COLORADO SUPREME COURT REITERATES NEW PLEADING STANDARD IN SUIT AGAINST PLANNED PARENTHOOD

On January 22, 2018, the Colorado Supreme Court released its opinion in *Norton v. Rocky Mountain Planned Parenthood, Inc.*, 2018 CO 3, upholding the trial court's dismissal of a suit by former Lieutenant Governor Jane Norton alleging that the Colorado Department of Public Health and Environment, a state government agency she formerly led, and Rocky Mountain Planned Parenthood violated the Colorado Constitution's ban on providing public funds for the performance of abortions. While the bulk of the analysis focused on the interpretation of that constitutional provision, the opinion provides an important glimpse into the Colorado Supreme Court's understanding of its 2016 decision in *Warne v. Hall*, 2016 CO 50, where it adopted the federal "plausibility pleading" standard to hold that a claim can only survive a motion to dismiss where it "contains sufficient factual matter" to support each element of the claim.

Warne adopted the standard explained in the United States Supreme Court cases *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, which held that a complaint needs to do more than fulfill the old standard under which a complaint could only be dismissed if "no set of facts" could establish entitlement to relief. In the federal courts, this shift to "plausibility pleading" has been a boon to defendants, especially in cases involving a mental state, such as discrimination claims. In Colorado, though, state trial court judges are only beginning to apply the standard, and thus, it is not uncommon for a motion to dismiss to be denied, even where the plaintiff merely alleged that "Defendant knew or should have known …" without alleging any facts suggesting what the Defendant knew and when they knew it—an outcome that is clearly contrary to *Iqbal*.

In *Norton v. Planned Parenthood*, the constitutional provision at issue, Section 50, prohibits public funding used to pay for "induced abortion" either "directly or indirectly." Norton's Complaint asserted that the State "indirectly" subsidized abortion operations by subsidizing Rocky Mountain Planned Parenthood. Under the "no set of facts" standard as some trial courts apply it, that allegation might have been enough. However, the Colorado Supreme Court delved deeply into both the meaning of the constitutional provision and the actual facts alleged to determine that the Complaint was insufficient. In other words, even at the pleading stage, trial courts may not simply take a plaintiff's word for it that a defendant violated the law or is liable.

In our practice, this signal that the Colorado Supreme Court intends plausibility pleading to be strictly enforced is not only important to discrimination cases, but even to premises liability claims where a plaintiff must allege that a defendant "knew or should have known" of a dangerous condition. While not all trial courts are yet familiar and comfortable with applying the standard to dismiss complaints (*Warne* has only been cited 16 times, compared to *Iqbal*, which has been cited over 160,000 times), there is reason for optimism. Hall & Evans will recommend pursuing motions to dismiss whenever appropriate, and as courts apply Colorado's new pleadings standard, we anticipate being increasingly able to spare our clients from the expense, hassle, and uncertainty of litigation.

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