

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. DA-23-0407

PATRICK A. MALLOY, III,

Plaintiff/Appellant,

-vs.-

**BETTINA J. WEILER MALLOY HUNT,
PROVIDENCE ST. PATRICK HOSPITAL,
PROVIDENCE HEALTH SERVICES, and
JOHN DOES 1-5,**

Defendants/Appellees.

APPELLANT'S BRIEF

**APPEALED FROM THE JUNE 16, 2023 ORDER GRANTING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S RULE 56(f) MOTION OF THE MISSOULA
COUNTY DISTRICT COURT ENTERED ON JUNE 26, 2023 BY THE
HON. SHANE VANATTA, DISTRICT JUDGE**

Appearances:

**Jami L. Rebsom
Attorney at Law
P.O. Box 670
Livingston, Montana 59047
Telephone: (406) 222-5963**

Attorneys for Plaintiff/Appellant

**Elizabeth Hausbeck
Jennifer Swajkoski
HALL BOOTH SMITH, P.C.
101 E. Front St., Ste. 402
Missoula, Montana 59802
Telephone: (406) 317-0070**

Attorneys for Defendants/Appellees

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ISSUE FOR REVIEW

WHETHER THE DISTRICT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS WHEN GENUINE ISSUES OF MATERIAL FACTS EXIST.

STATEMENT OF THE CASE

This case involves Bettina Weiler Malloy Hunt's theft of confidential medical information and financial information from Plaintiff Patrick Malloy. This theft occurred during the times that Hunt was employed by St. Patrick/Providence Hospital as a registered nurse. Hunt created fictitious online accounts to access Malloy's information without his knowledge or consent. Hunt engaged in these activities using her Providence issued email account, while on shift and working and employed as a registered nurse at Providence. Malloy did not authorize her to access his records. Hunt acknowledged that she was aware she was not authorized to access his information, however despite this lack of authorization, Hunt accessed his records over 199 times between July 2017 and January 14, 2021. Malloy communicated to St. Patrick/Providence about Hunt's access to his records and requested that it investigate as early as November, 2017. Providence ignored that request. Malloy authored a final letter to Providence on January 13, 2021 specifically indicating that Hunt was not authorized to access his medical information. This letter was placed in Malloy's medical file.

On January 13, 2021, after Providence was once again expressly on notice of Malloy's objection to Hunt's access, Hunt again accessed Malloy's records without permission or consent while on shift at Providence St. Patrick Hospital. Providence did nothing to investigate or deter Hunt's conduct. This action followed.

In this case, Malloy plead six (6) causes of action against Defendant Hunt and Providence St. Patrick's Hospital in her initial Complaint and in the Amended Complaint filed subsequently. Those causes of action included Plaintiff's Complaint sets forth six (6) causes of action against Defendant Hunt individually and Providence Hospital as Hunt's employer. These claims included the following: 1) Negligence/Respondeat Superior; 2) Negligent Retention of Hunt as an Employee; 3) Negligent Establishment of Safeguards; 4) Intentional Infliction of Emotional Distress; 5) Negligent Infliction of Emotional Distress; and 6) Actual Malice.

The district court entered an Order for Summary Judgment dismissing Malloy's claims, imposing a requirement on Malloy to provide copies of medical records in opposition to Defendants' Motion for Summary Judgment rather than relying on the undisputed facts of record related to the status of Hunt's employment, and Malloy's obvious and substantial emotional distress related to Hunt's acts including his acknowledged PTSD, depression and anxiety and his full VA service connected disability related to those mental health conditions as well as his

hospitalization at the Montana State Hospital during the time Hunt was illegally obtaining his records.

The District Court further declined to allow Malloy additional discovery to obtain the information that would have further supported his claims, such as Hunts' work schedule, Hunt's email communications related to her unauthorized activities, her personnel file related to any actions Defendant Providence/St. Patrick Hospital took after learning of Malloy's complaints.

Finally, the District Court confused "parasitic" damages for emotional distress related to negligence claims with the independent causes of action for negligent and intentional infliction of emotional distress. It imposed a requirement that Malloy provide an expert to support these claims, contrary to the holdings of this Court.

STATEMENT OF FACTS

The following facts are taken directly from the Verified Response to Defendants' Motion for Summary Judgment, the Complaint in this matter as well as the Affidavit of Patrick A. Malloy, III , in opposition to Defendants' Motion for Summary Judgment herein (Exhibit 2). Pursuant to Rule 56(c) M.R.Civ.P., the Court must make all reasonable factual inferences in favor of the Plaintiff herein.

Plaintiff Patrick A. Malloy and Defendant Bettina J. Weiler Malloy Hunt (Hunt) were formerly husband and wife. Patrick and Hunt separated on or about July 9, 2017 and were fully and finally divorced on November 2, 2018. (Cause No.

DR-17-532, Missoula County District Court; DA 19-238N). Up through the November, 2, 2018 dissolution date, Malloy was covered under Hunt's health insurance policy through her employment with Providence. After that date, his coverage terminated as a matter of law. Malloy was then covered by Medicaid following the dissolution, specifically in February, 2019, when he was hospitalized at the Montana State Hospital. The district court mistakenly concluded that Hunt was the billing contact for Malloy's insurance claims, when in fact, her coverage terminated as a matter of law on November 2, 20218. Thus, Hunt was no longer receiving billing statements from her insurance company for Malloy's treatments after November 2, 2018. Hunt acknowledged this when she contacted Malloy over a year later (November 2019) and indicated that at least he "wasn't on Medicaid" when they were together and expressed her knowledge concerning his Montana State Hospital Stay. Malloy did not provide her with this information. Hunt admits that she did not have authorization to access Malloy's medical information after July, 2017 via Epic (the owner of MyChart). (Exhibit 2, Exhibit B, page 11, Response to RFA 10).

However, even prior to the dissolution, during the time that the divorce was pending, Patrick became aware that Hunt was improperly accessing his confidential credit information and confidential medical records. He learned of the medical access through various communications that she sent to him referencing his

confidential medical information that he had not shared with her. Hunt provided Patrick with text message communications indicating that she had obtained confidential information including that he had been hospitalized at the Montana State Hospital. Copies of this communication were provided in connection with Patrick's Responses to Defendants' First Discovery Requests herein and are part of the record provided to Defendants. Defendants do not deny that they received copies of this communication or that Hunt in fact made this communication. Further copies of Hunt's communications to third parties, including communications with Douglas Marshall were also provided in Plaintiff's First Discovery Responses to Defendants. (Exhibit 2, Exhibit C text message to Douglas Marshall 9/2017). Finally, Malloy identified Caleb Malloy, Kiana Malloy, Linda Weiler, Michael Weiler and Douglas Marshall as the recipients of confidential medical information from Hunt regarding his stay at the Montana State Hospital as well as other medical conditions she discussed and disclosed.

Initially Patrick believed that Hunt was accessing his medical records directly through her employment at Providence through the EPIC medical records system designed for hospital use and accessible to nurses and other hospital personnel. Patrick became so concerned that he made it known to Providence through e-mail communication as early as November, 2017 to Brenda Gramling and Andrew Schillinger, both employed by Providence that he believed

that Hunt was improperly accessing his records and requested that they investigate this matter and take appropriate action based upon the findings of that investigation. (Copies of these communications were produced to Defendants in Response to Discovery Requests herein and appended to Exhibit 2). The district court acknowledged and quoted these communications in full in its Order Granting Summary Judgment (Exhibit 1, pages 4-5). Neither Ms. Gramling nor Mr. Schillinger provided any response and/or assurance that Patrick's concerns were investigated or even given serious consideration by Providence. His concerns were summarily dismissed. Neither Gramling no Schillinger ever identified the MyChart system, designed for patients to obtain their own medical information without need for contacting the hospital directly to receive the information.

The MyChart system is owned and operated by the makers of the EPIC system, which is the same system used by hospital staff and employees to access medical records. Patrick was not aware of the ability to access his records through the MyChart system until January 13, 2021 when he learned of the process during a procedure he was undergoing at Providence from one of the medical personnel attending to him at that time.

Hunt had been accessing his records throughout the duration of the dissolution process from Patrick and following the completion of that process. Hunt admitted in her discovery responses that she had in fact established the MyChart account for

Malloy (Exhibit 2, Exhibit B, page 10, Response to RFP 9) though she asserts that Malloy knew about and authorized this access. This is disputed by Malloy in the allegations of the Complaint and his verified Response herein. (First Amended Complaint, ¶26; Plaintiff's Opposition to Motion for Summary Judgment, page 8). Though Hunt denied that her access was unauthorized, she did admit that she had sole and exclusive use of the e-mail address associated with the account (Kiananbro@bresnan.net). (Exhibit 2, Exhibit C, page 10, RFA 4). Patrick did not have access to this email address and did not have login information related to that MyChart account up until he changed the access to his own email address and password on or about January 14, 2021.

The access record for his medical account indicates, and Defendants do not dispute, that the MyChart system had been accessed at least 199 times between the time of the parties' separation in July, 2017 and January 14, 2021. This included access on January 13, 2021, the day Patrick had the medical procedure even though he was aware that he would not have any results of that procedure until at least the following day. It was when he attempted to set up his account the following day that he learned that he had a preexisting account and that it had been accessed only hours previously during Hunt's hours of employment with Providence. He did not access the record at that time. (Response to Motion for Summary Judgment, page 8-9). Hunt does not deny that the access occurred during her hours of employment.

Despite Providence's lack of follow up on the initial complaint to Gramling and Schillinger, Patrick continued to reach out to Providence to repeatedly express his concerns about Hunt's unauthorized access to his records. Mr. Malloy also made complaints to the Board of Nursing against Ms. Hunt in early 2018, however his concerns were once again dismissed. Over this time period, Hunt repeatedly expressed to third party individuals that she in fact had access to his medical information and, on occasion, passed that information on to third parties without his knowledge or consent.

One such example was when Hunt wrote a letter to Patrick's primary treating physician, Dr. Carol Bridges in an effort to malign Patrick and interfere with his treatment with Dr. Bridges. Copies of this communication were identified by Plaintiff and provided to Defendants in response to their discovery requests to Defendants. Hunt admitted she made this contact as well in her Responses to Plaintiff's Discovery Requests (Exhibit 2, Exhibit C, page 12, RFA, 13).

Following the dissolution of marriage (a full year later) in November, 2019, Hunt sent Patrick a text message indicating that she had knowledge that he had spent time at the state hospital and was "on Medicaid." Copies of those communications were likewise provided to Defendants in response to their Discovery Requests herein. Defendants do not dispute receiving these communications. This was presented to the district court as a fact issue in Plaintiff's

Response to Summary Judgment. Patrick did not share these highly sensitive and confidential matters with Hunt, particularly during an acrimonious divorce.

Hunt goes on to acknowledge in that e-mail that she was aware that he did not consent to her receiving such information and attempts to explain her knowledge away by stating that "File another [sic] HIPPA it is not from that." This communication again, was made by Hunt, is in her possession, and was provided by Patrick in Response to Defendants' discovery requests to him. She does not identify the source of her knowledge at that time, however Patrick later learned it was through her unauthorized use of the MyChart system. Defendants do not dispute receiving this communication.

Though he did not choose to pursue an additional complaint at that time, Malloy continued to receive reports from third parties indicating that Hunt was somehow continuing to learn about his confidential medical information. These communications included information concerning a colonoscopy he underwent at Community Hospital which she shared with Caleb Malloy and Kiana Malloy, information concerning his hospitalization at the State Hospital that was also shared by Caleb Malloy and Kiana Malloy.

Counsel for Plaintiff discussed this situation with Providence representatives again in late fall, 2020, however again Providence refused to address the situation and did not indicate that Hunt may in fact be using the MyChart system to access

Malloy's records.

On January 13, 2021, Malloy underwent a procedure at Providence. As Malloy continued to be concerned about Hunt's access to and knowledge of his medical conditions, he once again, on January 13, 2021 expressed those concerns, this time through written communication indicating that he expressly did not authorize any access for Hunt to his medical files. A copy of that communication is now included in Patrick's Providence chart. He prepared that document on January 13, 2021 because he continued to be concerned that Hunt had improperly accessed his medical records. Defendants do not dispute receiving this communication and do not dispute receiving a copy of this written communication.

After the testing was complete on January 13, 2021, and while Patrick was recovering from the procedure, the nurse advised him that he could access the results of the study on the My Chart website. Prior to that advice, Patrick was not aware that was an option. He had not personally established and did not have access to a MyChart account that would allow him to access that information. Malloy left the hospital around 4:00 p.m. after he was assured that he had no further complications from this procedure.

On January 14, 2021, per the staff's advice, Patrick attempted, for the first time, to create a MyChart account through the MyChart/Providence website. He was denied access. He then contacted the telephone number associated

with the service and learned that an account had already been established using his information to access his confidential records. The username associated with the established account for his records was "Kiananbro1" and was the username that Hunt admitted in discovery (Exhibit 2, Exhibit C, page 9, RFA's 3 and 4) that she had used to create the account.

The e-mail address associated with the account for his records, established by Defendant Hunt was Kiananbro@bresnan.net. The e-mail address associated with his records belongs/belonged exclusively to Hunt and Patrick did not have access to that account. The corresponding user name also belonged to Hunt. Hunt admitted that these accounts belonged to her in her Responses to Plaintiff's Discovery Requests to Hunt. (Exhibit 2, Exhibit C, page 9, RFA's 3 and 4). Patrick did not have access to that e-mail and did not consent to its use to access his medical records, particularly after the divorce process started in August, 2017. (Exhibit 2, Exhibit C, page 9, RFA's 3 and 4).

Patrick did not create a MyChart account any time prior to January 14, 2021, but upon learning of its existence, he immediately changed the username and e-mail related to the account and received e-mail confirmations that he did so. This communication was likewise provided in Plaintiff's Discovery Responses to Defendants. Defendants do not dispute they received this Response. Hunt was well aware that any previous authorization that she may have had

as Mr. Malloy's former wife was revoked when he made the first complaint about her access in November, 2017. (Exhibit 2, Exhibit C, page 11, RFA 10). Despite this knowledge, Hunt continued to access his account repeatedly between August, 2017 up through January 13, 2021. Patrick at no time accessed his own records until January 14, 2021 when he became aware of that capability. (Exhibit 2).

Hunt's final unauthorized access to his records occurred on January 13, 2021 at 9:12 pm. while she was on shift and on duty at Providence. Patrick, who had just had the procedure earlier in the day and knew that the records would not be available until the following day, which is what prompted him to explore creating this access at all. Had it not been for the personnel at the procedure, Hunt's unauthorized access would have continued. Hunt does not deny that she was on shift at the time of the access, though Providence refused to provide that information in discovery.

To date, Hunt has accessed Mr. Malloy's file in an unauthorized manner 199 times between 2017 and the present. A log of the accesses was provided in Response to Defendants' discovery requests to Plaintiff herein. Hunt works the night shift at Providence as a registered nurse. Almost every single access to this record occurred during the early morning hours (i.e. between 2:00 a.m. and 5:00 a.m.) and while she was on duty as a nurse at Providence/St. Pat's.

My Chart access is part of the EPIC system used routinely by

the hospital for keeping medical records. Providence/St. Patrick's Hospital is responsible for Hunt's actions while on duty and working her shift at the hospital. Providence is responsible for maintaining the EPIC MyChart system in a safe and secure manner and to ensure that no unauthorized access occurs to that system pursuant to §50-16-511, MCA.

Finally, on April 23, 2022, Patrick learned that not only had Hunt accessed his medical records without authorization while on duty and in the employ of Providence, Defendant Weiler Malloy Hunt had created a Credit Karma account through Credit Karma on or about July 29, 2017 without his knowledge, or consent. At the time Defendant Weiler Malloy Hunt's created the unauthorized Credit Karma account, she and Patrick were separated and she was seeking a dissolution of marriage from Patrick. The district court did not address this allegation and/or whether Hunt had in fact created this account. Despite this, it dismissed this claim against Hunt and Providence without any further evidence and refused to provide copies of email communications Malloy requested in discovery to obtain verification of Hunt's unauthorized and unmonitored activities. Defendant Weiler Malloy Hunt provided Tmalloy@saintpatrick.org as the email that was associated with the account. This account is a unique account provided for employees of Providence. Hunt does not deny that she used this email. Malloy did not have access to that email account or login information.

Defendant Hunt provided a credit/debit card for payment of the fees associated with the account that was solely in her name. At no time did Hunt ever seek permission from Patrick to establish the account. Defendant Hunt established the account without Patrick's knowledge. Defendant Weiler Malloy Hunt established the account without Patrick's permission. Defendant Weiler Malloy Hunt continued to receive confidential financial information from Credit Karma from July 29, 2017 through April, 2022. At no time did Plaintiff authorize Credit Karma to establish this account on his behalf. The district court's Order did not address these allegations at all.

Finally, Defendants do not dispute that Malloy withdrew his consent to authorize Hunt to access his medical information in 2017, following the parties' separation, nor do they dispute that he was covered by starting November, 2018—immediately following the parties' dissolution. (DA-2019-238N).

SUMMARY OF ARGUMENT

The district Court erred when it granted Defendants' Motion for Summary Judgment when genuine issues of material fact exist in this case. Specifically, fact issues exist as to Hunt's actions, Providence's responses to Hunt's actions, and whether Malloy was entitled to additional discovery pursuant to Rule 56(f), M.R.Civ.P. The Court confused "parasitic" emotional distress damages with independent causes of action for emotional distress and inserted a requirement that

Malloy: 1) specifically identify records that support the distress without citation to authority; and 2) provide expert testimony on this topic. The district Court erred in its analysis and in entering judgment based on a finding that Malloy could not support his claim for emotional distress damages without an expert. This is contrary to this Court's previous holdings.

Additionally, the Court erred when it determined that Hunt and Providence were not subject to the confidentiality provisions contained in Title 50 of the Montana Code Annotated as health care providers. For these reasons, this Court should reverse the district court's entry of Summary Judgment in Defendants' favor.

STANDARD OF REVIEW

This Court reviews a district court's "summary judgment rulings *de novo* for conformance to the applicable standards specified in M. R. Civ. P. 56." *Lawrence v. Pasha*, 2023 MT 150, ¶ 8, 413 Mont. 149, 533 P.3d 1029 The district court has discretion to decide whether to continue a motion for summary judgment pursuant to Mont. R. Civ. P. 56(f), M.R.Civ.P., on the basis that the party opposing the motion needs further discovery. This Court reviews the denial of a Rule 56(f) motion for an abuse of discretion. *Rosenthal v. County of Madison*, 2007 MT 277, ¶37.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS WHEN GENUINE ISSUES OF MATERIAL FACTS EXIST.

A. Summary Judgment Law

"Summary judgment is proper only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Pasha*, ¶ 8. "A genuine issue of material fact is a fact materially inconsistent with proof of an essential element of a claim or defense at issue." *Pasha*, ¶ 8. The moving party "has the initial burden of showing a complete absence of any genuine issue of material fact on the Rule 56 record and that the movant is accordingly entitled to judgment as a matter of law." *Pasha*, ¶ 8. "[T]he burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue [of fact] does exist." *Osterman v. Sears*, 2003 MT 327, ¶ 17, 318 Mont. 342, 80 P.3d 435. When determining whether there exists a genuine issue of material fact, "all facts considered material in light of the substantive principles that entitle the moving party to judgment as a matter of law and all reasonable inferences are to be drawn in favor of the party opposing summary judgment." *Weber v. Interbel Tel. Coop., Inc.*, 2003 MT 320, ¶ 5, 318 Mont. 295, 80 P.3d 88.

The purpose of summary judgment is to facilitate judicial economy through the elimination of unnecessary trials. However, summary judgment is not a substitute for trial if a genuine factual controversy exists. *Reaves v. Reinbold* (1980), 189 Mont. 284, 288, 615 P.2d 896, 898; *Singleton v. L.P. Anderson Supply Co.*, 284 Mont. 40 (1997).

Ordinarily, negligence actions involve factual issues which make summary judgment inappropriate. *Brohman v. State* (1988), 230 Mont. 198, 201, 749 P.2d 67, 69. The existence of a duty ... is a question of law to be determined by the Court. *Yager v. Deane*, 258 Mont. 453, 853 P.2d 1214 (1993).

B. Negligence/Respondeat Superior Claims.

Plaintiff has plead a cause of action against Hunt individually and against Hunt in her capacity as a nurse employee of Providence Hospital. Plaintiff's claims include that Hunt, a nurse, had a duty to Plaintiff to refrain from accessing his medical information without authorization and that on occasion, Hunt accessed that information while on duty and on shift at Providence. For the reasons set forth herein, Plaintiff has provided evidence that factual issues exist with respect to these claims and Summary Judgment was improper.

a. Hunt and Providence Liability Pursuant to Title 50.

Negligence claims are generally not appropriate for disposition by summary judgment. Negligence is the failure to use the degree of care that an ordinarily prudent person would have used under the same circumstances. *Barr v. Great Falls Int'l Airport Authority*, 2005 MT 36, ¶ 41, 326 Mont. 93, ¶ 41, 107 P.3d 471, ¶41. To maintain an action in negligence, the plaintiff must prove four essential elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached that duty, (3) the breach was the actual and proximate cause of an injury to the plaintiff, and (4)

damages resulted. *See Willden v. Neumann*, 2008 MT 236, ¶ 14, 344 Mont. 407, ¶14, 189 P.3d 610, ¶ 14; *Bonilla v. University of Montana*, 2005 MT 183, ¶14, 328 Mont. 41, ¶ 14, 116 P.3d 823, ¶ 14; *Massee v. Thompson*, 2004 MT 121, ¶ 30, 321 Mont. 210, ¶30, 90 P.3d 394, ¶30.

For there to be a genuine issue of material fact in a negligence case, there must be a duty imposed on the defendant and allegations which, if proven, would support a finding of a breach of the duty. *Richardson v. Corvallis Public School Dist. No. 1*, 286 Mont. 309, 313, 950 P.2d 748, 751 (1997). In this case, Hunt is an individual that has a duty to refrain from stealing confidential medical and credit information by deceptive means. Plaintiff has offered evidence and documents to support his claims against Hunt in an individual capacity that she indeed breached that duty by creating fictitious accounts to access his protected information without authorization. He has identified instances and dates of conduct that constitute breach of that duty. He has further identified records that Providence has willfully refused to provide that would further support this claim. It is clear that he has provided factual issues regarding Hunt's duty and breach of the duty. Plaintiff's medical records and Declaration set forth the damages that he has sustained as a result of her acts.

Moreover, Hunt is a health care provider §50-16-504(7) as follows: “. . . a person who is licensed, certified, or otherwise authorized by the laws of this state to provide health care in the ordinary course of business or practice of a

profession.” Hunt, as a registered nurse is subject to the provisions set forth in Title 50-16-511, MCA as well as Providence. It defies common sense to find, as the district did, that Hunt’s actions would not be subject to the terms of Title 50 as an individual and a nurse formerly married to a patient of Defendant Hospital. The District Court for the Eleventh Judicial District Flathead County addressed a similar claim by the healthcare provider wherein it alleged that it was not responsible for unauthorized disclosure of records to a third party by one of its employees. Defendants argued that the matter was appropriate for summary judgment, however the Court declined to enter the same holding that:

With regard to the negligence per se claim, the alleged violation of the Uniform Health Care Information Act, a health care provider is required to "effect reasonable safeguards for the security of all health care information it maintains." *Section 50-16-511, MCA*. "Maintains" means to possess or control. Section 50-16-504 (9). The evidence in this case in this regard is that Plaintiff's medical records were delivered to NVH from KRMC. The records were delivered to NVH in the customary manner, following which Ms. House removed them from the NVH premises and delivered them to Plaintiff's father. Under these circumstances, it certainly appears that a fact finder could conclude that NVH "possessed" or "controlled" the records, and that it failed to "effect" reasonable safeguards for securing the records, regardless of whether Ms. House was acting within the course and scope of her employment in her conduct. Therefore, count I involves a genuine issue of material fact and is not appropriate for summary judgment.

House v. Kalispell Regional Medical Center et al., 2002 ML 3121; 2002 Mont.

Dist. LEXIS 3387. This is the only case that discusses application of Title 50 to claims such as Plaintiffs, and the conclusion the Court drew was that title 50 does in

fact apply to situations related to unauthorized access and/or disclosure of medical records by hospital staff.

So too, did Providence “possess” and “control” Plaintiff’s records through its contract with MyChart to store and provide access to them. Hunt clearly owed Plaintiff a duty to keep his information confidential. She breached the duty by accessing it without permission and disclosing it to third parties (Caleb Malloy, Kiana Malloy, Douglas Marshall, Mike Weiler and Linda Weiler) as set forth in the Statement of Fact, Discovery and Declaration herein. A genuine issue of fact exists as to Hunt’s acts that constitute a breach of her duties that precludes this Court from entering summary judgment against Plaintiff.

b. Providence is Liable for Plaintiff’s Acts (Respondeat Superior) and Negligent Supervision/Retention (Counts I, II, III, IV).

Distinct from direct liability for an employer's own tortious conduct, the common law doctrine of *respondeat superior* imposes vicarious liability on employers for the tortious conduct of employees committed while acting within the scope of their employment. *Kornec v. Mike Horse Mining & Milling Co.*, 120 Mont. 1, 7, 180 P.2d 252, 256 (1947); *Keller v. Safeway Stores*, 111 Mont. 28, 35, 108 P.2d 605, 610 (1940); Restatement (Third) of Agency §§ 2.04, 7.03(2)(a), and 7.07 (Am. Law Inst. 2006). "The doctrine establishes a principle of employer liability for the costs that work-related torts impose on third parties." Restatement (Third) of Agency

§ 2.04 cmt. b. It recognizes, inter alia, that the "ability to exercise control over . . . employees' work-related conduct enables[,] [and provides incentive for,] the employer to take measures to reduce the incidence of tortious conduct." Restatement (Third) of Agency § 7.07 cmt. b. *See also Billig v. Southern Pacific Co.*, 189 Cal. 477, 209 P. 241, 243 (Cal. 1922) (noting that respondeat superior depends on employer's power and duty of control over the employee). However, the elemental limitations of the doctrine protect employers from becoming "insurer[s] against all harm suffered by third parties with whom [their] employees may interact." Restatement (Third) of Agency § 7.07 cmt. b. For purposes of *respondeat superior*, a tortious act occurred within the scope of employment if the act was either expressly or implicitly authorized by the employer or was incidental to an expressly or implicitly authorized act. *See Kornec*, 120 Mont. at 8-12, 180 P.2d at 256-58; *Keller*, 111 Mont. at 36-40, 108 P.2d at 610-12; Restatement (Third) of Agency § 7.07(2) cmt. b. See also 18 Case 1:20-cv-00032-TJC Document 63 Filed 10/14/21 Page 18 of 28 Restatement (Second) of Agency § 228(1)(a), (c).

Expressly authorized acts include, inter alia, acts the employer specifically directed or authorized the employee to perform. See § 28-10-402, MCA ("[a]ctual authority is authority that the principal intentionally confers upon the agent or intentionally or [negligently] allows the agent to believe that the agent possesses"). Implicitly authorized acts include acts reasonably necessary or customary under the

circumstances to the performance of specifically authorized acts or functions and other acts "of the same general nature." Restatement (Second) of Agency § 229(1) cmt. a. *See also Kastrup v. Yellow Cab & Baggage Co.*, 129 Kan. 398, 282 P. 742, 747 (Kan. 1929) (cited in *Kornec*—"[e]xpress authority to do an act carries with it authority to do those subordinate and incidental acts which may be reasonably necessary and proper to be done, or which are usually and ordinarily done, in order effectively to do the main thing"). Accord § 28-10-405(1), MCA.

Relevant factors in determining whether an act or conduct was implicitly authorized by the employer include, inter alia: (1) whether the act was of a type such employees commonly perform; (2) "the time, place and purpose of the act"; (3) whether the employer had reason to expect that the employee might so act under the circumstances; (4) the extent, if any, to which the act departed from a normal or typical means of accomplishing an authorized task or function; and (5) whether the employer furnished the instrumentality the employee used to harm the 19 Case 1:20-cv-00032-TJC Document 63 Filed 10/14/21 Page 19 of 28 third party at issue. *Keller*, 111 Mont. at 36-37, 108 P.2d at 610; Restatement (Second) of Agency § 229(2).

The finder of fact may infer that an employee performed an expressly or implicitly authorized act in furtherance of the interest of the employer. *See Restatement (Second) of Agency* § 235 cmt. a. Even an act or conduct not expressly

or implicitly authorized by the employer is nonetheless within the scope of employment if the act was incidental to the performance of an expressly or implicitly authorized act and at least partially motivated by the employee's intent or purpose to serve the employer's interest. *Keller*, 111 Mont. at 36-40, 108 P.2d at 610-12. *Accord Kornec*, 120 Mont. at 9-10, 180 P.2d at 256-57; Restatement (Third) of Agency §7.07(2) cmt. b; Restatement (Second) of Agency §§ 228(1)(a), (c), and 229(1). "An act may be incidental to an authorized act," even though "an entirely different kind of an act." Restatement (Second) of Agency § 229 cmt. b.]

However, the incidental act: must be . . . subordinate to or pertinent to an act which the [employee] [was] employed to perform. . . . The fact that a particular employer ha[d] no reason to expect the particular [employee] to perform the act is not conclusive. . . . [For example,] [a]n assault by one employed to recapture a chattel, while entirely different from the act which he was employed to do, which was merely to take possession of the chattel, may be within the scope of employment, unless committed with such violence that it bears no relation to the simple aggression which was reasonably foreseeable. Restatement (Second) of Agency § 229 cmt. b. Thus, the fact that the employer did not authorize the tortious conduct, the employee was disobedient, or the employee disregarded the employer's instruction or rule does not necessarily preclude a finding that the employee was acting in furtherance of the employer's interest. *Kornec*, 120 Mont. at 9-10, 180 P.2d

at 256-57; *Keller*, 111 Mont. at 38-40, 108 P.2d at 611-12; Restatement (Third) of Agency § 7.07(2) cmt. c; Restatement (Second) of Agency § 230.

Depending upon the circumstances, an employer may be vicariously liable in *respondeat superior* for negligent, willful, and malicious acts of employees committed within the scope of their employment. *Kornec*, 120 Mont. at 7-8, 180 P.2d at 256; *Keller*, 111 Mont. at 38, 108 P.2d at 611. The fact that an employee's predominant motive was self-interest does not preclude an act from the scope of employment if the employee was motivated by any purpose or intent to serve the employer's interest "to any appreciable extent." Restatement (Second) of Agency § 236 cmt. b. Thus, a dual or mixed motive does not preclude a finding that the employee was acting in furtherance of the employer's interest unless the employee was engaged in "an independent course of conduct not intended . . . to serve any purpose of the employer." Restatement 21 Case 1:20-cv-00032-TJC Document 63 Filed 10/14/21 Page 21 of 28 (Third) of Agency § 7.07(2) cmt. b (emphasis added). Accord *Keller*, 111 Mont. at 37, 108 P.2d at 611 (personal motive does not take the act beyond the scope of employment "unless it clearly appear[s] that the [employee] could not have been directly or indirectly" acting in furtherance of the employer's interest in any regard); *Webster v. Mountain States Tel. & Tel. Co.*, 108 Mont. 188, 198-99, 89 P.2d 602, 604-05 (1939); Restatement (Second) of Agency § 230 cmt. c ("[c]onduct is not within the scope of employment if it has no connection with the

act which the employee is required to perform"); Restatement (Second) of Agency § 235 (an act is not within the scope of employment if performed "with no intention to perform it as a part of or incident to a service on account of which he [or she] is employed"). The question of whether an employee was acting at least partially in furtherance of the employer's interest does not depend on whether the employer actually profited or benefitted from the act. *Taber v. Maine*, 67 F.3d 1029, 1036 (2nd Cir. 1995) (noting "hasty [modern] retreat" from that aspect of the "older conception of *respondeat superior*" articulated in Restatement (Second) of Agency § 228); *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 227 Cal. Rptr. 106, 719 P.2d 676, 680 (Cal. 1986). The state of mind of the employee is determinative—the issue is whether the employee was at least partially motivated to serve the employer's interest "to some extent." Restatement (Second) of Agency § 235 cmt. a. Accord Restatement (Third) of Agency § 7.07 cmt. b ("employee's intention severs the basis for treating" an "act as that of the employer"). The question of whether an employee was at least partially motivated by an intent or purpose to directly or indirectly further the employer's interest is a question of fact for consideration under the totality of the circumstances. *Denke v. Shoemaker*, 2008 MT 418, ¶¶ 73-74, 347 Mont. 322, 198 P.3d 284; *Kornec*, 120 Mont. at 10, 180 P.2d at 257; *Keller*, 111 Mont. at 36, 38, 108 P.2d at 610-11; Restatement (Second) of Agency § 235 cmt. a., emphasis added.

In *Keller*, the Montana Supreme Court considered, inter alia, whether the trial

evidence was sufficient to support a jury finding that the store manager of a grocery store corporation (Safeway) was acting within the scope of his employment when he personally traveled from the Butte Safeway store to the home of the plaintiff's mother and made a slanderous allegation that the plaintiff deceitfully paid for groceries with a forged or otherwise bad check. *Keller*, 111 Mont. at 39-41, 108 P.2d at 611-12. Based on evidence that Safeway discouraged its managers from accepting personal checks from customers (by holding managers personally liable for customer checks that did not clear) and that a Safeway supervisor had specifically told that particular manager not to accept personal checks from customers (like the plaintiff) he did not know, the employer asserted in defense of the ensuing slander claim that the store manager acted on his own, outside the scope of his employment. *Keller*, 111 Mont. at 39-40, 108 P.2d at 612. Even assuming, arguendo, that Safeway had not expressly or implicitly authorize the manager to accept a personal check from the plaintiff, the Court noted that a fact question still remained as to whether the manager made the slanderous statement incidental to the performance of an authorized act and at least partially in furtherance of the employer's interest. *Keller*, 111 Mont. at 40, 108 P.2d at 612. Acknowledging that Safeway had not expressly or implicitly authorized its managers to make slanderous statements about customers, this Court held that the jury could nonetheless have reasonably found that the manager's personal trip to the mother's home, and ensuing slanderous statement,

were "so closely intermingled with" his authorized employment duties that the "slander was a wrong committed, if not in furtherance of his employment, at least as an incident thereto." *Keller*, 111 Mont. at 40, 108 P.2d at 612.

The *Keller* Court thus held that the evidence was sufficient to support the jury's finding that the manager made the slanderous statement to the plaintiff's mother within the scope of his employment. *Keller*, 111 Mont. at 40, 108 P.2d at 612. The employee contrarily asserted that the plaintiff attacked him and that he acted only in self-defense. *Kornec*, 120 Mont. at 7, 180 P.2d at 255. In its defense, the company asserted that the employee was acting outside the scope of his employment because his assault of the plaintiff "was a personal and independent act. . . not binding" on the employer. *Kornec*, 120 Mont. at 4, 180 P.2d at 254. Despite conflicting evidence, the Court held that there was sufficient evidence upon which the jury could have reasonably concluded that the employee was "carrying out the duties for which he was employed at the time and place assigned" when the verbal and resulting physical altercation occurred between the employee and the plaintiff. *Kornec*, 120 Mont. at 10-11, 180 P.2d at 257. Noting further that there was no evidence that the employee "held any personal grudge or ill will against the plaintiff," we affirmed the jury verdict, holding: The question as to whether [the employee] was acting within the scope of his employment was a question for the jury under proper instruction. Under the facts disclosed there was evidence presented

from which a jury could find that the act complained of was within the scope of the actor's employment and done while engaged in his masters' business and "in furtherance of that business and the masters' interest." *Kornec*, 120 Mont. at 11, 180 P.2d at 257.

Finally, in *Rocky Mountain Enterprises, Inc. v. Pierce Flooring*, 286 Mont. 282 (1997), in which an employee made nuisance calls to and otherwise harassed a competitor, without the knowledge of his employer. The Montana Supreme Court held that it was not error to submit to the jury the issue of whether or not the employer was liable under respondeat superior, since the employee understood that his acts could harm Rocky Mountain's [the competitor's] business activities." On this basis, the Court concluded that there was a genuine issue of material fact as to whether the employee's conduct "was in furtherance of his employer." 286 Mont. at 306.

Similarly, in *Kornec*, after a jury found a mining company vicariously liable for an employee's intentional assault and battery of the plaintiff, this Court considered whether the trial evidence was sufficient to support the jury finding that the employee was acting within the scope of his employment, as a miner and general laborer, when he physically assaulted the third-party plaintiff. *Kornec*, 120 Mont. at 10, 180 P.2d at 257. Though accounts of the events varied, the employee was in the process of effecting repairs to a diversionary dam on company property

adjacent to the plaintiff's property when the plaintiff appeared and challenged him about water backing up from the dam onto the plaintiff's property. *Kornec*, 120 Mont. at 6-7, 180 P.2d at 255-56. According to the plaintiff's version of events, the mining company employee, in response to the plaintiff's "remonstrat[ion] . . . and complain[t]" about the dam, walked onto the plaintiff's property and then threatened and repeatedly beat him with a shovel. *Kornec*, 120 Mont. at 7, 180 P.2d at 255.

Similarly here, Hunt was employed by Providence as a nurse. Her duties included accessing patient charts and responding to patient needs. Hunt accessed Plaintiff's records at times that she was on duty at Providence. Providence was aware that it may be harmed if it condoned Hunt's activities of improperly accessing patient files while on duties. Plaintiff informed Providence on multiple occasions that Hunt was accessing his records. It took no action to investigate or suspend Hunt pending any sort of determination. Providence, by its non-action ratified Hunt's acts during her hours of employment. Providence supplied Hunt with an employee email account for her use for work related matters. Hunt used that account to set up and monitor Plaintiff's credit history without his knowledge or consent.

These facts show, at a minimum, a fact question for the jury to decide, as to whether Hunt was: 1) within the course and scope of her duties; 2) whether Providence implicitly allowed her to continue the unauthorized access of Plaintiff's

records; and 3) whether Providence was negligent when it failed to monitor her employee email use. There is a further fact question as to whether Providence provided appropriate safeguards against such misuse of its accounts and whether it negligently retained Hunt based upon her acts.

As to the negligent supervision claims set forth in Counts II, III and IV, *House v. Kalispell Regional Hospital et al.*, again provides guidance. This is not a claim based on *Respondeat Superior*. The United Health Care Information Act was designed to protect patients' interests in privacy and health care while at the same time providing them with access to their own records. Section 50-16-502, MCA.

Under the Act, "health care information" includes:

. . .any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and relates to the patient's health care. The term includes any record of disclosures of health care information.

Section 50-16-504 (6), MCA. Health care providers may not disclose health care information to any other person without the patient's written authorization. Section 50-16-525 (1), MCA.

This is a claim that Providence failed to exercise ordinary care in the supervision of Hunt when Plaintiff expressly informed it that she was engaging in unauthorized activities. This is a similar claim to the Plaintiff's claims in *House* where the allegation was that Defendant failed to ensure its staff did not improperly

disseminate patient medical records. In analyzing that claim, the Court relied on the testimony of the Defendant (also named House) that:

[s]he did not recall her supervisor ever "looking into" what she was doing in her work at NVH, and she was not aware of any procedure for oversight of records requests that she handled. The fact that she was on break at the time of her telephone call to KRMC to get the records is not dispositive as to this issue, nor is the fact that the records were handled by her for her own purposes.

The Court concluded that based on this testimony, there are genuine issues of material fact as to the negligent supervision claim, and summary judgment was not appropriate. In this case, Defendants have refused to provide the results of its alleged investigation into Hunt's actions. At a minimum, this is necessary information and Defendants cannot rely on their own failure to provide the same as a basis for judgment herein. It would be absurd for this Court to determine that neither Hunt nor Providence is a medical provider subject to the prohibitions of this section. Moreover, the district court should not have denied Malloy's request for information related to when Hunt was on shift and working to identify when she was using Providence's facilities and computerized access to steal Malloy's information.

Plaintiff was entitled to obtain Rule 30(b)(6) testimony from Providence employees would support that no formal investigation was ever conducted, no audit of Hunt's email was conducted and she was never questioned about her access to Plaintiff's records despite Plaintiffs multiple communications that Hunt's actions

were taking place. Plaintiff should have been afforded the opportunity to collect this information prior to the entry of judgment on this claim.

For these reasons the Court erred when it granted summary judgment on Defendant's Motion on Counts I, II, III, and IV of the Complaint as genuine issues of material facts exist that make summary judgment improper. It further erred when it refused to allow Plaintiff additional time to collect this information pursuant to Rule 56(f) based on Defendants' wilful acts of refusing to provide discoverable information and then asking the Court to enter judgment without further opportunity to obtain the same. Defendants should not be permitted to benefit from their own bad acts. The district court erred in dismissing these claims.

Accordingly, the Court must deny the same.

C. Emotional Distress Claims

The District Court erred when it dismissed Malloy's claims for negligent and intentional infliction of emotional distress based upon Plaintiff's failure to provide an expert related to the severity of the distress. It further erred when it dismissed claims for *damages* as a result of Hunt/Providence's conduct basing that dismissal on the lack of expert testimony to support Malloy's claims. In sum, the district court has confused an independent cause of action for damages (Counts V and VI) with a claim for *damages* (Counts I-IV) for the harm caused, including, but not limited to, emotional distress.

A plaintiff may seek damages on independent claims of negligent or intentional infliction of emotional distress or may seek "parasitic" emotional distress damages as an element of damages for other claims. *Childress v. Costco Wholesale Corp*, 2021 MT 192, ¶¶ 8-9. Independent claims require plaintiffs to demonstrate distress "so severe that no reasonable person could be expected to endure it." *Childress*, ¶ 8 (quoting *Sacco v. High Country Indep. Press*, 271 Mont. 209, 896 P.2d 411, 426 (1995)). Plaintiffs asserting parasitic claims, on the other hand, do not have to demonstrate that heightened standard of proof. *Childress*, ¶ 9. Instead, for parasitic damages, "the severity of the distress affects the amount of damages recovered but not the underlying entitlement to recover." *Childress*, ¶ 9 (quoting *White v. Longley*, 2010 MT 254, ¶ 48, 358 Mont. 268, 244 P.3d 753). And "the amount of damages is not the amount which in our opinion would compensate the injured party; rather, 'it is a question of what amount of damages will the record in the case support when viewed, as it must be, in the light most favorable to the plaintiff.'" *Maloney v. Home and Investment Center, Inc.* 2000 MT 34, ¶ 71 (quoting *French v. Ralph E. Moore, Inc.*, 203 Mont. 327, 336, 661 P.2d 844, 849 (1983)).

An independent cause of action for infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff **was the reasonably foreseeable consequence of the defendant's negligent or intentional act or omission**. *Sacco v. High Country Independent Press, Inc.* (1995),

271 Mont. 209, 896 P.2d 411, 429. Damages for emotional distress are compensatory, not punitive. Thus, the quality of the conduct is per se irrelevant, because negligently caused damage may be as disturbing as that caused by a defendant intentionallythe relevance of the quality of the conduct is in its effect on the victim."

This Court further discussed the "serious or severe" requirement for actionable emotional distress in *Maloney v. Home and Investment Center, Inc.*, 2000 MT 34, 57 Mont. St. Rep. 144, 994 P.2d 1124, 298 Mont. 213 where it opined that the standard for determining "serious or severe" as set forth by the Restatement (Second) of Torts § 46 comment j:

[Emotional distress] 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 tranquility 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 [person] could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity.

Maloney, ¶62.

The *Maloney* Court also stated that "measuring this element requires a careful consideration of the circumstances under which the infliction occurs, and the party relationships involved, in order to determine when and where a reasonable person should or should not have to endure certain kinds of emotional distress." *Maloney*,

¶63.

United States Magistrate Judge James K. Bredar described the distinction between emotional distress damages as opposed to emotional distress causes of action as follows:

Events that give rise to lawsuits usually cause the plaintiffs some form of emotional distress. Although this emotional distress sometimes is severe and rises to the level of a clinical condition, it is more often the less serious sort of emotional pain that everyone feels when something bad happens. Plaintiffs often can recover for this emotional distress as an element of compensatory damages.

When emotional distress is unusually severe or alleged in clinical terms, or when another party intends to offer expert testimony about the distress, the testimony of an expert would help the trier of fact understand the nature, severity, and characteristics of the emotional distress. A trier of fact, however, does not need help understanding the ordinary grief, anxiety, anger, and frustration that any person feels when something bad occurs. Most triers of fact are already experts in that. ***Therefore, a defendant would not need to offer expert testimony on this kind of emotional distress.*** By the same token, a defendant would not need to consult an expert to understand the ordinary emotional distress that any person in the plaintiff's claimed position would experience. Because laypersons can understand this kind of ordinary emotional distress without the help of an expert, there is no need for an expert to conduct a mental examination of the plaintiff who claims only ordinary and uncomplicated emotional distress.

Ricks v. Abbott Labs., 198 F.R.D. 647, 648-649 (D. Md., 2001), emphasis added.

An independent cause of action for negligent or intentional infliction of emotional distress arises under circumstances where 1) serious or severe emotional distress to the plaintiff was 2) the reasonably foreseeable consequence of 3) the defendant's negligent or intentional act or omission." *Sacco v. High Country*

Independent Press (1995), 271 Mont. 209, 234, 896 P.2d 411, 426. Further, this

Court has held that:

Emotional distress must be severe or serious. In cases where there is a physical manifestation of bodily harm resulting from emotional distress ... this bodily harm is sufficient evidence that the emotional distress suffered by the plaintiff is genuine and severe.

Henricksen v. State, 2004 MT 20, ¶ 79. Thus, physical manifestation of bodily harm resulting from emotional distress is merely a means of establishing that the emotional distress is severe or serious. It is not required, however. *May v. ERA Landmark Real Estate*, 2000 MT 299.

Furthermore, this Court has recognized that “there is no requirement that a plaintiff present expert or medical testimony of emotional distress, some evidence of serious or severe emotional distress is necessary to survive a motion for summary judgment.” *May v. ERA Landmark Real Estate*, 2000 MT 299 ¶57, emphasis added. Despite this, the district court imposed a requirement on Malloy to have provided an expert to opine as to his emotional distress. The district court’s finding was misplaced.

A review of the record in this matter reveals that the evidence of emotional distress presented to the District Court in opposition to the Defendants' motion for summary judgment was not only substantial and continuing to support his independent causes of action, it is indeed an element of “parasitic” damages in this

case. Specifically, Malloy has provided evidence that: 1) Defendant Hunt was Malloy's ex-wife; 2) the parties had been involved in an acrimonious dissolution *Marriage of Malloy*, DA 19-238N; 3) Malloy had unequivocally told Hunt and Providence that Hunt was not authorized to access his medical file; 4) Malloy had previously been committed to the Montana State Hospital immediately following Hunt and Malloy's dissolution; 5) Malloy suffered from severe PTSD as a result of his service in the United States Military; 6) Hunt abused her privilege as a nurse at St. Patrick's Hospital as well as the former spouse of Malloy in accessing his medical information; 7) Malloy had been treated on multiple occasions at Providence Hospital wherein Hunt accessed his medical records—over 199 times from the time the parties separated until the time he discovered her unlawful acts; 8) Hunt shared Malloy's confidential information with their children without his knowledge or consent; 9) Malloy provided medical records to Defendants evidencing his treatments for the anxiety and depression that he suffered from as a result of his life circumstances and PTSD following Hunt's unlawful access of his medical files; 10) Malloy suffered from severe nausea, vomiting and stress as a result of Hunt's actions. He supplied copies of treating provider medical records related to his extreme weight loss (50 lbs.) and treatment for his symptoms.; 11) Malloy sent multiple communications to Providence concerning Hunt's unlawful acts and it refused to address her conduct. Each of these allegations was set forth in

Malloy's Affidavit in Response to Defendants' Motion for Summary Judgement (Exhibit 2).

Moreover, whether Malloy's emotional distress was indeed caused by Hunt's actions is a question of fact for the jury. Likewise, the district court has imposed an obligation on Malloy to provide copies of his medical records to avoid summary judgment. However, this is not the standard. Malloy is not required to provide complete copies of his voluminous medical records produced in discovery to survive such a motion. Defendants have not provided any evidence that Malloy's medical records do not show that he suffers from the claimed medical issues. In fact, Defendants specifically acknowledge that Malloy, a decorated veteran, had been involved in a military helicopter crash that set into motion his claim for full VA connected disability benefits. Neither do Defendants deny that he suffered from anxiety, depression, PTSD and other mental health issues at the time Hunt stole his medical information, nor do they deny that he was hospitalized at the Montana State Hospital related to his mental health concerns. At a minimum, this provides evidence in support of his claims for *damages* related to Hunt's negligent and intentional acts. Indeed, it goes beyond the minimum as well and supports his independent claims for emotional distress as well –despite not having a specific expert identified to testify on his behalf.

Accordingly, the District Court erred when it dismissed the Plaintiff's claims

for negligent and intentional emotional distress. Based on this evidence supplied in the course of the proceeding.

CONCLUSION

For the reasons set forth herein, the Court erred when it granted Defendants' Motion for Summary Judgment. This Court should reverse the Order of District Court and remand this case for further proceedings.

DATED this 8th day of January, 2024.

/s/ Jami L. Rebsom,
Attorney for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's opening brief contains 9649 words completed using double spaced 14 point Roman Typeface proportionately spaced.

/s/ Jami L. Rebsom, Counsel for Appellant

CERTIFICATE OF SERVICE

I, Jami L. Rebsom, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-09-2024:

Jennifer Lynn Swajkoski (Attorney)
101 East Front St. Suite 402
Missoula MT 59802
Representing: Bettina J. Weiler Malloy Hunt
Service Method: eService

Gabrielle Gee (Attorney)
101 East Front Street, Suite 402
MISSOULA MT 59802
Representing: Providence Health Services, Providence St. Patrick Hospital
Service Method: eService

Elizabeth L. Hausbeck (Attorney)
Hall Booth Smith, P.C.
101 East Front Street, Suite 402
Missoula MT 59802
Representing: Providence Health Services, Providence St. Patrick Hospital
Service Method: eService

Electronically Signed By: Jami L. Rebsom
Dated: 01-09-2024