suggested that Rule 12(b)(6) dismissals with prejudice are disfavored. Those decisions have imposed a "high" bar for Rule 12(b)(6) dismissals with prejudice. See, e.g., Belizan v. Hershon, 434 F.3d 579, 583-184 (D.C. Cir. 2006). By their terms, however, it is not evident that the Rules impose such a constraint on the discretion of district courts in issuing Rule 12(b)(6) dismissals. On the contrary, Rule 41(b) contemplates that a Rule 12(b)(6)

dismissal ordinarily operates as a dismissal with prejudice, unless the district court in its discretion states otherwise.").

145 **Federal question claims**

"Turning to the claims against Chase, we also conclude that the district court did not err in determining that res judicata bars Stone's wrongful foreclosure claim against Chase because Stone had the opportunity to raise this claim in her first action. As to the first prong of the res judicata analysis, in her first foreclosure-related action, Stone sued Chase in state court and the defendants properly removed the action to federal court based on federal-question jurisdiction—the federal district court therefore properly exercised jurisdiction over the action. The second prong is also met because, by dismissing all the claims against Chase for failure to state a claim, the district court entered a final judgment on the merits." Stone v. JPMorgan Chase Bank, N.A., 786 Fed. Appx. 212 (11th Cir. 2019).

Kennemer v. Denton County, 2022 WL 4459881, *6-10 (E.D. Tex. 2022) (finding "all elements for res judicata [we]re met" when plaintiff sought to bring § 1983 claims that had been dismissed for failure to state a claim by a court exercising federal question subject matter jurisdiction in a prior case), report and recommendation adopted, 2022 WL 4449320 (E.D. Tex. 2022).

Sabeerin v. Fassler, 2021 WL 4155899, *4 (D.N.M. 2021) ("[Because the judge in the corresponding case] dismissed Plaintiffs' federal claims and issued a final judgment on the merits based on application of qualified immunity raised pursuant to Fed. R. Civ. P., Rule 12(b)(6) * * * the corresponding judgment carries preclusive effect and requires dismissal here."), report and recommendation adopted, 2021 WL 4150886 (D.N.M. 2021).

146 **Split of authority**

Frazier v. Colthfelt, 2020 WL 914323, *4 (E.D. Mich. 2020) (cataloguing the split of authority), report and recommendation adopted, 2020 WL 905746 (E.D. Mich. 2020).

Tish v. Magee-Women's Hosp. of University of Pittsburgh Medical Center, 2007 WL 1221137, *3-5 (W.D. Pa. 2007) (same).

U.S. v. Union Corp., 194 F.R.D. 223, 230-231 (E.D. Pa. 2000) (same).

Amendment as matter of right despite dismissal

"[P]laintiffs enjoy leave to amend once as a matter of course * * * this right survives dismissal." Stoller v. Walworth County, 770 Fed. Appx. 762, 764 (7th Cir. 2019).

"[A] plaintiff ordinarily retains the ability to amend his complaint once as a matter of right, even after a court grants a motion to dismiss." Alioto v. Town of Lisbon, 651 F.3d 715, 721 (7th Cir. 2011).

"[A]n order dismissing the original complaint normally does not eliminate the plaintiff's right to amend once as a matter of right." Camp v. Gregory, 67 F.3d 1286, 1289 (7th Cir. 1995).

Domino Sugar Corp. v. Sugar Workers Local Union 392 of United Food and Commercial Workers Intern. Union, 10 F.3d 1064, 1068 n.1 (4th Cir. 1993) (explaining that motion to dismiss did not preclude plaintiff from amending complaint and therefore leave to amend was not needed).

Ohio Cas. Ins. Co. v. Farmers Bank of Clay, Ky., 178 F.2d 570, 572-573 (6th Cir. 1949) (upholding an amendment as a matter of right filed after the district court dismissed the original complaint).

Pactiv LLC v. Perez, 2021 WL 4439393, *1 n.1 (N.D. Ill. 2021) (citing Camp v. Gregory, 67 F.3d 1286, 1289 (7th Cir. 1995)).

"A motion to dismiss is not a 'responsive pleading' within the meaning of the Rule. Neither the filing nor granting of such a motion before answer terminates the right to amend." Eileen Frances Living Trust v. Bank of America, 2016 WL 3162061, *2 (E.D. Wash. 2016) (quoting Mayes v. Leipziger, 729 F.2d 605, 607 (9th Cir. 1984)).

"Courts have held generally that a party may amend its pleading without seeking leave of court after the pleading has been dismissed, as long as the amendment is made within a reasonable time and no responsive pleading has been served." Waterloov Gutter Protection Systems Co., Inc. v. Absolute Gutter Protection, L.L.C., 64 F. Supp. 2d 398, 408 (D.N.J. 1999), **citing Wright & Miller.**

Azevedo v. Housing Authority of City of Sarasota, 147 F.R.D. 255 (M.D. Fla. 1993) (allowing amendment despite previous dismissal because new facts raised sufficient claim).

Amendment within court's discretion
See cases cited in note 129 above.

147 **Right to amend endures**
Mayes v. Leipziger, 729 F.2d 605, 607 (9th Cir. 1984) ("Neither the filing nor granting of [a 12(b)(6)] motion before answer terminates the right to amend [under Rule 15(a)].").

"The right to amend a complaint 'as a matter of course' is provided in Rule 15(a). Rule 15(a)(1) expressly mentions only two events which terminate this right. The first event is upon being served with a responsive pleading. A responsive pleading was never filed by Gharibco. The second event is the passing of '20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.' A responsive pleading was allowed in this case. Therefore, Hamblen's right to amend as a matter of course under Rule

15(a) was not terminated at the time the Court dismissed his complaint under Rule 12(b)(6)." Hamblen v. Gharibco Enterprises, LLC, 2008 WL 4173621, *1 (D. Ariz. 2008).

148 **Entry of judgment**

Adams v. American Family Mut. Ins. Co., 813 F.3d 1151, 1155 (8th Cir. 2016) (district court did not abuse discretion by refusing plaintiff leave to amend because plaintiff sought to change theory of liability after class action petition had been dismissed).

Under Eleventh Circuit case law: "After the dismissal of a complaint and the entry of final judgment for the defendant, Federal Rule of Civil Procedure 15(a) does not apply; the plaintiff who seeks leave to amend must do so within 10 days of the entry of judgment by seeking relief under Rule 59(e) (motion to alter or amend a judgment) or Rule 60(b)(6) (motion for relief from a judgment). * * * A plaintiff's obligation is to ask the district court for leave to amend at that time, rather than to ask this court for leave to amend in the event it affirms the district court's Rule 12(b)(6) dismissal." Friedman v. Market Street Mortg. Corp., 520 F.3d 1289, 1293 n.4 (11th Cir. 2008) (internal citations omitted) (Tjoflat, J.).

The plaintiff cannot amend a dismissed complaint as a matter of right, since the right to amend without leave ends with the entry of a judgment dismissing the action. O'Bryan v. Chandler, 352 F.2d 987 (10th Cir. 1965).

The right to amend the complaint once as a matter of course prior to a responsive pleading terminates with a judgment of dismissal; thereafter efforts to amend presumably must first be directed to reopening the judgment under Rule 59(a) or Rule 60(b). Cassell v. Michaux, 240 F.2d 406 (D.C. Cir. 1956).

Feddersen Motors v. Ward, 180 F.2d 519 (10th Cir. 1950).

It might be argued that the plaintiff would be entitled as of right to one amendment of his complaint, without any limitation of time, despite the filing of a motion to dismiss; however, it hardly could have been intended that the plaintiff should have the right to amend without limit of time after a judgment of dismissal had been entered. U.S. v. Newbury Mfg. Co., 123 F.2d 453 (C.C.A. 1st Cir. 1941).

Fields v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 2004 WL 626180 (S.D. N.Y. 2004).

Christophides v. Porco, 289 F. Supp. 403 (S.D. N.Y. 1968).

A party is not entitled to amend his complaint as a matter of right after the court has entered an order dismissing the original complaint. Kirsch v. Barnes, 157 F.

Supp. 671 (N.D. Cal. 1957), judgment aff'd on other grounds, 263 F.2d 692 (9th Cir. 1959).

149 **Delaying entry of judgment**

"[W]hen a complaint is dismissed under Rule 12(b)(6) and the claimant still possesses the right to amend as a matter of course under Rule 15(a), the district court must give the claimant an opportunity to exercise this right before dismissing the action. This opportunity need not be a sua sponte granting of an explicit leave to amend. Instead, the district court can simply provide a reasonable amount of time between the granting of a 12(b)(6) motion and the dismissal of the action for the claimant to exercise its 15(a) right. Here, however, the Court did neither, and Hamblen was denied the opportunity to exercise his right to amend as a matter of course. Denying Hamblen this opportunity was clear error." Hamblen v. Gharibco Enterprises, LLC, 2008 WL 4173621, *1 (D. Ariz. 2008).

150 **Relief from appellate court**

Where federal appellate court affirmed district court's decision to dismiss investment group's claim with prejudice, the rule of mandate doctrine precluded amendment of that claim on remand. The Hemmer Group v. Southwest Water Company, 663 Fed. Appx. 496 (9th Cir. 2016).

When the proposed amended complaint did not disclose any new ground for relief, and the appellate court had affirmed a dismissal of the complaint and had not granted leave to amend on a prior appeal, it was beyond the power of the district court to disturb the judgment by granting the plaintiff leave to amend. Ginsburg v. Stern, 242 F.2d 379 (3d Cir. 1957).

See also

Butcher & Sherrerd v. Welsh, 206 F.2d 259 (3d Cir. 1953), judgment vacated, 223 F.2d 262 (3d Cir. 1955) and (disapproved of by, Standard Oil Co. of California v. U.S., 429 U.S. 17, 97 S. Ct. 31, 50 L. Ed. 2d 21 (1976)).

151 **Rule 15**

See §§ 1471 to 1510.

Rule 59

See §§ 2801 to 2821.

Rule 60

See §§ 2851 to 2873.

152 **Transferee court**

In re Donald J. Trump Casino Securities Litigation-Taj Mahal Litigation, 7 F.3d 357 (3d Cir. 1993).

See also

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Terry v. SunTrust Banks, Inc., 493 Fed. Appx. 345 (4th Cir. 2012).

In re: Whole Foods Market, Inc., 163 F. Supp. 3d 385 (W.D. Tex. 2016) (transferee court dismissed all claims, although it applied choice-of-law rules of transferor courts).

153 **Power to terminate**

See generally §§ 3865 to 3867.

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CASE NO. 56

2018 WL 296063
Only the Westlaw citation
is currently available.
United States District Court,
N.D. **Texas**, Dallas Division.

Arthur **LOPEZ**, individually, and on behalf of himself and all other similarly situated individuals, Plaintiff,
v.
DON HERRING LTD., Defendant.

CIVIL ACTION
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Signed 01/**04/2018**

Attorneys and Law Firms

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David B. Tabor, Martha Hardwick Hofmeister, Shackelford Bowen McKinley & Norton LLP, Dallas, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

JANE J. **BOYLE**, UNITED STATES DISTRICT JUDGE

***1** The Driver's Privacy Protection Act (DPPA) limits access to and disclosure of personal information in state-maintained motor-vehicle records and authorizes private individuals to sue those they believe have violated the act. In this case, auto dealer **Don Herring** Ltd. (**Herring**) mailed to Arthur **Lopez** (**Lopez**) an advertisement containing **Lopez's** name and address as well as the make and model of his car. Believing the information in the advertisement to have come from the Texas Department of Motor Vehicles's (DMV) records, **Lopez** filed a class-action DPPA claim against **Herring** and others. **Herring**, the only remaining defendant, now moves the Court to dismiss **Lopez's** suit under Federal Rule of Civil Procedure 12(b)(6), contending that **Lopez** has failed to plead sufficient facts to support a DPPA claim. For the reasons that follow, the Court DENIES **Herrings** motion to dismiss.

I.

BACKGROUND

A. Factual History [1]

This case begins with an advertisement **Lopez** received in the mail from **Herring**. Doc. 47, Am. Compl., ¶ 5; Doc. 47-1, Am. Compl., Ex. 1. Having never done business with **Herring**, **Lopez** was shocked to find that the advertisement contained not only **Lopez's** full name and address but also the make, model, and year of his car. Doc. 47, Am. Compl., ¶

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23. Believing the safety of his identity was on the line, **Lopez** decided to investigate. *Id.* **Lopez** pleads that he talked to **Herring** Senior Sales Associate Cary Wilson, who told him that **Herring** obtained his vehicle information from the Texas DMV. *Id.*

Lopez then asked his attorney, Joseph Malley (Malley), to investigate further. *Id.* Malley asked **Herring** via mail,[2] "I understand you informed [**Lopez**] that the information was not obtained from [**Lopez's** former employer][3] but from the state motor vehicle department. Can you clarify this issue?" *Id.* **Herring's** General Sales Manager, Reuben Mosley, responded, "Yes that is correct. We use a third party company that supplies the information and it is gathered through vehicle registrations." *Id.*

Malley also contacted the third party the General Sales Manager mentioned: Tacito & Associates, Inc. (Tacito). Doc. 1, Compl., ¶ 72; Doc. 1-**4**, Compl., Ex. 5. Tacito created the advertisement that triggered this action and may have provided **Herring** with **Lopez's** vehicle information. Doc. 47-1, Am. Compl., Ex. 1; Doc. 1-**4**, Compl., Ex. 5. The letter Malley sent Tacito is not in the record, but Tacito's CEO responded that Tacito received **Lopez's** record from another company, BB Direct, and that BB Direct's auto list is "Shelby Act compliant"[4] and does not draw from Texas DMV records. Doc. 1-**4**, Compl., Ex. 5.

***2** Malley then contacted BB Direct. What Malley sent to BB Direct is not in the record. BB Direct's Brian Berg responded that BB Direct had a record of an order from Tacito for **Herring** but no longer had the "data file." Doc. 1-8, Compl., Ex. 9. Though nothing in the complaints nor their attachments explain what this "data file" is, the Court presumes it contained information of car owners like **Lopez**. Berg went on to explain that BB Direct acts as a broker when it receives requests for automobile owners and obtained the list for the Tacito order from a Texas company called Data Shark. *Id.* Berg said Data Shark's owner told him that Data Shark's file is Shelby compliant and that Data Shark's file sources are oil-lube stations, insurance companies, and some auto groups. *Id.* Berg did not believe Data Shark's data came from the DMV because Data Shark's data contained errors. *Id.* Berg said also that he did not know where **Lopez's** information came from or whether it was even on the Tacito list. *Id.*

B. Procedural History

When **Lopez** first filed this class-action lawsuit, he sued **Herring**, Tacito, BB Direct, and Monica Braverman, the owner of Data Shark, alleging they violated the DPPA and purporting to represent a class of "millions, if not tens of millions" of victims of the defendants' allegedly unlawful practices. Doc. 1, Compl, ¶ 136. But the Court dismissed **Lopez's** original complaint. Doc. 45, Electronic Order. **Lopez** then filed an Amended Complaint, naming **Herring** as the only defendant but still claiming to represent a class possibly numbering in the tens of millions. Doc. 47, Am. Compl., ¶¶ 8, 33. Though, **Lopez** more realistically describes the class he purports to represent as consisting of those whose personal information **Herring** obtained from state DMVs. *Id.* at ¶ 30. And whereas **Lopez** attached emails from Tacito and BB Direct to his original complaint, he attaches only emails from **Herring** to his amended

complaint and omits from his pleadings any mention of Tacito, BB Direct, or Data Shark. Doc. 47-2, Am. Compl., Ex. 2; Doc. 47-3, Am. Compl., Ex. 3.

Herring now moves that the Court dismiss **Lopez's** amended complaint under Federal Rule of Civil Procedure 12(b)(6). Doc. 48, Mot. to Dismiss. That motion is ripe for the Court to resolve.

II.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). When analyzing rule 12(b)(6) motions, courts generally consider "the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Wolcott v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011). Courts can consider documents attached to a motion to dismiss if the documents are referenced in the challenged complaint and central to the plaintiff's claims. *Kaye v. Lone Star Fund V (U.S.), L.P.*, 453 B.R. 645, 661–62 (**N.D**. **Tex**. 2011). During this review, factual allegations must be viewed as true and taken "in the light most favorable to the plaintiffs." *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999). Courts are not, however, "bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 555 (2007).

Rule 12(b)(6) motions turn on whether a complaint contains "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. Facially plausible complaints " 'allege more than labels and conclusions'[;] ... [the] 'factual allegations must be enough to raise a right to relief above the speculative level.' " *Jebaco, Inc. v. Harrah's Operating Co.*, 587 F.3d 314, 318 (5th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). If the allegations lack sufficient detail, "this basic deficiency should ... be exposed" before the parties and court spend unnecessary time and resources on the case. *Twombly*, 550 U.S. at 558.

III.

ANALYSIS

Lopez complains that **Herring** violated the DPPA. Doc. 47, Am. Compl., ¶¶ 3–6. The DPPA authorizes individuals to file **civil actions** against those they believe to have violated the act. 18 U.S.C. § 2724(a). To prevail in his **civil action** against **Herring**, **Lopez** must prove that **Herring** "knowingly ... obtain[ed] or disclos[ed] personal information, from a motor vehicle record, for any use not permitted under ... this title." *Id.* § 2722(a).

***3** **Herring** now argues that **Lopez** has failed to plead a plausible claim. Doc. 48, Mot. Dismiss. The Court disagrees.

Lopez has pleaded sufficient facts to make his claim plausible. Reading the complaint and disregarding legal conclusions leaves the Court with two key facts. *See* *Twombly*, 550 U.S. at

555 (stating that courts should disregard legal conclusions when evaluating the sufficiency of a pleading under rule 12(b)(6)). First, **Lopez** alleges that, when he asked **Herring** where it obtained the information in the advertisement he received in the mail, a **Herring** salesperson responded that **Herring** obtained **Lopez's** information from the Texas DMV. Doc. 47, Am. Compl, ¶ 23. Second, **Lopez's** attorney emailed **Herring**, "I understand you informed [**Lopez**] that the information was not obtained from [**Lopez's** former employer] but from the state motor vehicle department. Can you clarify the issue?" *Id.* **Herring's** General Sales Manager responded, "Yes that is correct. We use a third party company that supplies the information and it is gathered through vehicle registrations." *Id.* Taken together and in the light most favorable to **Lopez**, *Spivey*, 197 F.3d at 774, these pleadings make it plausible that **Herring** knowingly obtained **Lopez's** information from the DMV or disclosed it, knowing it had been obtained from the DMV.

Herring's arguments that the sales person's and General Sales Manager's statements do not make **Lopez's** claim plausible fail. **Herring** first contends that the sales person and the General Sales Manager were incorrect about how **Herring** obtained **Lopez's** information and therefore that their statements do not make **Lopez's** claim plausible. Doc. 51, Reply, 3–**4**. But the Court must take **Lopez's** factual pleadings as true and construe factual allegations in the plaintiff's favor. *Spivey*, 197 F.3d at 774. Thus, the Court must accept as fact who **Lopez** said made the statements and what they said. And the Court can reasonably infer based that information that **Herring** knew **Lopez's** information came from the DMV. Thus, the mere possibility that the sales person and General Sales Manager were incorrect about the source of **Lopez's** information does not render **Lopez's** claim implausible.

Second, **Herring** argues that the General Sales Manager's statement, even if taken as true, does not make **Lopez's** claim plausible. Doc. 51, Reply, 3. Because the General Sales Manager said **Herring** obtained the information from third parties, **Herring** contends, the General Sales Manager could only have been speculating about the origin of the information. *Id.* But although the manager could have been speculating, the Court can still reasonably infer that **Herring** knew **Lopez's** information came from the DMV based on what he said and the query to which he was responding.

Herring additionally contends that the General Sales Manager said only that the third parties obtained their information from "vehicle registrations" and that "vehicle registrations" is different from the state DMV. *Id.* But **Lopez** alleges that his attorney asked if the records came from the DMV, and the general manager said, "Yes that is correct." Doc. 47, Am. Compl. ¶ 23. Again, the Court can reasonably infer that the sales manager was confirming Malley's suspicion that **Lopez's** information came from the DMV.

***4** Next, moving beyond the **four** corners of **Lopez's** complaint, **Herring** argues that the attachments **Lopez** attached to his original, now dismissed, complaint render his current claim implausible. Doc. 48, Reply, 3–**4**. In both **Lopez's** live and dismissed complaints, **Lopez** accuses **Herring** of violating the DPPA,

and **Lopez** attaches the **Herring** General Sales Manager's response to **Lopez's** attorney's question to both complaints. Doc. 1-3, Compl., Ex. **4**; Doc. 47-2, Am. Compl., Ex. 2. In the response, the General Sales Manager referred to a third party from which **Herring** may have obtained **Lopez's** information. Doc. 47, Am. Compl., ¶ 23. **Lopez** attached an email from this third party to his original complaint. Doc. 1-**4**, Compl., Ex. 5. The email was from the CEO of Tacito Marketing, which, according to the advertisement **Herring** sent **Lopez**, created the advertisement for **Herring**. Doc. 47-1, Am. Compl., Ex. 1. The Tacito email says in relevant part, "The record for Mr. **Lopez** came from BB Direct. BB Direct is a mailing list broker ... They have been providing TACITO alternate date for over 13 years. Their auto list is Shelby Act compliant and does not draw from the Texas DMV records." Doc. 1-**4**, Compl., Ex. 5. **Lopez's** attorney also contacted BB Direct and attached BB Direct's response to **Lopez's** original complaint. Only BB Direct's response is in the record; it says BB Direct received an order from Tacito regarding **Herring** but that BB Direct did not retain the data file. Doc. 1-8, Compl., Ex. 9. BB Direct says it obtained the list it sent to Tacito from a company called Data Shark, the owner of which has told BB Direct that Data Shark's file is Shelby compliant and that Data Shark's sources are oil lube stations, insurance companies, and some auto groups. *Id.* BB Direct did not know the source of the information for the list sent to Tacito or if **Lopez's** information was on the list sent to Tacito. *Id.* BB Direct said also that it has found errors on **her** lists, which indicated to BB Direct that Data Shark data did not come from the DMV because if it did it would not contain errors. *Id.*

At the outset, the Court must determine whether it can consider the emails on which **Herring** relies. Typically, courts resolving 12(b)(6) motions consider only the challenged complaint. But the Fifth Circuit has said courts may consider also a complaint's "proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Wolcott*, 635 F.3d at 763. The Fifth Circuit has allowed trial courts to consider also documents a movant attaches to its motion to dismiss as long as the plaintiff's complaint refers to the documents and the documents are "central" to the plaintiff's claims. *Kaye*, 453 B.R. at 661–62 Courts treat such documents as incorporated into the plaintiff's complaint. *Id.* at 662 n.16 (citing Fed. R. Civ. P. 10(c)).

Although the Fifth Circuit has not stated a test for determining whether a document is central to plaintiffs' claim such that a trial court may consider it when resolving a 12(b)(6) motion, *id.* at 662, Fifth Circuit precedent makes clear that a document is central to a plaintiff's claim only if "necessary to establish an element of one of the plaintiff's claims." *Id.* In contract cases, for example, the contract on which the plaintiff relies is central to the plaintiffs claim; the plaintiff cannot prevail without the contract. *Id.*

But if a "document referenced in a plaintiff's complaint is merely evidence of an element of the plaintiff's claim, then the court may not incorporate it into the complaint." *Id.* at 662. For example, in *Scanlan v. Texas A&M University*, the plaintiffs sued Texas A&M University in the wake of the Texas A&M 1999

bonfire incident, alleging that the university violated their civil rights. 343 F.3d 533, 535 (5th Cir. 2003). The Fifth Circuit held that the district court erred by relying on a "final report" to dismiss the plaintiffs claims under 12(b)(6). *Id.* at 536–37. The report was not central to the plaintiffs' claims because the plaintiffs relied on "substantial, other evidence to support their claims." *Id.* at 537; *See also Kaye*, 453 B.R. at 662.

In two cases, though, the Fifth Circuit has allowed trial courts to consider at the 12(b)(6) stage materials outside the pleadings other than contracts giving rise to plaintiffs' claims. The most recent case is *Walch v. Adjutant General's Department of Texas*, 533 F.3d 289 (5th Cir. 2008). There Walch challenged his discharge from the Texas National Guard, raising "claims for deprivation of constitutional due process, conspiracy, failure to prevent conspiracy, intentional infliction of emotional distress, and retaliation." *Id.* at 292. The district court dismissed his case under 12(b)(6) but in doing so considered Walch's discharge letters, which Walsh attached to his complaint. *Id.* at 294. The Fifth Circuit affirmed because "[n]o party question[ed] the authenticity of these two documents and both were sufficiently referenced in the complaint to permit their consideration on a motion to dismiss." *Id.*

***5** *Causey v. Sewell Cadillac–Chevrolet, Inc.*, 394 F.3d 285 (5th Cir. 2004), though ultimately inapposite, also warrants some discussion. Causey sued Sewell and General Motors, alleging that they wrongfully discriminated against him because of his race when he asked Sewell to repair his car. *Id.* at 287. Relevant here is General Motors's motion to dismiss. After the district court dismissed Causey's case, the Fifth Circuit approved the trial court's considering of the franchising agreement between Sewell and General Motors. *Id.* at 290. The agreement was relevant because Causey sought to hold General Motors vicariously liable for Sewell's allegedly wrongful conduct. *Id.* Ultimately, agreement showed that General Motors was a separate legal entity from Sewell and therefore could not be vicariously liable for Sewell's allegedly wrongful actions. *Id.* But the trial court did not say whether it treated the motion as one to dismiss for failure to state a claim or as a motion for summary judgment, nor did the Fifth Circuit actually hold anything about what trial courts may consider when resolving 12(b)(6) motions. *Id.* Rather, the Fifth Circuit affirmed because, in a prior case, the Fifth Circuit affirmed a trial court's granting of summary judgment on similar facts. *Id.* (citing *Arguello v. Conoco, Inc.*, 207 F.3d 803, 807 (5th Cir. 2000)). *Causey* thus sheds little light on the question of what trial courts may consider when resolving 12(b)(6) motions.

Here, **Herring** wants the Court to consider not only emails attached to the challenged complaint but also emails attached to a complaint the Court has already dismissed. Doc. 51, Reply, 3, 6. But the Court may not consider the emails. First, the emails are not attached to the challenged complaint. *See Wolcott*, 635 F.3d at 763 (stating that trial court may consider complaint's proper attachments).

Second, the Court cannot judicially notice the facts **Herring** says the emails establish. *Id.* at 763 (allowing trial courts to consider facts they can judicially notice). Federal Rule of Evidence 201 determines what facts a court may

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judicially notice. Courts may judicially notice facts not subject to reasonable dispute that are not subject to reasonable dispute because they are "generally known within the trial court's territorial jurisdiction; or ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). **Herring** argues that the emails show that third parties from which it obtained **Lopez's** information did not obtain **Lopez's** information from the Texas DMV, which means **Herring** could not possibly have violated the DPPA. Doc. 51, Reply, 6. But that Tacito, BB Direct, and Data Shark obtained **Lopez's** records from a source other than Texas or some other state's DMV is not generally known in this Court's territorial jurisdiction, nor can the Court determine the truth of **Herring's** assertions from sources whose accuracy cannot be reasonably questioned. *See* Fed. R. Evid. 201(b).

Nor can the Court consider the emails on the ground that they are central to **Lopez's** claim. Here, the emails on which **Herring** relies are like the report in *Scanlan* and unlike a contract in a contract case. Like the report the district court improperly considered in *Scanlan*, the emails **Herring** wants the Court to consider are "merely evidence," *Kaye*, 453 B.R. at 662; they do not give rise to **Lopez's** claim in the way a contract gives rise to a contract claim. Though the emails may be relevant, probative evidence in **Lopez's** case, they are not legally necessary for **Lopez** to prevail.

Walch does not counsel otherwise. In *Walch*, the documents the Fifth Circuit considered were referenced by the plaintiffs' complaint and attached to the plaintiffs' response to the defendant's motion to dismiss. *Walch*, 553 F.3d at 294. But here, **Lopez** neither attached the emails to his complaint or his response to **Herring's** motion to dismiss nor referenced the emails in his live complaint. Thus, the Court declines to incorporate the emails **Herring** wants the Court to consider into **Lopez's** amended complaint.

Even if the Court considered the email incorporated into **Lopez's** complaint, the Court would deny **Herring's** motion. At the 12(b)(6) stage, the Court must accept **Lopez's** pleadings as facts. *Spivey*, 197 F.3d at 774. The emails **Herring** wants the Court to consider contradict the facts **Lopez** pleaded, but that does not mean the emails render **Lopez's** claim implausible. At any rate, the oddity of the Court comparing pleadings it must accept as facts and actual evidence demonstrates why courts generally limit their 12(b)(6) analysis to the pleadings.

***6** There is still one way for the Court to consider the emails attached to **Lopez's** original complaint. But that would require converting **Herring's** motion to dismiss into a motion for summary judgment, Fed. R. Civ. P. 12(d), a procedural vehicle that allows court to consider evidence the parties submit, *id.* 56(c). The Court declines to issue summary judgment for **Herring** at this time. Although the emails on which **Herring** relies may be some evidence tending to disprove **Lopez's** claim, granting summary judgment before **Lopez** has had the chance to gather and submit evidence would be improper.

One matter remains unresolved: **Herring's** motion to strike portions of **Lopez's** amended complaint under Federal Rule of Civil

Procedure 12(f). Doc. 48, Mot. to Dismiss, 8. Rule 12(f) allows courts to strike "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Motions to strike under rule 12(f) are disfavored. *FDIC v. Cheng*, 832 F. Supp. 181, 185 (**N.D**. **Tex**. 1993). A court should grant a 12(f) motion to strike only when "the matter of which the movant complains bears no possible relation to the controversy or may cause the objecting party prejudice." *OKC Corp. v. Williams*, 461 F. Supp. 540, 550 (**N.D**. **Tex**. 1978). The Court will not strike **Lopez's** pleadings because the pleadings are related to the controversy and do not prejudice **Herring**.

IV.

CONCLUSION

The Court **DENIES** **Herring's** motion to dismiss **Lopez's** Amended Complaint and **DENIES** **Herring's** motion to strike. Doc. 48, Mot. to Dismiss.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 296063

Footnotes

1 This factual history is drawn from **Lopez's** original and amended complaints and their attachments.

2 Exactly who at **Herring** Malley emailed is unclear.

3 **Lopez** was at some point worried that **Herring** had obtained his personal information from his former employer, another car dealership. Doc. 47-2, Am. Compl., Ex. 2.

4 In 2000 Congress amended the Driver's Privacy Protection Act to include the act's current prohibitions on state officials disclosing drivers' personal information contained in DMV records. Pub. L. No. 106-346, 114 Stat. 1356(codified as amended at 18 U.S.C. §§ 2721, 2725). The 2000 amendment is known colloquially as the Shelby Amendment. But the provision of the DPPA **Lopez** seeks to enforce was not amended in 2000. Thus, why Tacito and BB Direct refer to lists of personal information as "Shelby compliant" and "Shelby Act compliant" is unclear.

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CASE NO. 57

2024 WL 4720290
Only the Westlaw citation
is currently available.
United States District Court, S.D. Texas, Corpus Christi Division.

BANQUETE INDEPENDENT SCHOOL DISTRICT, Plaintiff,
v.
The **ALLIANCE** FOR **COMMUNITY SOLUTIONS**, LTD., Defendant.

Civil Action
No.
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Signed September **10**, **2024**

Attorneys and Law Firms

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MEMORANDUM AND RECOMMENDATION

Jason B. **Libby**, United States Magistrate Judge

***1** Pending are Defendant The **Alliance** for **Community Solutions**, Ltd.'s ("ACS") two Motions for Partial Summary Judgment to which Plaintiff **Banquete** Independent School District ("**Banquete**") has responded. (D.E. 29; D.E. 42; D.E. 48; and D.E. 50). For the reasons stated below, the undersigned recommends ACS' Motions for Partial Summary Judgment be **GRANTED in part** and otherwise **DENIED**. (D.E. 29 and D.E. 48).

I. JURISDICTION

The Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332. This case was referred to the undersigned United States Magistrate Judge for case management pursuant to 28 U.S.C. § 636.

II. BACKGROUND

Originally filed in state court, this diversity action arises from a proposed security project on **Banquete's** campus by ACS, involving the installation of an electronic monitoring and communication system linking the **Banquete** campus to local law enforcement agencies in the event of an emergency. The parties entered into an Interlocal Agreement in January 2020 which was executed by Joe Abrams, Executive Director and Chairman of ACS and by Dr. Max Thompson, then **Banquete's** Superintendent. (D.E. 29-7). Dr. Thompson signed the Interlocal Agreement, stating he received school board approval to do so which **Banquete** now disputes. The final estimate for the project was $2,199,762.00 with an additional recurring annual fee of $46,149.00.

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A proposed school district tax bond was then put on the ballot for county voters and was approved in November 2020. After ACS was paid an initial payment of $100,000.00, Mr. Abrams delivered a presentation to the school board in February 2021 including plans for starting the project and a few months later, in April 2021, the bond funds became available. ACS then began ordering items for the project, alleging it encountered supply chain delays associated with the Covid-19 pandemic which prevented ACS from completing the project before the start of school according to the initial schedule. ACS held items off site for installation during **Banquete's** breaks.

After Dr. Thompson retired in mid-June 2021, he was replaced by Dr. Stacy Johnson. Two payments were made to ACS in May and July 2021, making the total paid to ACS $1,754,889.00. ACS provided updates through September 2021 to **Banquete** regarding the status of the project and completion of work although it is evident **Banquete** was dissatisfied with the quality and amount of work performed by ACS during this time. On October 28, 2021, **Banquete** ordered ACS off all **Banquete** property. The parties then unsuccessfully attempted to resolve outstanding issues until March 18, 2022, when **Banquete** sent ACS a letter titled "Notice of Termination-Physical Security Upgrade Project." (D.E. 29-14).

Shortly thereafter, on March 25, 2022, **Banquete** initiated an action against ACS in state court alleging that while approximately $1.7 million had been paid to ACS since 2020, little progress had been made on the project, asserting claims for breach of contract, negligence, fraudulent inducement, negligent misrepresentation and fraud. (D.E. 1, Pages 7-19). This case was removed to this Court on May 2, 2022. (D.E. 1). On November 9, 2022, **Banquete** filed an Amended Complaint, eliminating its claim for fraudulent inducement. (D.E. 12). ACS, on November 23, 2022 and February 13, 2023, filed Amended Answers and asserted counterclaims for breach of contract and conversion. (D.E. 15 and D.E. 18). On October 27, 2023, ACS filed the pending Motion for Partial Summary Judgment. (D.E. 29). **Banquete** later filed a Second Amended Complaint on November 16, 2023, eliminating its claim for breach of contract and adding a claim for rescission of void contract. (D.E. 40). On June 17, **2024**, ACS filed the pending second Motion for Partial Summary Judgment seeking dismissal of **Banquete's** claim for rescission as well as "a determination that Chapter 44 of the Texas Education Code, rather than Chapter 2269 of the Texas Government Code, governs the Interlocal Agreement." (D.E. 48). This case was referred to the undersigned on July 17, **2024**. (D.E. 54).

III. SUMMARY JUDGMENT STANDARD

***2** Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must examine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52. In making

this determination, the Court must consider the record as a whole by reviewing all pleadings, depositions, affidavits, and admissions on file, and drawing all justifiable inferences in favor of the party opposing the motion. *Caboni v. Gen. Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002).

The Court may not weigh the evidence or evaluate the credibility of witnesses. *Id.* Furthermore, "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56; *see also Cormier v. Pennzoil Exploration & Prod. Co.*, 969 F.2d 1559, 1561 (5th Cir. 1992) (Refusing to consider affidavits that relied on hearsay statements); *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987) (Stating that courts cannot consider hearsay evidence in affidavits and depositions). Unauthenticated and unverified documents do not constitute proper summary judgment evidence. *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994).

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The evidence must be evaluated under the summary judgment standard to determine whether the moving party has shown the absence of a genuine issue of material fact. "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. If the moving party demonstrates an absence of evidence supporting the nonmoving party's case, then the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

To sustain this burden, the nonmoving party cannot rest on the mere allegations of the pleadings. Fed. R. Civ. P. 56; *Anderson*, 477 U.S. at 248. The nonmovant may not rely merely on allegations, denials in a pleading or unsubstantiated assertions that a fact issue exists, but must set forth specific facts showing the existence of a genuine issue of material fact concerning every element of its cause(s) of action. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). "After the nonmovant has been given an opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted." *Caboni*, 278 F.3d at 451.

IV. ANALYSIS

A. Negligence [1] And Negligent Misrepresentation [2]

***3** ACS next seeks dismissal of **Banquete's** negligence claims as barred by the economic loss rule, among other reasons. While a party's conduct may implicate various torts as well as contractual obligations, "[a]s a general rule, 'the failure to perform the terms of a contract is a breach of contract, not a tort.' " *Heller Fin., Inc. v. Grammco Computer Sales, Inc.*, 71 F.3d 518, 527 (5th Cir. 1996) (citation omitted). Under Texas law, the economic loss

rule "generally precludes recovery in tort for economic losses resulting from a party's failure to perform under a contract when the harm consists only of the economic loss of a contractual expectancy." *Id.* (citation omitted); *Golden Spread Elec. Coop., Inc. v. Emerson Process Mgmt.*, 954 F.3d 804, 808 (5th Cir. 2020) (citations omitted) ("[T]he economic loss rule generally prevents recovery in tort for purely economic damages unaccompanied by injury to persons or property."); *Shrieve Chem. Prods., Inc. v. Caremoli*, No. H-16-2173, 2018 **WL** 1558273, at *4 (**S.D**. **Tex**. Jan. 4, 2018) (The economic loss doctrine bars negligent misrepresentation claims where the plaintiff is seeking to recover benefit-of-the-bargain damages.); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) ("When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone.") Recovering in tort for economic losses resulting from a party's failure to perform under a contract when the alleged harm consists of only economic loss of the expected contract, without any claim of personal injury or damage to other property, is precluded. *Chapman Custom Homes, Inc. v. Dall. Plumbing, Co.*, 445 S.W.3d 716, 718-19 (Tex. 2014) (Plumber had an implied duty not to flood or otherwise damage the plaintiff's house when performing contracted plumbing work, this implied duty was independent of the plumber's contractual obligations and the damages caused by the plumber's breach were "beyond the economic loss of any anticipated benefit under the plumbing contract.") "If the alleged injury is only due to the party's failure to fulfill its contractual obligation, the rule precludes recovery of economic losses in tort." *Expedited Servicepartners, LLC v. 1011 Ram Fairfield AMA, LLC*, No. 7:22-cv-103-O, 2023 **WL** 7190849, at *4 (N.D. Tex. Nov. 1, 2023) (citations omitted) ("Even if the matter in dispute is the subject of a contract, a party may elect recovery in tort if the duty breached stands independent from the contractual undertaking, and the alleged damages are not solely the result of a bargained-for contractual benefit."). The rule "restricts contracting parties to contractual remedies for those economic losses associated with the relationship, even when the breach might reasonably be viewed as a consequence of a contracting party's negligence." *PCS Software, Inc. v. Dispatch Servs., Inc.*, No. H-23-108, **2024** **WL** 3448009, at *4 (**S.D**. **Tex**. July 16, **2024**) (citations omitted) (The economic loss rule bars negligent misrepresentation claims when they are "dependent on a contractual relationship.") However, "an actor whose negligence causes personal injury or physical harm to the property of another can be held liable in tort regardless of whether the negligence occurs in the performance of a contract between the parties." *Shakeri*, 816 F.3d at 293 (citation omitted) (Finding the district court erred in dismissing plaintiffs' negligence claim pursuant to the economic loss rule where ADT failed to provide a working alarm and backup alarm system pursuant to the parties' contract, was notified the system needed repair and plaintiffs, after their jewelry store was then robbed, alleged severe physical injuries requiring surgery).

Upon review, **Banquete** has not stated a negligence claim independent of obligations in the agreement nor do the claimed damages extend beyond the economic loss of the anticipated benefit under the agreement.

Banquete does not allege any personal injury damages. Further, the property damage alleged by **Banquete** to its schools as a result of ACS' purported subpar work is the result of ACS' failure to properly perform under the party's agreement.[3] (D.E. 29-8, Pages 8-9). **Banquete** seeks the return of the money it paid to ACS pursuant to the parties' agreement, alleging the work performed was sub-par, defective, unsafe and/or not completed. (D.E. 40 and D.E. 29-11, Pages 15-16). **Banquete** cites to no evidence that it suffered any loss independent from the subject matter of the parties' agreement. Accordingly, the undersigned recommends **Banquete** has failed to create a fact question as to its negligence claims.[4] [5]

B. FRAUD

***4** **Banquete** asserts false statements were made regarding the completion of a full security assessment, which **Banquete** alleges was never completed. (D.E. 29-8, Page 5). Additionally, **Banquete** asserts Mr. Abrams misrepresented that a master plan of the facilities related to the project would be prepared and provided. (D.E. 29-8, Pages 5-6). **Banquete** further asserts Mr. Abrams misrepresented that ACS would hold the project funds in an escrow account requiring dual authority for their release and also that contractors would be paid their final payments after approval by the project coordinator and the district representative. (D.E. 29-8, Pages 4 and 5). Based on these representations, **Banquete** asserts it continued to let ACS "send invoices and demand funds from the District on the reliance that adequate planning and progress was taking place and would be taking place," tendering several payments. (D.E. 29-8, Pages 6-8).

Claims of fraud have six elements. *Barge, **2024 WL** 2520324, at *6* (*citing* *Aquaplex, Inc. v. Rancho La Valencia, Inc*, 297 S.W.3d 768, 774-75 (Tex. 2009)) (other citations omitted). They are: "(1) a material representation was made; (2) the representation was false; (3) the speaker knew that the representation was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the statement with the intent that the other act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered an injury." *Id.* (citations omitted). These elements establish that "[a] promise of future performance constitutes an actionable misrepresentation if the promise was made with no intention of performing at the time it was made." *Id.* (citing *Formosa Plastics Corp. U.S. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998) (other citation omitted) (A plaintiff is required to present evidence that defendant made representations with the intent to deceive at the time the representations were made and with no intention of performing as represented). While "intent is determined at the time a party made the representation, it may also be inferred from the party's ... acts after the representation was made." *Id.* (citations omitted). "Proving that a party had no intention of performing... is [difficult], as intent to defraud is not usually susceptible to direct proof." *Barge, **2024 WL** 2520324, at *6* (*citing* *Aquaplex*, 297 S.W.3d at 774–75) (other citations omitted). Thus, a contractual "breach combined with slight circumstantial evidence of fraud is" sufficient to support a finding of fraudulent intent. *Id.*

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(citations omitted); *Premiere Holdings of Texas LP v. Sterling Reit, Inc.*, No. H-04-0916, 2006 WL 2796387, at *5 (S.D. Tex. Sept. 26, 2006) (citation omitted) ("Intent is a fact question uniquely within the realm of the trier of fact because it so depends on the credibility of witnesses and the weight to be given to their testimony.") Under Texas law, "a contract may be induced by fraud when a party promises to perform the contract while knowing that it has no intention of carrying out that promise." *L & C Consultants, LLC v. ASH Petroleum, Inc.*, No. 3:07-cv-1904-D, 2009 WL 3110200, at *6 (N.D. Tex. Sept. 29, 2009) (citation omitted). "[A] party's denial that they ever made a promise is a factor showing no intent to perform when they made the promise." *Id.* (citation omitted). Further, a plaintiff must show actual and justifiable reliance. *Noble Capital Fund Mgmt., LLC v. US Capital Glob. Inv. Mgmt.*, No. 1:20-cv-1247-RP, 2023 WL 5814390, at *9 (W.D. Tex. Sept. 7, 2023) (citations omitted) ("The issue of justifiable reliance is generally a question of fact" as "[t]he justifiable reliance inquiry is necessarily fact intensive.")

ACS asserts **Banquete** has no evidence of ACS' fraudulent intent, justifiable reliance or evidence of damages. However, reviewing the evidence, the undersigned recommends there is a genuine issue of material fact as to whether ACS made representations with no intention of performing as represented, inducing **Banquete** to enter into an agreement and to continue to make payments pursuant to this agreement as further discussed below.

***5** In one of the initial documents prepared by ACS for **Banquete**, titled "Security Upgrade Project Quote," a $260,000.00 estimate for completion of a "District-Wide Assessment & Plan" is included, which **Banquete** asserts it never received. (D.E. 42-11, Page 3).[6] There is no dispute that ACS received the initial payment of $100,000.00 in December 2020 toward the preparation of this assessment and plan. (D.E. 42, Page 7). Approximately six months later, on July 20, 2021, **Banquete** received a "Security Upgrade Project Invoice" which was the same as the aforementioned "Security Upgrade Project Quote" with updates provided under each section as to the amount of work performed and the remaining amount now owed. (D.E. 42-22). Under the section at issue, it states, "This portion of the project is essentially done, with assessments complete and building maps/plans completed within the next 2 weeks." (D.E. 42-22, Page 2). It further indicated the remaining $160,000.00 was due and owing. (D.E. 42-22, Page 3). The parties do not dispute that ACS was then paid a third payment of $1,304,889.00 in July 2021. (D.E. 42, Page 7). During her deposition, Dr. Johnson stated ACS had no intention of completing a full security assessment "[b]ecause to have a project design, it's done before the project is started on and initialed, and that has never been shared with us, nor when we asked for it repeatedly any part of it." (D.E. 42-3, Page 22). She further stated that when ACS was confronted about this issue, they did not provide any evidence that they had completed any part of a full security assessment and she asked "for it multiple times, and not one time did they say it was going to be a document provided at the end. They said they were compiling it and would get it to me" and were "90 percent done" or "70 percent done." (D.E. 42-3, Pages 22-23 and 31). Dr. Johnson further stated she "asked

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specifically for the district-wide assessment and plan" and "our conversations [while not remembering specific dates but it being after her employment began in June 2021] led me to believe they were producing a document with all of this information in it" "through the summer and fall." (D.E. 42-3, Pages 23 and 31). These documents and testimony, along with the competing evidence as to whether any portion of this plan was ever produced or provided,[7] are sufficient circumstantial evidence to support **Banquete's** contention that ACS breached the parties agreement, intentionally made representations that it never intended to keep in order to induce **Banquete** to enter into an agreement and to approve payments, and **Banquete** did in fact rely on those misrepresentations to its detriment by making those payments for work and materials it did not receive. This alone is sufficient for the undersigned to recommend there is a genuine issue of material fact as to **Banquete's** fraud claim. Additionally, the undersigned notes that ACS should not be permitted to refuse to produce financial documents as to "where funds from Plaintiff for the Project were spent" and then argue Plaintiff has not provided sufficient evidence of exact damages.[8]

C. RESCISSION, CONSTRUCTIVE TRUST, PUNITIVE DAMAGES AND ATTORNEYS' FEES

ACS moves for dismissal of the remedies of rescission, constructive trust, punitive damages and attorneys' fees premised on the dismissal of all **Banquete's** claims. If the Court were to grant dismissal of all **Banquete's** causes of action, **Banquete** would not be able to recover any of these remedies. However, because the undersigned has recommended ACS' Motion be denied as to **Banquete's** claim for fraud, the undersigned also recommends ACS' Motions be denied related to these remedies as they would be more appropriately decided should this case proceed to trial. The undersigned further recommends **Banquete's** argument that rescission is "both an independent claim and independent remedy" is without merit. (D.E. 50, Page 9). "Rescission is an equitable remedy available under Texas contract law that 'operates to set aside a contract that is legally valid but is marred by fraud, mistake or for some other reason." *Integrated Pipe & Supply, LLC v. Critical Path Res., Inc.*, No. 4:23-cv-2006, **2024** **WL** 554151, at *2 (**S.D**. **Tex**. Feb. 12, **2024**) (citations omitted). "Rescission is a remedy only, and not an independent cause of action." *Kreway v. Countrywide Bank*, No. 15-CA-332-OLG, 2015 **WL** 11622495, at *5 (W.D. Tex. July 21, 2015) (citation omitted); *Wallner, et al., v. Farish, et al.*, No. 3:09-cv-587-G, No. 2011 **WL** 1085307, at *4 FN 2 (N.D. Tex. Mar. 23, 2011) (citation omitted) ("Texas courts have long held under general principles of common-law fraud that one who is induced by fraud to enter into a contract has a choice of remedies: he may either recover his monetary damages flowing from the fraud or he may elect the equitable remedy of rescission in lieu of damages and demand a return of any amount paid."); *James v. Wells Fargo Bank, N.A.*, No. H-14-0449, 2014 **WL** 2123060, at *6 (**S.D**. **Tex**. May 21, 2014) (citations omitted) (Rescission is remedy, not a legal cause of action, and therefore, plaintiffs must prevail on an underlying claim to seek this remedy); As cited by **Banquete**, *Italian Cowboy Partners, Ltd. V. Prudential Ins. Co. of America*, 341 S.W. 3d 323, 347 (Tex. 2011) (Rendering "judgment

in favor of Italian Cowboy on its claim for rescission premised on Prudential's breach of implied warranty of suitability" directing the court to "consider any such remaining issues as to Italian Cowboy's rescission damages.") As the undersigned has recommended **Banquete's** claim for fraud survive summary judgment, the undersigned recommends rescission remains a viable remedy for **Banquete** to claim should it prevail.

D. APPLICABLE LAW OF THE INTERLOCAL AGREEMENT

***6** Section 2269 of the Texas Government Code applies to public works contracts entered into by school districts, meaning contracts "for constructing, altering, or repairing a public building or carrying out or completing any public work." Tex. Gov't Code §§ 2269.001(6); 2269.002(2)(c). There are set procedures that must be followed prior to entering into a public works contract, including publishing notice and permitting bids on the proposed project, and any contract "entered into in violation [of § 2269] is voidable as against public policy." Tex. Gov't Code §§ 2269.052; 2269.451. Section 44 of the Texas Education Code lists the approved methods for "all school district [to enter into] contracts for the purchase of good and services...valued at $50,000.00 or more in aggregate for each 12-month period." Tex. Educ. Code § 44.031(a). Methods include, but are not limited to, competitive bidding, competitive sealed proposals and requests for proposals for services other than construction services. *Id.* § 44.031(a)(1)-(3). Also listed are interlocal contracts and, for construction services, "a method provided by Chapter 2269, Government Code." *Id.* § 44.031(a)(4)-(5).

ACS asserts "**Banquete ISD** has made it clear that one of the bases for its rescission claim is the Interlocal Agreement being void under Chapter 2269 of the Texas Government Code. In addition, **Banquete ISD** has made it clear that this same basis underlies its defense to ACS' counterclaim for breach of contract that the Interlocal Agreement is unenforceable." (D.E. 48, Page 9). ACS asserts Chapter 44 of the Texas Education Code applies to the parties' agreement rather than Chapter 2269 of the Texas Government Code and requests the Court, in this summary judgment motion, determine which law is applicable to the parties' agreement. (D.E. 48, Pages 8-17).

However, in response, **Banquete** affirmatively states, "The District does not make the contention that Chapter 44 of the Tex. Educ. Code applies to the Interlocal Agreement rather than Chapter 2269 of the Tex. Gov't Code. The sections of the Tex. Educ. Code, Tex. Gov't Code, and Tex. Local Gov't Code are all complimentary and applicable to the Interlocal Agreement." (D.E. 50, Page **10**). Further, "[t]he District states, in its Petition that both the Tex. Educ. Code and Tex. Local Gov't Code spell out the procurement requirements that a school district must abide by for contracts over $50,000.00 for the purchase of good and services and for contracts involving the construction, repair, or renovation of an improvement to real property. Both statutes are meant to be read together since they do not conflict with one another." (D.E. 50, Page **10**). **Banquete** further responds that "a motion for partial summary judgment is not the correct procedural vehicle to address this since Plaintiff makes no such claim in its pleadings." (D.E. 50, Page **10**).

ACS has not sought declaratory relief on this issue in its pleading. Further, there is clearly a dispute as to whether the agreement entered into by the parties is a construction contract, in whole or in part, or an installation contract combined with the sale of goods and services. By requesting the Court determine the controlling law applicable to the parties' agreement, ACS is asking the Court to classify it as one or the other. The parties, while giving clear briefing on the relevant law applicable to certain contracts entered into with school districts, have not sufficiently presented arguments and supporting evidence related to the proposed scope of work and/or the work performed on **Banquete's** campus which would permit this Court to make a determination at this stage as to whether there is a genuine issue of material fact as to how the agreement should be classified. Accordingly, the undersigned recommends ACS' request for declaratory relief on this issue be denied.

V. CONCLUSION

For the reasons stated above, the undersigned recommends ACS' Motions for Partial Summary Judgment be **GRANTED in part** and **otherwise DENIED**. (D.E. 29 and D.E. 48).

***7** ORDERED on September **10**, **2024**.

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **FOURTEEN (14) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to 28 U.S.C. § 636(b)(1)(c); Rule 72(b) of the Federal Rules of Civil Procedure; and Article IV, General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendations in a Magistrate Judge's report and recommendation within **FOURTEEN (14) DAYS** after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

All Citations

Slip Copy, 2024 WL 4720290

Footnotes

1 Under Texas law, "[t]o sustain a negligence action, the plaintiff must produce evidence of a legal duty owed by the defendant to the plaintiff, a breach of that duty,

and damages proximately caused by that breach." *Shakeri v. ADT Sec. Serv., Inc.*, 816 F.3d 283, 292 (5th Cir. 2016) (citation omitted).

2 A negligent misrepresentation cause of action has four elements. *Barge v. Wells Fargo Bank, N.A.*, No. 1:23-cv-189, **2024** **WL** 2520324, at *5 (E.D. Tex. Mar. 28, **2024**) (citing *Wal-Mart Stores, Inc. v. Xerox State & Loc. Sols., Inc.*, 663 S.W.3d 569, 581 n.55 (Tex. 2023)). First, "the defendant made a representation in the course of its business or in a transaction in which it has a pecuniary interest." *Id.* Second, "the representation conveyed false information for the guidance of others in their business." *Id.* Third, "the defendant did not exercise reasonable care or competence in obtaining or communicating the information." *Id.* Finally, "the plaintiff suffers pecuniary loss by justifiably relying on the representation." *Barge, **2024** **WL** 2520324, at *5* (citation omitted). There must be a false representation for a successful negligent misrepresentation claim and therefore, "[a] promise to do or refrain from doing an act in the future is not actionable because it does not concern an existing fact." Id. (citation omitted); *Pi Data Centers Pvt. Ltd. V. HPE Enter. Co.*, No. H-22-3947, **2024** **WL** 1056039, at *4 (**S.D**. **Tex**. Mar. 4, **2024**) (citation omitted) ("[T]he false information contemplated in a negligent misrepresentation case must be a misstatement of an existing fact rather that the promise of future conduct.")

3 **Banquete** attempts to save its negligence claim by arguing that at some point, there was undocumented floor damage caused by water coming into the school as a result of ACS' alleged subpar work. The only evidence in support of this allegation is Dr. Johnson's deposition testimony. She stated the school "had some door issues with water coming in [as the result of missing door sweeps] and the flooring around it" was damaged sometime in the "summer/fall" with **Banquete** staff replacing "it with supplies we had." (D.E. 42-3, Page 42). Dr. Johnson further stated there is no documentation as to what amount of damage was involved or what supplies were used. (D.E. 42-3, Page 43). Nor does **Banquete** direct the Court to any additional information on this alleged floor damage being disclosed in discovery or otherwise mentioned until the pending Motion and Response. Fed. R. Civ. P. 37(c)(1) (A party who fails to provide information as required in discovery is not permitted to use that information to supply evidence on a motion, at a hearing or at a trial unless the failure was substantially justified or harmless). Further, **Banquete** does not offer any reason, if such evidence does exist, why it was not previously disclosed. In fact, while **Banquete** referenced that "[d]oor sweeps were missing from the exterior doors installed in the elementary school" in response to an interrogatory about its negligence claim, no mention is made of any floor damage. (D.E. 29-8, Page 8). The undersigned recommends Dr. Johnson's limited deposition testimony alone is insufficient to defeat summary judgment on this negligence claim. While this Court must not weigh the evidence or evaluate the credibility of witnesses, here, there is

no evidence to weigh as **Banquete** has provided no evidence as to the extent of the damages, when the damages definitively happened, exactly where the damages occurred or what the cost of repairs were.

4 The undersigned notes **Banquete**, after ACS filed its first dispositive motion which seeks dismissal of **Banquete's** negligence claims, has now filed a Second Amended Complaint which removes the breach of contract claim, adding a new count for "Rescission of Void Contract," which the undersigned has addressed below. (D.E. 40). Having reviewed the parties briefing regarding **Banquete's** negligence claims, the parties have not sufficiently addressed, citing to precedent, whether voluntarily withdrawing its claim for breach of contract would impact the viability of **Banquete's** negligence claims. Further, the undersigned declines to address ACS' Motion requesting summary judgment on **Banquete's** now withdrawn breach of contract claim as it not currently in the live pleading. There is a factual dispute as to whether the parties' agreement was executed properly and therefore, whether it is a binding contract. Whether **Banquete** will request to further amend its pleadings based on the Court's decision on ACS' pending motions, as well as its own motion to plea to jurisdiction, remains to be seen.

5 As the undersigned recommends **Banquete's** negligence claims be dismissed as barred by the economic loss rule, ACS' remaining arguments as to why **Banquete's** negligence claims should be dismissed need not be addressed at this time.

6 This section provided that, "To begin this project, a district-wide assessment will be conducted to document the as-built condition of every security asset, including doors, gates, locks, keying systems, door controls, cameras, video recording and distribution systems, phones, intercoms, panic/duress reporting mechanisms, intrusion systems, other monitoring systems and related infrastructure. From these details various plans will be developed to repair, upgrade, replace or deploy new **solutions** to help ensure defined security goals. As **solutions** are deployed, a record of as-built configurations and security assets will be documented for district use." (D.E. 42-11, Page 3).

7 While not directly arguing it completed the disputed assessment and plan, ACS appears to assert it was completed in the form of a PowerPoint presentation presented to the school board in February 2021. (D.E. 29, Page 5 and D.E. 29-18 (PowerPoint) ("Mr. Abrams delivered a presentation to the BISD school board on February 8, 2021 that summarized the conclusions of the assessment and initial plan for starting the project.") This further demonstrates a genuine issue of material fact, given Dr. Johnson's testimony that ACS repeatedly represented to her that it

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was still being completed after she began her employment over four months later as discussed above.

8 In response to **Banquete's** request for production for ACS to "produce any financial documents or records which demonstrate where funds from Plaintiff for the Project were spent," ACS stated it would "not produce documents responsive to this request" because it "seeks information that is not relevant to this litigation. There is no dispute about the amount of money paid to ACS and there is nothing about the allegations asserted by either party that make the requested documents reasonably likely to lead to the discovery of admissible evidence in this case." (D.E. 42-19, Page 32). Additionally, prior to this litigation, **Banquete** repeatedly requested an accounting which it states it never received. (D.E. 42-8; D.E. 42-9; and D.E. 42-**10**). Further, whether this claim could be barred by the economic loss rule was not raised in ACS' Motion.

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CASE NO. 58

2024 WL 2520324
Only the Westlaw citation
is currently available.
United States District Court,
E.D. Texas, Beaumont Division.

Byron **BARGE**, Individually
and d/b/a Byron's RV Repair;
and Kathleen **Barge**, Plaintiffs,
v.
WELLS FARGO
BANK, N.A., Defendant.

CIVIL
ACTION
NO.
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-
CV
-
00189

Signed March **28**, **2024**

Attorneys and Law Firms

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ORDER GRANTING IN PART DEFENDANT WELLS FARGO BANK, N.A.'S MOTION TO DISMISS COMPLAINT

Michael J. **Truncale**, United States District Judge

***1** Before the Court is the Motion to Dismiss Complaint ("Motion") [Dkt. 6] filed by Defendant **Wells Fargo Bank, N.A.** ("**Wells Fargo**"). For the following reasons, the Motion is **GRANTED IN PART**.

I. BACKGROUND

Plaintiff Byron **Barge** and Plaintiff Kathleen **Barge** ("the **Barges**") seek recovery from **Wells Fargo**, arguing that the **bank** failed to fulfill its promise of protecting their funds against a wire transfer fraud. [Dkt. 4]. The **Barges** have multiple accounts with **Wells Fargo**. *Id.* at 3. They signed a contract where the **bank** supposedly "agreed to protect [the couple] from fraud and fraudulent transfers[ ] and represented that it would provide such protection ...." *Id.*

The **Barges** aver that this promise was breached on November 10, 2022, when **Wells Fargo** failed to protect them against two fraudulent wire transfers in the total amount of $37,500.00. *Id.* The **Barges** charge that, eight days before the transactions were approved, a **Wells Fargo** employee called them "numerous times" to confirm whether the requests were legitimate. *Id.* Byron allegedly visited the **Wells Fargo** branch in his area, only to be told that the person he spoke to over the telephone was the hacker. *Id.* at 3–4. Byron alleges that a manager told him that the **bank**

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needs up to ten business days to review the transfers. *Id.* at 4. **Wells Fargo** refused to return the funds after eight days of supposed investigation, saying that a "business partner" of Byron's "approved the transfer." *Id.* The **Barges** also assert that, about three months after the fraudulent transfers, they started to receive a checking statement listing a new account under Byron's name. *Id.* at 4–5.

So the **Barges** sued **Wells Fargo**, asserting nine common law claims and one statutory claim under the Texas Deceptive Trade Practices Consumer Protection Act (also known as the Deceptive Trade Practices Act, or "DTPA") to recover their lost fund. *Id.* at 5–17. The live Plaintiffs' First Amended Petition with Jury Demand ("Amended Petition") uses screenshots of **Wells Fargo's** webpages to present general assertions of tort and contract causes of action. *Id.* at 5–15. The **Barges** filed their suit in state court on March 17, 2023. [Dkt. 1-3 at 2]. They served **Wells Fargo** on April 21 of the same year. [Dkt. 1 at 2]. The **bank** removed for diversity and then filed the Motion. *Id.* at 1; [Dkt. 6]. The **Barges** responded. [Dkt. 7]. The Motion is now ripe for review.

II. LEGAL STANDARD

The Court applies federal procedural law and Texas substantive law. *Ferrer & Poirot, GP v. Cincinnati Ins. Co.*, 36 F.4th 656, 659 (5th Cir. 2022) (per curiam) (first citing **28** U.S.C. § 1332; and then citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

A court may dismiss a complaint for its "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In considering a 12(b)(6) motion, the Court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007) (per curiam) (quoting *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007)). In doing so, the Court cannot "accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010) (citations omitted).

***2** To survive a 12(b)(6) challenge, a complaint must allege "enough [well-pleaded] facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 697 (2009) (Souter, J., dissenting) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also* Fed. Rs. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain[ ] ... a short and plain statement of the claim showing that the pleader is entitled to relief."), 9(b) ("In alleging fraud ..., a party must state with particularity the circumstances constituting fraud or mistake."). [1] A claim is "plausible on its face" if its well-pleaded facts lead to "the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). By contrast, "if a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility." *Id.* (cleaned up).

Determining whether a plausible claim exists is "a context-specific task that requires the ... [C]ourt to draw on its judicial experience and common sense." *Id.* at 679 (citation omitted).

III. DISCUSSION

The following issues are before the Court:

1. Whether the UCC preempts the **Barges**' case against **Wells Fargo**; and

2. Whether the **Barges** present viable claims of:

   a. negligence and breach of fiduciary duty;

   b. gross negligence;

   c. negligent misrepresentation;

   d. fraud;

   e. fraudulent misrepresentation;

   f. breach of contract;

   g. breach of express warranty;

   h. breach of implied warranty; and

   i. violation of the DTPA.

[Dkt. 4 at 9–15; Dkt. 6 at 2–15].

After considering the Motion, record, and relevant law, the Court rules that the Amended Petition is not preempted and therefore **GRANTS** the Motion as to the following causes of action: negligence, breach of fiduciary duty, gross negligence, fraud, fraudulent misrepresentation, breach of contract, and breach of implied warranty.

A. Dismissal Motion

1. Preemption

The Court finds that the **Barges**' case is not preempted by Chapter 4A of the Texas Business and Commerce Code, "which incorporates the Uniform Commercial Code ("UCC") and governs wire transfers." *See* *Ashcroft*, 556 U.S. at 679; [Dkt. 6 at 9] (citations omitted). This result is based on **Wells Fargo's** failure to cite a preemptive UCC clause. *See* Tex. Bus. & Com. Code § 4A.102 cmt.; *Gentilello*, 627 F.3d at 544; *Ashcroft*, 556 U.S. at 679.

A supplementary comment to Chapter 4A states that preemption under the chapter occurs if one of its clauses contradicts a state law claim. Tex. Bus. & Com. Code § 4A.102 cmt. "To the extent the UCC does not resolve a question, courts [use] the common law." *United Galvanizing, Inc. v. Imperial Zinc Corp.*, No. H–08–0551, 2011 **WL** 11185 at *9 (S.D. Tex. Jan. 3, 2011); *see also* *Moody Nat'l* ***Bank*** *v. Tex. City Dev., Ltd. Co.*, 46 S.W.3d 373, 378–79 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (citation omitted) ("Common law claims are precluded when a claim ... impose[s] liability inconsistent with any of the [Chapter]'s provisions.").

Here, **Wells Fargo** cites the same UCC comment but ignores its textual guidance in arguing that Chapter 4A is "to be the exclusive means of determining the rights, duties[,] and liabilities of the affected parties in

any situation *covered by particular provisions* of the [Chapter].” [Dkt. 6 at 10] (quoting Tex. Bus. & Com. Code § 4A.102 cmt.) (emphasis added). The **bank** argues that the chapter covers everything related to wire transfers and that “state law claims that attempt to burden **banks** with additional duties are [thus] preempted.” *Id.* (citations omitted). But the Motion fails to state which Chapter 4A clause preempts which cause of action. Such conclusory reasoning cannot justify a dismissal of this case. *See* Tex. Bus. & Com. Code § 4A.102 cmt.; *Gentilello*, 627 F.3d at 544; *Ashcroft*, 556 U.S. at 679.

***3** Accordingly, the Court rejects **Wells Fargo's** preemption argument and evaluates each recovery theory. *See Moody*, 46 S.W.3d at 378–79; *Gentilello*, 627 F.3d at 544; *Ashcroft*, 556 U.S. at 679.

2. Common Law and Statutory Causes of Action

The Court rules that only the negligent misrepresentation, breach of express warranty, and DTPA noncompliance theories survive the 12(b)(6) scrutiny.

a. Common Law Claims

i. Negligence Causes of Action [2]

The Court notes that the following negligence analyses focus on duty. *See Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170, 178 (5th Cir. 2018); *Ashcroft*, 556 U.S. at 679. This is so since “the existence of duty is a question of law for the [C]ourt to decide ....” *Allen*, 907 F.3d at 178 (first quoting *Greater Hous. Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); and then citing *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 312 (Tex. 1983) (McGee, J., dissenting)). In other words, duty is the “threshold inquiry.” *Centeq Realty v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995) (first citing *Graff v. Beard*, 855 S.W.2d 918, 919 (Tex. 1993); and then citing *Greater Hous.*, 801 S.W.2d at 525). All other questions are for the jury to decide. *See Allen*, 907 F.3d at 178.

(A) Negligence, Breach of Fiduciary Duty

The Court **DISMISSES** these two claims as the **Barges** were not owed an actionable duty. *See Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); *Ashcroft*, 556 U.S. at 679.

***4** Negligence means that there were “(1) a legal duty, (2) a breach of that duty, and (3) damages ... resulting from the breach.” *Elephant Ins. Co., LLC v. Kenyon*, 644 S.W.3d 137, 144 (Tex. 2022) (cleaned up) (citing *Praesel v. Johnson*, 967 S.W.2d 391, 394 (Tex. 1998)). Regarding duty in a **banking** relationship, “the relationship ... does not usually create a special or fiduciary relationship.” *Farah v. Mafrige & Kormanick, P.C.*, 927 S.W.2d 663, 675 (Tex. App.—Houston [1st Dist.] 1993, no writ) (first citing *Manufacturers Hanover Tr. Co. v. Kingston Inv. Corp.*, 819 S.W.2d 607, 610 (Tex. App.—Houston [1st Dist.] 1991, no writ); and then citing *Thigpen*, 363 S.W.2d at 253). Otherwise, “the security of contracts and conveyances in this state would be

seriously jeopardized." *Elephant*, 644 S.W.3d at 144. To be sure, there are situations where a debtor-creditor relationship may be fiduciary. *Thigpen*, 363 S.W.2d at 253. More specifically, the Court may find that a fiduciary relationship existed only if the plaintiff sufficiently establishes that his or her "relationship with [the defendant] was ... more than a debtor-creditor relationship." *Farah*, 927 S.W.2d at 675. And whether a fiduciary relationship exists is "determined from the actualities of the relationship between the persons involved." *Id.* One such factor, for example, is an "excessive lender control over, or influence in, the borrower's business activities." *Id.* (citation omitted).

Here, the **Barges** fail to show that they had a qualifying relationship with **Wells Fargo**. *See id.*; *Thigpen*, 363 S.W.2d at 253. The **bank** rightly observes that the **Barges** have not alleged facts establishing that its relationship with the couple is fiduciary. [Dkt. 8 at 4–5]. Indeed, the thrust of the **Barges**' argument rests on a Texas Court of Appeals case about a financial advisor's fiduciary duties, which the couple claims plausibly establishes **Wells Fargo's** duty. [Dkt. 7 at 10–12] (citing *W. Rsrv. Life Assurance Co. v. Graben*, 233 S.W.3d 360, 374 (Tex. App.—Fort Worth 2007, pet. denied)). But the Court is unconvinced that *Graben* applies because, while the that case involved "a professional who promised to use sophisticated measures to safeguard" the fund *and* advance his clients' financial interests via investments, the dispute here concerns a **bank** that only protected the monies. *Compare Graben*, 233 S.W.3d at 367 (stating that the financial advisor knew that his clients "wanted to preserve their principal" and that "he had a [duty] to determine the ... suitability of investments."), *with* [Dkt. 4 at 3–4] (clarifying that **Wells Fargo** "agreed to protect [the **Barges**] from fraud and fraudulent transfers[ ] and represented that it would provide such protection ....). This stark contrast prevents the Court from finally determining whether **Wells Fargo** was under an actionable duty. *See Thigpen*, 363 S.W.2d at 253; *Ashcroft*, 556 U.S. at 679; *see also Elephant*, 644 S.W.3d at 144.

Accordingly, the Court **GRANTS** the Motion with respect to the negligence and breach of fiduciary duty theories. *See Thigpen*, 363 S.W.2d at 253; *Ashcroft*, 556 U.S. at 679.

(B) Gross Negligence

The Court also **DISMISSES** this cause of action as gross negligence cannot be established without negligence. *See Nowzaradan v. Ryans*, 347 S.W.3d 734, 739 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *Ashcroft*, 556 U.S. at 679.

Legally and logically, "negligence and gross negligence are ... inextricably intertwined." *Nowzaradan*, 347 S.W.3d at 739 (citation omitted). This is so since "ordinary negligence is needed for gross negligence." *Id.* (citing *Sonic Sys. Int'l, Inc. v. Croix*, 278 S.W.3d 377, 395 (Tex. App.—Houston [14th Dist.] 2008, pet. denied)). Gross negligence requires a higher standard of duty than negligence does. *See Elephant*, 644 S.W.3d at 145; *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012). For ordinary negligence, the Court evaluates the relevant factors to define "the existence, scope, and elements of

legal duties" and then decides whether an ordinary person in the defendant's position must use ordinary care. *See* Elephant, 644 S.W.3d at 145. This process hardly (if at all) examines the defendant's subjective intent. *See id.* By contrast, gross negligence requires "both objective and subjective elements." U-Haul, 380 S.W.3d at 137 (citing Lee Lewis Const., Inc. v. Harrison, 70 S.W.3d 778, 785 (Tex. 2001)). That is, a plaintiff "must prove by clear and convincing evidence that (1) when viewed objectively from the defendant's position when the event occurred, the act or omission involved an extreme degree of risk, considering the probability and magnitude of the potential harm, and (2) the defendant had actual, subjective awareness of the risk, but proceeded with indifference to the rights, safety, or welfare of others." *Id.* (cleaned up).

***5** Here, as the negligence theory was dismissed, the Court must rule that the gross negligence claim fails. *See supra* Section III.A.2.a.i.(A); Nowzaradan, 347 S.W.3d at 739. Finding gross negligence without ordinary negligence defies law and logic. *See* Nowzaradan, 347 S.W.3d at 739.

Accordingly, the Court **GRANTS** the Motion with regard to this cause of action as well. *See id.*; Ashcroft, 556 U.S. at 679.

(C) Negligent Representation

Since this theory concerns **Wells Fargo's** representations about security measures that were presumably in place when those statements were made, the Court declines to dismiss it. *See* BCY Water Supply Corp. v. Residential Inv., Inc., 170 S.W.3d 596, 603 (Tex. App.—Tyler 2005, pet. denied); Ashcroft, 556 U.S. at 679.

A viable negligent misrepresentation cause of action has four elements. Wal-Mart Stores, Inc. v. Xerox State & Loc. Sols., Inc., 663 S.W.3d 569, 581 n.55 (Tex. 2023) (citing JPMorgan Chase **Bank**, **N.A**. v. Orca Assets G.P., 546 S.W.3d 648, 653–54 (Tex. 2018)). First, "the defendant made a representation in the course of its business or in a transaction in which it has a pecuniary interest." *Id.* Second, "the representation conveyed false information for the guidance of others in their business." *Id.* (quotation omitted). Third, "the defendant did not exercise reasonable care or competence in obtaining or communicating the information." *Id.* Finally, "the plaintiff suffers pecuniary loss by justifiably relying on the representation." *Id.*

Notably, "the duty to avoid making a negligent misrepresentation is separate from any duty that may exist and can arise even if the parties' relationship otherwise precludes a duty." Jeffries v. Pat A. Madison, Inc., 269 S.W.3d 689, 691 (Tex. App.—Eastland 2008, no pet.) (cleaned up) (citing McCamish, Martin, Brown & Loeffler v. F.E. Appling Ints., 991 S.W.2d 787, 795 (Tex. 1999)). Negligent misrepresentation instead asks that "the misrepresentation ... be one of existing fact." BCY, 170 S.W.3d at 603 (citing Allied Vista, Inc. v. Holt, 987 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1999, pet. denied)). This is so since, as the second and third elements of this claim imply, a false representation is needed for negligent misrepresentation. *See* Wal-Mart, 663 S.W.3d at 581 n.55. Put differently, "[a] promise to do

or refrain from doing an act in the future is not actionable because it does not concern an existing fact." *BCY*, 170 S.W.3d at 603 (citing *Miksch v. Exxon Corp.*, 979 S.W.2d 700, 706 (Tex. App.—Houston [14th Dist.] 1998, pet. denied)).

Here, the Court finds the negligent misrepresentation cause of action plausible since some allegations concern security policies that supposedly were in place when the **Barges** signed their contract with **Wells Fargo**. *See id.* The **Barges** urge that **Wells Fargo's** presentations about its security measures, presented in purported screenshots of the **bank's** webpages, induced them into trusting their monies to the **bank**. [Dkt. 4 at 5–9]. These screenshots' authenticity notwithstanding, the Court agrees with **Wells Fargo** that many of the captured statements are about future acts. [Dkt. 6 at 16–17]. For instance, one screenshot contains a statement that **Wells Fargo** "may take [four] steps to help protect [an] account[ ]," apparently promising that the **bank** will take at least one of the listed measures if a client's account is at danger. [Dkt. 4 at 6]. Such representations concern future acts and thus must be excluded in a proper negligent misrepresentation analysis. *See BCY*, 170 S.W.3d at 603. At the same time, the screenshots discuss what appear to be **Wells Fargo's** ongoing security policies. [Dkt. 4 at 5–7]. Most tellingly, the third image shows a webpage titled "Fraud Defenses" that lists six acts that "help[a client] protect [his or her] accounts from online fraud." *Id.* at 7. **Wells Fargo** presumably implements those rules so long as it makes representations about them on its website. Put simply, the listed items are statements of existing fact that may qualify as negligent misrepresentations. *See BCY*, 170 S.W.3d at 603; *see also Jeffries*, 269 S.W.3d at 691.

***6** Accordingly, the Court **DENIES** the Motion with respect to negligent misrepresentation. *See BCY*, 170 S.W.3d at 603; *Jeffries*, 269 S.W.3d at 691; *Ashcroft*, 556 U.S. at 679.

ii. Fraud Causes of Action

(A) Fraud

The Court **DISMISSES** this claim, as the **Barges** fail to produce evidence establishing that **Wells Fargo's** publications were fraudulent. *See Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 775 (Tex. 2009) (per curiam); *Wesdem*, 70 F.4th at 291; *Ashcroft*, 556 U.S. at 679.

As the Parties agree, fraud has six elements. *Aquaplex*, 297 S.W.3d at 774. They are: "(1) a material representation was made; (2) the representation was false; (3) the speaker knew that the representation was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the statement with the intent that the other act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered an injury." *Id.* (cleaned up) (first quoting *In re FirstMerit **Bank**, **N.A.***, 52 S.W.3d 749, 758 (Tex. 2001); and then citing *Formosa Plastics Corp. U.S. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998)). These elements establish that

"[a] promise of future performance constitutes an actionable misrepresentation if the promise was made with no intent[ ] of performing [when] it was made." *Id.* (citing *Formosa*, 960 S.W.2d at 48). While "intent is determined at the time a party made the representation, it may also be inferred from the party's ... acts after the representation was made." *Id.* (cleaned up) (citing *Spolijaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986)).

That said, a fraud allegation without evidence falls short of federal pleading standards. *See Wesdem*, 70 F.4th at 291. In an ideal world, a plaintiff asserting fraud would produce "confessions by the defendant or its agents of the requisite intent." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2006) (first citing *Formosa*, 960 S.W.2d at 48; and then citing *Spolijaric*, 708 S.W.2d at 434–35). But "[p]roving that a party had no intent[ ] of performing ... is [difficult], as intent to defraud is not usually susceptible to direct proof." *Aquaplex*, 297 S.W.3d at 774–75 (first quoting *Tony Gullo*, 212 S.W.3d at 305; and then citing *Spolijaric*, 708 S.W.2d at 435). Thus, a contractual "breach combined with slight circumstantial evidence of fraud is ... [also] evidence of fraudulent intent ...." *Id.* at 775 (quotation omitted) (citing *Tony Gullo*, 212 S.W.3d at 305); *see also, e.g.*, *Tony Gullo*, 212 S.W.3d at 305–06 (breach plus evidence of spoliation and forgery sufficed); *Spolijaric*, 708 S.W.2d at 435–36 (breach plus evidence that employer refused to commit bonus plan to writing and kept silent on relevant details met standard).

Here, the **Barges** lack the required evidence of fraudulent intent and therefore fail to state a viable fraud claim. *See Aquaplex*, 297 S.W.3d at 775. The Amended Petition states all fraud elements. [Dkt. 4 at 11–12]. But the **Barges** lack an evidentiary allegation that show **Wells Fargo's** fraudulent intent and thus would shield this claim against **Wells Fargo's** 12(b)(6) challenge. *See id.* Nor do their allegations suggest that **Wells Fargo** made its written assurances with fraudulent intent. *See id.* at 3–8. While the facts that **Wells Fargo** agents "called numerous times," talked to the **Barges**, and still ended up approving the transfers after six days of investigation may indicate questionable services, they do not establish that the **bank** presents fraudulent representations on its webpage (or on the missing contract, for that matter). *See id.*; *Aquaplex*, 297 S.W.3d at 775; *Wesdem*, 70 F.4th at 291; *Ashcroft*, 556 U.S. at 679.

***7** Accordingly, the Court **GRANTS** the Motion as to the fraud assertion. *See Aquaplex*, 297 S.W.3d at 775; *Wesdem*, 70 F.4th at 291; *Ashcroft*, 556 U.S. at 679.

(B) Fraudulent Misrepresentation

The Court also **DISMISSES** this cause of action due to the lack of circumstantial evidence. *See Enter. Crude GP LLC v. Sealy Partners, LLC*, 614 S.W.3d 283, 306 (Tex. App.—Houston [14th Dist.] 2020, no pet.); *Wesdem*, 70 F.4th at 291; *Ashcroft*, 556 U.S. at 679.

Fraudulent misrepresentation requires the same elements and evidence as fraud. *See Enter. Crude*, 614 S.W.3d at 306. This means that a viable claim of fraudulent misrepresentation shows the six elements of fraud. *Id.* (citing

Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 337 (Tex. 2011)). Also, the plaintiff must show direct or circumstantial evidence to establish the movant's fraudulent intent. *See id.*; *Wesdem*, 70 F.4th at 291. The relevant evidence may establish that the defendant had no intent to perform the promised act, knew that the representation was false or made recklessly, or made the promise with the intent for the plaintiff to act on the promise. *See Enter. Crude*, 614 S.W.3d at 306 (gathering cases).

Here, the same lack of evidence that undermines the **Barge's** fraud theory permeates their fraudulent misrepresentation cause of action. [Dkt. 4 at 11–12].

Accordingly, the Court **GRANTS** the Motion in respect to this claim. *See Enter. Crude*, 614 S.W.3d at 306; *Wesdem*, 70 F.4th at 291; *Ashcroft*, 556 U.S. at 679.

iii. Contractual Causes of Action

(A) Breach of Contract

The Court **DISMISSES** this theory for the absence of a specific provision from the contract signed by the **Barges**. *See Bayway Servs., Inc. v. Ameri-Build Const., L.C.*, 106 S.W.3d 156, 160 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Ashcroft*, 556 U.S. at 679.

"Breach of contract requires pleading *and proof* that (1) a valid contract exists; (2) the plaintiff performed or tendered performance as contractually required; (3) the defendant breached the contract by failing to perform or tender performance as contractually required; and (4) the plaintiff sustained damages due to the breach." *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 890 (Tex. 2019) (emphasis added) (citing *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 501 n.21 (Tex. 2018)). It is true that other evidence may supplement the contract and that its "terms cannot be viewed in isolation, ... because doing so distorts [the contract's] meaning." *Id.* at 889. At the same time, the Court must honor "the written expression of the parties' intent." *Id.* at 888 (first citing *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 763 (Tex. 2018); and then quoting *Matagorda Cty. Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 740 (Tex. 2006) (per curiam)). This is so because "a contract's plain language controls," given that the "objective manifestations of intent" are crucial to a contractual case. *Id.* (alterations and citations omitted). So "[a] petition in an action based on a contract must contain ... the substance of the contract which supports the pleader's right to recover." *Bayway*, 106 S.W.3d at 160.

***8** Here, the Court must dismiss this cause of action because **Barges** fail to produce a single contractual provision allegedly breached by **Wells Fargo**. *See id.*; *Ashcroft*, 556 U.S. at 679. Surely the couple signed at least one contract to open their accounts with the **bank**. *See* [Dkt. 4 at 3]. But, as **Wells Fargo** rightly notes, the Amended Petition instead uses the three screenshots and "broad and general claims" to pursue this theory. *Id.* at 3–9, 12. The Court agrees that these materials "do not amount to a contract." *See* [Dkt. 8 at 8]. Nor does the **Barges**' response brief cite their contract. [Dkt.

7 at 22–23]. The **Barges** seem to be aware of this as well, as they explain that they have yet to conduct adequate discovery and will address this deficiency if given a chance to do so. *Id.* at 23.

Accordingly, the Court **GRANTS** the Motion as to this cause of action. *See* Bayway, 106 S.W.3d at 160; *Ashcroft*, 556 U.S. at 679.

(B) Breach of Express Warranty

The Court declines to dismiss this claim since **Wells Fargo's** statements about its security measures adequately support it. *See* *Chrysler-Plymouth City, Inc. v. Guerrero*, 620 S.W.2d 700, 705 (Tex. App.—San Antonio 1981, no writ); *Ashcroft*, 556 U.S. at 679.

A claim for breach of express warranty is "contractual in nature." *Med. City Dall., Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 60 (Tex. 2008) (citations omitted). This is so because "[a]n express warranty is the result of a negotiated exchange" and therefore a "creature of contract." *Id.* at 60–61 (citations omitted). An express warranty claim thus requires a court to rely on "well-established rules for interpretation and construction of contracts." *Id.* at 61 (citations omitted). But, at the same time, the defendant's factual representations made before the contract's formation may create an express warranty. *See* *Chrysler-Plymouth*, 620 S.W.2d at 705 (salesman's assertions regarding product's condition sufficed for finding of express warranty). This conversely means that opinions, beliefs, judgments, or estimates do not lead to an express warranty. *See* *Gen. Supply & Equip. Co., Inc. v. Phillips*, 490 S.W.2d 913, 917–18 (Tex. App.—Tyler 1972, writ ref'd n.r.e.). Notably, a claim for breach of express warranty supported by general assertions about security systems and protocols is one about services. *See* *Contractors Source, Inc. v. Amegy **Bank** Nat'l Ass'n*, 462 S.W.3d 128, 138 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

Here, the Court rules that **Wells Fargo's** representations on its website about its security measures satisfy the 12(b)(6) standard. *See* *Chrysler-Plymouth*, 620 S.W.2d at 705; *Ashcroft*, 556 U.S. at 679. The Court already found that the statements shown in the third screenshot presented in the Amended Petition constitute statements of present facts. Section III.A.2.a.i.(C). Such factual representations may create express warranties about security systems and protocols used by **Wells Fargo**. *See* *Chrysler-Plymouth*, 620 S.W.2d at 705; *Contractors Source*, 462 S.W.3d at 138.

Accordingly, the Court **DENIES** the Motion as to this theory. *See* *Chrysler-Plymouth*, 620 S.W.2d at 705; *Ashcroft*, 556 U.S. at 679.

(C) Breach of Implied Warranty

The Court **DISMISSES** this cause of action as well because of its lack of specificity. *See* *Nghiem v. Sajib*, 567 S.W.3d 718, 723–24 (Tex. 2019); *Ashcroft*, 556 U.S. at 679.

"Causes of action for breach of implied warranties defy simple categorization because an implied warranty is a freak hybrid born of the illicit intercourse of tort and contract."

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Nghiem, 567 S.W.3d at 723 (quotation and citations omitted). It is true that "[t]he precise nature of [an implied warranty] claim [depends on] the damages alleged: when the damages are purely economic, the claim sounds in contract[ ] ...." *JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701, 705 (Tex. 2008) (first citing *DeLanney*, 809 S.W.2d at 495; and then citing *Jim Walter*, 711 S.W.2d at 618). But implied warranties "have feet" in both contract and tort because they are "created by operation of law in connection with a contract." *Nghiem*, 567 S.W.3d at 724 (citing *JCW*, 257 S.W.3d at 704). Further, "[i]mplied warranties may be imposed either by statute or under the common law." *Rocky Mountain Helicopters, Inc. v. Lubbock Cnty. Hosp. Dist.*, 987 S.W.2d 50, 52 (Tex. 1998) (citing *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 438 (Tex. 1995)). All this is to say that there are many variants of implied warranty, each of which "behave[s] differently" and therefore requires different elements. *See Nghiem*, 567 S.W.3d at 724 (citation omitted).

***9** Here, **Wells Fargo** successfully challenges the **Barges**' vague assertion of breach of implied warranty. *See id.*; *Ashcroft*, 556 U.S. at 679. The Amended Petition presents a rather undeveloped articulation of this theory, presented in the same section as the express warranty theory. [Dkt. 4 at 14–15] ("Breach[es] of Express and Implied Warranties"). This shortcoming, again, seems to arise out of the fact that the **Barges** could not amend their complaint "to fit the heightened standard of a federal pleading" due to insufficient discovery. *See* [Dkt. 7 at 23]. The Amended Petition may satisfy state pleading standards, but it fails to meet federal ones. *See Nghiem*, 567 S.W.3d at 724; *Ashcroft*, 556 U.S. at 697, 679.

Accordingly, the Court **GRANTS** the Motion as to this cause of action. *See Nghiem*, 567 S.W.3d at 723–24; *Ashcroft*, 556 U.S. at 679.

b. Statutory Claim

i. DTPA Violation

The Court declines to dismiss this theory since its negligent misrepresentation and express warranty breach counterparts enable it to meet the pleading standard. *See Tony Gullo*, 212 S.W.3d at 305; *Nghiem*, 567 S.W.3d at 722; *Ashcroft*, 556 U.S. at 679.

When evaluating a claim under the DTPA, the Court must consider "both the source of the defendant's duty to act (whether it arose solely out of the contract or from some common[ ]law duty) and the nature of the remedy sought by the plaintiff." *Formosa*, 960 S.W.2d at 45 (quoting *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 13–14 (Tex. 1996) (per curiam)). In a contract case, a breach of the contract itself is not a "false, misleading, or deceptive" act that violates the DTPA. *Tony Gullo*, 212 S.W.3d at 304 (citing *Ashford Dev., Inc. v. USLife Real Est. Servs. Corp.*, 661 S.W.2d 933, 935 (Tex. 1983)). In other words, a mere contractual breach cannot support a DTPA noncompliance allegation. *See id.* But the DTPA allows recovery for an initial misrepresentation. *See Tony Gullo*, 212 S.W.3d at 305 (citation omitted) (discussing fraudulent misrepresentation). Likewise, a viable express warranty breach claim may support a DTPA noncompliance cause of action. *See Nghiem*,

567 S.W.3d at 722 (citing *La Sara Grain Co. v. First Nat'l **Bank** of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984)).

Here, the DTPA violation theory is viable as the negligent misrepresentation and warranty breach claims are too. *See* *Tony Gullo*, 212 S.W.3d at 305; *Nghiem*, 567 S.W.3d at 722; *Ashcroft*, 556 U.S. at 679. The Court determined that most causes of action fall short of the 12(b)(6) scrutiny. Sections III.A.2.a.i.(A)–(B), III.A.2.a.ii.(A)–(B), III.A.2.a.i.(A), III.A.2.a.i.(C). But the Court also determined that the negligent misrepresentation and breach of express warranty claims survive the Motion. Sections III.A.2.a.i.(C), III.A.2.a.iii.(B). Since the DTPA allows recovery for those causes of action, the Court concludes that the **Barges** successfully pleaded this statutory theory as well. *See* *Tony Gullo*, 212 S.W.3d at 305; *Nghiem*, 567 S.W.3d at 722; *Ashcroft*, 556 U.S. at 679.

Accordingly, the Court **DENIES** the Motion as to the DTPA violation cause of action. *See* *Tony Gullo*, 212 S.W.3d at 305; *Nghiem*, 567 S.W.3d at 722; *Ashcroft*, 556 U.S. at 679.

B. Leave to Amend

Finally, after dismissing seven causes of action, the Court grants the **Barges** another chance to replead all seven due to **Wells Fargo's** failure to cooperate in discovery. *See* *S&W Enters., L.L.C. v. SouthTrust **Bank** of Ala.*, 315 F.3d 533, 535 (5th Cir. 2003); *Douglas v. **Wells Fargo Bank, N.A.***, 992 F.3d 367, 373 (5th Cir. 2021); *Brown v. Taylor*, 911 F.3d 235, 246 (5th Cir. 2018) (per curiam); *Edionwe v. Bailey*, 860 F.3d 287, 295 (5th Cir. 2017); *Ashcroft*, 556 U.S. at 679.

***10** Federal Rule of Civil Procedure 16(b) "governs amendment of pleadings after a scheduling order deadline has expired." *S&W*, 315 F.3d at 536 (cleaned up); Fed. R. Civ. P. 16(b). In other words, Rule 16(b)(4) applies if "leave to amend would require modification of the [live] scheduling order." *S&W*, 315 F.3d at 536; Fed. R. Civ. P. 16(b)(4). Such an amendment is warranted "upon a showing of good cause and by leave of the Court." *S&W*, 315 F.3d at 535 (cleaned up). "The good cause standard requires the party seeking relief to show that the deadlines cannot reasonably be met despite its diligence." *Id.* (cleaned up). "If the party [does] show[a] good cause, the [C]ourt may then consider certain factors under Rule 15(a)(2)." *Douglas*, 992 F.3d at 373 (citing *Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987, 994 (5th Cir. 2005)). Rule 15(a)(2) states that the Court may "freely give leave to amend the complaint when justice so requires." *Brown*, 911 F.3d at 246 (cleaned up); Fed. R. Civ. P. 15(a)(2). But the Court can also deny leave to amend for a "substantial reason." *Brown*, 911 F.3d at 246 (citations omitted). Precedents identify at least five rationales for failure to allow leave to amend: "undue delay, bad faith on the movant's part, repeated failure to cure deficiencies, undue prejudice to the opposing party, and futility of the amendment." *Edionwe*, 860 F.3d at 295 (cleaned up); *see also* *Foman v. Davis*, 371 U.S. 178, 182 (1962) (implying that there could be other rationales —"etc."—for granting a leave to amend the complaint).

Here, the **Barges** have exercised their privilege to a free amendment, and the deadline to file an amended complaint has passed. *See*

[Dkts. 3 (the original complaint), 4 (the live Amended Petition), 21 (the First Amended Scheduling Order)]. The couple thus asks that they be allowed another chance to amend their complaint, especially as they had yet to "receive discovery materials which may be necessary" to amend the Amended Petition and meet "the heightened standard of a federal pleading." [Dkt. 7 at 3, 22–23, 25]. The **Barges** aver that this is due in part to **Wells Fargo's** refusal to produce the documents they need to establish their claims. [Dkt. 13 at 4–5].

The Court rules that **Wells Fargo's** failure to cooperate in discovery is a good cause and so gives the **Barges** one more chance with all dismissed causes of action. *See* S&W, 315 F.3d at 535; *Douglas*, 992 F.3d at 373; *Brown*, 911 F.3d at 246; *Edionwe*, 860 F.3d at 295; *Ashcroft*, 556 U.S. at 679. The couple's response brief observes that they filed the Amended Petition before adequate discovery occurred. [Dkt. 7 at 22–23]. The **Barges** thus implore that "dismiss[ing] a proper state court pleading based on federal standards before [they] had [an opportuunity] to receive discovery materials" would be unjust. *Id.* at 23. The Court agrees. *See Douglas*, 992 F.3d at 373; *Edionwe*, 860 F.3d at 295; *Ashcroft*, 556 U.S. at 679; *see also* Fed. R. Civ. P. 1 (declaring that the Federal Rules of Civil Procedure "should be construed, administered, and employed by the [C]ourt *and* the [P]arties to secure the *just*, speedy, and inexpensive determination of every action and proceeding) (emphases added). Also, Federal Rule of Civil Procedure 15(a)(2) states that the Court "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Each dismissal is due to the absence of supporting evidence or allegations. Sections III.A.2.a.i.(A)–(B), III.A.2.a.ii.(A)–(B), III.A.2.a.iii.(A), III.A.2.a.iii.(C). Considering that about ten months have passed since this case was removed, the **Barges**, had there been adequate discovery, could have by now decided whether they want to replead some or all of the dismissed theories. *See* [Dkts. 1 (the removal notice); 9–10, 19 (discovery disclosures)]. This assessment finds further support in the Court's determination that no other reason for denying an amendment applies. *See Edionwe*, 860 F.3d at 295; *Foman*, 371 U.S. at 182; *Ashcroft*, 556 U.S. at 679. Granting one more chance to remedy a discovery issue creates neither an undue delay nor an undue prejudice. *See Edionwe*, 860 F.3d at 295; *Ashcroft*, 556 U.S. at 679. The Court finds no bad faith or futility. *See Edionwe*, 860 F.3d at 295; *Ashcroft*, 556 U.S. at 679. Nor is there a repeated failure to cure deficiencies just yet. *See Edionwe*, 860 F.3d at 295; *Ashcroft*, 556 U.S. at 679.

***11** Accordingly, the Court **DISMISSES WITHOUT PREJUDICE** and allows the **Barges** an additional chance to replead their negligence, breach of fiduciary duty, gross negligence, fraud, fraudulent misrepresentation, breach of contract, and breach of implied warranty causes of action after adequate discovery takes place. *See* S&W, 315 F.3d at 535; *Douglas*, 992 F.3d at 373; *Brown*, 911 F.3d at 246; *Edionwe*, 860 F.3d at 295; *Ashcroft*, 556 U.S. at 679.

IV. CONCLUSION

It is therefore **ORDERED** that **Wells Fargo's** Motion [Dkt. 6] is hereby **GRANTED IN PART**. The **Barges**' negligence, breach

of fiduciary duty, gross negligence, fraud, fraudulent misrepresentation, breach of contract, and breach of implied warranty claims are **DISMISSED WITHOUT PREJUDICE**.

It is further **ORDERED** that the Motion is hereby **DENIED** with respect to the negligent misrepresentation, breach of express warranty, and DTPA violation theories.

The Court will issue the Second Amended Scheduling Order—which will establish, among others, the new dispositive motion deadline and trial setting—once the Court is satisfied that **Wells Fargo** fulfilled its discovery duties.

All Citations

Not Reported in Fed. Supp., 2024 WL 2520324

Footnotes

1 The Court agrees with the **Barges** that Federal Rule of Civil Procedure 9(b) governs their fraud claims. *See* *Wesdem, L.L.C. v. Ill. Tool Works, Inc.*, 70 F.4th 285, 291 (5th Cir. 2023); *Ashcroft*, 556 U.S. at 679. The usual 8(a) standard demands that the complaint "do more than name laws that may have been violated by the defendant" by stating "facts regarding what conduct violated those laws." *Anderson v. U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 525, 528 (5th Cir. 2008). But a fraud claim under Rule 9(b) "requires that the plaintiff 'state with particularity the circumstances constituting [the] fraud.' " *Wesdem*, 70 F.4th at 291 (alteration in original) (quoting Fed. R. Civ. P. 9(b)).

2 The Court notes that its decisions on negligence and DTPA claims comply with the economic loss rule. *See* *Chapman Custom Homes, Inc. v. Dall. Plumbing Co.*, 445 S.W.3d 716, 718 (Tex. 2014) (per curiam); *Ashcroft*, 556 U.S. at 679. "The economic loss rule generally precludes recovery in tort for economic losses resulting from a party's failure to perform under a contract when the harm [is] only ... the economic loss of a contractual expectancy." *Chapman*, 445 S.W.3d at 718 (first citing *LAN/STV v. Martin K. Eby Constr. Co., Inc.*, 435 S.W.3d 234, 243 (Tex. 2014); and then citing *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986)). "But it does not bar all tort claims arising out of a contractual setting." *Id.* Indeed, "a party states a tort claim when the duty allegedly breached is independent of the contractual undertaking and the harm suffered is not merely the economic loss of a contractual benefit." *Id.* (first citing *LAN/STV*, 435 S.W.3d at 242 n.35; and then citing *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494–95 (Tex. 1991)). Here, the **Barges** allege that they have a contractual relationship with **Wells Fargo**. [Dkt. 4 at 3–16]. This Court holds that **Wells Fargo** did not owe a duty to the **Barges** and thus dismissed their negligence, breach of fiduciary duty, and gross

negligence claims. Sections III.A.2.a.i.(A)–(B). But this Court also denies the Motion with respect to the negligent misrepresentation cause of action, which does not require a duty to satisfy the pleading standard. Section III.A.2.a.i.(C). And the DTPA violation theory survives partly since the negligent misrepresentation cause of action survives. Section III.A.2.b. Accordingly, these outcomes follow the economic loss rule. *See* *Chapman*, 445 S.W.3d at 718.

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CASE NO. 59

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United States District Court,
S.D. **Texas**, Houston Division.

PREMIERE HOLDINGS
OF TEXAS LP., Plaintiff,
v.
STERLING REIT, INC., et al., Defendants.

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Sept. **26**, **2006**.

Attorneys and Law Firms

Ernest W. Boyd, Jr., Jeremy Richard Stone, Mehaffy Weber PC, John F. Higgins, IV, Porter & Hedges LLP, Houston, TX, for Plaintiff.

ORDER

GILMORE, J.

***1** Pending before the Court is Defendant Thomas Mathew's Motion for Summary Judgment. (Instrument No. 36).

I.

On June 23, 2005, this Court issued an Order withdrawing the reference as to this adversary proceeding, which was originally filed in the United States Bankruptcy Court for the Southern District of Texas, Houston Division (**Case No**. 03-3948) pursuant to 28 U.S.C. § 157 and § 1334.[1] (Instrument No. 8). Venue is proper in this district pursuant to 28 U.S.C. § 1409. On September 15, 2005, Premiere Holdings of Texas, LP Liquidating Trust ("Plaintiff" or "Premiere")[2] filed its Second Amended Complaint against Defendants Sterling REIT, Inc. ("Sterling") and Thomas Mathew ("Mathew") alleging dishonor of a promissory note, breach of contract, fraud, and conspiracy relating to an exit fee for broker services allegedly rendered in relation to a loan made to Defendants. (Instrument No. 20, at 3-4). Plaintiff is seeking actual damages as well as exemplary damages, attorneys' fees, and pre- and post-judgment interest. (*Id.,* at 4-5).

In 2001, Mathew and Sterling made a business decision to purchase the remainder of the ownership interests in the Fixed Based Operations ("FBO's") in which Mathew was already part owner. (Instrument No. 36, at 2). FBO's are "private airports" of sorts that provide hangar, fueling, and other services at airports. (*Id.*). The purchase of the ownership interests would allow Sterling and Mathew to become the sole owners of the FBO's. (*Id.*). Considering the time restraints to close this deal, and after having considered more traditional lending institutions (e.g., Wells Fargo Bank) that could not produce the amount of loan money necessary in such a short amount of time, Sterling and Mathew chose Money Mortgage, Ltd. ("Mortgage" or

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"Money Mortgage") (a division of Premiere) to underwrite the loan. (*Id.*). Lucky Srinivasan ("Lucky"), an agent and consultant of Sterling, contacted Mortgage to initiate the loan for the FBO's in the amount of $5,000,000 at a 15% interest for a term of 12 months ("the Waterfront Note"). (*Id.*). Once the loan process was initiated, Mortgage gave Lucky loan documents to be signed by Sterling and Mathew. The documents included the following: Mortgage Loan Application: Equity Loan (the general application); the Disclosures Regarding Mortgage Transaction: Equity Loan (document purporting to establish a broker relationship and basis for broker fees); the Waterfront Note; and the Exit Note (a promissory note in the amount of $500,000). (*Id.*).

On August 9, 2001, Mathew signed all of the documents related to the loan, and the loan was closed and funded on that same day. (*Id .,* at 1). As part of the closing, Mathew and Sterling paid Mortgage a $750,000 broker's fee as part of the loan agreement. (*Id.*). The Exit Note, which stated that an exit fee in the amount of $250,000 would be payable to Mortgage if the Waterfront Note was paid on or before six months before the due date, or $500,000 if the loan was paid off after six months after closing. The Exit Note also stated that "[a]ll exit fees shall be payable upon payoff of the loan." (*Id.,* at Exhibit 2). The Note also includes the following clause:

> ***2** By your signature below Borrower agrees (1) the loan fees and exit fees are paid as broker compensation in consideration for arranging this loan; (2) the loan and exit fees are reasonable and voluntarily paid by Borrower; (3) the lender will receive none of the loan fees and exit fees; (4) the loan fees and exit fees are not paid to Broker for the use or forbearance of money; (5) Money Mortgage, Ltd. and its affiliates will not fund any of the loan amount; (6) it has rights under Texas Usury Law and specifically renounces its right to bring a usury claim arising out of this Mortgage Loan Application and any loan made as a direct result of this Mortgage Loan Application; and (7) Borrower specifically agrees that absent his express and effective waiver of any possible usury claim, Money Mortgage, Ltd. would not arrange for and its investors would not extend credit under this Mortgage Loan Application.

(*Id.*). The $5,000,000 Waterfront Note was paid in full in February 2003 after a settlement was reached in a suit commenced by Mathew against Waterfront. (Instrument No. 38, at 2). Mathew, however, did not at that time pay the Exit Note, despite Plaintiff's demand letter dated February 13, 2003, per Lucky's advice.

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(Instrument No. 36, at 4; Instrument No. 38, Exhibit C). Mathew states that he did in fact have the money to pay Mortgage the $500,000 Exit Note fee, but because Mortgage never requested payment of the fee, Mathew never tendered the money-despite his contention that he believed he was legally obligated to pay the additional fee. (Instrument No. 36, at 4-5).

Plaintiff states that both Mortgage and Lapin were divisions within Premiere as well as assumed names of Premiere. (*Id.,* at 4). Plaintiff argues that Lapin, while affiliated with Premiere, was a separate and distinct entity. (*Id.,* at 5). Defendant argues that Mortgage and Lapin were both wholly-owned subsidiaries of Premiere where all were housed in the same office under one lease, all of their employees' paychecks came from Premiere, and all were a part of an operation controlled by Premiere. (Instrument No. 36, at 3). As for Waterfront Mortgage, L.P. ("Waterfront" or "Waterfront Mortgage") (the company to which the principal amount of the loan was due), Defendant believes the entity to be no more than a "paper company." (*Id.,* at 4). Plaintiff states that just a short time before Sterling and Mathew's loan was closed, either Premiere or its affiliates filed a Certificate of Limited Partnership for Waterfront with the Texas Secretary of State. (*Id.*). Waterfront's general partner was listed as Lapin & Wigginton, Ltd., but Defendant asserts that there is no evidence that Waterfront had any employees, officers, bank accounts, or assets (besides it being named as payee on Mathew's Waterfront note). Further, Defendant contends that there is no evidence that Waterfront received funds from investors in the general public to fund the loan to Mathew and Sterling. (*Id.*). The $500,000 exit fee remains unpaid and is the focus of this adversary proceeding that was removed from the Bankruptcy Court. (Instrument No. 1). On the other hand, Plaintiff states that its summary judgment evidence demonstrates that Waterfront did have limited partners who funded the Mathew and Sterling loan, and the facts that Waterfront continued on as a limited partnership even after the bankruptcy of Premiere and that Mathew and Sterling settled with Waterfront on the loan amount, contradict Defendant's position that Waterfront was a "paper company." (Instrument No. 38, at 5).

***3** Prior to the closing, Defendant Mathew avers that he had no contact or communication of any kind with Mortgage, Lapin, or any other "Premiere entity." (Instrument No. 36, at 4). After the closing, Mathew states that he had a brief conversation with Mr. Kaminski, a purported limited partner in Waterfront. (*Id.*). In early 2004, Richard Kammerman ("Kammerman") was retained as counsel for Sterling and Mathew. (*Id.,* at 5). In November 2005, this Court granted Kammerman's motion to withdraw as Sterling's counsel, and as a result, Sterling was ordered to retain new counsel. (*Id.*). By January **2006**, Sterling had not yet retained new counsel in this case, and this Court granted Plaintiff's Motion for Default Judgment against Sterling and issued a Default Judgment. (*Id.*).

Plaintiff Premiere's corporate structure chart shows that Mortgage and Lapin & Wigginton, Ltd. ("Lapin") conduct two separate functions in the processing of a loan-the chart states that Mortgage is responsible for mortgage operations, while Lapin is responsible for

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funding operations. (Instrument No. 38, at Exhibit E). More specifically, Lapin was responsible for raising cash from the general public to fund loans-charging 12% interest on amounts invested with Lapin; and Mortgage was responsible for originating, underwriting, negotiating, approving, funding, and servicing the loans. (Instrument No. 36, at 3).

On April 10, **2006**, Defendant Mathew filed this Motion for Summary Judgment. (Instrument No. 36). Defendant argues that the Exit Note is unconscionable, fraudulent, and violative of the usury laws of Texas. (*Id.,* at 7). More specifically, Defendant argues that Plaintiff's claims of fraud and conspiracy fail as a matter of law because there were never any communications made by Mathew to Mortgage, Lapin, Premiere, Waterfront, or any of the other Premiere-related entities. (*Id.,* at 8). Further, Defendant argues that because no broker services were rendered by Mortgage to him or Sterling, no consideration was given in exchange for the Exit Note, and therefore, the Note violates general principles of contract law. (*Id.,* at 9). Also, Defendant believes that the broker fees charged by Mortgage are unconscionable, as the total amount of fees equaled $1,250,000 ($750,000 at closing plus $500,000 upon payment of the principal). (*Id.,* at 11-15). Defendant also asserts a usury defense because he believes that if the Court determines consideration was given for the Exit Note, the broker fees charged to Mathew and Sterling is actually disguised interest on the $5,000,000 loan. (*Id.,* at 15-18). Finally, Defendant raises the defense of fraud because he argues that Plaintiff perpetrated a fraud on him by making misrepresentations to him about material facts regarding the loan. (*Id.,* at 18-19).

On May 1, **2006**, Plaintiff Premiere filed its Response to Defendant Mathew's Motion for Summary Judgment. (Instrument No. 38). First, Plaintiff objects to affidavits attached to Defendant's Motion for Summary Judgment because (1) Plaintiff alleges that much of Mathew's affidavit is based on hearsay and contains conclusory statements, and (2) Plaintiff alleges that Jeffrey Dunn's affidavit should be stricken because Mr. Dunn has no personal knowledge of the matters in this case. (*Id.,* at iv). Plaintiff contends that Defendant's defenses of fraud and conspiracy fail because Defendant Mathew did in fact sign the loan documents, and as a result, made representations that he would pay the exit fee upon the repayment of the loan. (*Id.,* at iv-v). Moreover, Plaintiff states that there is ample evidence to demonstrate that consideration was given for the Exit Note because Mathew has testified that he received exactly what he wanted and that he was able to close on his transaction. (*Id.,* at v). Further, Plaintiff avers that because Mathew knew of all the fees and terms of the agreement, and signed the loan documents in his own home, the Exit Note cannot constitute an unconscionable contract. (*Id.*). Premiere next argues that the Exit Note is not usurious on its face, and that Defendant cannot assert this defense because of the savings clause in the Exit Note. (*Id.,* at v-vi). Lastly, Premiere contends that Mathew's affirmative defense of fraud fails because nothing was ever misrepresented to him, and he cannot show any damages. (*Id.,* at vi).

II.

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***4** Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. A fact is "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see also United States v. Arron*, 954 F.2d 249, 251 (5th Cir.1992). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 248. If the evidence rebutting the motion for summary judgment is only colorable or is not significantly probative, summary judgment should be granted. *See id.* at 2511; *see also Thomas v. Barton Lodge, Ltd.*, 174 F.3d 636, 644 (5th Cir.1999). The summary judgment procedure, therefore, enables a party "who believes there is no genuine issue as to a specific fact essential to the other side's case to demand at least one sworn averment of that [specific] fact before the lengthy process continues." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886-88, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

Under Rule 56(c), the moving party bears the initial burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial and of identifying those portions of the record that demonstrate such absence. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 576, 586-87 (1986); *see also Burge v. Parish of St. Tammany*, 187 F.3d 452, 464 (5th Cir.1999).

Where the moving party has met its Rule 56(c) burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts.... [T]he nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial.*" ' *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 586-87 (quoting FED. R. CIV. P. 56(e)) (emphasis in original). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Engstrom v. First Nat'l Bank*, 47 F.3d 1459, 1462 (5th Cir.1995). To sustain the burden, the nonmoving party must produce evidence admissible at trial. *See Anderson*, 477 U.S. at 242; *see also Thomas v. Price*, 975 F.2d 231, 235 (5th Cir.1992) ("To avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue.").

The Court reviews the facts in the light most favorable to the nonmovant and draws all reasonable inferences in favor of the nonmovant. *See Brown v. Bunge Corp.*, 207 F.3d 776, 781 (5th Cir.2000). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252.

III.

A.

Defendant argues that no conspiracy existed to commit fraud because there was little to no communication among Defendant and Plaintiff, Mortgage, Waterfront, and any of

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the other Premiere-related entities. (Instrument No. 36, at 8). To prove a *prima facie* case of common-law fraud, the Plaintiff must show that: (1) a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the representation was made with the intention that it be acted upon by the other party; (5) the party acted in reliance upon the representation; and (6) the party suffered injury. *Johnson & Higgins v. Kenneco Energy,* 962 S.W.2d 507 (Tex.1998). A promise to do something in the future is not fraud unless the promise was made with the intent not to perform. *M.J. Sheridan & Sons Co. v. Seminole Pipeline Co.,* 731 S.W.2d 620, 624 (Tex.App.-Houston [1st Dist.] 1997, no writ). Plaintiff argues that Defendant and Sterling committed fraud in a conspiracy against it because by signing the loan documents, which included the Exit Note, Defendant represented to Plaintiff that he would pay the exit fee ($500,000) in conjunction with the loan from Mortgage, but has not paid such fee. (Instrument No. 1, at 4).

1.

***5** Circumstantial evidence, including the subsequent conduct of the promisor, may be used to prove intent not to perform a promise at the time it was made. *Pulchny v. Pulchny,* 555 S.W.2d 543, 545 (Tex.Civ.App.-Corpus Christi 1977, no writ). "Intent is a fact question uniquely within the realm of the trier of fact because it so depends upon the credibility of the witnesses and the weight to be given to their testimony" *Spoljaric v. Percival Tours, Inc.,* 708 S.W.2d 432, 434 (Tex.1986); and therefore, "[s]ummary judgment is rarely proper." *Taylor v. Bonilla,* 801 S.W.2d 553, 557 (Tex.App.1990, writ denied). By itself, the failure to perform does not establish fraudulent intent; however, "[s]light circumstantial evidence of fraud, when considered with the breach of promise to perform, is sufficient to support a finding of fraudulent intent." *Spoljaric,* 708 S.W.2d at 435 (internal quotations omitted).

Here, it is clear from the record that Mathew signed all of the loan documents, on his own volition, including the Exit Note, which required him to pay an additional $500,000 when the principal amount of the loan was paid off at a certain time. While this is true, evidence in the summary judgment record also indicates that Mathew's verbal communication with Plaintiff Premiere, Waterfront, or any of the Premiere-related entities was virtually non-existent. Mathew does state that at the time he signed the Exit Note, he intended to pay the amount in full upon the repayment of the entire loan balance, which, if true, would negate the majority of the elements of Plaintiff's fraud and conspiracy claims. Further, Mathew states that he would have paid the Exit Note in February 2003, at which time he said he was acting without counsel, if he had received such a request from Premiere. Plaintiff counters Mathew's statement by providing evidence to the Court that in February 2003 Mathew was in fact represented by counsel, and also that a letter dated February 13, 2003 entitled "Notice of Intention to Accelerate and Demand for Payment" was sent to both Mathew and Sterling demanding payment of the Exit Note. (Instrument No. 38, at Exhibit C).

In viewing the evidence in the light most favorable to the Plaintiff, this evidence; specifically, Defendant's statement that the reason the Exit Note was never paid was in part due to the fact that he never received a request for payment of the Exit Note even when Plaintiff has produced evidence to the contrary, creates a material fact issue with respect to Mathew's intent to pay the Exit Note at the time he signed the agreement with Money Mortgage.

2.

In order to prove a case of fraud, the Plaintiff must show that Defendant possessed the requisite intent to defraud Plaintiff and that Plaintiff Premiere both justifiably and actually relied on Defendant's promise to pay the Exit Loan. *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1025 (5th Cir.1990). Defendant Mathew highlights that David Lapin (Chief Operating Office of Premiere) stated in his deposition that he was not made aware of any misrepresentations or the like by Mathew to Premiere or any other Premiere-related entity regarding the payment of the Exit Note or the loan. (Instrument No. 36, at 8). Plaintiff attempts to refute this evidence by stating that the deposition testimony of Richard Melamed ("Melamed")(real estate attorney for Premiere) and Ted Murray ("Murray") (principal of Premiere) provide proof that both of these Premiere representatives believe that Premiere relied on promises made by Mathew and Sterling, and that if Mathew or Sterling signed the Exit Note without intending to pay it, it would be misrepresentation. (Instrument No. 38, at 6).

***6** To make a determination about justifiable reliance, the court must consider whether, "given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud-it is extremely unlikely that there is actual reliance on the plaintiff's part." *Id.*, at 1026; *see also General Motors Corp., Pontiac Motor Div. v. Courtesy Pontiac, Inc.*, 538 S.W.2d 3, 6 (Tex.Civ.App.-Tyler 1976, no writ) (quoted in *Haralson*, 919 F.2d at 1026) (internal quotations omitted). In other words, a plaintiff cannot justifiably rely on "representations which any [person] would recognize at once as proposterous ... or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth." *Courtesy Pontiac, Inc.*, 538 S.W.2d at 6.

Mathew maintains that because he had little to no communication with Premiere, Money Mortgage, or any other Premiere-related entities, the Court cannot presume that any of these entities acted in reliance on or suffered any injury as a result of alleged representations made by him. (Instrument No. 36, at 9). Further, Mathew states that "[m]erely refusing to pay a note or any debt when one has good reason to do so is not fraud or any civil wrong." (*Id.*). The summary judgment evidence shows, however, that Mathew did in fact sign all of the loan documents-including the Exit Note, and by his signature, he acknowledged the following:

> (1) the loan fees and exit fees are paid as broker compensation in

> consideration for arranging this loan; (2) the loan and exit fees are reasonable and voluntarily paid by Borrower; (3) the lender will receive none of the loan fees and exit fees; (4) the loan fees and exit fees are not paid to Broker for the use or forbearance of money....

(Instrument No. 36, Exhibit 2, at 2). Based on the deposition testimony and the loan agreement which includes Mathew's signature, and viewing the evidence in the light most favorable to the Plaintiff, the Court concludes that Plaintiff has provided sufficient evidence to establish that a fact issue exists as to whether its reliance on Mathew's signature was justifiable. Because genuine issues of material fact exist with respect to Plaintiff's claim that a conspiracy existed to commit fraud, Defendant's Motion for Summary Judgment with respect to that issue is DENIED.

B.

Next, Defendant argues that because there were no broker services rendered in connection with the loan agreement signed by Defendant Mathew and Sterling, no consideration was given in exchange for the Exit Note, and as a result, the Note must be declared unenforceable and/or void. (Instrument No. 36, at 9). Plaintiff argues that deposition testimony provides support for its argument that broker services were provided by Mortgage, and that because these services were performed by Mortgage for Defendant Mathew, consideration exists to support the Exit Note. "A complete failure of consideration constitutes a defense to an action on a written agreement." *Gensco, Inc. v. Transformaciones Metalurgicias Especiales S.A.*, 666 S.W.2d 549, 553 (Tex.App.-Houston [14th Dist.] 1984, writ dism'd). "The defense of failure of consideration defeats summary judgment if the nonmovant alleges facts and presents evidence that the consideration in the agreement was not received." *Stewart v. U.S. Leasing Corp.*, 702 S.W.2d 288, 290 (Tex.App.-Houston 1985, no writ (citing *O'Shea v. Coronado Transmission Co.*, 656 S.W.2d 557, 563 (Tex.App.-Corpus Christi 1983, writ ref'd n.r.e).

***7** The loan agreement and Exit Note were signed by Mathew at the same time. (Instrument No. 36, at 10). In addition to the $5,000,000 Waterfront Note, Mortgage assessed what it dubbed to be broker fees in the amount of $1,250,000 ($750,000 at closing; $500,000 Exit Note). Defendant has not yet paid the $500,000 Exit Note despite his paying back the principal amount of the loan in 2003. In this case, Defendant asserts that the Exit Note, valued at $500,000 was not supported by consideration (namely, broker services), and is therefore unenforceable. In both the loan application and the Disclosures and Mortgage and Equity Loan Agreement, Money Mortgage characterized the $1,250,000 fees as "broker fees." (*Id.*). Defendant states that despite this characterization, Mortgage never provided any broker services. (*Id.*). More specifically, Defendant asserts that Mortgage did not seek out additional lenders, and that it did not perform adequate due diligence to seek out the best possible deal. (*Id.*). On the other

hand, Plaintiff provides deposition testimony by Melamed as evidence that Mortgage did render broker services. Specifically, Melamed's deposition indicates that Mortgage originated the loans, brokered the loans, completed transactions using others' funds, arranged the loan, qualified borrowers, evaluated the collateral, and both packaged and serviced the loan. (Instrument No. 38, at 7). Defendant contends that because L & W (a Premiere affiliate) found the investors, and in its opinion essentially brokered the loan, L & W's services cannot also suffice as services provided by Mortgage, and therefore, the Exit Note still lacks consideration. Plaintiff has provided evidence that refutes this contention, however. The Premiere Holdings Corporate Chart shows that both L & W and Money Mortgage were assumed names of Premiere, and that despite each division having separate functions, they all operated under the Premiere umbrella. (Instrument No. 38, at 8). Further, Plaintiff points to Defendant's own testimony to support its position. In Defendant's deposition, he stated that he "received exactly what he asked for" (regarding the $5,000,000 loan), and that although more traditional lending institutions would have been able to structure the loan for less interest and fees, those institutions were unwilling to structure the loan in the expeditious manner which Defendant required for the purchase of FBO's. (Instrument No. 38, at 8).

In viewing the evidence in the light most favorable to the nonmovant, the Court concludes that Plaintiff has presented evidence that creates fact issues with respect to whether the Exit Note in the amount of $500,000 was supported by consideration-namely, broker services. Accordingly, Defendant's Motion for Summary Judgment with respect to the defense of lack of consideration is DENIED.

C.

Defendant alleges that even if the Court decided that Mortgage provided broker services, the amount already paid and the amount to be paid as broker fees are unconscionable, and the Exit Note is unenforceable. (Instrument No. 36, at 11). Also, Defendant states the Exit Note is unconscionable because Mortgage "never shopped the deal to anyone." (*Id.,* at 11). Plaintiff argues that the Exit Note is not unconscionable, as Mathew considered many lenders before choosing Mortgage, and Mortgage was ultimately chosen because it was the only institution willing to arrange the loan in the time period required by Defendant. (Instrument No. 38, at 10).

***8** "[T]he decision of whether some agreement is or is not unconscionable is dependent upon the existence of facts which allegedly illustrate unconscionability." *El Paso Natural Gas Co. v. Minco Oil & Gas Co.*, 964 S.W.2d 54, 61 (Tex.App.-Amarillo, 1997), *rev'd on other grounds,* 8 S.W.3d 309 (Tex.1999). The defense of unconscionability is available to prevent unfair advantage procured through surprise or deception. TEX.BUS. & COM.CODE ANN. § 2.302, cmt. 1. There is no precise or agreed upon definition of unconscionability, but "it must be shown that the agreement in question arose through [both] procedural and substantive abuse." *El Paso,* 964 S.W.2d at 61 (citing *Tri-*

Continental Leasing Corp. v. Law Office of Richard W. Burns, 710 S.W.2d 604, 609 (Tex.App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Wade v. Austin,* 524 S.W.2d 79, 85 (Tex.Civ.App.-Texarkana 1975, no writ)). First, procedural abuse relates to whether oppression and unfairness tainted the negotiation process leading up to the formation of the agreement. *Pony Express Courier Corp. v. Morris,* 921 S.W.2d 817, 820 (Tex.App.-San Antonio 1996, no writ). Things such as (1) the presence of deception, overreaching, and sharp business practices; (2) the absence of a viable alternative; (3) and the relative acumen, knowledge, education, and financial ability of the parties involved all go to the determination of whether procedural unconscionability was present at the time of the negotiation of the agreement. *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Westinghouse Electric Corp. .,* 844 F.2d 1174, 1184 (5th Cir.1988); *Wade,* 524 S.W.2d at 86; Restatement (Second) of Contracts § 208, cmt. d.. Second, substantive unconscionability relates more to the fairness of the contract itself. *Pony Express,* 921 S.W.2d at 821. Substantive unconscionability is best determined on a case-by-case basis, as it is not easily quantifiable, and case law and statutes vary somewhat on the definition of the term. It is well settled, however, that "when the negative aspects of the bargaining process and subsequent contract are *gross,* under the totality of the circumstances, the [ ] court's authority to intercede [is] triggered." *El Paso Natural Gas Co.,* 964 S.W.2d at 62 (citing Restatement (Second) of Contracts § 208, cmt. d.).

Here, Defendant states in his motion for summary judgment that because the deadline was near for the closing of the sale of the FBO's he "had no choice but to sign [the] Loan documents." (Instrument No. 36, at 12). He further states that he did not go to another lender because there was no time, and that Mortgage knew or should have known this information. (*Id.*). Mathew's deposition testimony, however, directly contradicts these statements made in his motion for summary judgment with respect to unconscionability. He stated in his deposition that he did actually consider a number of traditional lending institutions to broker the loan, but that because none of the traditional institutions were willing to arrange the loan in the time period required, he chose to conduct business with Mortgage. (Instrument No. 38, at 10). Further, there is no evidence in the record of overreaching or sharp business practices, as Mathew was told about Mortgage through his partner Sterling REIT, Sterling was the contact person between Mathew and Mortgage, and Sterling sent the loan documents to Mathew to secure his signature on the paperwork. (*Id.*). The record demonstrates that Mathew had a strong desire to close his deal expeditiously so that he could reap the benefits of a substantial profit. "[I]f the complainant did what he did because of his own motivations, and not those of his opponent, then he must suffer the result of his deal." *El Paso Natural Gas Co.,* 964 S.W.2d at 62. The record does not show, as Defendant suggests, that he was somehow forced to sign the loan documents without full knowledge of the terms of the agreement, including the terms of the Exit Note. *See Troy Mining Corp. v. Itmann Coal Co.,* 176 W.Va. 599, 346 S.E.2d 749, 754 (1986) (failing

1.

to uphold claim of unconscionability where there was a lack of evidence that indicated contract was "forced" upon the complainant); *see also Wade,* 524 S.W.2d at 86 (a person who "knowingly enters an improvident contract cannot be heard to complain thereafter). While Defendant avoids discussing his level of familiarity with regard to deals of this nature, the record shows that Defendant's acumen or level of business sophistication with respect to these types of transactions is fairly high in that he has entered into several similar agreements in the past. (Instrument No. 38, at 18). Defendant attempts to liken this case to *Walton v. Hoover, Bax & Slovacek, L.L.P.* where it was found that a contingency fee arrangment was unconscionable as a matter of law after the issue had been submitted to the jury. 149 S.W.3d 834 (Tex.App.-El Paso 2004, pet. granted). The present case is distinguishable from *Walton* because here, the loan agreement as well as the Exit Note explicitly stated the percentage rate of interest as well as the amount of broker fees that the borrower (Mathew) would be required to pay upon acceptance of the $5,000,000 loan. In *Walton,* the court considered several factors in determining that the fee arrangement was unconscionable-namely, that the agreement did not clearly and accurately explain how the fee was to be calculated, and that the fee was not tied to the work performed or the risk incurred by the firm. *Id.,* at 846-47. Also in *Walton,* the attorneys had a distinct advantage over their clients, and tried to exploit this advantage through deception. This is not the case here. The risk involved in structuring a loan of the type that was given to Mathew is evidenced by the fact that all of the traditional lending institutions sought out by Mathew declined to arrange the loan for the amount and in the time frame necessary for Mathew to still make a substantial profit on his deal. Further, Defendant Mathew was knowledgeable about these types of deals, and was made aware of all of the terms of the agreement, but still chose to enter into the deal for his own benefit.

***9** Therefore, the Court finds that Mathew was not subjected to procedural unconscionability because the record does not reflect that Mortgage was in any way deceptive with respect to making Mathew aware of its fee structure, Mathew solicited other traditional lending institutions and chose Mortgage based on the fact that it was able to structure the agreement in the time period he required, and Mathew possessed the requisite acumen to either accept or reject the agreement based on the terms that were made explicitly clear to him. Accordingly, the Court finds that Mathew was not subjected to gross procedural abuse in the formation of the agreement to pay the loan and the Exit Note.

2.

With respect to the bargaining process, Defendant argues that "the circumstances regarding the signing of the loan were oppressive." (Instrument No. 36, at 12). This averment, however, is not supported by the facts in the record. In fact, the record indicates that Mathew had an opportunity to sign the loan documents in the comforts of his own home, and that he was sent the paperwork by his partner, Sterling REIT with no time pressure from Plaintiff. (Instrument No. 38, at 11). Also, Plaintiff notes that Mathew had

legitimate commercial reasons for entering into this supposedly unconscionable agreement with Mortgage, as he wanted to make quick money on the purchase of the FBO's. (*Id.*). Texas has a strong policy in favor of freedom of contract. *Marsh v. Marsh,* 949 S.W.2d 734, 740 (Tex.App.-Houston [14th Dist.] 1997, no writ); *see also Churchhill Forge, Inc. v. Brown,* 61 S.W.3d 368, 371 (Tex.2001). Mathew has failed to make a showing that the Exit Note was formed as the result of gross oppression, fraud, or mutual mistake, as he himself sought out Mortgage's services to assist in making his deal possible given the time constraints. *See Earman Oil Co., Inc., v. Burroughs Corp.,* 625 F.2d 1291, 1299 (5th Cir.1980) (stating that an individual who both knowingly and "willingly" enters an agreement is not a victim of gross conduct). In considering the totality of the circumstances surrounding the formation of the Exit Note agreement, this Court finds that Mathew was not subjected to substantive unconscionability. Accordingly, Defendant Mathew's Motion for Summary Judgment with respect to his defense of unconscionability fails and, therefore, is DENIED.

D.

The Texas Finance Code prohibits creditors from contracting for, charging, or receiving interest in excess of the statutory limit on a loan of money. Tex. Fin.Code § 305.001. To prevail on a claim of usury, a plaintiff must show "(1) a loan of money; (2) an absolute obligation to repay the principal; and (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower." *First Bank v. Tony's Tortilla Factory, Inc.,* 877 S.W.2d 285, 287 (Tex.1994) (citing *Holley v. Watts,* 629 S.W.2d 694, 696 (Tex.1982)). Generally, lenders do not expressly charge an interest rate above the legal rate. Usury occurs more often, however, when the lender charges borrowers fees that are disguised as interest that, when added to the interest rate on the face of the loan, results in the borrower paying an interest rate that is not allowable under the law. "[A]mounts charged or received in connection with a loan are not interest if they are not for the use, forbearance, or detention of money." *First USA Management Inc. v. Esmond,* 960 S.W.2d 625, 627 (Tex.1997). To make this determination, the Texas Supreme Court has held that "fees which are an additional charge supported by a distinctly separate and additional consideration, other than the simple lending of money, are not interest and thus do not violate the usury laws." *Tony's Tortillas,* 877 S.W.2d at 287. Further, courts may look past the label given to a particular fee to discern whether the fee is a service charge or disguised interest. *Id.*

***10** Defendant Mathew argues that the $500,000 due on the Exit Note constitutes disguised interest, making the fee usurious and the Exit Note unenforceable-despite Plaintiff's attempt to make Defendant waive any possible usury claim by including such language in the Exit Note. (Instrument No. 36, at 15). The Note reads as follows:

> By your signature below Borrower agrees (1) the loan fees and exit fees are paid as broker compensation in

> consideration for arranging this loan; (2) the loan and exit fees are reasonable and voluntarily paid by Borrower; (3) the lender will receive none of the loan fees and exit fees; (4) the loan fees and exit fees are not paid to Broker for the use or forbearance of money; (5) Money Mortgage, Ltd. and its affiliates will not fund any of the loan amount; (6) it has rights under Texas Usury Law and specifically renounces its right to bring a usury claim arising out of this Mortgage Loan Application and any loan made as a direct result of this Mortgage Loan Application; and (7) Borrower specifically agrees that absent his express and effective waiver of any possible usury claim, Money Mortgage, Ltd. would not arrange for and its investors would not extend credit under this Mortgage Loan Application.

Defendant requests this Court to draw a negative inference from Mortgage's inclusion of the above language in the Exit Note, as Defendant believes it logical that a company would include such language only if it realized that it was charging interest in excess of the maximum allowed under the law. (*Id.,* at 17-18).

In an effort to provide concrete support for his usury argument, Defendant relies almost exclusively on the deposition testimony of Jeff Dunn ("Dunn"), who was retained because of his expertise in this area of the law. (*Id.,* at 16). Defendant avers that because he believes no broker services were provided, the Court must construe the $500,000 Exit Note coupled with the $750,000 paid at the time the loan was finalized as additional interest on the loan. (*Id.,* at 17). Dunn testified that in his experience, a broker's fee generally ranges from 1% to 3% of the total loan amount. According to Dunn's own calculations, Defendant argues that, given the interest rate of 15% on the $5,000,000 loan amount and the $1,250,000 in alleged broker's fees, the real amount of total interest is $2,045,256, which in his opinion, far exceeds the maximum allowable interest charge of $1,234,096 (calculated using an interest rate of 18%). (*Id.*). Plaintiff maintains, and the Court agrees, that Dunn's calculations and testimony related to whether the Exit Note is usurious do not demonstrate that the Note is in fact usurious on its face. (Instrument No. 38, at 13). "One who uses the defense of usury in a suit on a note that does not call for usurious interest on its face has the obligation to establish that there was a corrupt agreement or scheme to cover usury and that such agreement or scheme was in full contemplation of the parties." *Moss v. Metropolitan Nat'l Bank of Houston,* 533 S.W.2d 397, 399 (Tex.Civ.App.-Houston [1st Dist.] 1976, no writ). Mathew has not put forth any evidence to demonstrate that Waterfront and Money Mortgage entered into a corrupt scheme to cover usury and, therefore,

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he cannot prevail as a matter of law on this issue. Even further, after evaluating Dunn's testimony, the Court chooses not to rely on the calculations performed by Dunn, as there are clearly fact issues with respect to the true principal amount of the loan, (Plaintiff states the amount is $5,000,000; Defendant states the amount is $4,250,000 ($5,000,000 less the $750,000 in broker fees), the interest actually paid by Mathew, and the actual term of the loan.

***11** The Court has also previously discussed that a fact issue exists with regard to whether Money Mortgage actually provided broker services, which would suffice as separate consideration for the broker fees assessed at the time the loan was paid, and the broker fees related to the Exit Note. The determination of this fact is critical because if it is found that no broker services were provided to Mathew, the "broker fees" included in both the Waterfront Note and the Exit Note could potentially be categorized as disguised interest, and also lead the jury to the conclusion that the broker fees coupled with the interest of 15% on the $5,000,000 Note are usurious in nature.

Moreover, while Mathew alleges that Money Mortgage served as the lender in the transaction, Plaintiff argues that Waterfront Mortgage, L.P. was the lender (despite Defendant's belief that Waterfront is a paper company) and that Money Mortgage was in fact the broker on the deal. (*Id.,* at 14-15). Plaintiff states that Waterfront Mortgage is not related to Premiere, and that its general partner (post-Premiere's bankruptcy) is Jefferson Advisors GP, L.L.C. To bolster Plaintiff's argument that Waterfront Mortgage is not a paper company and that it existed on its own-wholly separate from Premiere-Plaintiff points to the Premiere Holdings Corporate Chart as well as to the fact that Waterfront Mortgage continued on as a limited partnership even after the bankruptcy of Premiere. Also, Plaintiff highlights that when Defendant Mathew paid the $5,000,000 loan, he paid Waterfront Mortgage and not Money Mortgage, which in its opinion further evidences that Waterfront Mortgage and Money Mortgage had two separate and distinct roles in the execution of the loan agreement and Exit Note with Mathew (as lender, Waterfront received payment of the principal; as broker, Money Mortgage received payment of the broker fees). (*Id.*). In viewing the evidence in the light most favorable to the non-movant, Plaintiff has presented sufficient summary judgment evidence to create a fact issue with respect to whether Waterfront Mortgage acted as simply a paper company in the Mathew transaction, or if Waterfront is a separate entity, unaffiliated with Premiere that received the payment of the principal amount of the loan.

The determination of whether the broker fees included in the Waterfront Note as well as the broker fees included in the Exit Note are usurious is rather fact intensive. *Morris v. Miglicco,* 468 S.W.2d 517, 520 (Tex.Civ.App.-Houston [14th Distr.] 1971, reh'g denied) (remanding the case to the trial court where court found that the question of the bona fides of the charge for brokerage fees is a question of fact). Defendant has not satisfied his burden of proof by demonstrating that no genuine issues of material fact exist with respect to this affirmative defense and, therefore, the court cannot conclude that as a matter of law Defendant should prevail on this defense. Accordingly, Defendant's Motion for Summary

Judgment regarding his usury claim defense is DENIED.

1.

***12** Plaintiff contends that Defendant cannot prove a claim of usury on a receiving or charging theory because the Exit Note contains a savings clause. (Instrument No. 38, at 15). "Usury savings clauses are valid in Texas and, in appropriate circumstances, are enforced to defeat a violation of the usury laws." *Mims v. Fidelity Funding, Inc.*, 307 B.R. 849, 859 (N.D.Tex.2002). Without assessing the validity of the savings clause contained in the Exit Note, the Court concludes that to determine properly the effect the savings clause would have on the Exit Note agreement, a determination of the fact issues discussed above with respect to Defendant's affirmative defense of usury must first be resolved. *Woodcrest Assoc., Ltd. v. Commonwealth Mtg. Corp.*, 775 S.W.2d 434, 438 (Tex.App.-Dallas 1989, writ denied).

E.

Defendant asserts that a fraud was perpetrated on him because Mortgage represented that it would perform broker services, and Defendant contends that Mortgage did not provide him with such services. (Instrument No. 36, at 18). Defendant also believes that although the loan was funded by Mortgage, it did not "shop the loan," nor did Mortgage receive reimbursement from any money received by the public investors secured by L & W, which Defendant argues evidences Mortgage's and Premiere's "scheme [ ] to gain additional fees." (Instrument No. 36, at 19). Moreover, Defendant maintains that he has been damaged because Plaintiff brought a claim against him, which required him to retain counsel to defend himself. Plaintiff argues that Defendant's affirmative defense of fraud fails because: (1) Mathew received exactly what was represented to him that he would receive; (2) Mathew was admittedly aware of the all of the terms of the Exit Note and loan agreement and chose Mortgage; and (3) Mathew also admittedly had no substantive conversations with Mortgage, and his partner Sterling sent all of the loan documentation to him. (Instrument No. 38, at 18).

Mathew's argument in support of his defense of fraud, to negate any liability he may have that stems from the Exit Note, relies heavily on the fact that Mortgage purportedly did not provide broker services as promised and set forth in the Exit Note. Because the Court has already decided above that a genuine issue of material fact exists as to whether actual broker services were indeed provided to Mathew, as stated in the language included in the Exit Note and the loan agreement, Mathew's affirmative defense of fraud fails at this juncture. Further, another fact issue exists because there is summary judgment evidence that demonstrates Mathew may not have relied to his detriment on representations made with respect to broker services, but rather that he relied on representations related to the amount of money he was to receive as part of the loan and the time frame in which the loan would be arranged and made available to him. (Instrument No. 38, at 19). Based on these conclusions, the Court finds that Defendant has failed to establish that no genuine issues

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of material fact exist regarding both the broker services provided and his reliance on the alleged misrepresentations. Accordingly, Defendant's Motion for Summary Judgment with respect to this issue is DENIED.

IV.

***13** Based on the foregoing, IT IS HEREBY ORDERED that Defendant Thomas Mathew's Motion for Summary Judgment (Instrument No. 36) is DENIED.

The Clerk shall enter this Order and provide a copy to all parties.

All Citations

Not Reported in F.Supp.2d, 2006 WL 2796387

Footnotes

1 This case is a core proceeding to the bankruptcy case styled *In re Premiere Holdings of Texas, LP,* **Case No**. 01-40836-H2-11.

2 The Premiere Trust was established under the Chapter 11 Trustee's Third Amended Joint Consolidated Plan of Liquidation under Chapter 11 of the Bankruptcy Code, confirmed in the Premiere Holdings of Texas, LP; MMCOA, LP; and Lapin & Wigginton Funding LP bankruptcy cases.

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CASE NO. 60

2024 WL 3541499
Only the Westlaw citation
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United States District Court,
S.D. Texas, Houston Division.

UNITED STATES of America **EX REL. BAKERRIPLEY**, Plaintiff,
v.
KIDS U **US**, INC. d/b/a Fueling Brains, et al., Defendants.

CIVIL ACTION
NO.
23
-
cv
-
1124

Signed July **25**, **2024**

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MEMORANDUM AND OPINION

Lee H. **Rosenthal**, **United States** District Judge

***1** **BakerRipley**, a Texas nonprofit and public charity that operates Head Start and Early Head Start federal programs throughout the Houston, Texas area, sues four defendants under the False Claims Act. (Docket Entry No. 22). **BakerRipley** is a designated Head Start Agency. (*Id.*). **BakerRipley** alleges that **Kids** U **US**, Inc. d/b/a Fueling Brains, Cimberli Darrough, Antonio Corrales d/b/a Sterling Evaluation and Assessment, LLC, and Michele Peters d/b/a MNA Evaluation and Assessment, LLC, submitted false claims and statements that defrauded the **United States**; engaged in a kickback program; and breached common law contractual obligations owing to **BakerRipley**. The defendants move to dismiss. (Docket Entry Nos. 32-36).

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Based on the record and the applicable law, the court grants in part and denies in part the motions to dismiss. The reasons are set out below.

I. Background

BakerRipley's claims arise from alleged conflicts of interest between its former senior director of the Head Start division (Darrough) and three vendors for Head Start programs who provided virtual curriculum and training and who received government grants related to those programs (Corrales, Fueling Brains, and Peters). (*See generally* Docket Entry No. 22). Unbeknownst to **BakerRipley**, Corrales and Peters had an existing relationship with Darrough. (*Id.*). Both Corrales and Peters had served on Darrough's dissertation committee while she pursued her Ph.D. at the University of Houston—Clear Lake. Fueling Brains, Corrales, and Peters all secured grants from **BakerRipley** (approved by Darrough) to provide training, evaluation, and material support to **BakerRipley's** Head Start programs in Houston. (*Id.*).

BakerRipley claims that the defendants worked together to deceive and defraud both **BakerRipley** and other publicly funded entities throughout the Houston area. (*Id.* at ¶ 6). **BakerRipley** claims to have paid these three vendors in excess of $800,000 in federal funds as a result of their fraud and breaches of contract. (*Id.*). **BakerRipley** claims that Corrales failed to disclose that he had acted as a "Strategic Advisor" to Fueling Brains and that he had received payment for referring Head Start clients who signed service contracts with Fueling Brains. (*Id.* at ¶¶ 34, 142-154). Darrough also allegedly received payments from Fueling Brains, both for approving Fueling Brain's contracts with **BakerRipley** and for marketing the organization to other federally funded education providers across Houston. All three vendors allegedly engaged in this coordinated "kickback scheme," which helped the vendors obtain federal Head Start grants totaling over $3 million over the course of roughly two years. (*Id.* at ¶ 7).

BakerRipley also alleges that the three vendors only partially fulfilled their contracts with **BakerRipley**, and that Fueling Brains fraudulently misrepresented its capacity and willingness to deliver on its contractual obligations. (Docket Entry No. 45 at ¶¶ 15, 48). **BakerRipley** alleges that Darrough facilitated a conspiracy to circumvent the federal grant procurement requirements, so as to evade managerial scrutiny. (*Id.* at ¶ 28).

***2** For contracts of $150,000 and over, **BakerRipley** used the Request for Proposal process, which takes approximately two to three months to complete and triggers additional managerial oversight. (Docket Entry No. 22 at ¶ 43). **BakerRipley** alleges that the three vendors, under Darrough's direction, intentionally submitted multiple invoices to **BakerRipley** for amounts less than that threshold to avoid the Request for Proposal process and the oversight it involves. (*Id.* at ¶ 98).

BakerRipley brings the following causes of action:

- **False Claims Act claims** (*qui tam*):
  - (1) Violation of the False Claims Act (31 U.S.C. § 3729(a)(1)(A)) –

The Submission of, or Causing the Submission of, False Claims – *against all defendants*

- (2) Violation of the False Claims Act (31 U.S.C. § 3729(a)(1)(B)) – **Use of False Statements** – *against all defendants*
- (3) Violation of the False Claims Act (31 U.S.C. § 3729 (a)(1)(G)) – **Reverse False Claims** – *against all defendants*
- (4) Violation of the False Claims Act (31 U.S.C. § 3729(a)(3)) – **Conspiracy to Violate the FCA U.S.C. 3729 (a)(1)(C)** – *against all defendants*

- **Common law claims:**
  - (5) **Unjust Enrichment** – *against Fueling Brains, Corrales, Peters*
  - (6) **Payment by Mistake** – *against Fueling Brains, Corrales, Peters*
  - **(7) Breach of Contract and Covenant of Good Faith and Fair Dealing** – *against Corrales, Peters*
  - (8) **Fraud** – *against all defendants*
  - (9) **Fraud by Nondisclosure** – *against all defendants*
  - (10) **Civil Conspiracy** – *against all defendants*
  - (11) **Money Had and Received** – *against Fueling Brains, Corrales, and Peters*
- **Texas Civil Practice and Remedies Code claims:**
  - (12) Violation of TTLA, Chapter 134 – **Theft** – *against Fueling Brains, Corrales, Peters*

II. The Legal Standards

A. Rule 12(b)(6)

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556).

To withstand a Rule 12(b)(6) motion, a complaint must include "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Lincoln v. Turner*, 874 F.3d 833, 839 (5th Cir. 2017) (quoting *Twombly*, 550 U.S.

at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Iqbal*, 556 U.S. at 678 (alteration in original) (quoting *Twombly*, 550 U.S. at 557). "A complaint 'does not need detailed factual allegations,' but the facts alleged 'must be enough to raise a right to relief above the speculative level.' " *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019) (quoting *Twombly*, 550 U.S. at 555). "Conversely, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (alterations omitted) (quoting *Twombly*, 550 U.S. at 558).

***3** A court reviewing a motion to dismiss under Rule 12(b)(6) may consider "(1) the facts set forth in the complaint, (2) documents attached to the complaint, and (3) matters of which judicial notice may be taken under Federal Rule of Evidence 201." *Inclusive Cmtys Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 900 (5th Cir. 2019).

B. The False Claims Act and the Anti-Kickback Statute

The False Claims Act "is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side." ***United States ex rel.*** *Grubbs v. Kanneganti*, 565 F.3d 180, 184 (5th Cir. 2009) (quotation omitted). "To aid the rooting out of fraud, the Act provides for civil suits brought by both the Attorney General and by private persons, termed relators." *Id.* "[R]elators share in the government's winnings, receiving a bounty of up to thirty percent of the government's proceeds." ***United States ex rel.*** *Ruscher v. Omnicare, Inc.*, No. 4:08-CV-3396, 2014 WL 2618158, at *2 (S.D. Tex. June 12, 2014) (quotation omitted).

Whether the action is prosecuted by the government or by relators, a violation of the False Claims Act occurs when: (1) "there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a claim)." ***United States*** *v. Bollinger Shipyards, Inc.*, 775 F.3d 255, 259 (5th Cir. 2014). The scienter requirement of a False Claims Act claim requires the relator to show that false claims and records were "knowingly" made or caused to be made. ***United States ex rel.*** *Bennett v. Bos. Sci. Corp.*, 2011 WL 1231577, at *14. "Knowingly" means "actual knowledge of the information"; "deliberate ignorance of the truth or falsity of the information"; or "reckless disregard to the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A)(i)–(iii). "Material" means "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). Specific intent to defraud is not required to establish knowledge. 31 U.S.C. § 3729(b)(1)(B).

A "kickback" is "any ... gratuity, thing of value, or compensation of any kind that is provided to a ... prime contractor employee ... to improperly obtain or reward favorable treatment in connection with a ... subcontract relating to a prime contract." 41 U.S.C. § 8701(2). The Fifth Circuit has concluded "that anything of

value offered in order to subvert the 'proper' process for awarding contracts is a potential kickback." ***U.S. ex rel.*** *Vavra v. Kellogg Brown & Root, Inc.*, 848 F.3d 366, 380 (5th Cir. 2017). Examples of the "pursuit of improper favorable treatment" include receiving something of value in exchange for "forgiv[ing] deficiencies in performance, overlook[ing] shortcomings in a bid or suggested contract, ... obtain[ing] some other treatment not generally available." *Id.*

C. Rule 9(b)

"[A] complaint filed under the False Claims Act must meet the heightened pleading standard of Rule 9(b)." ***United States ex rel.*** *Grubbs v. Kanneganti*, 565 F.3d 180, 185 (5th Cir. 2009). Relators "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). That standard requires pleadings to "set forth the who, what, when, where, and how of the alleged fraud." ***United States ex rel.*** *Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 266 (5th Cir. 2010) (quotation omitted). A relator's complaint may survive a motion to dismiss by alleging either "the details of an actually submitted false claim" or "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Grubbs*, 565 F.3d at 190.

III. Analysis

A. False Claims and False Statements under the False Claims Act

***4** **BakerRipley** brings two causes of action against all defendants: (1) the submission of, or causing the submission of, false claims (31 U.S.C. § 3729(a)(1)(A)); and (2) the use of false statements (31 U.S.C. § 3729(a)(1)(B)). These claims may be divided into two broad categories: (i) False Claims Act violations by the defendants stemming from their contracts with **BakerRipley** itself; and (ii) False Claims Act violations by the defendants due to the alleged kickback scheme stemming from Fueling Brains's contracts with other federal grantees.

i. The False Claims Act Claims Arising from the Defendants' Contracts with BakerRipley

The False Claims Act "permits, in certain circumstances, suits by private parties on behalf of the **United States** against anyone submitting a false claim to the Government." *Hughes Aircraft Co. v.* ***United States ex rel.*** *Schumer*, 520 **U.S.** 939, 941 (1997). The Act attempts to balance the "promot[ion of] private citizen involvement in exposing fraud against the government" against the "prevent[ion of] parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud." ***U.S. ex rel.*** *Reagan v. E. Texas Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174 (5th Cir. 2004). The False Claims Act limits the subject-matter jurisdiction of courts adjudicating *qui tam* actions under the Act if the relator's suit is based on earlier public disclosures of sufficiently related information. The statute states:

> No court shall have jurisdiction over an action under this section

> based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). The Fifth Circuit has established a three-question test to determine whether a public disclosure information bars a particular FCA suit:

> (a) Was there a "public disclosure" of the allegations or transactions?
>
> (b) Was the *qui tam* action "based upon" what was publicly disclosed?
>
> (c) If so, was the relator an "original source" of the information that forms the basis of the complaint?

U.S. ex rel. *Sonnier v. Standard Fire Ins. Co.*, 84 F. Supp. 3d 575, 586 (**S.D. Tex.** 2015) (citing *Fed. Recovery Servs., Inc. v.* ***United States***, 72 F.3d 447, 450 (5th Cir. 1995)); see also *Graham Cnty. Soil & Water Conservation Dist. v.* ***United States***, 559 **U.S.** 280, 290, 130 S. Ct. 1396, 1404, 176 L. Ed. 2d 225 (2010).

The defendants argue that the public disclosure rule bars the False Claims Act claims against Darrough and Peters related to **BakerRipley** itself. (Docket Entry No. 36 at ¶¶ 42-48). **BakerRipley** does not dispute that Darrough's dissertation contained the information that Corrales and Peters had served on Darrough's dissertation committee. **BakerRipley** similarly does not dispute that the dissertation has been and is available online—both on the scholarly database ProQuest and on the University of Houston—Clear Lake's library website. (Docket Entry No. 46 at ¶ 44). The dissertation was published on the university's website in December 2021—well before **BakerRipley** filed its complaint in March 2023. (*Id.*). Information in a dissertation published on a university's website, given the Supreme Court's broad interpretation of what counts as "news media," meets the standard of a "public disclosure." *Graham Cty. Soil & Water Conservation Dist.*, 559 **U.S.** at 290 (2010) ("[t]he 'news media' referenced in [§ 3730(e)(4)(A)(iii)] plainly have a broader sweep."); see also *Schindler Elevator Corp. v.* ***U.S. ex rel.*** *Kirk*, 563 **U.S.** 401, 408 (2011) (holding that courts have interpreted the term "public disclosure" to include disclosures on websites and online publications).

5** The public disclosure bar is meant to prevent suits that "add nothing to the exposure of fraud"—in other words, to hinder those seeking to benefit from disclosing information that is already publicly known. *Reagan*, 384 F.3d at 174; *see also Jamison*, 649 F.3d at 332; ***U.S. ex rel. *Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 381 (5th Cir. 2009). Because the information about a prior relationship between Darrough and Peters was

publicly disclosed before the filing of this lawsuit, the information was publicly disclosed for the purpose of the False Claims Act. [1]

BakerRipley's False Claims Act causes of action against Darrough and Peters are fundamentally "based upon" the defendants' undisclosed associations with each other at the University of Houston—Clear Lake. (Docket Entry No. 22 at ¶ 17 ("Defendants knowingly failed to disclose their conflicts of interest to the Agency and other school systems and federal grantees, knowingly misrepresented their interrelationships, and made affirmative false representations of 'independence' in order to further their claims."); ¶¶ 10, 13, 16, 17, 37, 53, 57, 120, 125-27, 131, 141). **BakerRipley** argues that these claims are "not based upon the relationships in and of themselves, but the reciprocal nature and benefits received by virtue of those relationships[,]" (Docket Entry No. 47 at ¶ 26). But **BakerRipley** also states that it "would have refused to enter into ... contract[s]" or make payments on defendants' claims, if it had known of each defendant's "affiliation with" the others (i.e., at UHCL). (Docket Entry No. 22 at ¶ 131). The public disclosure bar applies to **BakerRipley's** claims against Darrough and Peters.

By contrast, **BakerRipley's** claims against Fueling Brains and Corrales are based on separate allegations that both defendants participated in fraudulent invoicing practices and failed to provide promised goods and services, in breach of their Head Start vendor contracts with **BakerRipley**. (Docket Entry No. 22). A violation of the False Claims Act occurs when (1) "there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a claim)." *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 467 (5th Cir. 2009) (quoting *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008)). False Claims Act claims must meet the heightened pleading standard of Rule 9(b). *Grubbs*, 565 F.3d at 185. **BakerRipley** must either plead "the details of an actually submitted false claim" by Fueling Brains, or "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Grubbs*, 565 F.3d at 190.

***6** **BakerRipley's** allegations of breach of contract do not allege a violation of the False Claims Act unless the allegations additionally satisfy the four requirements articulated in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 579 **U.S.** 176, 194 (2016) ("The False Claims Act is not 'an all-purpose antifraud statute,' or a vehicle for punishing garden-variety breaches of contract or regulatory violations.") (citation omitted). As **BakerRipley** concedes, Fueling Brains and Corrales did partially deliver on their contractual obligations, weighing against a finding of the scienter required to prove a violation of the False Claims Act. And regardless of whether these defendants provided all the services called for by their contracts with **BakerRipley**, the complaint does not allege plausible facts that would support an inference that these defendants intentionally submitted "fictitious service offerings," or knowingly misrepresented that

they could fulfill those service offerings. (Docket Entry Nos. 45 at ¶ 15; 22 at ¶¶ 70-80).

BakerRipley alleges that Fueling Brains submitted two invoices for "professional development" and "material kits" that were "double bill[s]." (Docket Entry No. 22 at ¶¶ 77, 89). **BakerRipley** also alleges that Corrales submitted two double-billed invoices for "trauma and emotional intelligence training" and "financial literacy training." (*Id.* at ¶104). These factual allegations are sufficiently specific to plead "reliable indicia" that Corrales and Fueling Brains possessed the requisite scienter when submitting duplicate invoices. *Grubbs*, 565 F.3d at 190. The invoices were facially redundant or identical, suggesting that the defendants should have known they were duplicates. The timing of Corrales's invoicing also suggests fraudulent intent. He sent the second set of bills to **BakerRipley** soon after it had suffered a debilitating cyberattack, preventing it from verifying the procurements and payments to vendors in a timely manner. (Docket Entry No. 22 at ¶¶ 103-105). Darrough approved the duplicate invoices promptly after Corrales referred Darrough to the University of Houston College of Education Director of Student Relations for the purpose of furthering Darrough's career and networking contacts. (*Id.* at ¶ 106). Finally, **BakerRipley** alleges that Fueling Brains and Corrales attempted to circumvent the automatic managerial review of contracts for $150,000 and over. Both defendants allegedly submitted multiple invoice "installments" for amounts just under that threshold, including a $149,000 invoice from Corrales, in order to evade scrutiny of the invoices they submitted. (*Id.* at ¶¶ 68-69). This allegation, taken together with the alleged submission of duplicative invoices, sufficiently alleges fraud to meet Rule 9(b).

ii. FCA claims against Fueling Brains, Corrales, and Darrough for participating in a kickback scheme with other school systems

A "relator must provide reliable indicia that there was a kickback provided in return for the referral" to survive the Rule 9(b) standard. *U.S. ex rel. Parikh v. Citizens Med. Ctr.*, 977 F. Supp. 2d 654, 664 (S.D. Tex. 2013). Pleading reliable indicia of unlawful kickbacks requires **BakerRipley** to allege the wrongful conduct attributable to each defendant. *U.S. ex rel. Hebert v. Dizney*, 295 F. App'x 717, 722 (5th Cir. 2008). **BakerRipley** does not need to plead and prove the exact amount of the false claims, only that the defendants made specific false claims. *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 189 (5th Cir. 2009).

Although **BakerRipley** admits that it is basing most of the allegations "on information and belief," a claim has "facial plausibility" when the pleaded facts allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). Affidavits attached to the complaint[2] discuss the alleged kickback scheme in detail. Two former Fueling Brains employees, Dr. Nici Esch and Vinicius Ozorio, detailed a scheme by Corrales and Fueling Brains to sell Fueling Brains' services to educational entities receiving federal funding. (Docket Entry Nos. 23 at ¶¶ 8, 9; 23-1 at ¶ 8). Dr. Esch states in his affidavit that Corrales's "job was to get districts to

sign up with Fueling Brains, for which he received 20% commissions." (Docket Entry No. 23 at ¶ 8). **BakerRipley** also alleged that Corrales emailed Fueling Brains that he expected to receive "cuts" from nine identified contracts with eight different school districts, allegedly in return for his "marketing services." (Docket Entry No. 22 at ¶ 156). Fueling Brains and Corrales both allegedly paid "referral sources"—individuals who "exercise discretion in connection with Federal Government contracts, purchases, payments, claims, or other financial transactions"—when potential clients coming through those sources accepted Fueling Brains' service proposals. (*Id.* at ¶ 34).

***7** **BakerRipley** alleges that Darrough also marketed Fueling Brains to other school districts, using both her **BakerRipley** email and her personal email. (*Id.* at ¶¶ 142-154). Despite her knowledge of Fueling Brains's alleged failure to fulfill most of its contractual obligations with **BakerRipley** within the contractual timelines, Darrough appears to have worked with Corrales to sell Fueling Brains's services to other school districts. (*Id.*). In one email, Darrough provided Corrales with a list of local Head Start providers, noting "This is everyone in the Houston Metropolitan Area that has any impact on Early Childhood Education ... YOU OWE ME!" (*Id.*). **BakerRipley** also alleged that Darrough sent emails through her **BakerRipley** email account to the Bryan Independent School District and Fort Bend Independent School District trying to sell Fueling Brains's services. (*Id.*).

BakerRipley has pleaded that Fueling Brains, Corrales, and Darrough participated in the alleged kickback scheme, with other federal grantors, with sufficient particularity to meet Rule 9(b). **BakerRipley's** False Claims Act allegations for false claims and false statements under § 3729(a)(1)(A)-(B), against Fueling Brains, Corrales, and Darrough may proceed; the False Claims Act claims against Peters are dismissed.

B. Reverse False Claims under the False Claims Act

In a reverse-false claims suit, the defendant's action "does not result in improper payment by the government to the defendants, but instead results in no payment to the government when a payment is obligated." ***U.S. ex rel.*** *Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 653 (5th Cir. 2004). "Reverse false claim liability" for failing to disclose and return an overpayment from the government requires proof of the following elements: (1) a false record is created; (2) the provider knows the record is false; (3) the false record or statement is made, used, or caused to be made or used; (4) to conceal, decrease, or avoid an obligation to pay the government; and (5) the misrepresentation is material. *See* 31 U.S.C. § 3729(a)(1)(G); ***U.S. ex rel.*** *Ligai v. ETS-Lindgren Inc.*, No. CIV.A. H-112973, 2014 **WL** 4649885, at *12 (**S.D. Tex.** Sept. 16, 2014), *aff'd sub nom.* ***U.S. ex rel.*** *Ligai v. ESCO Techs.*, Inc., 611 F. App'x 219 (5th Cir. 2015).

BakerRipley alleges that the defendants submitted reverse false claims by "making false statements relating to their failure to provide materials and services it was to provide [**BakerRipley**] and/or to repay [**BakerRipley**] for overpayments to which the

Defendants were not entitled." (Docket Entry No. 22 at ¶ 182). **BakerRipley** alleges that "had the Agency been aware of Defendants' wrongful conduct, it would have taken steps to recover" the overpayments. (*Id.* at ¶ 183). Pleading reverse-false-claims liability requires factually sufficient allegations that a contractor knowingly created a false record or knowingly concealed overpayments obtained by fraud and not repaid. *Ligai*, 2014 **WL** 4649885 at *12. The defendants' failure to refund "the same money the Government allegedly paid in relation to [Relator's] § 3729(a)(1)(A) and (B) claims" is not, itself, actionable under the reverse False Claims Act provision. *See* ***U.S.*** *v. Cath. Health Initiatives*, No. 4:18-CV-123, 2022 **WL** 2657131, at *11 (**S.D.** **Tex.** Mar. 31, 2022). The crux of **BakerRipley's** reverse false claims allegations is that the defendants did not refund the payments for the same alleged false claims at issue in the § 3729(a)(1)(A) and (B) claims. While it is true that **BakerRipley** or the federal government could have sought to reclaim the overpayments if reported, the failure to report the overpayments is part of the original false claims, and not a separate reverse false claim.

The allegations against the defendants do not plausibly plead a reverse false claim under the False Claims Act, 31 U.S.C. § 3729(a)(1)(G). This claim is dismissed as to all defendants.

C. Conspiracy to Violate the False Claims Act

8** To plead a conspiracy, **BakerRipley** must plead facts that show "(1) the existence of an unlawful agreement between defendants to get a false or fraudulent claim allowed or paid" and "(2) at least one act performed in furtherance of that agreement." ***U.S. ***ex*** ***rel.*** *Farmer v. City of Houston*, 523 F.3d 333, 343 (5th Cir. 2008). Specific intent to defraud is a required element, but allegations of intent are not required to be pleaded with the same level of particularity as other factual allegations. Fed. R. Civ. P. 9(b); ***U. S.*** ***ex*** ***rel.*** *Farmer v. City of Houston*, 523 F.3d 333, 343 (5th Cir. 2008). The allegations against Fueling Brains, Corrales, and Darrough described above meet the threshold for a claim of conspiracy to violate the False Claims Act. 31 U.S.C. § 3729 (a)(1)(C). The conspiracy claim against Peters does not, because there are no viable False Claims Act allegations against Peters, (*see supra* III.A), and it is dismissed.

D. State-law claims

i. Quasi-contractual claims

BakerRipley brings claims for unjust enrichment, payment by mistake, and money had and received against Fueling Brains, Corrales, and Peters. Unjust enrichment, payment by mistake, and money had and received are quasi-contractual theories of liability. ***U.S.*** ***ex*** ***rel.*** *Campbell v. KIC Development, LLC*, No. EP-18-CV-193-KC, 2019 **WL** 6884485, at *17 (W.D. Tex. Dec. 10, 2019) (payment by mistake); *Stewart Title Guar. Co. v. Mims*, 405 S.W.3d 319, 339 (Tex. App.—Dallas 2013, no pet.) (unjust enrichment and money had and received). "[W]hen a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory." *Fortune Production Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000). However, **BakerRipley** may plead quasi-contractual claims in the alternative,

because it disputes whether the contracts were validly formed. *See, e.g.*, *Peters v. Norwegian Cruise Line Ltd.*, No. 01-05-00906, 2007 WL 1633555, at *10 (Tex. App. June 7, 2007) (the plaintiff produced evidence that the contract was unconscionable, making his unjust enrichment claim a "viable alternative to his breach of contract claim"). The complaint adequately pleads false claims and statements, including duplicate invoices and invoices presented in a way that circumvented internal review. (*See supra* III.A). The quasi-contractual claims may proceed.

ii. Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing

In Texas, "[t]he essential elements of a breach of contract action are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach." *Smith Int'l, Inc. v. Egle Grp., LLC*, 490 F.3d 380, 387 (5th Cir. 2007). **BakerRipley** has pleaded with particularity that Fueling Brains, Corrales, and Peters, failed to completely fulfill their contracts and did not provide all the services required under their contracts. (Docket Entry No. 22).

Texas courts have resisted imposing an implied covenant of good faith and fair dealing in contracts unless there is a special relationship between the parties governed or created by a contract. *Arnold v. Nat'l Cnty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987). **BakerRipley** has not pleaded the existence of a special relationship, and the record discloses none. **BakerRipley's** breach of contract claims against Fueling Brains, Corrales, and Peters, may proceed; the claims for breach of covenant of good faith are dismissed.

iii. Fraud and Fraud by Nondisclosure

Under Texas law, a claim for fraud must allege: (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009) (quoting *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001)). Breach of contract "combined with 'slight circumstantial evidence' of fraud is enough to support a verdict for fraudulent inducement." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2006). The elements of fraud by nondisclosure are that: (1) the defendant failed to disclose facts to the plaintiff; (2) the defendant had a duty to disclose those facts; (3) the facts were material; (4) the defendant knew the plaintiff was ignorant of the facts and the plaintiff did not have an equal opportunity to discover the facts; (5) the defendant was deliberately silent when it had a duty to speak: (6) by failing to disclose the facts, the defendant intended to induce the plaintiff to take some action or refrain from acting; (7) the plaintiff relied on the defendant's nondisclosure; and (8) the plaintiff was injured as a result of acting

without that knowledge. *Horizon Shipbuilding, Inc. v. Blyn II Holding, LLC*, 324 S.W.3d 840 (Tex. App.—Houston [14th Dist.] 2010).

***9** Based on the plausible pleading of false claims and statements, (*see supra* III.A), **BakerRipley** has met the heightened standard for pleading fraud and fraud by nondisclosure against all the defendants except Peters. **BakerRipley** has not sufficiently alleged False Claims Act claims against Peters, because any information that could have provided the basis for such a claim was already publicly disclosed and therefore available to **BakerRipley**.

iv. Civil Conspiracy

"To allege civil conspiracy, the government and the relator must plead [ ] 'the defendants ... had an agreement to commit an illegal act which resulted in the plaintiff's injury.' " ***U.S. ex rel.*** *Wilkins v. North Am. Constr. Corp.*, 173 F. Supp. 2d 601, 639 (**S.D. Tex.** 2001) (quoting *Thomas v. City of New Orleans*, 687 F.2d 80, 83 (5th Cir. 1982)). The "illegal act" here is the alleged knowing submission of a false or fraudulent claim to **BakerRipley**. Baker Ripley alleges with sufficient particularity how all the defendants except Peters worked together to submit false claims, statements, and records to **BakerRipley** and other government-funded school districts, in hopes of procuring contracts with **BakerRipley** and other educational entities to provide Head Start-related services at a substantial markup. (Docket Entry No. 45 at ¶¶19-21; *see supra* III.A).

v. Theft

"When a claim of theft is made in connection with a contract, there must be 'proof of more than an intent to deprive the owner of property and subsequent appropriation of the property' "; "the appropriation [must have been] a result of a false pretext or fraud." *Porter-Garcia v. Travis L. Firm, P.C.*, 564 S.W.3d 75, 91 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). A breach of contract can give rise to a Texas Theft Liability Act claim only if the defendant "did not intend to deliver at ... at the time [it] entered into the contracts." See *Holcomb v. State*, 445 S.W.3d 767, 782 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). As discussed above, **BakerRipley** does not plead with sufficient particularity facts showing that the defendants never intended to perform their contracts because the defendants did partially perform their contracts. (*See supra* III.A).

IV. Conclusion

For the reasons explained above, the defendants' motions to dismiss, (Docket Entry Nos. 32-36), are granted in part and denied in part, as follows—

- **False Claims Act claims** (*qui tam* actions)
  - (1) Violation of the False Claims Act (31 U.S.C. § 3729(a)(1)(A)) – *dismissed only against Peters*
  - (2) Violation of the False Claims Act (31 U.S.C. § 3729(a)(1)(B)) – *dismissed only against Peters*

- (3) Violation of the False Claims Act (31 U.S.C. § 3729 (a)(1)(G)) – *complete dismissal*
- (4) Violation of the False Claims Act (31 U.S.C. § 3729(a)(3)) – *dismissed only against Peters*

- **Common law claims**
  - (5) Unjust Enrichment – *no dismissal*
  - (6) Payment by Mistake – *no dismissal*
  - (7) Breach of Contract and Covenant of Good Faith and Fair Dealing – *no dismissal for Breach of Contract; complete dismissal of Breach of Covenant of Good Faith and Fair Dealing*
  - (8) Fraud – *dismissed only against Peters*
  - (9) Fraud by Nondisclosure – *dismissed only against Peters*
  - (10) Civil Conspiracy – *dismissed only against Peters*
  - (11) Money Had and Received – *no dismissal*
- **Texas Civil Practice and Remedies Code claims**
  - (12) Violation of TTLA, Chapter 134 – Theft – *complete dismissal*

***10** The dismissed claims are dismissed with prejudice, as **BakerRipley** has already amended its complaint twice and further amendment would be futile.

All Citations

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Footnotes

1 **BakerRipley** has not proven itself to be an "original source" of the information that forms the basis of its claims. *Rockwell Int'l Corp. v. **United States***, 549 **U.S.** 457, 467–68 (2007). An "original source" is "an individual who has 'direct' and 'independent' knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Sonnier*, 84 F. Supp. 3d at 586 (citing 31 U.S.C. § 3730(e)(4)(B)). As established by both parties, **BakerRipley** relied specifically on the information disclosed in Darrough's dissertation (and published by the University of Houston—Clear Lake) to bring its False Claims Act causes of action.

2 When a "complaint relies substantially on the affidavits ... these affidavits should be considered as part of the pleadings, such that the motion need not be treated as

one for summary judgment." *Bosarge v. Mississippi Bureau of Narcotics*, 796 F.3d 435, 440 (5th Cir. 2015). Here the complaint relies heavily on the affidavits in the pleading of fraud, and the court can consider the affidavits as part of the pleadings at the motion to dismiss stage.

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CASE NO. 61

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United States District Court,
S.D. **Texas**, Houston Division.

XIONGEN JIAO, an individual, Qianju **Jiao**, an individual, Zhonghua Yu, an individual, Jiatong Yu, an individual, Pengfei Zhou, an individual, and Xuanmei Zhou. Plaintiffs,
v.
NINGBO XU, an individual, and LCL Company LLC, a Texas limited liability company, Defendants,
and
Dongtai Investment Group, LLC, a Texas Limited Liability Company Nominal Defendant

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ORDER GRANTING PRELIMINARY INJUNCTION AND DECLARATORY JUDGMENT

KEITH P. **ELLISON**, UNITED STATES DISTRICT JUDGE

***1** Before the Court is the Sealed Emergency Motion for Preliminary Injunction, Permanent Injunction, and Declaratory Judgment made and filed by Plaintiffs **XIONGEN JIAO**, QIANJU **JIAO**, ZHONGHUA YU, JIATONG YU, PENGFEI ZHOU, and XUANMEI ZHOU ("Plaintiffs"). (Doc. 30). Having heard the evidence and the arguments of counsel, and having considered Plaintiffs' Motion and attached exhibits, as well as relevant pleadings including Plaintiffs' Second Amended Verified Complaint with exhibits, and any oppositions, the Court reaches the following findings of fact and conclusions of law:

1. According to the Joint Venture Agreements, Defendant **Ningbo Xu** was obligated to make a $3 million contribution to Dongtai as his capital contribution in exchange for 50.02% of Dongtai's member units and designation as Dongtai's sole managing member. (Doc. 21, Ex. 2 at Section I, ¶3). However, **Xu's** contribution was approximately

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$2.2 million short. (Doc. 30, Exs. E, H). As demonstrated by the parties' jointly retained forensic accountant, **Xu** contributed only $867,889.11, making his percentage of ownership approximately 14.45%. (Doc. 30, Exs. E, H).

2. To conceal the shortfall, **Xu** provided a bogus HUD statement to Plaintiffs, who reasonably believed it was the real HUD statement for the hotel closing. (Doc. 30, XJ Affidavit at ¶¶ 16–17). The bogus HUD statement made it falsely appear that **Xu** had paid an additional $1.4 million toward his capital contribution. (Doc. 30, Ex. H at 7–8).

3. Subsequent to the purchase of the hotel, **Xu** made dozens of unauthorized withdrawals from Dongtai's account, resulting in a net cash outflow to **Xu** of $1,304,400.80. (Doc. 30, Ex. E at 7). **Xu** used these funds to further his own personal interests, including the purchase of a car dealership. (Doc. 21, **Jiao** Affidavit at ¶27 and Exs. 10, 11). **Xu's** unauthorized withdrawals have caused an almost fatal cash flow problem for Dongtai and its operation of the hotel. (Doc. 52, Ex. A at 80:6–7).

4. From October 2019 to December 2019, and in violation of this Court's order (Doc. 25), **Xu** obtained from different banks several unauthorized high-interest loans, totalling $435,000.00, by collateralizing Dongtai's assets. (Doc. 52, Exs. F–I). These loans were not intended or used for Dongtai's benefit.

5. To obtain a preliminary injunction, Plaintiffs must establish four elements: 1) a substantial likelihood that they will prevail on the merits, 2) a substantial threat that they will suffer irreparable injury if the injunction is not granted, 3) their threatened injury outweighs the threatened harm to Defendants, and 4) granting the preliminary injunction will not disserve the public interest. *See* *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007). Plaintiffs have satisfied all four elements.

6. Plaintiffs have satisfied the substantial-likelihood-of-success-on-the-merits element for each of their four claims: i) breach of fiduciary duty, ii) breach of contract, iii) fraud, and iv) federal securities fraud.

***2** i. Under Texas law, a breach-of-fiduciary-duty claim requires that: "(1) a fiduciary relationship must exist between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant." *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex.App.-Dallas 2010, no pet.). **Xu** breached his fiduciary duties as the President and Managing Member of Dongtai by failing to fully pay for his units, misleading Plaintiffs, and using Dongtai funds for his personal benefit, thereby harming Plaintiffs.

ii. To prevail on a breach of contract claim, Plaintiffs must establish: "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach." *Valero Mktg. & Supply Co. v. Kalama Int'l, LLC*, 51 S.W.3d 345, 351 (Tex.App.-Houston [1st Dist] 2001, no pet.). The Joint Venture Agreement and LLC Operating Agreement are valid agreements, fully performed by Plaintiffs. **Xu** breached these agreements by paying only $867,889.11 for his 50.02% stake. The $2.2 million shortfall has harmed Dongtai and Plaintiffs.

iii. Under Texas law, there are six elements of fraud: 1) a material misrepresentation was made; 2) the representation was false; 3) when the representation was made, the speaker knew that it was false or made it recklessly without any knowledge of the truth and as a positive assertion; 4) the speaker made the representation with the intent that the other party should act upon it; 5) the party acted in reliance on the representation; and 6) the party thereby suffered injury. *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009). **Xu** falsely represented that he would contribute $3,000,000.00 as his capital contribution in exchange for a 50.02% controlling stake in Dongtai. **Xu's** other actions—particularly, his attempt to cover up his shortfall by providing a fake HUD statement—establish that the representation was made with at least a reckless disregard for its truth and with the intent to induce Plaintiffs to action. Plaintiffs acted in reliance upon the representation and have suffered injury as a result.

iv. To prevail on a Rule 10b-5 securities fraud claim Plaintiffs "must prove 1) a misstatement or omission 2) of material fact 3) occurring in connection with the purchase or sale of a security, that 4) was made with scienter 5) upon which the plaintiff justifiably relied, 6) and that proximately caused injury to the plaintiff." *Rubinstein v. Collins*, 20 F.3d 160, 166 (5th Cir. 1994). Plaintiffs seek redress for injuries caused to them by **Xu's** misleading statements in connection with the purchase and sale of Dongtai member units. **Xu** represented to Plaintiffs he would contribute $3.0 million for his units and would act in Plaintiffs' best interests as Dongtai's Managing Member. There is circumstantial evidence that these material representations were false when made, including **Xu's** failure to pay the $3 million, falsification of the HUD statement, and withdrawal of funds for his own personal use. This evidence supports a "cogent and compelling" inference of misrepresentation and scienter. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007). Plaintiffs reasonably relied upon **Xu's** material misrepresentations and have suffered injury as a result.

7. Plaintiffs have established a substantial threat that they will suffer irreparable injury if the injunction is not granted. If **Xu** is allowed to continue to possess the units that he did not pay for, Plaintiffs will be unable to pay the $280,000 property taxes due by the end of January **2020** and will also be in imminent danger of losing the hotel's IHG franchise, and even the hotel itself. (Doc. 52 Ex. A, 75:8 – 76:5 and 128:13 – 128:16). Moreover, if **Xu** is permitted to continue as Dongtai's President and Managing Member, there is a substantial threat that he will further damage Dongtai.

***3** 8. Plaintiffs' threatened injury outweighs the hardship to **Xu**. **Xu** has no claim to the member units for which he did not pay. Thus, their return would not cause harm to **Xu**. In addition, because **Xu** has repeatedly mismanaged Dongtai and misappropriated Dongtai's assets, the threatened and continuing injury to Plaintiffs and Dongtai outweighs the harm that the injunction may cause to **Xu** if he is removed as President and Managing Member of Dongtai.

9. Granting the preliminary injunction will not disserve the public interest.

10. The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201.

Accordingly, IT IS HEREBY ORDERED this 29th day of January **2020**, that a preliminary injunction and declaratory judgment is GRANTED on the following terms:

a. **Xu** is permanently removed as the President and Managing Member of Dongtai and his management authority and ability regarding the affairs of the joint venture including the operation of the Crowne Plaza Hotel is terminated immediately;

b. It is declared **Xu** did not make a capital contribution of $3,000,000.00 as he promised and was contractually obligated to do in order to obtain 50.02% controlling interest in Dongtai;

c. It is declared **Xu** paid only $867,889.11 for his units and that this amounts to approximately 867,031 units (14.45%);

d. **Xu** must immediately surrender to Dongtai all member units he did not pay for, specifically 2,134,169 units (35.57%);

e. **Xu's** current unit certificates are declared invalid and Dongtai is to provide **Xu** with new certificates based on the amount **Xu** actually paid for within a reasonable time from the date of this Order;

f. **Xu** is enjoined from purchasing the member units he did not pay for;

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g. It is declared **Xu** owes and is indebted to Dongtai for $1,304,400.80 as a result of his withdrawals (this does not include the amount in consequential and other damages, attorneys' fees and costs Plaintiffs seek from Defendants and nothing in this Order prohibits or restrains Plaintiffs in any way from seeking these damages, fees and costs from Defendants).

Plaintiffs are required to post a bond in the amount of $10,000. F.R.C.P. 65(c).

IT IS SO ORDERED.

All Citations

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