

2007

Vickie Lynn Ward v. IHC Health Services dba McKay-Dee Hospital; Mountain West Anesthesia : Reply Brief

Utah Court of Appeals

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Merrill F. Nelson; Kirton & McConkie; George A. Hunt; Williams & Hunt; Attorneys for Defendant/Appellee.

Jonathon T. Tichy; Bradley H. Parker; James W. McConkie II; Prince, Yeates & Geldzahler; Attorneys for Plaintiff/Appellant.

Recommended Citation

Reply Brief, *Ward v. IHC Health Services; Mountain West Anesthesia*, No. 20070110 (Utah Court of Appeals, 2007).
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IN THE UTAH COURT OF APPEALS

VICKIE LYNN WARD, individually, as
Permanent Guardian of Terry Faye Ward
and as Conservator of the Estate of Terry
Faye Ward,

Plaintiff/Appellant.

v.

IHC HEALTH SERVICES, INC., dba
McKAY-DEE HOSPITAL,

Defendant/Third-Party
Plaintiff/Appellee,

v.

MOUNTAIN WEST ANESTHESIA,
LLC.,

Third-Party
Defendant/Appellee.

REPLY BRIEF OF APPELLANT

Appellate Case No. 20070110

Merrill F. Nelson

KIRTON & McCONKIE

60 East South Temple, Suite 1800

Salt Lake City, Utah 84111

Telephone: (801) 328-3600

Attorneys for Defendant/Appellee

George A Hunt

WILLIAMS & HUNT

257 East 200 South, Suite 500

Salt Lake City, Utah 84145

Telephone: (801) 521-5678

Attorneys for Third-Party

Defendant/Appellee

Jonathon T. Tichy

Bradley H. Parker

James W McConkie II

PRINCE YEATES & GELDZAHLER

175 East 400 South, Suite 900

Salt Lake City, Utah 84111

Telephone: (801) 524-1000

Attorneys for Plaintiff/Appellant

FILED
UTAH APPELLATE COURTS

AUG 10 2007

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George A Hunt

WILLIAMS & HUNT

257 East 200 South, Suite 500

Salt Lake City, Utah 84145

Telephone: (801) 521-5678

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Jonathon T. Tichy

Bradley H. Parker

James W McConkie II

PRINCE YEATES & GELDZAHLER

175 East 400 South, Suite 900

Salt Lake City, Utah 84111

Telephone: (801) 524-1000

Attorneys for Plaintiff/Appellant

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STATEMENT OF JURISDICTION

This appeal is taken from a final order of the Second District Court. The Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(j), § 78-2-2(4), and § 78-2a-3(2)(j).

SUMMARY OF REPLY ARGUMENT

Plaintiff Vickie L. Ward (“Ward”) contends that a fully integrated and incorporated Release and Settlement Agreement (“Final Agreement”) was executed on March 29, 2001 between herself and Mountain West Anesthesia, LLC (“Mountain West”) which supplanted an earlier March 16, 2001 interim arrangement (“Preliminary Agreement”) covering the same subject matter – the settlement of a malpractice incident that resulted in serious and permanently debilitating injuries to her husband, Terry F. Ward.

On appeal, Mountain West and McKay-Dee Hospital (“McKay-Dee”) concede that the consideration called for in the Preliminary Agreement was not distributed pursuant to the provisions of that agreement, but rather according to the terms of the subsequent Final Agreement, raising a question regarding the Preliminary Agreement’s invalidity for failure of consideration.

Finally, there is no Utah case law recognizing the novel circular indemnity doctrine advanced by Mountain West and McKay-Dee. Although they equate their theory to the well-established mootness doctrine, this approach presents a number of problems since its application in this matter requires the court to engage in the

speculative adjudication of possible contingent actions whose existence and viability is tied to the outcome of the underlying case. Traditional mootness analysis addresses a party's ability to proceed based on presently existing facts and circumstances pertaining to the substance of the claim itself, not a string of speculative "what-ifs."

ARGUMENT

A central component of the arguments now made on appeal by both Mountain West and McKay-Dee is that Mountain West is not a party to or otherwise bound by the Final Agreement, and that the Final Agreement and Preliminary Agreement each pertain to different matters. The premise that they want this Court to accept is that that the multiple integration/incorporation clauses of the Final Agreement do not therefore affect a provision of the Preliminary Agreement now invoked by Mountain West to shield McKay-Dee from liability in this case. Both of these propositions are in error.

A. SINCE THE PRELIMINARY AND FINAL AGREEMENTS WERE BOTH CONCLUDED BY THE SAME PARTIES AND PERTAIN TO THE SAME INCIDENT, THE LATER INTEGRATED AGREEMENT SUPPLANTS THE EARLIER ONE DESPITE VARIATIONS IN CERTAIN PROVISIONS.

"Where a contract is integrated, the parol evidence rule excludes evidence of terms in addition to those found in the agreement. If a contract is unambiguous, the intentions of the parties *must be determined from the words of the agreement*. A court may *only* consider extrinsic evidence if, after careful consideration, the contract language is ambiguous or uncertain." Lee v. Barnes, 977 P.2d 550, 552 (Utah App. 1999) (emphasis added) (internal citations omitted).

“The purpose and effect of including an integration clause is to preclude the subsequent introduction of evidence of preliminary negotiations or of side agreements in a proceeding in which a court interprets the document.” Tangren v. Tangren, 154 P.3d 180, 183 (Utah App. 2006).

1. Mountain West is a party to the Final Agreement.

The integrated Final Agreement indicates that the contracting parties are Vickie L. Ward, Mountain West Anesthesia, LLC, John Luckwitz, M.D., and Scottsdale Insurance Company. (R. at 1683). It then contains a formal recital verifying that Mountain West has contractually provided Scottsdale the authority to negotiate and settle Vickie Ward’s claims “on behalf of and as agent for [Mountain West].” (R. at 1684) (emphasis added). The basis for this authority is found in the liability insurance contract that Mountain West entered into with Scottsdale. (R. at 1440-1453). There is nothing in the record to establish that this authority was ever revoked prior to Scottsdale’s representation of Mountain West in connection with the execution of the Preliminary Agreement or between the execution of that agreement and the Final Agreement. (R. 1-1909).

In addition to the express contractual grant of authority, the parties’ course of conduct further solidified the implication of Scottsdale’s authority to act on Mountain West’s behalf in this matter. Among other things, Mountain West’s legal counsel personally participated in the process resulting in the Final Agreement. And in correspondence bearing the same date as the Final Settlement, he concedes that he

received and reviewed the contract but evidently had no objections to the language confirming Scottsdale's authority to act on behalf of Mountain West. (R. 1555).

Further belying Mountain West's argument that the Final Agreement was merely an ancillary annuity arrangement as opposed to a comprehensive, preclusive, and integrated settlement is Mountain West's counsel's acknowledgment of that document as a Second Revised Release and Settlement Agreement. (R. 1555). If the subject matter of the Final Agreement was confined solely to some innocuous independent annuity scheme and not with likewise modifying the terms of the interim Preliminary Agreement, it would seem rather peculiar for the parties to characterize it as a "revised settlement agreement."

Finally, Mountain West was affirmatively represented by Scottsdale in both instances. Mountain West is eager to recognize and accept Scottsdale's representation on its behalf for purposes of the Preliminary Agreement, but is now trying to distance itself from Scottsdale and disclaim Scottsdale's authority in connection with the Final Agreement. Mountain West's Br. 12-18 (June 25, 2007). Pursuant to the terms of Mountain West's liability policy, Scottsdale provided not only the resources for settling Mrs. Ward's claims and for Mountain West's legal representation, but maintained the authority to participate in negotiating and approving of the terms of any settlement. (R. at 1451).

Peeling away the self-serving assertions made only after the present dispute arose, a review of the record on appeal and the plain language of the settlement documents themselves makes apparent that the Preliminary Agreement was essentially an interim arrangement adopted by the parties pending finalization of a subsequent comprehensive Final Agreement.

2. The Preliminary Agreement and the Final Agreement both pertain to the same subject matter.

In addition to now disclaiming any involvement with or connection to the Final Agreement, Mountain West further tries to portray that agreement as pertaining to a different subject matter than the Preliminary Agreement by identifying some modifications in the terms between the two documents. While there may be some minor variations in terms, there can be no question that the central subject matter of each is identical – the settlement of Ward’s claims arising from the underlying medical malpractice incident.

The express purpose of the Preliminary Agreement is to settle Ward’s claims arising from “medical care and treatment [] alleged to have caused injury, damage and loss to Ward on or about July 18, 2000 . . . arising out of surgery and care at McKay-Dee Hospital. (R. 1678). And likewise, the purpose of the Final Agreement is “the full settlement and discharge of all claims and actions of the Claimant . . . for damages which allegedly rose out of or due to the Incident.” (R. 1683). If the Final Agreement was simply a separate post-settlement annuity arrangement as Mountain West claims in its

brief, it certainly would not contain several pages of provisions securing the release and discharge of claims against Mountain West or extensive recitations detailing the nature and circumstances of the underlying claims. (R. 1683-1686). Those would be irrelevant and extraneous if that were the case.

What Mountain West seizes on to create an argument that the two agreements pertain to different subject matters is the variation in the method of payment of settlement funds – the Preliminary Agreement calls for a lump sum payment while the Final Agreement calls for periodic payments. That however, does not obviate the fundamental fact that the Final Agreement purports to be an integrated “Release and Settlement Agreement” (R. 1683) which the parties themselves recognized at the time as a “revision” of their earlier accord. (R. 1555). Indeed, by its terms it constitutes “the entire agreement” between the parties (R. 1692) and “there are no other understandings or agreements . . . between the parties.” (R. 1692).

Mountain West argues that the Preliminary Agreement remains valid and was not supplanted by the Final Agreement because it contains no language expressly designating it as preliminary. Its preliminary nature, however, is perhaps best demonstrated by the fact that a later agreement pertaining to the same incident was subsequently executed by the same parties.

B. ALTERNATIVELY, IF THE PRELIMINARY AGREEMENT WAS NOT SUPPLANTED BY THE FINAL AGREEMENT, MOUNTAIN WEST HAS CONCEDED OTHER FACTS ON APPEAL WHICH ARGUABLY INVALIDATE THE EARLIER AGREEMENT.

“We have unequivocally held in the past that evidence of failure of consideration does not vary or alter the terms of a contract; it attacks the very existence of the contract for the purpose of proving it unenforceable. In fact, it is entirely permissible for a party to rescind a contract based on a failure of consideration . . . If a failure of consideration occurs, the contract ceases to exist.” Aquagen Intern., Inc. v. Calrae Trust, 972 P.2d 411, 414 (Utah 1998) (citing Nielsen v. MFT Leasing, 656 P.2d 454, 456 (Utah 1982)).

In accordance with the terms of the Preliminary Agreement, the consideration payable to render that agreement valid was \$1 million. (R. 1678). That amount, however, was never paid in accordance with the terms of the Preliminary Agreement. In fact, the subsequent Final Agreement specifically recognizes that only a fraction of the consideration due under the Preliminary Agreement was actually tendered, and makes alternative arrangements for the full and proper payment of the remainder (R. 1686). Both Mountain West and McKay-Dee also recognize that the consideration required by the Preliminary Agreement was never actually provided until the Final Agreement was later negotiated and executed. Mountain West’s Br. 13 (June 25, 2007); McKay-Dee’s Br. 8-9 (June 25, 2007). Consequently, the Preliminary Agreement is arguably invalid since the parties never implemented its terms before adopting another alternative arrangement.

C. THE SPECULATIVE CIRCULAR INDEMNITY DOCTRINE HAS NOT BEEN EMBRACED BY UTAH COURTS AND ITS ADOPTION NOW WOULD ONLY FURTHER PROMOTE COLLUSION BETWEEN POTENTIALLY LIABLE PARTIES AT THE EXPENSE OF INJURED CLAIMANTS.

With no Utah precedent to directly support their novel circular indemnity theory, McKay-Dee and Mountain West try to bootstrap their position by citing to case law on the mootness doctrine. Mountain West's Br. 23-25 (June 25, 2007); McKay-Dee's Br. 15-17 (June 25, 2007). This approach, however, cuts both ways, since the very upshot of the circular indemnity theory that they advance is to ask the court to issue what amounts to little more than a preemptive advisory opinion and stem presently pending legal action by jumping ahead and ruling on prospective ancillary claims which might ripen in the future. The whole notion runs afoul of the requirement that there be an actual case or controversy for the court's adjudication. "[A]ppellate courts do not give opinions on theoretical or moot matters, but only decide actual controversies." Meadow Fresh Farms, Inc. v. Utah State Univ. Dept. of Agriculture and Applied Science, 813 P.2d 1216, 1221 (Utah App. 1991).

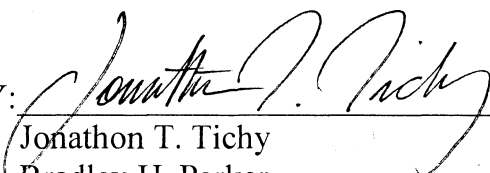
CONCLUSION

Since Mountain West is a party to the Final Agreement which expressly supersedes or integrates other earlier or alternative agreements between the parties, including the Preliminary Agreement, the trial court's grant of summary judgment was improper and this matter should be remanded for a trial on the merits on the basis of the Final Agreement.

Additionally, the premise upon which summary judgment was granted has not been accepted by Utah courts and would only encourage potentially liable parties to cooperate to deny a recovery to injured claimants. There are also other factors suggesting that the Preliminary Agreement may not be valid and enforceable. Consequently, the trial court's grant of summary judgment should be reversed and the matter remanded for further proceedings.

RESPECTFULLY SUBMITTED this 10TH day of August, 2007.

PRINCE YEATES & GELDZAHLER

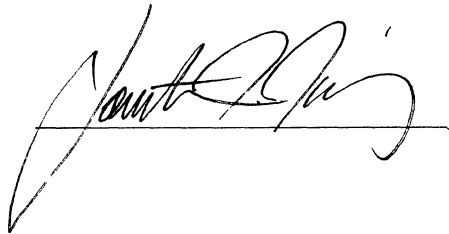
BY: 
Jonathon T. Tichy
Bradley H. Parker
James W. McConkie II
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10TH day of August, 2007, I caused to be served by Hand-delivery, a true and correct copy of the foregoing Reply Brief of Appellant to the following:

Merrill F. Nelson
KIRTON & McCONKIE
60 East South Temple, Suite 1800
Salt Lake City, Utah 84145
Attorneys for Defendant/Appellee

George A Hunt
WILLIAMS & HUNT
257 East 200 South, Suite 500
Salt Lake City, Utah 84145
Attorneys for Third-Party
Defendant/Appellee

A handwritten signature in dark ink, appearing to read "Merrill F. Nelson", is written over a horizontal line.

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RELEASE AND SETTLEMENT AGREEMENT

This Release and Settlement Agreement ("Agreement") is made and entered into among Vickie L. Ward, individually and as permanent Guardian of Terry Faye Ward, an incapacitated adult and Conservator of the Estate of Terry Faye Ward, an incapacitated adult; Mountain West Anesthesia, LLC, John Luckwitz, M.D.; and Scottsdale Insurance Company ("the Parties"). The "Claimant" shall collectively mean Vickie L. Ward, individually and as permanent Guardian of Terry Faye Ward, an incapacitated adult and Conservator of the Estate of Terry Faye Ward, an incapacitated adult, their respective heirs, executors, administrators, personal representatives, successors and assigns; the "Insured" shall collectively mean Mountain West Anesthesia, LLC, and John Luckwitz, M.D.; and the "Insurance Company" shall mean Scottsdale Insurance Company.

I. RECITALS

A. On or about July 18, 2000, at or near 3939 Harrison Boulevard, Ogden, Weber County, Utah, the Claimant claims that Terry Faye Ward sustained physical injuries as a result of the alleged conduct of the Insured (the "Incident"). In connection with the Incident, the Claimant has asserted a claim against the Insured based upon tort or tort type claims.

B. The Insurance Company and the Insured have entered into a liability insurance contract which provides that the Insurance Company shall defend the Insured against any claim or suit for damages arising from the Incident, has authority to settle any such claim

or suit on behalf of and as agent for the Insured, and shall insure the Insured for such liability subject to the limits set forth in the contract.

C. The Parties desire to enter into this Agreement to provide, among other things, for considerations in full settlement and discharge of all claims and actions of the Claimant against the Insured for damages which allegedly arose out of or due to the Incident, on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, it is agreed as follows:

II. RELEASE

A. Release and Discharge. In consideration of the cash payment(s) referred to in Paragraph III.A. and the promise to make the periodic payments referred to in Paragraph III.B. ("Periodic Payments"), the Claimant hereby completely releases and forever discharges the Insured, the Insurance Company, and any and all other persons, firms, or corporations from any and all past, present, or future claims, demands, actions, damages, costs, expenses, loss of services, and causes of action of any kind or character, whether based on tort, contract, or other theory of recovery, whether known or unknown, including any and all claims for loss of marital services and consortium, which have arisen in the past or which may arise in the future, whether directly or indirectly, caused by, connected with or resulting from the Incident. This release and discharge shall be a fully binding and complete settlement among all Parties to this Agreement, and their heirs, assigns, and

successors. Nothing in this Release and the attached Uniform Qualified Assignment and Release shall be construed as releasing Claimant's claims against Dr. Steven J. Carabine and/or McKay Dee Hospital and its employees.

The Claimant acknowledges and agrees that this release and discharge is a general release. The Claimant expressly waives and assumes the risk of any and all claims for damages and expenses against the Insured, which exist as of this date, but of which the Claimant does not know or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, would materially affect the Claimant's decision to enter into this Agreement. The Claimant further agrees that the Claimant has accepted the considerations set forth in Paragraphs III. A. and B. as a complete compromise of matters involving disputed issues of law and fact. The Claimant assumes the risk that the facts or law may be other than the Claimant believes. It is understood and agreed to by the Parties that this settlement is a compromise of a doubtful and disputed claim, and the payments are not to be construed as an admission of liability on the part of the Insured, by whom liability is expressly denied.

B. Injuries Known and Unknown. The Claimant fully understands that the Claimant may have suffered personal injuries that are unknown to the Claimant at present and that unknown complications of present known injuries may arise, develop or be discovered in the future, including, but not limited to, subsequent death or disability. The Claimant acknowledges that the consideration received under this Agreement is intended to and does release and discharge the Insured and the Insurance Company from any

claims for, or consequences arising from, the injuries which allegedly arose from the Incident; and the Claimant hereby waives any rights to assert in the future any claims not now known or suspected even though, if such claims were known, such knowledge would materially affect the terms of this Agreement.

C. Parties Released. This release and discharge shall also apply to the Insured's and the Insurance Company's past, present, and future officers, directors, stockholders, attorneys, agents, servants, representatives, employees, subsidiaries, affiliates, reinsurers, partners, predecessors and successors in interest, heirs, executors, personal representatives, and assigns and all other persons, firms or corporations with whom any of the former have been, are now, or may hereafter be affiliated.

III. PAYMENTS TO CLAIMANT, PAYEE, AND/OR BENEFICIARY

A. Payment at Settlement (and Amounts Previously Paid). The Insurance Company and the Insured have paid Three Hundred Ninety Three Thousand Three Hundred Thirty Three Dollars (\$393,333) to the Claimant, and Claimant's counsel, Lloyd Hardcastle, receipt of which is acknowledged. This includes, but is not limited to, all out of pocket expenses, attorney fees, all medical liens, all rights of recovery, all medical subrogation claims, all worker compensation subrogation claims, known and unknown, and claims for general damages.

B. **Periodic Payments.** The Insurance Company, on behalf of the Insured, agrees to pay or cause to be paid the following Periodic Payments:

- (1) To Vickie L. Ward, Trustee of the Terry F. Ward Trust ("Payee"), the sum of Two Thousand Seven Hundred Two Dollars (\$2,702) to be paid on or about the twenty ninth (29th) day of each month beginning on or about April 29, 2001, and continuing for the life of Terry Faye Ward. The aforesaid payments are guaranteed to be paid for a period of two hundred sixty five (265) months, with the last guaranteed payment to be made on or about April 29, 2023.
- (2) Should Terry Faye Ward die before April 29, 2023, then any remaining guaranteed Periodic Payments set forth in Subparagraph III.B.(1) shall instead be paid, subject to the provisions of Subparagraph III.B.(5) below, as they become due, to Vickie L. Ward ("Beneficiary"), with the last guaranteed Periodic Payment to be made on or about April 29, 2023. Should Vickie L. Ward die before the remaining guaranteed Periodic Payments are made as set forth in Subparagraph III.B.(1), then all remaining guaranteed Periodic Payments will be made subject to the provisions of Subparagraph III.B.(5) below, as they come due, to the duly appointed Successor Trustee of the Terry Faye Ward Trust, with the last payment to be on or about April 29, 2023. Should Terry Faye Ward die after April 29, 2023, then monthly payments as set forth in Subparagraph III.B.(1) shall cease.

- (3) To the Trustee of the Vickie L. Ward Trust ("Payee"), the sum of One Thousand Five Hundred Eighty Seven Dollars (\$1,587) to be paid on or about the first (1st) day of each month, beginning on or about May 1, 2001, guaranteed to be paid for a period of one hundred eighty (180) months, with the last guaranteed payment to be made on or about April 1, 2016.
- (4) Should Vickie L. Ward die before April 1, 2016, then any remaining guaranteed Periodic Payments sent forth in Subparagraph III.B.(3), shall instead be paid, subject to the provisions of Subparagraph III.B.(5) below, as they become due, to the duly appointed Successor Trustee of the Vicky L. Ward Trust, with the last payment to be made on or about April 1, 2016.
- (5) Each Payee shall have the right to submit a request to change the Beneficiary by filing a written request with the owner of the Annuity Contract. The change will be effective when approved by both the owner of the Annuity Contract and the Annuity Issuer. Any change in the Beneficiary shall not in any way affect or alter any of the provisions of this Agreement.

IV. ASSIGNMENT AND FUNDING OF PERIODIC PAYMENT OBLIGATION

A. **Assignment of Obligation.** The Parties understand and agree that the Insurance Company may assign its duties and obligations to make such future Periodic Payments to GE Capital Assignment Corporation ("Assignee") pursuant to a "Qualified Assignment and Release," within the meaning of Section 130(c) of the Internal Revenue Code of 1986, as amended, attached as Exhibit A. Such assignment is accepted by the

Claimant without right of rejection and in full discharge and release of the duties and obligations of the Insurance Company and all Parties released by this Agreement with respect to such Periodic Payments. Upon such assignment, it is understood and agreed by and between the Parties that the Assignee shall make said Periodic Payments directly to the respective Payee and/or Beneficiary designated in Subparagraphs III.B.(1) and (2), and that the Payee shall submit any request to change the Beneficiary directly to the Assignee.

THE PARTIES EXPRESSLY UNDERSTAND AND AGREE THAT, WITH THE INSURANCE COMPANY'S ASSIGNMENT OF THE DUTIES AND OBLIGATIONS TO MAKE SUCH PERIODIC PAYMENTS TO GE CAPITAL ASSIGNMENT CORPORATION PURSUANT TO THIS AGREEMENT, ALL OF THE DUTIES AND RESPONSIBILITIES OTHERWISE IMPOSED UPON THE INSURANCE COMPANY BY THIS AGREEMENT WITH RESPECT TO SUCH PERIODIC PAYMENTS SHALL CEASE, AND INSTEAD SUCH OBLIGATION SHALL BE BINDING SOLELY UPON GE CAPITAL ASSIGNMENT CORPORATION. THE PARTIES FURTHER UNDERSTAND AND AGREE THAT WHEN THE ASSIGNMENT IS MADE, THE INSURANCE COMPANY SHALL BE RELEASED FROM ALL OBLIGATIONS TO MAKE SUCH PERIODIC PAYMENTS AND GE CAPITAL ASSIGNMENT CORPORATION SHALL AT ALL TIMES BE DIRECTLY AND SOLELY RESPONSIBLE FOR, AND SHALL RECEIVE CREDIT FOR, THE PERIODIC PAYMENTS, AND THAT WHEN THE ASSIGNMENT IS MADE, GE CAPITAL ASSIGNMENT CORPORATION ASSUMES THE DUTIES AND RESPONSIBILITIES OF THE INSURANCE COMPANY WITH RESPECT TO SUCH PERIODIC PAYMENTS.

B. **Annuity Funding.** The Parties understand and agree that the Assignee may fund its obligation to make the Periodic Payments by purchasing an annuity contract (the Annuity Contract") from GE Capital Assurance Company (the "Annuity Issuer"). If such Annuity Contract is purchased, the Assignee shall be the owner of the Annuity Contract and shall have and retain all rights of ownership in the Annuity Contract.

For its own convenience, the Assignee may direct the Annuity Issuer to make all the Periodic Payments directly to the respective Payees and/or Beneficiaries designated in Paragraph III.B. Each Payee and Beneficiary designated in Paragraph III.B. shall be responsible for maintaining his/her current mailing address with the Annuity Issuer.

The obligation assumed by the Assignee to make each Periodic Payment shall be fully discharged upon the mailing of a valid check or electronic funds transfer in the amount of such payment on or before the due date to the last address on record for the Payee or Beneficiary with the Annuity Issuer. If the Payee or Beneficiary notifies the Assignee that any check or electronic funds transfer was not received, the Assignee shall direct the Annuity Issuer to initiate a stop payment action and, upon confirmation that such check was not previously negotiated or electronic funds transfer deposited, shall have the ~~Annuity Issuer~~ process a replacement payment.

C. **Status of Claimant, Payees, and Beneficiaries.** The Claimant, each Payee and each Beneficiary, as applicable, shall at all times remain a general creditor of the Assignee and shall have no rights in the Annuity Contract nor in any other assets of the Assignee. The Assignee shall not be required to set aside sufficient assets or secure its obligation to the Claimant, each Payee, or each Beneficiary, in any manner whatsoever.

D. **Date of Birth.** The Claimant, Vickie L. Ward, warrants and represents that Terry Faye Ward was born on April 29, 1958. Notwithstanding anything to the contrary in this Agreement, if the actual date of birth is not as stated above, and if the Insurance Company or the Assignee relies or has relied on the accuracy of the above-stated date of birth in determining the amount, timing and/or duration of the Periodic Payments or the cost of providing them, the Insurance Company or the Assignee may take such actions as are necessary to reflect the correct date of birth. These actions include but are not limited to: 1) adjusting the amount, timing and/or duration of the remaining Periodic Payments so that the Insurance Company or Assignee incurs no additional cost beyond that necessary to purchase the Annuity Contract on the date of assignment to provide the Periodic Payments based on the correct date of birth or 2) recovering from the Claimant, Payee, or Beneficiary, as appropriate, any Periodic Payments already paid in excess of the Periodic Payments that could have been provided by an Annuity Contract purchased on the date of assignment based on the correct date of birth.

V. NO CHANGES IN PERIODIC PAYMENTS

The Claimant acknowledges and agrees that all, some, or any part of the Periodic Payments cannot be accelerated, commuted, transferred, deferred, increased or decreased by the Claimant or by any Payee or Beneficiary and that the Claimant or any Payee or Beneficiary shall not have the power to sell, mortgage, encumber, or otherwise anticipate all, some, or any part of the Periodic Payments by assignment or otherwise.

VI. ENTIRE AGREEMENT

This Agreement contains the entire agreement between the Claimant, the Insured, and the Insurance Company with regard to the matters set forth in it. There are no other understandings or agreements, verbal or otherwise, in relation to the Agreement, between the Parties except as expressly set forth in it.

This Agreement is intended to conform with the requirements of Internal Revenue Code Sections 104(a)(2) and 130. All provisions of this Agreement should be construed in a manner so as to effectuate that intent.

VII. READING OF AGREEMENT

In entering into this Agreement, the Claimant represents that the Claimant has completely read all of its terms and that such terms are fully understood and voluntarily accepted by the Claimant. The Claimant has been represented by counsel of the Claimant's choice.

VIII. FUTURE COOPERATION

All Parties agree to cooperate fully, to execute any and all supplementary documents, and to take all additional actions that may be necessary or appropriate to give

full force and effect to the terms and intent of this Agreement which are not inconsistent with its terms.

IX. DRAFTING OF DOCUMENT AND RELIANCE BY CLAIMANT

This Agreement has been negotiated by the respective Parties through counsel. The Parties to this Agreement contemplate and intend that all payments set forth in Section III constitute damages received on account of personal injuries or sickness, arising from the Incident, within the meaning of Section 104(a)(2) of the Internal Revenue Code of 1986, as amended. However, the Claimant warrants, represents, and agrees that the Claimant is not relying on the advice of the Insured, the Insurance Company, anyone associated with them, including their attorneys and the insurance broker placing the Annuity Contract, as to the legal and income tax or other consequences of any kind arising out of this Agreement. Accordingly, the Claimant hereby releases and holds harmless the Insured, the Insurance Company, and any and all counsel or consultants for the Insured and the Insurance Company from any claim, cause of action, or other rights of any kind which the Claimant may assert because the legal, income tax or other consequences of this Agreement are other than those anticipated by the Claimant.

The Parties signing this Agreement, and each of them, warrant and represent that no promise, inducement or agreement not expressed in this Agreement has been made to them and that this Agreement constitutes the entire agreement between the Parties and that the terms of this Agreement are contractual and not mere recitals.

The Claimant represents and agrees that the Claimant has read the Agreement and fully understands it, and has been advised by counsel of the Claimant's own choosing as to the propriety and legal effect of executing it, and neither the Agreement nor the compromise and settlement recited in it were induced by fraud, coercion, compulsion or mistake, nor is this Agreement nor the compromise and settlement made in reliance upon any statement or representation of any of the Parties released by this Agreement, or their representatives, agents or attorneys.

X. WARRANTY OF CAPACITY TO EXECUTE AGREEMENT

The Claimant represents and warrants that, with the exception of contingency fee contracts and any agreements which may exist between the Claimant and Claimant's counsel relative to the reimbursement of litigation expenses, no other person or entity has, or has had, any interest in the claims, demands, obligations, or causes of action referred to in this Agreement, and that the Claimant has the sole right and exclusive authority to execute this Agreement and receive the sums specified in it and that the Claimant has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to in this Agreement.

XI. COURT APPROVAL

The Parties agree that the Claimant will file petitions for all necessary court approvals, that all such petitions and orders shall be in a form satisfactory to all Parties, and that this Agreement will not be effective until such approvals have been obtained.

XII. CONTROLLING LAW

This Agreement shall be construed and interpreted in accordance with the laws of the State of Utah.

Dated: 3-29-01

Vickie L. Ward
Vickie L. Ward, individually and as permanent Guardian of Terry Faye Ward, an incapacitated adult and as Conservator of the Estate of Terry Faye Ward, an incapacitated adult, Claimant

Dated: 4/3/01

Kameron Jones
Duly Authorized Representative for Scottsdale Insurance Company

Approved as to Form and Content:

Dated: 3-29-01

Lloyd Hardcastle
Lloyd Hardcastle, Counsel for Claimant

Uniform Qualified Assignment and Release

Claimant" Vickie L. Ward, individually and as permanent Guardian of Terry Faye Ward, an incapacitated adult and as Conservator of the Estate of Terry Faye Ward, an incapacitated adult

Assignor" Scottsdale Insurance Company

Assignee" GE Capital Assignment Corporation

Annuity Issuer" GE Capital Assurance Company

Effective Date" 4-27-01

This Agreement is made and entered into by and between the parties hereto as of the Effective Date with reference to the following facts:

- A. Claimant has executed a settlement agreement or release dated 29th day of March, 2001 (the "Settlement Agreement") that provides for the Assignor to make certain periodic payments to or for the benefit of the Claimant as stated in Addendum No. 1 (the "Periodic Payments"); and
- B. The parties desire to effect a "qualified assignment" within the meaning and subject to the conditions of Section 130(c) of the Internal Revenue Code of 1986 (the "Code").

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the parties agree as follows:

1. The Assignor hereby assigns and the Assignee hereby assumes all of the Assignor's liability to make the Periodic Payments. The Assignee assumes no liability to make any payment not specified in Addendum No. 1.
2. The Periodic Payments constitute damages on account of personal injury or sickness in a case involving physical injury or physical sickness within the meaning of Sections 104(a)(2) and 130(c) of the Code.
3. The Assignee's liability to make the Periodic Payments is no greater than that of the Assignor immediately preceding this Agreement. Assignee is not required to set aside specific assets to secure the Periodic Payments. The Claimant has no rights against the Assignee greater than a general creditor. None of the Periodic Payments may be accelerated, deferred, increased or decreased and may not be anticipated, sold, assigned or encumbered.
4. The obligation assumed by Assignee with respect to any required payment shall be discharged upon the mailing on or before the due date of a valid check in the amount specified to the address of record.
5. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Utah.
6. The Assignee may fund the Periodic Payments by purchasing a "qualified funding asset" within the meaning of Section 130(d) of the Code in the form of an annuity contract issued by the Annuity Issuer. All rights of ownership and control of such annuity contract shall be and remain vested in the Assignee exclusively.
7. The Assignee may have the Annuity Issuer send payments under any "qualified funding asset" purchased hereunder directly to the payee(s) specified in Addendum No. 1. Such direction of payments shall be solely for the Assignee's convenience and shall not provide the Claimant or any payee with any rights of ownership or control over the "qualified funding asset" or against the Annuity Issuer.
8. Assignee's liability to make the Periodic Payments shall continue without diminution regardless of any bankruptcy or insolvency of the Assignor.
9. In the event the Settlement Agreement is declared terminated by a court of law or in the event that Section 130(c) of the Code has not been satisfied, this Agreement shall terminate. The Assignee shall then assign ownership of any "qualified funding asset" purchased hereunder to Assignor, and Assignee's liability for the Periodic Payments shall terminate.

10. This Agreement shall be binding upon the respective representatives, heirs, successors and assigns of the Claimant, the Assignor and the Assignee and upon any person or entity that may assert any right hereunder or to any of the Periodic Payments.

11. The Claimant hereby accepts Assignee's assumption of all liability for the Periodic Payments and hereby releases the Assignor from all liability for the Periodic Payments.

Assignor: Scottsdale Insurance Company

By: Kameron Jones
Authorized Representative

Title Claim Manager

Assignee: GE Capital Assignment Corporation

By: Barry C. Wilkerson
Authorized Representative

Title Vice President

Claimant: Vickie L. Ward
Vickie L. Ward, individually and as permanent Guardian of Terry Faye Ward, an incapacitated adult and as Conservator of the Estate of Terry Faye Ward, an incapacitated adult

Approved as to Form and Content:

By: Lloyd Hardcastle
Claimant's Attorney
Lloyd Hardcastle

Addendum No. 1
Description of Periodic Payments

The following Periodic Payments:

- (1) To Vickie L. Ward, Trustee of the Terry F. Ward Trust ("Payee"), the sum of Two Thousand Seven Hundred Two Dollars (\$2,702) to be paid on or about the twenty ninth (29th) day of each month beginning on or about April 29, 2001, and continuing for the life of Terry Faye Ward. The aforesaid payments are guaranteed to be paid for a period of two hundred sixty five (265) months, with the last guaranteed payment to be made on or about April 29, 2023.
- (2) Should Terry Faye Ward die before April 29, 2023, then any remaining guaranteed Periodic Payments set forth in paragraph (1) shall instead be paid, subject to the provisions of paragraph (5) below, as they become due, to Vickie L. Ward ("Beneficiary"), with the last guaranteed Periodic Payment to be made on or about April 29, 2023. Should Vickie L. Ward die before the remaining guaranteed Periodic Payments are made as set forth in paragraph (1), then all remaining guaranteed Periodic Payments will be made subject to the provisions of paragraph (5) below, as they come due, to the duly appointed Successor Trustee of the Terry Faye Ward Trust, with the last payment to be on or about April 29, 2023. Should Terry Faye Ward die after April 29, 2023, then monthly payments as set forth in paragraph (1) shall cease.
- (3) To the Trustee of the Vickie L. Ward Trust ("Payee"), the sum of One Thousand Five Hundred Eighty Seven Dollars (\$1,587) to be paid on or about the first (1st) day of each month, beginning on or about May 1, 2001, guaranteed to be paid for a period of one hundred eighty (180) months, with the last guaranteed payment to be made on or about April 1, 2016.
- (4) Should Vickie L. Ward die before April 1, 2016, then any remaining guaranteed Periodic Payments set forth in paragraph (3), shall instead be paid, subject to the provisions of paragraph (5) below, as they become due, to the duly appointed Successor Trustee of the Vickie L. Ward Trust, with the last payment to be made on or about April 1, 2016.
- (5) Each Payee shall have the right to submit a request to change the Beneficiary by filing a written request with the owner of the Annuity Contract. The change will be effective when approved by both the owner of the Annuity Contract and the Annuity Issuer. Any change in the Beneficiary shall not in any way affect or alter any of the provisions of this Agreement.

Initials

Claimant:

VLW

Assignor:

KKJ

Assignee:

BCW

SETTLEMENT AGREEMENT AND GENERAL RELEASE

VICKIE LYNN WARD, individually and as permanent guardian of TERRY FAYE WARD, an incapacitated adult, and as conservator of the ESTATE OF TERRY FAYE WARD, an incapacitated adult (hereinafter collectively referred to as "Ward") and MOUNTAIN WEST ANESTHESIA, LLC, all of its associated physicians including JOHN LUCKWITZ, M.D., and SCOTTSDALE INSURANCE COMPANY (hereinafter collectively referred to as "Insured"), and their respective heirs, executors, administrators, personal representatives, successors, agents, employees, indemnitors and assigns, enter into this Settlement Agreement and General Release (hereinafter referred to as "Settlement Agreement"), for the consideration hereinafter set forth this 12th day of March, 2001.

1. Settlement Payments.

Concurrently with the execution of this Settlement Agreement, Insured agrees to pay Ward the total sum of one million dollars (\$1,000,000), receipt of which is hereby acknowledged.

2. Release of All Claims.

In consideration of the payment referred to above, the receipt and sufficiency of which is hereby acknowledged, Ward, for and on behalf of her heirs, administrators, successors and assigns, hereby releases, acquits and forever discharges Insured and their past, present and future officers, directors, stockholders, attorneys, agents, physicians, servants, representatives, employees, subsidiaries, affiliates, partners, insureds, predecessors and successors in interest, and all other persons or entities, for whose conduct they may be liable, of and from any and all claims, demands, damages, causes of action, suits and liabilities, which Ward now has or which may hereafter accrue, because of, arising out of or in any way connected with any act or omission committed prior to the date of this Settlement Agreement, including specifically, but without limitation, to medical care and treatment (or the alleged lack thereof) rendered prior to the date of this Settlement Agreement, which medical care and treatment is alleged to have caused injury, damage, and loss to Ward on or about July 18, 2000, at or near 3939 Harrison Boulevard, Ogden, Weber County, Utah, arising out of surgery and care at McKay Dee Hospital. Nothing in this Release shall be construed as releasing Ward's claims against Dr. Steven J. Carabine, McKay Dee Hospital, and/or its employees.

Ward understands and agrees that the sum paid, as specified in this Settlement Agreement, constitutes full and complete satisfaction of all claims she now has or which may hereafter accrue against Insured, and all other persons or entities for whose conduct Insured may be liable by reason of acts and omissions committed prior to the date of this Settlement Agreement and that this is a document of release of all claims including, but not limited to, claims for: pain and suffering; personal injury, death, permanent disability; bodily impairment;

neurological injury and damage; loss of cognitive abilities, loss of bodily function and function of organs, glands, structures, tissues and muscles; loss of consortium; psychological or emotional damage, distress or anxiety; loss or impairment of earning capacity, loss of wages and salary and all other employment and income losses of every kind and character; hospital, surgical, medical, nursing and drug expenses and all other expenses arising from bodily injury or impairment; punitive damages; attorney fees and legal costs; and claims of every other kind and character against Insured and all other persons or entities for whose conduct they may be liable arising from or relating to acts and omissions committed prior to the date of this Settlement Agreement.

3. General Release.

Ward hereby acknowledges and agrees that the release of claims against Insured is a general release, and she further expressly waives and assumes the risk of any and all claims for damages against Insured which exist as of this date, but which Ward does not know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, would materially affect her decision to enter into this Settlement Agreement. Ward further agrees to accept payment of the sum specified in this Settlement Agreement as a complete compromise of matters involving disputed issues of law and fact and she fully assumes the risk that the facts or law may be otherwise than she believes.

4. Warranty of Capacity to Execute Agreement.

Ward represents and warrants that no other person or entity has or has had any interest in the claims, demands, obligations or causes of action referred to in this Settlement Agreement; that she has the sole right and exclusive authority to execute this Settlement Agreement and receive the sum specified in it; and that she has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to in this Settlement Agreement. Ward warrants that she has received no notice of any subrogation claims against the amounts to be paid pursuant to this Settlement Agreement and further warrants that she has received no Medicaid assistance for which reimbursement may be owed pursuant to the Medical Benefits Recovery Act, U.C.A. § 26-19-1, et seq.

5. Disclaimer of Liability.

Ward acknowledges and agrees that she accepts payment of the sum specified in this Settlement Agreement as a full and complete compromise of matters involving disputed issues; that neither payment of the sum specified herein nor the negotiation for this settlement shall be

constituted as admissions of the Insured; that no past or present wrongdoing on the part of Insured shall be implied by such payment or negotiation.

6. Entire Agreement and Successors in Interest.

Ward acknowledges and agrees that this Settlement Agreement contains the entire agreement between herself and Insured with regard to the matters set forth in this Settlement Agreement, and that this Settlement Agreement shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, indemnitors, successors, officers, directors, employees and assigns of each.

7. Indemnification.

As consideration for the payment described in paragraph 1 of the Settlement Agreement, Ward agrees to indemnify Insured from all claims of Ward or others arising from or in any way connected with the actual or alleged acts or omissions of Insured occurring prior to the date hereof. Ward also agrees to satisfy all legal rights for contribution, subrogation and indemnity and to hold the Insured harmless from all such claims, including but not limited to such claims of public or private health insurance companies or state or federal agencies.

8. Confidentiality.

Insured and Ward agree that neither they nor their attorneys or representatives shall reveal to anyone, other than to Ward's financial advisors, or as may be mutually agreed to in writing or by order of a court of competent jurisdiction, any of the terms of this Settlement Agreement, or any of the amounts, numbers, terms, or conditions of any sums payable to Ward as set forth.

9. Representation of Comprehension of Document.

In entering into this Settlement Agreement, Ward represents that she has relied upon the legal advice of her attorney, who is the attorney of her choice, that the terms of this Settlement Agreement have been completely read and explained to her by her attorney and that she fully understands and voluntarily accepts them.

10. Court Approval

Ward warrants that she has filed or will file for all necessary court approvals of this Agreement, that may be required by law.

DATED this 16 day of March, 2001.

Vickie Lynn Ward
VICKIE LYNN WARD

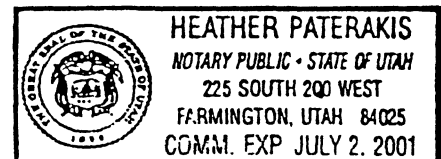
STATE OF UTAH)
 : ss.
COUNTY OF DAVIS)

On the 16 day of March, 2001, personally appeared before me VICKIE LYNN WARD, who being first duly sworn on oath, acknowledged to me that she is the person named in the foregoing Settlement Agreement and General Release, and that she executed the same as her own free act and deed.

Heather Paterakis
NOTARY PUBLIC

APPROVED AS TO FORM:

SCHWAB & HARDCASTLE



Lloyd A. Hardcastle
LLOYD A. HARDCASTLE
MICHAEL L. SCHWAB
Attorney for Vickie Lynn Ward