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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

JD,

Plaintiff,

No. 0704-04734

vs.

ORDER ON DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT AND TO STRIKE

SIMON P. GREEN and AMERICAN
MEDICAL RESPONSE NORTHWEST,
INC., doing business as AMERICAN
MEDICAL RESPONSE (AMR),

Defendants.

This matter came on for hearing on December 18, 2007, before the Honorable Erich H. Hoffman on the motions for summary judgment of defendant American Medical Response (AMR) and of defendant Simon P. Green, and defendants' motions to strike portions of plaintiff's response memorandum and certain supporting declarations.

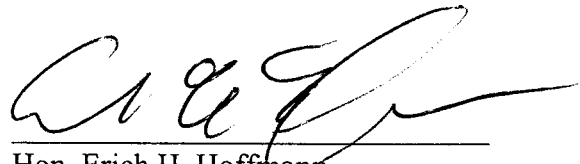
Plaintiff appeared through her attorney Janine Robben, defendant AMR appeared through one of its attorneys, Elizabeth Schleuning, and Simon Green appeared through one of his attorneys, Karen O'Kasey. Having considered the motions and memoranda submitted by the parties as well as oral argument, the court hereby ORDERS that:

- 1. Defendant Green's motion for summary judgment on plaintiff's claims against Green for breach of any HIPAA rule and Oregon Public Records Law or any allegations regarding AMR's personnel policies is GRANTED for the reasons set forth in Exhibit 1, attached to this order.

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- 2. Defendant Green's motion for summary judgment on plaintiff's claims against Green for relief based upon a common law duty of confidentiality is DENIED for the reasons set forth in Exhibit 1, attached to this order.
- 3. Defendant AMR's motion for summary judgment on plaintiff's claims against AMR is GRANTED for the reasons set forth in Exhibit 1, attached to this order.
- 4. The court did not rule on defendants' respective Motions to Strike.
- 5. It is further ORDERED that a Limited Judgment of Dismissal shall be entered in favor of AMR.

Dated this 8 day of February, 2008.



Hon. Erich H. Hoffmann
Multnomah County Circuit
Court Judge Pro Tem

Form of Order submitted by:
Elizabeth Schleuning
Schwabe Williamson & Wyatt, P.C.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2008, I served the foregoing ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND TO STRIKE on the following parties at the following addresses:

Janine Robben
4429 SE Francis
Portland, Oregon 97206
Of Attorneys for Plaintiff

Karen O'Kasey
Hoffman Hart Wagner
1000 SW Broadway, 20th Floor
Portland, Oregon 97205
Of Attorneys for Defendant, Simon P. Green

by mailing to them a true and correct copy thereof, certified by me as such, placed in a sealed envelope addressed to them at the addresses set forth above, and deposited in the U.S. Post Office at Portland, Oregon on said day with postage prepaid.



Judith A. Parker

Erich H. Hoffmann

Attorney at Law

Suite 1000
111 S.W. Columbia Street
Portland, Oregon 97201
Telephone: 503-222-2110
Facsimile: 503-222-2337

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January 3, 2008

Ms. Janine Robben
Attorney at Law
4429 SE Francis
Portland, Oregon 97206

Ms. Elizabeth Schleuning
SCHWABE, WILLIAMSON & WYATT
Suite 1600-1800
1211 SW Fifth Avenue
Portland, Oregon 97204

Ms. Karen O'Kasey
HOFFMAN, HART & WAGNER
Attorneys at Law
Twentieth Floor
1000 SW Broadway
Portland, Oregon 972305

Re: JD vs. Simon P. Green, et al.
Multnomah County Case No: 0704-04734

Dear Counsel:

I have had an opportunity to review the extensive amount of material that was filed in this matter. This case presents a number of interesting challenges for the court to review and rule upon. Initially, I am deferring any rulings on the parties' motions to strike the various portions of Mr. Green's personnel file and purported hearsay statements from the police officers and media. I do not believe that a ruling on these points is necessary given the conclusions I have reached in this matter.

BACKGROUND

On February 15, 2007, plaintiff was brutally assaulted and raped by an intruder wearing a black face mask and threatened plaintiff with bodily harm if plaintiff failed to comply with the intruder's instructions (see exhibit 1 to affidavit of Kevin Anderson). Defendant, Simon Green, was an Oregon certified EMT paramedic employed by defendant American Medical Response ("AMR") and was called to the location to assist in the care and treatment of plaintiff. Plaintiff was subsequently transported to OHSU trauma department.

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During plaintiff's transport, defendant Green performed certain assessments regarding plaintiff's health and recorded details regarding the assault that was inflicted on plaintiff. (See plaintiff's exhibit 4, plaintiff response to defendant's AMR's motion for summary judgment). The police dispatch log also contained information regarding the case including the plaintiff's name and address. Information such as that included in the dispatch report is available to the public through the use of scanners or other electronics.

On March 3, 2007, Lindsay, a friend of defendant Green posted on MySpace a bulletin regarding an alleged serial rapist in SE Portland. Defendant Green, in turn, responded to this posting by adding a few details regarding the assault/rape of February 15, 2007. Green forwarded this information to his MySpace "friends". (Plaintiff's attachment 12A to plaintiff's response to MSJ). The posting by Mr. Green did not mention plaintiff's name nor plaintiff's address but did provide some particulars concerning the assault on plaintiff not contained in the original posting. The posting did contain some errors that conflicted with the actual police dispatch of the incident. Mr. Green's response in turn was subsequently re-posted to a My Space friend of plaintiff and ultimately forwarded to plaintiff.

Plaintiff recognized the additional posting as one concerning her assault that occurred approximately three weeks earlier. Plaintiff further testified that, as a result of seeing that re-posting, plaintiff moved from her apartment. Plaintiff also saw a Fox TV News van and received an additional phone call from KPTV news regarding "a MySpace posting". The evidence submitted in this matter indicates that plaintiff was not identified by any acquaintances or friends as the rape victim referenced in Mr. Green's posting. The plaintiff testified that she was extremely disturbed when she saw the posting. Plaintiff called AMR to complain which led to defendant Green's termination.

OPINION

The court has reviewed the plaintiff's first amended complaint and demand for jury trial. The defendants at the time of the motion for summary judgment had not filed a pleading in response to the allegations. Although not artfully drawn, the complaint alleges negligence on the part of Simon Green for divulging confidential medical information and against defendant AMR as Simon Green's employer and directly against AMR for certain allegations of negligence in hiring, training and supervising defendant Green. Plaintiff has alleged claims that involve what I describe as "psychic" injuries. In other words, the law in the State of Oregon holds that recovery from emotional distress without accompanying physical injuries is permitted in only unique and narrow circumstances. Rathgeber v. James Hemenway, Inc., 335 Or 404, 2003. Under Oregon law, there is no general duty to guard against emotional harm. Rathgeber, 335 Or. at 415-16. To recover for emotional distress damages, plaintiff must identify a source for the duty to protect her from psychic harm. Id.

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Plaintiff has cited the Health Insurance Portability and Accountability Act (HIPPA), specifically 42 USC §1320 D-6 as creating a duty of confidentiality on the part of defendant Green and defendant AMR. In reviewing the authorities that discuss possible claims for breach of the act, I am persuaded by the court's ruling in University of Colorado Hospital v. Denver Publishing Company, 340 F.Supp. 2d 1142 (D.Ct. Colo, 2004). In essence, the court goes through an analysis to determine whether or not privacy rights exist on behalf of individual claimants rather than simply providing a governmental regulatory process to guide persons with access to individuals' health information. The court found that HIPPA does not create a private right of action for individual claims based upon purported disclosure of individually identifiable health information.

This court determines that, similarly, HIPPA does not provide any potential remedies nor does it create any special duty on the part of defendant Green. Furthermore, the court finds as a matter of law that there is no duty under the State's public disclosure laws. This claim does not involve public entities. Any public records regarding plaintiff's claim would be the information such as posted in the police dispatch regarding the commission of a crime which, clearly, is a public record. I further find, as a matter of law, that AMR's rules and policies listed as attachments 23B and 21A in plaintiff's response to MSJ did not create a remedy for plaintiff in this situation. The personnel policies, regardless of whether they are contractual or not, simply establish and govern the relationship between an employer and employee. The policies are not for the benefit of any third parties.

In essence, the court concludes that plaintiff is attempting to allege a negligent common law claim for breach of confidentiality regarding the posting that may have included private identifiable health information. Setting aside for a moment whether the posting includes identifiable health information there are also questions of fact concerning what relationship, if any, the ambulance/EMT had with the plaintiff and, further, whether it gives rise to a special relationship.

Plaintiff cites in support the case of Shulman v. Group W Productions, Inc., a California case found at 18 Cal. 4th 200 (1998). In Shulman, the court determined there was questions of fact as to whether victims of a car accident who were subsequently transported by helicopter have an expectation of privacy similar to what occurs in hospital emergency rooms. This case involved a medic and video camera operator who recorded the plaintiff and in addition picked up certain conversations from the flight nurse who wore a wireless microphone. The court relied on a previous decision which had determined that an ambulance providing emergency medical care is considered a private space, both by social tradition and by an analogy to a hospital room. Hence, plaintiff arguably had an expectation of privacy. Noble v. Sears, Roebuck & Co., 33 Cal. App. 3rd 654 (1973).

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Based upon my review of the authorities, Oregon has not yet determined whether an individual in Mr. Green's position as an EMT has a duty of confidentiality to a patient in the position of the plaintiff so as to not release medical information which could give rise to an action for damages. In Humphers v. First Interstate Bank of Oregon, 298 Or 706 (1985), the court determined that plaintiff stated a claim for breach of confidentiality against a physician who divulged a professional secret. No such liability was determined in Doe v. Portland Health Centers, Inc., 99 Or. App 423 (1989) regarding a hospital employee and the mother of a patient.

At this juncture of the lawsuit, I must recognize that in viewing the material submitted in the matter most favorable to the adverse party, the plaintiff herein, I believe there are questions of material fact as to whether a special duty not to divulge confidential information exists between an EMT and a patient such as plaintiff herein. It would appear to me that a person in plaintiff's position would arguably have an expectation of privacy to health information divulged to an EMT/ambulance attendant in the course of treatment.

This, however, does not end the inquiry as to whether or not plaintiff has stated a claim for relief based upon a purported breach of the common law duty of confidentiality. There are issues that need to be addressed regarding causation and damages. I believe that, when taking all reasonable inferences to the benefit of the plaintiff, plaintiff does state a claim for relief against defendant Green for a breach of confidential relationship. I also believe there are issues of material fact regarding what damages, if any, were caused by the posting by defendant Green of the MySpace information. In addition, there are also issues of material fact regarding the contents of Green's posting and whether or not it is the plaintiff that is identified as the person involved. I am also troubled by the lack of testimony from any other source that clearly identifies plaintiff as the individual involved in this traumatic situation.

I have also performed an analysis of whether AMR would be vicariously liable or directly liable for claims as asserted in the first amended complaint. I find the case of Minnis v. Oregon Mutual Insurance Company, 334 Or 191 (2002) persuasive on this point. Quite frankly, I think Chesterman v. Barmon, 305 Or 439 (1988) was unique in its own special circumstances. Under a respondent superior analysis, the court must look to the time the injury actually occurred or whether there was a time-lag between the act and the resulting harm. I find that based upon the evidence submitted to the court, that the act of posting the notice allegedly caused the injury. I find as a matter of law that posting of the information by Mr. Green was not authorized, sanctioned or otherwise approved by defendant AMR and occurred outside the course and scope of Mr. Green's employment with AMR. The posting did not occur within the time and space limits authorized by employment and, further, happened away from AMR's premises at defendant Green's personal residence. I further find, as a matter of law, based upon the material submitted, the motion for summary judgment regarding AMR's independent negligence is also granted. There is no evidence sufficient to create issues of material fact that AMR was negligent in hiring, training or supervising defendant Green regarding the issues that gave rise to plaintiff's

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claims. It is the court's opinion that Green was motivated by altruistic notions to put out the word in the community about a serial rapist for the benefit of the community at large.

To summarize, I believe that plaintiff has stated a claim for relief based upon a common law duty of confidentiality which allegedly was breached by defendant Green in his posting of the information on MySpace. Defendant Green's motions for summary judgment against plaintiff for breach of any HIPPA rule and Oregon Public Records Law; or any allegations regarding AMR's personnel policies are granted. I find that there are questions of material fact regarding whether the posting contained "identifiable health information" and caused damages.

AMR's motion for summary judgment is granted in its entirety. Defendant AMR should prepare an order in conformance with this letter opinion. After first providing sufficient time for plaintiff and defendant Green to review the order, please submit the original document to this office for review and signature.

I would like to thank all the parties for their excellent briefs and presentations.

Sincerely,



ERICH H. HOFFMANN
Judge Pro Tem

EHH:lrb