DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock Street Denver, Colorado 80202	DATE FILED: December 22, 2014 5:32 PM FILING ID: 10601FBBF0F22 CASE NUMBER: 2014CV31778
CHARLES L. SISK, Public Administrator for 20th Judicial District, and/or STEPHANIE L. BRENNAN, Deputy Public Administrator for 20th Judicial District, as Conservator for R.Z. Plaintiff, v. **ROCKY MOUNTAIN PLANNED PARENTHOOD, INC. d/b/a PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC., a Colorado non-profit corporation, and JANE DOES 1-4** Defendants.	▲ **COURT USE ONLY** ▲
ATTORNEYS FOR PLAINTIFF: Jodi S. Martin (#44658) MARTIN LAW OFFICE LLC 1526 Spruce St., Ste. 102 Boulder, CO 80302 Tel: 303-928-2320 Fax: 303-928-2360 jodi@themartinlawoffice.com Beth A. Klein (#17477) Carrie Frank (#17807) KLEIN | FRANK, P.C. 1909 26th Street, Ste. 1C Boulder, CO 80302 Tel: 303-448-8884 Fax: 303-861-2449 carrie@kleinfrank.com beth@kleinfrank.com	**Case Number: 2014CV31778** **Courtroom: 376**

PLAINTIFF'S MOTION TO AMEND COMPLAINT TO ADD CLAIM FOR PUNITIVE DAMAGES

Plaintiffs, CHARLES L. SISK, Public Administrator for 20th Judicial District, and/or STEPHANIE L. BRENNAN, Deputy Public Administrator for 20th Judicial District, as

Conservator for R.Z., by their counsel, respectfully file this Motion to Amend the Complaint to Add a Claim for Punitive Damages. As grounds for this Motion, Plaintiffs state as follows:

Pursuant to C.R.C.P 121 § 1-15 ¶ 8, Plaintiff's counsel has conferred in good faith with Defendants' counsel about this motion. Plaintiff's counsel represents to the Court that Defendants' counsel takes no position with respect to this motion.

I. APPLICABLE LEGAL FRAMEWORK

A. Colorado Statutes Governing Punitive Damages.

The claim for punitive damages is auxiliary to the claims for damages against Defendant Rocky Mountain Planned Parenthood, Inc. D/B/A Planned Parenthood Of The Rocky Mountains, Inc. (hereinafter "Planned Parenthood"), for negligence and negligence *per se, respondeat superior*, negligent infliction of emotional distress and extreme and outrageous conduct. *Pulliam v. Dreiling*, 839 P.2d 521, 524 (Colo. App. 1992)("A claim for punitive damages is not a separate and distinct cause of action; rather, it is auxiliary to an underlying claim.").

"In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages."

"As used in this section, 'willful and wanton conduct' means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff." C.R.S. § 13-21-102(1)(a) and (b).

"A claim for exemplary damages in an action governed by this section may not be included in any initial claim for relief. A claim for exemplary damages in an action governed by this section may be allowed by amendment to the pleadings only after the exchange of initial disclosures pursuant to rule 26 of the Colorado rules of civil procedure and the plaintiff establishes prima facie proof of a triable issue. After the plaintiff establishes the existence of a triable issue of exemplary damages, the court may, in its discretion, allow additional discovery on the issue of exemplary damages as the court deems appropriate." C.R.S. § 13-21-102(1.5)(a).

B. Establishing a Triable Issue on Punitive Damages.

"The existence of a triable issue on punitive damages may be established through discovery, by evidentiary means, or by an offer of proof." *Rosania v. Grp. O, Inc.*, 2014 WL 679884, at *3 (D. Colo. Feb. 20, 2014). For "an amendment seeking exemplary damages to be proper, the court must find plaintiff establishes *prima facie* proof of a triable issue that defendants purposefully behaved in a reckless manner "without regard to consequences, or of the rights and safety" of plaintiff. *Moore v. Banta*, 2014 WL 2566278, at *1 (D. Colo. 2014).

Below, Plaintiff establishes triable issues on punitive damages by means of evidence and additionally by deposition testimony. As for the establishing a triable issue by means of

discovery, plaintiffs inform the Court that a number of depositions have been taken where the employees and personnel of the Defendant have demonstrated an intentional and systematic methodology of failing to communicate and inquire about critical factual matters that would have provided the Defendant with the necessary information to protect the minor Plaintiff. By establishing a policy that fails to ask minor children of the age of their sexual partners, and that fails to properly send out the required parental notification, Planned Parenthood fails to provide the protection to minor children and allows for them to be returned to the hands of their abusers. Defendant's witnesses testified that it is the policy of the Defendant to "not ask questions" although they recognize that the answers would have provided information necessary to perform the mandatory reporting required by the law. Further, Planned Parenthood's methodology of allowing a minor child to select the date for the abortion, rather than appropriately scheduling the appointment, creates a situation where parental notification is not properly done under the law.

For example, Dr. Owens testified that the Planned Parenthood policy provides that they not ask the age of the minor patient's sexual partner, but she agrees that if she, and other Planned Parenthood employees, do not ask, they would not know if the patient's situation met the mandatory reporting requirements given disparate ages. (Exhibit 1). Elizabeth Healy, acknowledged that she was to schedule abortion appointment five days out to meet the parental notification requirements, but schedule R.Z.'s appointment only two day after the initial phone call and cannot explain why that was done. (Exhibit 2).

C. Nature of *Prima Facie* Evidence for Purposes of Punitive Damages.

"*Prima facie* evidence is evidence that, unless rebutted, is sufficient to establish a fact." *Stamp v. Vail Corp.*, 172 P.3d 437, 449 (Colo. 2007)(internal citations omitted). Given that Defendant has taken no position on this motion, it is doubtful that it will respond to this motion with evidence that "rebuts" Plaintiff's *prima facie* evidence, *infra*. However, even if rebuttal evidence was offered, rebuttal evidence cannot defeat a motion to amend to add a claim for exemplary damages.

According to the *Stamp* court, the "exemplary damages provision requires [plaintiff] to establish *prima facie* proof of willful and wanton conduct, not to prove willful and wanton conduct beyond a reasonable doubt, which is the burden of proof at trial. This is a lenient standard. A plaintiff should have an opportunity to test the merits of any claim for relief that is supported by the underlying facts of the case." *Stamp*, 172 P.3d at 450 (underscoring added).

Colorado federal courts have also recognized and applied the *Stamp* jurisprudence. In Colorado, the applicable standard "is whether Plaintiff has provided *prima facie* evidence of willful and wanton behavior, and not whether the Court believes that a jury could find beyond a reasonable doubt that exemplary damages are warranted." *Bituminous Cas. Corp. v. Hartford Cas. Ins. Co.*, 2013 WL 6676157 at *3 (D. Colo. 2013). Quoting *Stamp*, the *Bituminous* court held: "*Prima facie* proof of a triable issue of punitive damages is established by 'a showing of a reasonable likelihood that the issue will ultimately be submitted to the jury for resolution.'" 2013 WL 6676157 at *3.

"The Colorado Supreme Court has noted that '[w]here the defendant is conscious of his conduct and the existing conditions and knew or should have known that injury would result, the statutory requirements' are met. *Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59, 66 (Colo. 2005). Moreover, at this stage of the litigation, the Court is only concerned with whether the evidence, when viewed in the light most favorable to Plaintiff, is sufficient to make out a *prima facie* case of willful and wanton behavior for the purpose of allowing Plaintiff to amend its Amended Complaint to include exemplary damages, not whether such evidence is sufficient to defeat a motion for summary judgment or to prevail on the issue at trial." *Bituminous*, 2013 WL 6676157 at *3.

In *Siemens v. Romero*, the court noted that "Defendant neither cites case law nor makes other adequate argument to support his assertion that it is appropriate for the Court to deny Plaintiff's request to add a claim for exemplary damages because such an award may be disallowed upon trial of the matter. A determination of the propriety of an exemplary damages award pursuant to section 13–21–102(2) is not properly made at this stage of the litigation." 2010 WL 427893 *4 (D. Colo. 2010).

In addition, inferences from the *prima facie* evidence submitted can and should be considered when assessing whether a plaintiff has established *prima facie* proof of a triable issue. In *Stamp*, the court rejected defendant Vail's argument that the prima facie "facts should be disregarded because they either require improper inference or are inadmissible lay testimony. Vail contends that it is impermissible to infer that [Vail staff] did not turn on the snowmobile's siren from witnesses' statements that they did not hear a snowmobile siren. However, inferences that are fairly deduced from other facts are reasonable." *Stamp*, 172 P.3d at 450.

Finally, under Colorado law, *prima facie* evidence can be upon information and belief. In *Gray v. Univ. of Colorado Hosp. Auth.*, the Colorado Supreme Court repudiated the notion that *prima facie* evidence of willful and wanton conduct cannot be "upon information and belief." Held the court: "information and belief pleadings are generally deemed permissible under the Federal Rules, especially in cases in which the information is more accessible to the defendant. . . . [The] trial court erred when it concluded that the factual allegations were not sufficiently specific to support a reasonable inference that the doctor was consciously aware that his acts or omissions created danger or risk to the patient's safety, and that he acted, or failed to act, without regard to the danger or risk." 284 P.3d 191, 200.

D. Scope of Attending Circumstances.

As quoted above, the Colorado statutes governing punitive damages provide: if "the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages." C.R.S. 13-21-102(1)(a) (underscoring added).

Colorado courts have construed the underscored language of the statute to comprehend more than the acts or omissions which inflict injury. In *Gray*, for example, the court found relevant to the willful and wanton issue "information" about "the events surrounding the 'near miss' and what the doctor told the hospital about the 'near miss.'" 284 P.3d at 200 (underscoring added). See also *Amber Properties, Ltd. v. Howard Elec. & Mech. Co., Inc.*, ("injured party need

prove only 'circumstances of fraud' surrounding a tortious act resulting in damages." 775 P.2d 43, 46 (Colo. App. 1988) (underscoring added).

In addition, the plain language of C.R.S. 13-21-102(1)(b), which recognizes that "willful and wanton conduct" can harm or injure the "the rights and safety of others" and thus is not limited to harm to the plaintiff, indicates that the range of actionable willful and wanton conduct is not limited to the immediate circumstances of the acts or omissions which injured the Plaintiff.

II. *PRIMA FACIE* EVIDENCE OF TRIABLE ISSUES

In the Third Amended Complaint, filed simultaneously herewith, and in the prior complaints, Plaintiff alleges the following conduct:

a. None of the staff or personnel spoke to R.Z. about sexual abuse, physical abuse, her relationship with Mr. Smith, or any other personal details that could have lead to a determination that R.Z.'s pregnancy was due to abuse.

b. Neither Planned Parenthood nor any of the staff or personnel Jane Does 1-4 ever contacted law enforcement, child services, or any other agency to report any suspicion of child sexual abuse as is required under Colorado law, although they should have been alerted to the risk of abuse due to R.Z.'s age, the different last names of R.Z. and Smith, and Smith's conduct.

c. As a result of Defendants' failure to inquire about R.Z.'s suspicious circumstances and failure to report any knowledge or suspicion of the sexual abuse of R.Z., Smith was able to continue his sexual abuse of R.Z. on numerous occasions over the course of the next few months.

d. Defendants had a duty under C.R.S. § 19-3-304 to report known or suspected sexual abuse of minors, they had sufficient information available to them to provide knowledge or suspicion of sexual abuse of R.Z., yet Defendants failed to report known or suspected sexual abuse of R.Z.

e. On May 3, 2012, Defendants had a duty under C.R.S. § 12-37.5-104 to not perform an abortion on R.Z. until 48 hours after written notice of the pending abortion had been delivered to R.Z.'s mother at her home. However, they failed to send the notice to R.Z.'s mother.

During the depositions of the staff, doctor and other personnel of Planned Parenthood, testimony has developed showing a policy of "don't ask, don't tell" that essentially guarantees that Planned Parenthood will not learn the age of the abuser and therefore, will not have to properly report the abuse under Colorado law.

For example, Jamie Skarvan, R.N., agreed that it is Planned Parenthood's policy to not ask a minor child the age of the sexual partner and that no routine conversations with patients take place regarding sexual abuse. Elizabeth Healy, who scheduled the minor child's abortion

procedure, confirmed that she knew the minor's age but never asked the age of the partner. Further, Dr. Owens also agreed that is Planned Parenthood's policy not to ask about the age of the sexual partner. (Exhibits 1, 2 and 3).

Furthermore, Dr. Owens acknowledged that if the minor doesn't voluntarily disclose the partner's age, she would not ask for the information, and therefore, if statutory rape had occurred, Dr. Owens would have no way to know. (Exhibit 1). Given this conduct, the consequence is that Dr. Owens would fail to report abuse as required by law.

Planned Parenthood's "don't ask, don't tell" policy allowed the minor child to be returned to the hands of her abuser. Such conduct demonstrates *prima facie* evidence of willful and wanton conduct which Planned Parenthood must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.

In addition to the "don't ask, don't tell" policy, Planned Parenthood failed to provide the proper forty-eight hours notice to the minor child's parent as required by C.R.S. § 12-37.5-104. The statute requires notification to a parent, who is specifically defined, and does not include a step-parent. However, Planned Parenthood failed to send the required notice to the minor child's mother. Elizabeth Healy acknowledged that abortions for minors are supposed to be scheduled at least five days after the initial phone call to provide appropriate time for the notice requirement, but that is not what was done in this case. (Exhibit 2). Although there are a few exceptions to scheduling an abortion five days later, none of them were present in this case such as a medical emergency or judicial bypass. (Exhibit 2).

Finally, Laura Hurwitz, a health care assistant at Planned Parenthood at the time the minor child was seen, testified that when she began working at Planned Parenthood, she was not provided any training. (Exhibit 4, p. 5). Likewise, Dr. Owens testified that she was not provided with any training on the statistics regarding the likelihood that thirteen year old children are having sex with older partners even though the data was available in 2005, years before R.Z.'s abortion. (Exhibit 1). Training by Planned Parenthood regarding signs of abuse and specific requirements in the law would be vital to ensure that the staff know how to protect minor patients and so that proper sexual abuse reporting and parental notification are done.

These are a few specific examples of the conduct of Planned Parenthood which demonstrate it acted heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff and allowed her to be returned to the hands of her abuser. Additional examples are included in the testimony attached as Exhibits 1, 2, 3 and 4.

IV. CONCLUSION

For the foregoing reasons, Plaintiff requests that the Court permit amendment to the Complaint and that a claim for punitive damages be tried to the jury. The proposed Amended Complaint is attached as Exhibit 5.

Dated this 22nd day of December, 2014.

Respectfully submitted,

MARTIN LAW OFFICE LLC
Original signature on file at Martin Law Office

/s/ Jodi S. Martin
Jodi S. Martin

KLEIN | FRANK, P.C.
Original signature on file at Klein | Frank, P.C.

/s/ Carrie Frank
Beth A. Klein
Carrie R. Frank

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of December, 2014, that a true and correct copy of the forgoing Plaintiff's Motion To Amend Complaint To Add Claim For Punitive Damages was served on the following through ICCES:

Edward T. Ramey
Kevin C. Paul
Cynthia A. Coleman
Heizer Paul LLP
2401 15th Street, Suite 300
Denver, Colorado 80202

Original signature on file at Klein | Frank, P.C.
/s/ *Robin Fagler*
Robin Fagler