

tort law. The Court will address each issue in turn.

STANDARD OF REVIEW

C.R.C.P. 12(b)(5) permits the court to dismiss part of an action for failure to state a claim upon which relief can be granted. COLO. R. CIV. P. 12(b)(5). Motions made under 12(b)(5) are looked upon with disfavor and should only be granted if it appears beyond a doubt that no facts exist entitling the plaintiff to relief. *Verrier v. Colorado Dept. of Corrections*, 77 P.3d 875, 877 (Colo. 2003). In evaluating plaintiff's claim, the court must accept the allegations within the complaint as true. *Schwindt v. Hershey Foods Corp.*, 81 P.3d 1144, 1148 (Colo. App. 2003). The trial court must view the allegations in the complaint in a light most favorable to the plaintiff. *Bell v. Arnold*, 487 P.2d 545, 547 (Colo. 1971). From a legal perspective, a motion to dismiss should not be granted if the plaintiff is entitled to relief under any theory of law based upon the allegations. *Id.* at 1146. In practice, motions to dismiss under 12(b)(5) are rarely granted under Colorado's notice pleading system. *Grizzell v. Hartman Enterprises, Inc.* 68 P.3d 551, 553 (Colo. App. 2003)(explaining that "[t]he chief function of a complaint is to give notice to the defendant of the transaction or occurrence that is the subject of the plaintiff's claims").

DISCUSSION

Issue #1: Defendant's argument that Plaintiffs have failed to allege that the Defendants owed them a duty does not justify a dismissal of its claim because, as a matter of law, a duty exists.

A negligence claim will fail if the law does not recognize a duty. *Smit*, 72 P.3d at 372. In the case at hand, whether a duty exists is critical to establish because if so, the Plaintiffs can maintain a viable negligence claim. Further, if an independent duty exists, Colorado's economic loss rule does not apply.

In order for a plaintiff to recover on a negligence claim, the plaintiff must establish the existence of a duty, the breach of that duty, causation, and damages. *Smit v. Anderson*, 72 P.3d 369, 371 (Colo. App. Ct. 2002). Whether a defendant owes a plaintiff a duty of care is a question of law to be determined by the court. *Taco Bell, Inc., v. Lannon*, 744 P.2d 43, 46 (Colo. 1987). In determining whether to recognize a duty courts consider several factors, including: (1) the risk involved in the activity undertaken by the defendant; (2) the foreseeability and likelihood of injury as weighed against the social utility of the defendant's conduct; (3) the magnitude of the burden of guarding against injury or harm; and (4) the consequences of placing the burden upon the defendant. *Id.*; *Taco Bell*, 744 P.2d at 46. Depending on the circumstances of each case, other considerations may be relevant. *Taco Bell*, 744 P.2d at 46. No one factor is controlling. *Id.* Thus, the question of whether a duty is imposed upon a defendant in a particular case is essentially one of fairness under contemporary standards. *Id.* That is, whether a reasonable person would "recognize a duty and agree that it exists." *Id.*

Defendant asserts that Plaintiffs' negligence claim must be dismissed because they fail to present any facts establishing a duty, thereby enabling them to maintain this cause of action.

Defendant argues that Plaintiffs' claims are solely premised upon the alleged breach of duties contained within the Assignment and this does not give rise to an independent duty of care owed by Defendants. The Plaintiffs' claims are clearly based on tort principles. Any defense by the Defendant that Plaintiffs cannot bring a contract claim is meritless.

In their Complaint, Plaintiffs assert that Defendant had an affirmative duty to review and assess all facsimile advertisements received, including facsimiles received from iHire, and only to provide USFLC with those facsimiles that constituted unsolicited advertisements as defined under the TCPA. Plaintiffs argue that Defendant breached this duty when they negligently reviewed facsimiles sent by Plaintiffs to Defendant and provided USFLC with these facsimiles that upon proper review would be determined as not unsolicited as defined under the TCPA.

This Court agrees with Plaintiffs that consideration of additional factors, referenced above, support the existence of a duty of care from Defendant to Plaintiffs. While it is true that the Plaintiffs allege a source of duty that was contained in the Assignment, this still gives rise to an independent duty of care owed by Defendants because the injury to the Plaintiffs was foreseeable. Looking at the facts presented in the Complaint, this Court concludes that the evidence presented sufficiently establishes that harm would result to Plaintiffs as the result of Defendant's alleged negligence in sending facsimiles to USFLC that are not unsolicited. Specifically, the fact that USFLC is in the business of soliciting and taking assignment from individuals and companies, of their rights in unsolicited facsimile advertisements and then filing lawsuits seeking relief under the TCPA against sender of the facsimiles on such assignments. (Comp. ¶ 20.) Defendant agreed to assign, sell and transfer to USFLC all right, title, and interest in and to any and all unsolicited facsimile transmissions. Because of this agreement, Defendant knew or should have known that USFLC will rely on Defendant's representations that the facsimiles were unsolicited. Further, because USFLC agreed to file lawsuits seeking relief against the sender of the facsimiles based on the assignments they received, Defendant should have known or reasonably should have known that USFLC would initiate a lawsuit based on representations by Defendant that Plaintiffs' facsimiles were in fact unsolicited. A lawsuit would require that the named defendants would have to represent themselves in the litigation. Additionally, the named defendant would be potentially be harmed if they were forced to represent themselves in a meritless lawsuit. Defendant could have easily guarded against injury by carefully reviewing the facsimiles sent by Plaintiffs before assigning them to USFLC in order to guarantee that they were indeed unsolicited. USFLC and their counterparts serve a beneficial social utility by initiating lawsuits against senders of unsolicited facsimiles in order to reduce this unwarranted advertising; however, those same social considerations are not furthered by the prosecution of innocent parties.

In their Complaint, Plaintiffs allege that the facsimiles they sent to Defendant were not unsolicited. Therefore, accepting the allegations in the Complaint as true, the Plaintiffs' injury was foreseeable and Defendant had a duty to review and asses all the facsimiles sent by Plaintiffs and only provide USFLC with facsimiles that are unsolicited. After a review of the allegations in the Complaint and under contemporary standards of fairness, this Court finds that reasonable persons would recognize and agree that Defendant owed Plaintiffs a duty to review and assess all

facsimiles received from Plaintiffs in order to guarantee that they are not unsolicited before assigning them to USFLC.

Issue #2: The Defendant's argument that Plaintiffs are only entitled to bring a cause of action based on contract as third-party beneficiaries is not sufficient to justify Defendant's 12(b)(5) motion to dismiss because Plaintiffs' have successfully pled the elements of a negligence action.

A person who is not a party to an express contract may bring an action on such contract if the parties to the agreement intended to benefit the non-party. *E.B. Roberts Construction Co. v. Concrete Contractors, Inc.*, 704 P.2d 859, 865 (Colo. 1985). The intent of the parties to benefit the third-party must be apparent from the terms of the agreement or the surrounding circumstances. *Id.* In *Roberts*, the general contractor, Roberts, and CCI, the subcontractor, entered into a contract. As a provision in the contract, CCI was to secure performance bonds. When CCI could not do this, Ideal was substituted as the subcontractor in place of CCI in the earlier contract. However, CCI still performed the work, submitted invoices, and received payments. The trial court found that Roberts, Ideal, and CCI all understood that CCI was to perform the work stated in the contract and was to be the ultimate recipient of the compensation for the completed work. Because Roberts and Ideal entered into an agreement that benefited both Roberts and CCI, the benefit to CCI was direct. *Id.* The Court of Appeals upheld this finding that CCI was a third-party beneficiary of the contract between Roberts and Ideal. The Colorado Supreme Court affirmed this determination; holding that CCI could be a party to the action to enforce the contract and recover damages. *Id.*

Defendant argues that this Court should dismiss the Complaint because similar to the plaintiff's claims in *Roberts*, the Plaintiffs' claims are solely premised upon the alleged breach of duties contained within the Assignment. (Def's Mot.). Because of this, Defendant asserts that Plaintiffs can only invoke the benefits of the Assignment as third-party beneficiaries; in turn, precluding their tort claim. This argument must fail because the Plaintiffs in the instant case are not attempting to enforce the contract between Defendant and USFLC by filing a breach of contract action. Here, the Plaintiffs assert negligence as their claim for relief and adequately pled the elements of negligence in their Complaint. Additionally, as stated in their response, Plaintiffs do not rely on a status of a third-party beneficiary as a basis of their claim for negligence, nor in their Complaint do they claim to be a third-party beneficiary. Further, unlike *Roberts*, there is no evidence presented in the Complaint, regarding the terms of the Assignment or the surrounding circumstances showing that Defendant and USFLC were intending to benefit iHire in anyway when they assented to the Assignment. The Assignment states that by agreeing to assign, sell and transfer to USFLC all the right, title, and interest to any unsolicited facsimile transmissions the Defendant receives, USFLC will agree to pay the sum of \$75.00 to Defendant for each facsimile which USFLC successfully processes. USFLC also agreed to pursue letter demand and suit upon legal transmission of the facsimiles assigned under the Assignment. The terms of the Assignment demonstrate that it was meant to benefit only the Defendant and USFLC.

In evaluating the allegations in the Complaint as true, it is clear that the Plaintiffs in the instant case, as a matter of law, are not third-party beneficiaries to the Assignment. Because Plaintiffs are not third-party beneficiaries intending enforce the contract between Defendant and USFLC, the Defendant's argument is not meritorious and, therefore, does not warrant dismissal of Plaintiffs' negligence claim.

Issue #3: Because Plaintiffs are not third party beneficiaries to the Assignment, and an independent duty has been established, as a matter of law, the economic loss rule does not bar Plaintiffs' negligence claim.

The scope of Colorado's economic loss rule applies to third-party beneficiaries who may have a cause of action for breach of contractual duties. *Town of Alma v. Azco Construction, Inc.*, 10 P.3d 1256, 1264 n. 12 (Colo. 2000). In addition, the economic loss rule also applies when a party seeks to remedy only economic loss that arises from interrelated contracts. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 72 (Colo. 2004). Where a breach of duty arises from contractual provisions between the parties the remedy must be redressed under the law of contracts. *Id.* However, in situations where a duty independent of any contractual obligations exists, the economic loss rule will not bar the plaintiff's tort claim. *Town of Alma*, 10 P.3d at 1263. In Colorado, whether or not the economic loss rule bars a claim depends on the duty that has allegedly been breached. *Id.* at 1262, ("The question, thus, is not whether the damages are physical or economic. Rather, the question ... turns on the determination of the source of the duty").

Pursuant to relevant authority, Colorado's economic loss rule applies to both third-party beneficiaries and claimants seeking to recover losses that arise from interrelated contracts. As determined above, it is apparent that Plaintiffs, in the instant case, were not third-party beneficiaries to the Assignment executed between Defendant and USFLC. Therefore, in order for the economic loss rule to bar the Plaintiffs claim of negligence, it would have to be determined that the losses Plaintiffs are seeking to recover arose from interrelated contracts

In *BRW*, the Court determined that Colorado's economic loss rule "requires courts to focus on the contractual relationship between and among the parties." *BRW*, 99 P.3d at 66. Here, the trial court found that even though the plaintiff had not directly contracted with the defendant, the economic loss rule applied because the plaintiff's claims arose from and were subject to a series of interrelated contracts. *Id.* at 71. It was important to the Court that the construction project was controlled by a "network of contracts" and "all parties were contractually obligated to build the project in accordance with BRW's plans and specifications." *Id.* In *BRW*, the Colorado Supreme Court determined that the economic loss rule did apply, barring plaintiff's claims of negligence because the plaintiff sought to recover only economic losses that arose from the interrelated contracts. *Id.* at 72.

While it is true that the Assignment specifically outlined the duties owed by both the Defendant and USFLC, the Plaintiffs were owed an independent duty of care by Defendants, as addressed in the first part of this Order. Further, there are no allegations in the Complaint that the

duties allegedly breached, were subject to a series of interrelated contracts between the Plaintiff, Defendant and USFLC that all parties were noticeably aware of. Therefore, the Court finds that because of the independent duty of care owed by Defendants to the Plaintiffs, the Plaintiff's tort claim of negligence is not barred by the economic loss rule.

Issue #4: The Defendant's argument that an established business relationship is not a valid defense under the TCPA does not warrant dismissal of its claim.

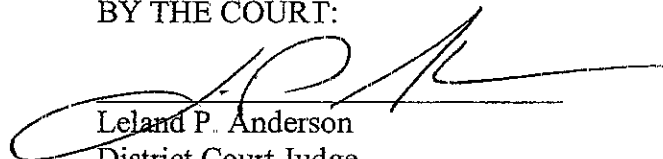
Insofar as the Defendant argues that an established business relationship is not a valid defense under the law, this argument is without merit because based on the analysis outlined above. To wit, this Court has found a duty sufficient to support Plaintiffs' negligence claim. Further, because an independent duty exists, as a matter of law, regardless of an established business relationship, this Court does not find it necessary to address this particular issue.

CONCLUSION

THEREFORE, based on the aforementioned analysis, the Court hereby DENIES Defendant Boston Market's Rule 12(b)(5) Motion to Dismiss Plaintiff's First Claim for Relief (Negligence).

SO ORDERED this 10th day of Aug, 2005.

BY THE COURT:


Leland P. Anderson
District Court Judge

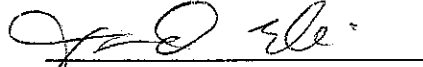
CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Order was placed in the United States mail, postage prepaid, addressed to the following this 10 day of July, 2005:

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