

2007

Vickie Lynn Ward v. IHC Health Services Inc.;
McKay-Dee Hospital, Mountain West Anesthesia :
Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VICKIE LYNN WARD, individually
and as permanent guardian of Terry
Faye Ward and as conservator of the
Estate of Terry Faye Ward,

Plaintiff/Appellant,

vs.

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

Defendant, Third Party
Plaintiff/Appellee.

vs.

MOUNTAIN WEST ANESTHESIA,
LLC,

Third Party Defendant/Appellee

**BRIEF
OF APPELLEE MOUNTAIN
WEST ANESTHESIA, LLC**

Appeal No. 20070110

Appeal from a Decision of the Second Judicial District Court,
Weber County, Judge Ernie W. Jones

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STATEMENT OF JURISDICTION

The Court of Appeals has appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did the trial court correctly rule that the two agreements at issue were separate contracts, separately enforceable according to their respective terms?

Preservation of issue. The issue was preserved in Mountain West's Motion for Summary Judgment (R. 1404-1416.), and in the trial court's ruling (R. 1871-1877.)

Standard of Review. A grant of summary judgment is reviewed for correctness and construction of contract terms presents questions of law which are also reviewed for correctness without deference to the trial court's conclusions. Green v. State Farm Fire & Casualty Co., 2005 UT App 564, ¶ 16, 127 P.3d 1279, 1282.

2. Did the trial court correctly rule that the indemnification agreements between plaintiff and Mountain West and between Mountain West and Mc-Kay-Dee operated to preclude a meaningful award of damages to the plaintiff?

Preservation of Issue. The issue was preserved in Mountain West's Motion for Summary Judgment (R. 1410-1415.), McKay-Dee's Motion for Summary Judgment (R.1513.), and the trial court's ruling (R. 1877.)

Standard of Review. A grant of summary judgment is reviewed for correctness and construction of contract terms presents questions of law which are also reviewed for correctness without deference to the trial court's conclusions. Green v. State Farm Fire & Casualty Co., 2005 UT App 564, ¶ 16, 127 P.3d 1279, 1282.

3. Did the trial court properly consider extrinsic evidence in resolving a potential ambiguity with respect to the intent of the parties on merger of the two agreements?

Preservation of Issue. The issue was preserved in the trial court's ruling in which it acknowledged the effect of evidence extrinsic to the agreements. (R. 1874.)

Standard of Review. A grant of summary judgment is reviewed for correctness and construction of contract terms presents questions of law which are also reviewed for correctness without deference to the trial court's conclusions. Green v. State Farm Fire & Casualty Co., 2005 UT App 564, ¶ 16, 127 P.3d 1279, 1282.

PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES AND RULES

There is no constitutional, statutory or other enacted law which is dispositive of the issues presented in this appeal.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This dispute began when Terry Ward suffered an anoxic brain injury during a surgical procedure at McKay-Dee Hospital in Ogden, Utah. Recognizing their responsibility in the matter, Mountain West and its anesthesiologist employee, John Luckwitz, M.D., settled all claims arising from the incident by paying the policy limits of their applicable medical malpractice insurance. Thereafter, this litigation was filed seeking further recovery from the hospital and its employees.

This appeal, though initially presented to the trial court as a medical malpractice claim, consists solely of the construction and application of three contracts. The first was a "Settlement Agreement and General Release" (the "Settlement Agreement") entered into by Vickie Lynn Ward ("Mrs. Ward") in her

individual, guardian and conservator capacities with Mountain West Anesthesia, LLC (“Mountain West”), John Luckwitz, M.D., and Scottsdale Insurance Company. (R. 1418-1421, copy attached as Addendum A.) The Settlement Agreement settled malpractice claims against Dr. Luckwitz and contained an indemnification provision holding Mountain West and Dr. Luckwitz harmless from any claims based upon the actions of Dr. Luckwitz. The Settlement Agreement also preserved claims which Mrs. Ward might assert against McKay-Dee or others. Mrs. Ward concurrently received \$393,333 pursuant to the Settlement Agreement.

The second contract was a “Release and Settlement Agreement” (the “Scottsdale Agreement”) between Mrs. Ward in all three of her capacities and Scottsdale Insurance Company. (R. 1423-1438, copy attached as Addendum B.) Though designated as “parties” in the Scottsdale Agreement, neither Dr. Luckwitz nor Mountain West executed the Scottsdale Agreement and there were no signature blocks for them to do so. The Scottsdale Agreement provided for structured payment of the balance of the settlement amount. The Scottsdale Agreement contained no indemnification provision.

The third agreement was a “Hospital-Based Independent Contractor Agreement for Anesthesia Services” (the “Hospital Agreement”) between IHC Health Services, Inc. dba McKay-Dee Hospital Center, IHC Health Plans, Inc., IHC Care, Inc., IHC Group, Inc. McKay-Dee Surgical Center Joint Venture and Mountain West Anesthesia Group, L.L.C. (R. 1455-1476, copy attached as

Addendum C.)¹ The Hospital Agreement contained an indemnification provision protecting McKay-Dee from liability arising from care rendered by Mountain West or its many physicians. (R. 1467.)

The issue presented to the trial court on Motion for Summary Judgment by Mountain West was whether Mountain West's indemnification of McKay-Dee and Mrs. Ward's indemnification of Mountain West precluded Mrs. Ward from receiving any meaningful award of damages, rendering moot any further proceedings. The trial court ruled that the Settlement Agreement and Scottsdale Agreement were independent, enforceable according to their terms and parties, and that the existence of the indemnification provisions would generate circular litigation from which no meaningful award would be available to Mrs. Ward. A copy of the Ruling of the lower court is attached as Addendum D.

B. COURSE OF PROCEEDINGS

This suit began as a medical malpractice case asserting claims against Steven J. Carabine, M.D. and McKay-Dee Hospital. (R.1-7.) Dismissal with prejudice was entered in favor of McKay-Dee Hospital Employees, (R. 717-19.) and the parties stipulated to the dismissal with prejudice of claims against Dr. Carabine. (R. 720-21.) The Complaint was then amended to assert a claim against McKay-Dee based upon the alleged negligence of Dr. Luckwitz and the legal argument of ostensible authority by making Dr. Luckwitz an agent of McKay-Dee. (Third Am. Compl.; R.

¹ Mrs. Ward prefers to refer to this as a "secret contractual arrangement" and "secret indemnification agreement." It was not, in fact, "secret." It was not public, as is the case with most contracts between private parties. As soon as the agreement became relevant to the litigation, it was made available to all parties and appears in its entirety attached to Mountain West's Memorandum in Support of its Motion for Summary Judgment.

756-762.) Because McKay-Dee might face liability under the ostensible authority theory, it asserted a third-party claim against Mountain West for indemnification under the Hospital Agreement for any judgment it may have to pay Mrs. Ward. (R. 1163-1168.) Based on the indemnification provision in the Settlement Agreement with Mrs. Ward, Mountain West filed a Rule 14(a) Counterclaim against her. (R. 1179-1188.) Mrs. Ward sought to have Mountain West's Counterclaim dismissed for lack of subject matter jurisdiction. (R. 1195-97.) The trial court ruled that, based on the indemnity provision in the Settlement Agreement, Mrs. Ward had potential liability for any damage award making the Counterclaim under Rule 14(a) appropriate. The court denied Mrs. Ward's Motion to Dismiss. (R. 1237-1239.)

After some modest discovery and an evaluation of the contract issues, Mountain West made a Motion for Summary Judgment arguing that it was impossible for the trial court to make a meaningful damage award to Mrs. Ward because of the circularity arising from the indemnity provisions, to wit: If McKay-Dee were required to pay damages to Mrs. Ward, it would collect that amount from Mountain West as indemnification, and if Mountain West had to pay McKay-Dee, it would seek indemnification from Mrs. Ward. (R. 1400-1476.)

In a written ruling dated November 29, 2006 (Addendum D), the trial court found that the indemnity provision of the Settlement Agreement was enforceable and the result would be circular litigation. It therefore granted Mountain West's Motion for Summary Judgment. (R. 1871-1878.) Summary Judgment was entered on January 4, 2007. (R. 1879-1882.) Mrs. Ward commenced her appeal with the Utah Supreme Court (R. 1890-1892.) which assigned the matter to this Court by order dated February 9, 2007. (R. 1896-1898.)

C. STATEMENT OF FACTS

Terry Ward underwent hernia repair surgery at McKay-Dee on July 18, 2000. During the procedure he suffered an anoxic brain injury. (R. 758.) The anesthesia services were provided by John Luckwitz, M.D., an employee of Mountain West. (R. 757.) Mrs. Ward initiated a claim against Dr. Luckwitz and Mountain West for negligence resulting in the incapacitation of her husband. After initial evaluation of the incident and before any litigation was filed, Dr. Luckwitz and Mountain West entered into the Settlement Agreement with Mrs. Ward in her individual, guardian and conservator capacities. (R. 1418-1421.)

Mrs. Ward signed the Settlement Agreement on March 16, 2001 after her attorney had approved the agreement as to form. (R. 1421.) In the Settlement Agreement, Mountain West, John Luckwitz, M.D. and Scottsdale Insurance Company are designated as "Insured." (R. 1418.) Consideration for the settlement was the sum of \$1,000,000. (R. 1418.) Mrs. Ward agreed to release all claims, present or future, against Dr. Luckwitz and Mountain West. (R. 1418-1419.) The Settlement Agreement preserved for Mrs. Ward potential claims against other defendants.

Nothing in this Release shall be construed as releasing Ward's claims against Dr. Steven J. Carabine, McKay-Dee Hospital, and/or its employees.

(R. 1418.) The Settlement Agreement also contained an indemnification provision.

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.

(R. 1420.) Leaving no chance for misunderstanding of the indemnification or other provisions, the Settlement Agreement further provides:

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.

(R. 1420.) No language in the Settlement Agreement indicates that the parties intended the Settlement Agreement to be preliminary, leading to a final agreement. To the contrary, the Settlement Agreement states that “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 . . .”

(R. 1420.)

After initial receipt of \$393,333 (R. 1426), Mrs. Ward opted to have the balance of her settlement structured in the form of an annuity. Related to that annuity, she entered into the Scottsdale Agreement with Scottsdale Insurance Company. (R. 1423-1438.) Scottsdale Insurance Company provided professional liability insurance to Mountain West under the provisions of its Anesthesiologists Professional Liability Insurance Policy (the “Liability Policy”). (R. 1440-1453.) The Liability Policy contains no language establishing Scottsdale Insurance Company as the agent of Mountain West or Dr. Luckwitz, or authorizing the company to enter into agreements on their behalf or to waive any contractual rights which they may have. (R. 1440-1453.)

The Scottsdale Agreement referred to Mountain West and Dr. Luckwitz as “Parties,” but neither signed the agreement nor had a signature block on the Agreement for doing so. (R.1423, 1435.) Mrs. Ward executed the Scottsdale

Agreement in her individual, guardian and conservator capacities. (*Id.*) The Scottsdale Agreement contained a redundant general release of liability of the Insureds, Mountain West and Dr. Luckwitz, and Scottsdale Insurance. (R. 1424-1426.) The bulk of the Scottsdale Agreement dealt with the method and amount of payments to Mrs. Ward. (R. 1426-1432.)

The Scottsdale Agreement contains two integration clauses.

This Agreement contains the entire agreement between the Claimant, the Insured and the insurance Company with regard to 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.

(R. 1432 emphasis added.)

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 this Agreement constitutes the entire agreement between the parties and that the terms of this Agreement are contractual and not mere recitals.

(R. 1433 emphasis added.) The Scottsdale Agreement contains no indemnification provision.

Mountain West provided services at McKay-Dee by virtue of the Hospital Agreement. The Hospital Agreement contains a comprehensive indemnity provision:

Group shall indemnify and hold harmless the Facility, its employees, agents, or representatives against any and all liability for injury, loss, claims, or damages arising from the intentional or negligent operations, acts, or omissions of the Group, its employees, agents, and representatives while engaged in clinical activities, *i.e.*, performing Anesthesia services within the scope of this Agreement. Furthermore, Group shall indemnify and hold harmless the Facility, its employees, agents, or representatives against all costs and expenses, including but not limited to, reasonable legal expenses, which are incurred by or on behalf of the Facility in connection with the defense of such claims against the Group.

(R. 1467.)

After Mrs. Ward asserted her ostensible agency claim against McKay-Dee based upon the negligence of Dr. Luckwitz (R. 756-762.), McKay-Dee filed a third party action against Mountain West for indemnification pursuant to the Hospital Agreement. (R. 1163-1168.) Faced with additional liability for negligence which it had already settled by payment of its policy limits which exhausted all available insurance coverage, Mountain West then filed its Rule 14(a) Counterclaim against Mrs. Ward based upon her promised indemnification of Mountain West. (R. 1179-1188.)

SUMMARY OF ARGUMENT

The trial court properly dealt with this issue by summary judgment. Mrs. Ward never seriously argued before the trial court that there were material facts in dispute. Interpretation of unambiguous contracts presents questions of law which are appropriate for disposition on summary judgment. The trial court did not err in granting that judgment.

The most glaring weakness in Mrs. Ward's arguments is the conclusory assumption that the Settlement Agreement was, in some way, intended by the parties to be a "preliminary agreement" to be replaced by and subsumed into the Scottsdale Agreement. There is no evidence to support this assumption. In fact, the terms of the Settlement Agreement expressly treat that Agreement as entire and without any collateral agreements between the parties. The reality is that the two Agreements are separate and complete in and of themselves.

While the trial court was able to harmonize the two agreements, that process was likely unnecessary. Each agreement can be enforced independently without

conflicting with the other. The Settlement Agreement was signed by Mrs. Ward and its provisions, including the indemnification agreement, can be enforced against her as a matter of contract law. The Scottsdale Agreement, dealing largely with the annuity method of payment, was executed by Scottsdale Insurance and is enforceable between it and Mrs. Ward. Neither Mountain West nor Dr. Luckwitz signed the Scottsdale Agreement, with the result that it cannot be enforced against them in any manner, also as a matter of law. While the Scottsdale Agreement contains an integration clause, it affects only integration of agreements between Mrs. Ward and Scottsdale Insurance. It has no effect on the independent Settlement Agreement and its indemnity provision.

Mrs. Ward's argument that the Settlement Agreement was preliminary and the Scottsdale Agreement was final between all parties raises a possible issue of ambiguity into the Agreements. Faced with that circumstance, it was appropriate for the trial court to consider all evidence, extrinsic or otherwise, in determining the intent of the parties. The extrinsic evidence relied upon by the trial court establishes that there was no intent that the Settlement Agreement be preliminary and that the Scottsdale Agreement was intended to address the issue of periodic payment of the \$606,667 balance due to Mrs. Ward.

While the issues involved construction of the Agreements, the core issue presented to the trial court was whether it could ultimately make a meaningful award of damages to Mrs. Ward in the event she prevailed on her ostensible agency claim against McKay-Dee. The existence of the indemnity agreements effectively precludes any meaningful award, would result in circular litigation, and would simply be a waste of judicial resources. If McKay-Dee had to pay damages to Mrs. Ward, it

would be entitled to indemnification by Mountain West. If Mountain West had to pay McKay-Dee under their agreement, it would be entitled to indemnification from Mrs. Ward. The circularity was apparent to the trial court. As a result, the trial court correctly entered summary judgment in favor of Mountain West and terminated the action based upon its inability to award meaningful damages. It is appropriate for this Court to affirm that decision.

ARGUMENT

POINT I

THE ISSUES PRESENTED HERE WERE PROPERLY RESOLVED BY SUMMARY JUDGMENT.

In order to recover on her tort claims, Mrs. Ward was required to establish that the trial court could award her damages for her alleged injuries. Schuurman v. Singleton, 2001 UT 52, ¶¶ 10, 18, 22, 26 P. 3d 227. In fact, however, the court could not award any meaningful damages until all of the indemnification issues had been resolved which resulted in circular payments and ultimately, no meaningful damage award. That governing issue is a matter of contract law.

Summary judgment is appropriate in any case where there are no disputed facts material to the legal issues and the moving party is entitled to judgment as a matter of law. Rule 56(c), Utah R.Civ.P. It is well-established that interpretation of a contract is a matter of law. *E.g.*, Pack v. Case, 2001 UT App 232, ¶ 16, 30 P.3d 436, 440. Where the applicable terms of the contract are unambiguous, there are no material issues of fact outside the contract itself. “If the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted

as a matter of law.” Green River Canal Co. v. Thayn, 2003 UT 50, ¶ 17, 84 P.3d 1134, 1140 (citation omitted). Mountain West’s involvement in this case is a matter of contract, specifically the indemnification clause in the Hospital Agreement. To the extent it incurs liability for indemnification, it is entitled to recover the entire amount from Mrs. Ward via contractual indemnification. There are no issues of fact related to these agreements and Mrs. Ward advanced no such issues at the trial court. The trial court, therefore, was dealing solely with questions of law appropriate for resolution by summary judgment.

POINT II

**THE SETTLEMENT AGREEMENT AND
SCOTTSDALE AGREEMENT ARE
INDEPENDENT AND EACH IS ENFORCEABLE
WITH RESPECT TO ITS RELATIVE TERMS
AND PARTIES. THE INDEMNITY PROVISION
IN THE SETTLEMENT AGREEMENT IS
THEREFORE ENFORCEABLE AGAINST MRS.
WARD.**

The Settlement Agreement and Scottsdale Agreement are unambiguous on their face. The only suggestion of ambiguity arises from Mrs. Ward’s insistence that the Settlement Agreement is preliminary to the Scottsdale Agreement, which became the final agreement between the parties. This possible ambiguity is addressed *infra* at Point III.

Mrs. Ward’s insistence that the Settlement Agreement is preliminary and that the Scottsdale Agreement is an integrated final agreement lacks any evidentiary basis. It is important, therefore, to avoid the temptation to accept this conclusory argument, but rather to understand the nature and specifics of each agreement.

A. The trial court correctly ruled that the Settlement Agreement is valid and enforceable.

The Settlement Agreement was a settlement of claims asserted by Mrs. Ward against Mountain West and Dr. Luckwitz. In return for \$1,000,000, Mrs. Ward agreed to release all claims against Mountain West and Dr. Luckwitz and to indemnify them for any future liability based upon their actions giving rise to her claims against them. Mrs. Ward executed the Settlement Agreement in her individual, conservator and guardian capacities.² In addition to the release and indemnity provisions, two things are worthy of note. The first is that there is no language in the Settlement Agreement which indicates the intent of the parties that it be a preliminary agreement leading to a second and final agreement. Instead, the Settlement Agreement expressly indicates the intent of the parties that it be a final, binding agreement. “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 . . .” (R. 1420.) Pursuant to the Settlement Agreement, Mrs. Ward was concurrently paid \$393,333 (R. 1426.), and the balance reserved for a structured annuity.

The Settlement Agreement contains all of the elements of a valid, enforceable contract. Mrs. Ward, as the one against whom the contract is to be enforced, signed the Settlement Agreement. She exchanged promises, *e.g.*, the release and

² Before the trial court, Mrs. Ward argued that the Settlement Agreement was void because it was not signed by Mountain West or Dr. Luckwitz. This, however, is typical of release agreements which are valid contracts given the consideration and performance provided by the non-signing party. Moreover, as correctly observed by the trial court, the Settlement Agreement is enforceable against Mrs. Ward under the Statute of Frauds. (R. 1872-1873.) A promise need only be in writing and signed by the party to be charged, *i.e.*, Mrs. Ward. Utah Code Ann. § 25-5-4(1)(b). *See also Auerbach’s, Inc. v. Kimball*, 572 P.2d 376, 378 (Utah 1977).

indemnification agreements, for consideration of \$1,000,000 with an initial payment of \$393,333.

B. The Scottsdale Agreement is valid and enforceable as to Mrs. Ward and Scottsdale Insurance.

It is the existence and nature of the Scottsdale Agreement which presents the problem resolved by the trial court. The Scottsdale Agreement was between Mrs. Ward and Scottsdale Insurance Co. Though Mountain West and Dr. Luckwitz were identified as “Parties” in the Scottsdale Agreement, neither signed the agreement. Nor was there any indication of intent that they sign the agreement. There are no signature blocks for them in the Scottsdale Agreement. “Under standard contract principles, the presence or absence of signatures on a written contract is relevant to determining whether the contract is binding on the parties.” In re Bunzl USA, Inc., 155 S.W.3d 202, 209 (Tex. App. 2004) (finding no agreement to arbitrate where party had not signed the written contract). *See also* Davies v. Olson, 746 P.2d 264, 267 (Utah App. 1987) (finding no meeting of minds where written contract was not executed by defendant).

Nor is there any evidence that Scottsdale Insurance had authority to act as agent for Mountain West or Dr. Luckwitz to waive, modify or impair their contractual right to indemnity under the Settlement Agreement. “To be an agent, a person must be authorized by another to act on his behalf and subject to his control.” Gildea v. Guardian Title Co. of Utah, 970 P.2d 1265, 1269 (Utah 1998) (punctuation omitted, quoting Restatement (Second) of Agency § 1 (1958)).

Although Mrs. Ward argued to the trial court that Scottsdale was agent for Mountain West and Dr. Luckwitz, here she simply makes a conclusory allegation of agency. (Appellant’s Br. ¶ 10 p. 7.) The closest thing to a statement of agency is in

the Scottsdale Agreement where Scottsdale states that it “has authority to settle any such claim or suit on behalf of and as agent for the insured . . .” (R. 1423-1424.) There are two problems with this cursory statement of agency. First, the “claim or suit” had already been settled pursuant to the Settlement Agreement. There was no remaining basis for Scottsdale to act as agent. Second is that the representations of agency in the Scottsdale Agreement are made by the purported agent and not by Dr. Luckwitz or Mountain West, who are the purported principals. It is black-letter law that to create an agency relationship, the principal must consent to have the agent represent his interests and the agent must agree to act on behalf of and for the benefit of the principal.

Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.

Restatement, Agency (Second) § 1. Utah case law addresses the situation where the agent claims to have agency authority.

The authority of the agent is not ‘apparent’ merely because it looks so to the person with whom he deals. It is the principal who must cause third parties to believe that the agent is clothed with apparent authority . . . It follows that one who deals exclusively with an agent has the responsibility to ascertain that agent’s authority despite the agent’s representations.”

Zions First National Bank v. Clark Clinic Corp., 762 P.2d 1090, 1095 (Utah 1988)

(punctuation, citations omitted, emphasis added.) For an agency relationship to exist, Dr. Luckwitz and Mountain West must have conducted themselves in a way to cause Mrs. Ward to believe that Scottsdale Insurance had apparent authority to act on their behalf. Bodell Construction Co. v. Stewart Title Guaranty Co., 945 P.2d 119, 124 (Utah App. 1997) (finding no apparent authority where title agent used

company's name and logo in its promotional materials.) "Additionally, if plaintiffs really believed that [Scottsdale] was acting as [Mountain West's] agent for settlement, . . . then they were under an obligation to ascertain the scope of that agency." *Id.* (citation omitted).

There is no express agency here. The Liability Policy does not create an agency relationship. In fact, for settlement purposes, the insurance agreement expressly reserves to the insured the right to ultimately control the settlement of any claim against it. (R. 1451, ¶ 6.) There is no written waiver of that privilege. Neither Dr. Luckwitz nor Mountain West did anything which would suffice to create apparent authority for Scottsdale to act as their agent. Nor, under the facts of this case, can settlement authority be inferred. There is no reason why, after having already entered into a settlement and indemnification agreement with Mrs. Ward, Dr. Luckwitz or Mountain West would authorize Scottsdale to alter, modify or compromise the already settled matter on their behalf. Dr. Luckwitz and Mountain West received nothing under the Scottsdale Agreement. Moreover, because they had paid their policy limits to settle the claim, the indemnification provision was of supreme importance to them because they had essentially exhausted their available insurance coverage by paying limits and their only remaining protection was the indemnity paragraph. Scottsdale's unilateral statement in the language of the Scottsdale Agreement that it had authority to act as agent for Dr. Luckwitz and Mountain West simply fails as a matter of well-established law to create an agency relationship by apparent authority. It is clear that Mrs. Ward and her counsel dealt solely with Scottsdale Insurance with respect to the Scottsdale Agreement, accepted its assurance of agency on behalf of all insureds, and did nothing to fulfill her

“obligation to ascertain the scope of that agency.” Bodell at 124. Her agency allegations therefore fail as a matter of law.

Mountain West and Dr. Luckwitz were neither parties nor principals represented by agents who were parties to the Scottsdale Agreement. That does not, however, undermine the validity of the Scottsdale Agreement with respect to the issues between Mrs. Ward and Scottsdale, *i.e.*, structured payment of the remaining settlement amount. This is made clear by language of the integration clause which Mrs. Ward ignores. The entirety of the agreement is between the parties “signing this Agreement.” (R. 1433.) Those signing parties are Mrs. Ward and Scottsdale. It is the entire agreement “with regard to the matters set forth in it.” (R. 1432.) Those matters are primarily provisions for periodic payment of the balance of the cash settlement.³ By its own language, the integration provision does not include matters not “set forth in it,” specifically matters such as the indemnification provision of the Settlement Agreement.

C. There was no intent that the Settlement Agreement be preliminary and incorporated into the Scottsdale Agreement in the future.

Without any evidentiary basis for doing so, Mrs. Ward focuses her efforts on arguing that the Settlement Agreement was simply a preliminary agreement which was incorporated into the Scottsdale Agreement. The main problem with this argument, as noted above, is that there is no evidence on the face of either agreement that there was an intent to make a preliminary settlement followed by a more detailed agreement. In fact, the face of the Settlement Agreement indicates

³ As noted, neither Dr. Luckwitz nor Mountain West benefitted in any way from the Scottsdale Agreement. They simply had no interest in the contractual matters involving a structured annuity. The sole beneficiaries from the Scottsdale Agreement were Mrs. Ward and Scottsdale Insurance.

otherwise. The Scottsdale Agreement makes no reference to the Settlement Agreement. Mrs. Ward argues that the unambiguous, but general language of the integration clauses in the Scottsdale Agreement incorporates the Settlement Agreement. She ignores the fact that the language in the Settlement Agreement is also unambiguous and does not, on its face, contemplate the agreement as preliminary. As discussed above, the proper construction yields the conclusion that both Agreements are independent.

D. It is not necessary to “harmonize” the two agreements.

Though the trial court sought to “harmonize” the two Agreements, it did not have to do so. Both Agreements are complete and separately valid and enforceable with respect to the promises contained in them respectively and as to the parties to the individual agreements. While there is some attraction to creating some sort of continuity between the documents, neither Agreement suffers if treated as a separate, distinct contract. Any attempt by the trial court to harmonize the two contracts is harmless and ultimately illustrates that the agreements serve different purposes.

POINT III

**THE TRIAL COURT PROPERLY CONSIDERED
EXTRINSIC EVIDENCE IN DETERMINING
WHETHER THE PARTIES INTENDED THAT
THE TWO AGREEMENTS BE MERGED.**

Mrs. Ward is critical of the trial court’s use of extrinsic evidence to reach its conclusion that the parties intended no merger of the two Agreements and that the Scottsdale Agreement was simply a second agreement intended to deal with periodic payment of the remaining settlement amount. She argues that “the trial court entertained and relied on extrinsic evidence to arrive at an outcome inconsistent with these same contractual provisions . . .” (Appellant’s Br. p. 11.) She misunderstands

the trial court's use of that extrinsic evidence.

As noted above, the closest thing there is to ambiguity in this matter arises from Mrs. Ward's insistence, despite absence of contract language to support the conclusion, that the Settlement Agreement was intended to be preliminary to the Scottsdale Agreement. Mrs. Ward challenges the trial court's resolution of any alleged ambiguity by considering extrinsic evidence on the issue.

It is true that the general rule of contract construction allows admission of extrinsic evidence only after a determination of ambiguity. However, Utah law recognizes a significant exception to that rule. "When determining whether a contract is ambiguous, any relevant evidence must be considered." Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268 (Utah 1995).

Under Utah law, if the initial review of the plain language of a contract, within its four corners, reveals no patently obvious ambiguities, the inquiry into whether an ambiguity exists in a contract does not always end there. Utah's rules of contract interpretation allow courts to consider any relevant evidence to determine whether a latent ambiguity exists in contract terms that otherwise appear to be unambiguous.

Gillmor v. Macey, 2005 UT App 351, ¶ 35, 121 P.3d 57, 70 (citing Ward).

Utah case law has rejected the strict application of the "four corners" rule, which limits the boundaries of inquiry into whether an ambiguity exists in a contract to the contract's "four corners" and effectively excludes the evidence of any surrounding circumstances-outside of the writing-that might indicate that the contract language lacks the required degree of clarity. Likewise, Utah no longer strictly applies the "parol evidence rule" or the "plain meaning rule," which exclude the use of any parol evidence to show whether a contract's language lacks the required degree of clarity. Instead, Utah law has made these rules of interpretation just part of the initial inquiry to determine whether an ambiguity exists in contract language. They are no longer the determinative rules they once were when parties asserted that a contract contained ambiguities.

Id. n.14 (multiple citations omitted).

The extrinsic evidence relied upon by the trial court was correspondence between Mrs. Ward's counsel and Scottsdale Insurance discussing an "additional release" for the insurance company and stating that he should be contacted regarding "any questions or concerns regarding the language of either of these two releases . . ." (R. 1874, emphasis by trial court.) This evidence goes to the issue of intent to merge the two Agreements and resolves the potential ambiguity raised by Mrs. Ward's arguments that the Settlement Agreement was merely preliminary. This use of extrinsic evidence is not only proper, but mandated by Utah law. Ward at 269 (noting that "[t]his is not a case where the extrinsic evidence, if believed by the fact finder, would contradict the parties written agreement" and remanding for evaluation of extrinsic evidence of intent.) Because the trial court's use of this extrinsic evidence was proper, it did not err in considering that evidence.

POINT IV

THE RESERVATION OF CLAIMS IN THE SETTLEMENT AGREEMENT ONLY PRESERVED A RIGHT OF ACTION AND DID NOT GUARANTEE UNIMPEDED PROSECUTION OF THAT ACTION.

The Settlement Agreement expressly reserved Mrs. Ward's potential claims against others.

Nothing in this Release shall be construed as releasing Ward's claims against Dr. Steven J. Carabine, McKay Dee Hospital, and/or its employees.

(R. 1418.) Mrs. Ward argues, without authority, that "it is evident that the parties' intent was that the settlement not impede plaintiff's claims against McKay-Dee Hospital." (Appellant's Br. p. 20.) She further argues that "[t]he intent and

understanding was to proceed against McKay-Dee Hospital without hindrance or interference from Mountain West, but Mountain West's current posture is clearly preventing that from happening in contravention of the settlement." (Appellant's Br. p. 22.) Even a cursory reading of the reservation language reveals no such intent.

It is true that enforcement of the indemnity provision of the Settlement Agreement impairs Mrs. Ward's ability to recover a meaningful award from McKay-Dee. However, the plain language of the reservation clauses in both Agreements permits Mrs. Ward to assert her claims against Dr. Carabine, the Hospital and its employees, but does not preclude the assertion of defenses by any party to that action.

Mrs. Ward, in fact, commenced action against Dr. Carabine and McKay-Dee Hospital. That action led to a determination that there was no independent negligence by McKay-Dee or Dr. Carabine and that the only negligence was that of Dr. Luckwitz, who had already settled with Mrs. Ward. Mrs. Ward then amended her Complaint to add a claim against McKay-Dee under a theory of ostensible authority.⁴ It is obvious that nothing from either of the settlement agreements precluded Mrs. Ward from pursuing her claims, and she in fact did so. Assuming she could prevail on the legal merits of her claim, she might have obtained a damage award from the hospital. In reality, there was no impediment to her claims against the non-settling parties.

⁴ This was an uphill battle. Utah courts have never recognized ostensible authority as a basis for *respondeat superior* liability. Mrs. Ward's action was, at best, an attempt to establish new law.

The reservation clauses do not, however, guarantee that Mrs. Ward can obtain a meaningful recovery in her legal action. By basing her claims against McKay-Dee on the negligence of Dr. Luckwitz, Mrs. Ward brought all of the contractual indemnity provisions into play in the litigation.

The impediment argument, though creative, lacks merit in law and in fact. Mrs. Ward has never argued that the Settlement Agreement released her claims against Dr. Carabine or McKay-Dee. The language of the reservation clauses has been satisfied and there is no basis for extending that language to preclude enforcement of the unambiguous indemnification of Dr. Luckwitz or Mountain West.

POINT V

MOUNTAIN WEST'S INDEMNIFICATION AGREEMENT WITH MCKAY-DEE WAS PROPERLY BEFORE THE COURT.

Mrs. Ward treats the indemnification provision of the Hospital Agreement as a nefarious “secret indemnification agreement concluded amongst the defendants.” Mrs. Ward alleges that at the time the Settlement Agreement was negotiated, “Mountain West had a separate secret contractual arrangement with McKay-Dee Hospital in place that included certain indemnification provisions that Mountain West failed to disclose to plaintiff.” (Appellant’s Br. ¶ 19, p. 9.) She argues that “Mountain West failed to disclose its arrangement *vis-a-vis* McKay-Dee to Plaintiff during settlement, but now wants to employ the terms of that agreement . . .” (Appellant’s Br. p. 12.)

This position is tenuous at best. When Mountain West was negotiating the Settlement Agreement, it was dealing with its relationship to Dr. Luckwitz and the

claims of negligence against him. The Hospital Agreement was not at issue. Mountain West had no duty to disclose the Hospital Agreement to Mrs. Ward. Neither Mountain West nor Dr. Luckwitz believed that Mrs. Ward would continue to make Dr. Luckwitz a material part of her litigation.⁵

The Hospital Agreement became material to the litigation only because Mrs. Ward made a claim against McKay-Dee based upon status liability for the negligence of Dr. Luckwitz, an employee of an independent contractor, Mountain West. McKay-Dee did not assert the indemnification agreement as a defense against Mrs. Ward's claims. It could not do so. What it could and did do was commence a third-party action against Mountain West for indemnification pursuant to the Hospital Agreement. Nor did Mountain West use the Hospital Agreement as a defense. It did the only thing it could do, viz. file a Rule 14(a) Counterclaim against Mrs. Ward based upon the indemnification provision of the Settlement Agreement. Both actions are appropriately within the Rules of Civil Procedure, bringing both indemnity provisions properly before the trial court.

POINT VI

**THE TRIAL COURT CORRECTLY RULED
THAT THE EFFECT OF THE INDEMNITY
PROVISIONS WAS TO PREVENT A
MEANINGFUL DAMAGE AWARD TO MRS.
WARD UNDER THE CIRCUMSTANCES OF
HER CASE.**

Mrs. Ward argues that the trial court should not have considered the applicability of the indemnity provisions because indemnity would be appropriate

⁵ Under current Utah law, tort claims based on ostensible authority are not recognized. When Mountain West and Dr. Luckwitz settled, they reasonably believed they were done with the matter.

only if and when she obtained a judgment against McKay-Dee. To wait until that point, however, would be a tremendous waste of judicial resources. It would provide only a serial and circular academic exercise with no meaningful result. Whether Mrs. Ward might or might not prevail against McKay-Dee is of no consequence if she can't receive any compensation to make the exercise worthwhile. Enforcement of the indemnity provisions means that whatever Mrs. Ward would recover from McKay-Dee will be recovered by the hospital from Mountain West who in turn will seek indemnification from Mrs. Ward. There simply cannot be any meaningful damage award in this case.

This circularity of action forms the basis for denial of recovery to a plaintiff. In Maryland Casualty Co. v. Employers Mutual Liability Ins. Co., 208 F.2d 731 (2nd Cir. 1953), the Second Circuit used the term "complete circuitry of action" to describe the result where plaintiffs could recover from an employer who could recover from an employee who would recover from the plaintiffs. It held that the circuitry was an absolute bar to recovery. Maryland Casualty at 733-34. The principle of not allowing circuitous litigation has also been followed more recently. In Moore v. Southwestern Electrical Power Co., 737 F.2d 496 (5th Cir. 1984), an employer was sued for the death of an employee and settled with an agreement which included an indemnification provision. The plaintiffs then sued the power company for the same accident. Because the power company was entitled to statutory indemnification from the employer, it filed a third-party action. The same circularity as exists here was present in Moore. If the plaintiff recovered from the power company, the power company would recover from the employer who would then recover from the plaintiff. The Moore court held that "[w]hen circular patterns

of indemnity develop, Texas courts resolve the matter by denying recovery to plaintiffs.” Moore at 501. *See also* St. Paul Fire & Marine Ins. Co. v. TIG Ins. Co., 365 F.3d 264, 277 (4th Cir. 2004) (finding that judicial economy does not allow circular litigation); Wal-Mart Stores, Inc. v. RLI Ins. Co., 292 F.3d 583, 594 (8th Cir. 2002) (“Generally, courts will not allow parties to engage in circuitous action when the foreseeable end result is to put the parties back in the same position in which they began.”)

The existence of the indemnification provisions in this matter makes the issue of damages a circular one, rendering the case moot. *See* Burkett v. Schwendiman, 773 P.2d 42, 44 (Utah 1989) (“a case is deemed moot when the requested judicial relief cannot affect the rights of the litigants.”) This is a case where the foreseeable end result is that Mrs. Ward would have no meaningful recovery, *i.e.*, be in the same position in which she began. The trial court was correct in avoiding the considerable waste of judicial resources by precluding Mrs. Ward from pursuing her circular litigation.

CONCLUSION

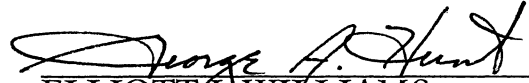
The Settlement Agreement is an independent, valid and enforceable agreement which is unaffected by the existence or terms of the Scottsdale Agreement. Its indemnity provisions are therefore enforceable against Mrs. Ward. The existence of the additional indemnity agreement between Mountain West and McKay-Dee creates a circularity of liability with the result that Mrs. Ward is unable to obtain a meaningful damage award by continued pursuit of her litigation. The trial court therefore correctly granted summary judgment to Mountain West. It is

appropriate, as a matter of law, for this Court to affirm that judgment.

RESPECTFULLY SUBMITTED this 25th day of June, 2007.

WILLIAMS & HUNT

By



ELLIOTT J. WILLIAMS

GEORGE A. HUNT

Attorneys for Third Party Defendant
and Appellee Mountain West
Anesthesia

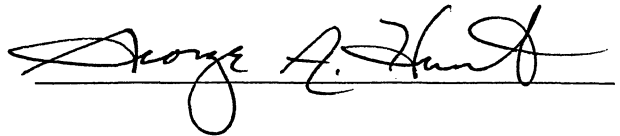
CERTIFICATE OF MAILING

I hereby certify that on the 25th day of June, 2007, I caused two true and correct copies of the foregoing **Brief of Appellee Mountain West Anesthesia, LLC** to be mailed through the United States Mail, via First Class, with postage prepaid thereon, to the following:

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ADDENDUM

- A. Settlement Agreement and General Release (the “Settlement Agreement”).
- B. Release and Settlement Agreement (the “Scottsdale Agreement”).
- C. Hospital-Based Independent Contractor Agreement for Anesthesia Services (the “Hospital Agreement”)
- D. Trial Court’s ruling granting Mountain West Anesthesia’s Motion for Summary Judgment.

Tab A

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; ✓

Ward Release
March 2000
Page 2

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

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Ward Release
March 2000
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concluded 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.

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Ward Release
March 2000
Page 4

DATED this 16 day of March, 2001.

Vickie Lynn Ward
VICKIE LYNN WARD

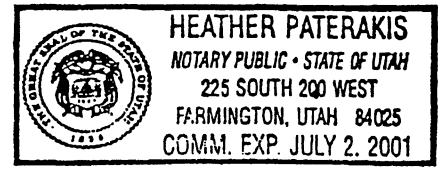
STATE OF UTAH)
) ss.
COUNTY OF DANIELS)

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

Tab B

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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

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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

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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.

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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.

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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.

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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 filling 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

KKT

Assignee

BCW

Tab C

COPY

**HOSPITAL-BASED INDEPENDENT CONTRACTOR AGREEMENT
FOR ANESTHESIA SERVICES**

between

IHC HEALTH SERVICES, INC.

doing business as
McKay Dee Hospital Center

and

IHC HEALTH PLANS, INC.

IHC CARE, INC.

IHC GROUP, INC.

and

MCKAY DEE SURGICAL CENTER JOINT VENTURE

and

MOUNTAIN WEST ANESTHESIA. L.L.C.

Urban North Region Anesthesia Group

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HOSPITAL-BASED INDEPENDENT CONTRACTOR AGREEMENT FOR ANESTHESIA SERVICES

THIS AGREEMENT by and between IHC Health Services, Inc., a Utah non-profit corporation (hereinafter referred to as IHCHS") dba McKay Dee Hospital Center (hereinafter referred to as "Facility") and IHC Health Plans, Inc., IHC Care, Inc., and IHC Group, Inc., all Utah non-profit corporations (hereinafter referred to as "HPI"), and McKay Dee Surgical Center Joint Venture, (hereinafter also referred to as "Facility") and collectively all of the aforementioned entities hereinafter referred to as "IHC", and the Urban North Region Anesthesia Group, a division of Mountain West Anesthesia, L.L.C., (hereinafter referred to as "Group"), specializing in the field of anesthesiology.

RECITALS

WHEREAS, IHC owns and operates Facility and in order to make available specialized, coordinated care in anesthesia services, including operative anesthesia and obstetrical anesthesia and, nonexclusively, conscious sedation and acute pain management ("Anesthesia Services"), IHC desires to contract with Group to serve as a clinical support service for Facility patients, HPI, and Affiliated Managed Care Plan Members, Facility medical staff, and referring physicians.

WHEREAS, the Group consists of private practicing physicians who are licensed to practice medicine in the State of Utah; and, except as disclosed on Appendix "A", each such physician is Board eligible/Board certified by the American Board of Anesthesiology; (collectively "Providers");

WHEREAS, Group is qualified, by virtue of training, education, experience, and background, to assist in the planning, organization, direction, and supervision of the development, operation, and provision of Anesthesia Services for the Facility within the anesthesia department(s) ("Department").

NOW, THEREFORE, in order to allow Group to provide services to Facility consisting of assisting in the planning, organization, direction, and supervision of the development, operation and provision of Anesthesia Services for the Facility within the Department, and in order to provide for Group's availability to Facility patients, HPI, and Affiliated Managed Care Plan Members, Facility medical staff, and referring physicians, the parties agree as follows:

ARTICLE I INDEPENDENT CONTRACTOR STATUS

- 1.1 Independent Contractor Relationship. It is expressly acknowledged by the parties hereto that in the provision of Anesthesia Services and in the performance of the work, duties, obligations, and services under this Agreement (collectively referred to herein as the "Services"), the Group and all individuals employed by or contracted with the Group are independent contractors. Nothing in this Agreement is intended nor shall be construed to create an employer/employee relationship, a partnership, a joint venture relationship, an agency relationship, or a lease or landlord/tenant relationship between the parties hereto.



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- 1.2 No Employee Benefits. Group's Services shall be those of an independent contractor practicing the profession of medicine. Accordingly, Group understands and agrees that the Providers listed in Appendix A, shall not be entitled to any of the rights and privileges established for employees of IHC including but not limited to vacation, sick leave with pay, paid days off, life, accident or health insurance, or severance pay upon termination of this Agreement. It is further expressly agreed and understood that IHC will not withhold any sum due or payable by or on behalf of Group for income tax, employment tax, Social Security, or any other withholding pursuant to any law or requirement of any governmental body and that all such payments as may be required by law are the sole responsibility of Group.
- 1.3 Independent Professional Judgment. It is further expressly agreed that, except with respect to obligations specifically set forth in this Agreement or in IHC's medical staff bylaws and rules and regulations, IHC shall exercise no control over the professional medical judgment of Providers. However, Group agrees that in addition to observing the foregoing requirements, Group shall at all times perform its duties and functions in strict conformance with currently approved practices in the field of medicine and in a competent and professional manner.

ARTICLE II GROUP QUALIFICATIONS AND COMPOSITION

2.1 Qualifications.

- A. The Group includes the Providers listed in Appendix A. Group warrants that it has authority from each Provider to enter into this Agreement on his/her behalf.
- B. Group shall assure that the Providers listed in Appendix A continuously meet the following requirements during the term of this Agreement:
1. Be licensed to practice medicine in the State of Utah;
 2. Obtain and maintain registration with the Federal Drug Enforcement Agency;
 3. Have expertise in the field of anesthesiology;
 4. Meet the requirements of Article III, Section 3.7 hereof regarding professional liability insurance;
 5. Except for those Providers listed in Appendix A for whom the board certification requirement is waived, be eligible for or hold and maintain in good standing a certification from the American Board of Anesthesiology;
 6. Obtain and continuously maintain membership and appropriate privileges on the Facility medical staff and relevant panels of HPI and Affiliated Managed Care Plans;
 7. Comply with all Medicare/Medicaid requirements;
 8. Comply with all Facility medical staff bylaws and rules and regulations including, but not limited to, avoiding disruptive behavior and engaging in

sexual harassment as such terms are defined in such bylaws and rules and regulations as amended; and

9. After January 1, 2000, maintain current Advanced Cardiac Life Support certification as determined by the American Heart Association.

- C. Group understands and agrees that loss of membership by a Provider in an HPI or an Affiliated Managed Care Plan panel shall constitute disqualification of that Provider to render services or to receive reimbursement from HPI or an Affiliated Managed Care Plan. Group further understands and agrees that loss of medical staff privileges at Facility shall also disqualify Provider from rendering services under this Agreement.
- D. This Agreement is not, and shall not be construed as any form of guarantee or assurance by IHC that individual Providers affiliated with Group will receive necessary medical staff membership or privileges for purposes of discharging Group's responsibilities hereunder. Group agrees that application, appointment, reappointment, and privileges are governed solely by the medical staff bylaws and rules and regulations of Facility, and the credentialing and appointment criteria of HPI and/or Affiliated Managed Care Plans.

2.2 Warranties of Past Performance. Group further represents and warrants to IHC that for each Provider listed in Appendix A:

- A. Provider's license to practice in any state has never been suspended or revoked, excepting suspension or revocation for non-renewal;
- B. Provider has never been reprimanded, sanctioned, or disciplined by any licensing board or state or local society or specialty board or medical staff unless such facts are submitted in writing to IHC, and, after considering such facts, IHC notifies Group in writing of the waiver of this subsection for such incident as it pertains to that Provider.
- C. A final judgment has never been entered against Provider in a malpractice action having an aggregate award to the plaintiff in excess of Ten Thousand Dollars (\$10,000.00) and no action, based on an allegation of malpractice by Provider, has ever been settled by payment to the plaintiff or plaintiff's agent of an aggregate of

more than Ten Thousand Dollars (\$10,000.00) unless such facts are submitted in writing to IHC, and, after considering such facts, IHC notifies Group in writing of the waiver of this subsection for such incident as it pertains to that Provider; and

- D. Provider's privileges have never been suspended, curtailed, or revoked based upon the quality of patient care provided, nor has Provider ever voluntarily relinquished such staff membership or clinical privileges while charges of substandard quality of patient care were pending against Provider unless such facts are submitted in writing to IHC, and, after considering such facts, IHC notifies Group in writing of the waiver of this subsection for such incident as it pertains to that Provider.
- E. Provider has not been excluded from Medicare or Medicaid or paid criminal fines or civil penalties for non-compliance with such laws.

2.3 Warranties of Future Performance. Group represents and warrants to IHC that in the provision of Services hereunder, Group shall meet the following standards of performance:

- A. Maintenance of technical skills and certifications relevant to the type(s) of patients served including Group's specific responses to the "Quality Improvement/Cost Management" section of IHC's Request for Proposal. Group's responses are attached as a part of this Agreement as Appendix B, "Group's Commitment to Quality Improvement/Cost Containment."
- B. Ensuring efficient scheduling, administration, and coverage of Services including Group's specific responses to the "Coverage and Availability" section of IHC's Request for Proposal. Group's responses are included as a part of Appendix C, "Coverage and Availability."
- C. Providing proper clinical support to ensure the safety and well-being of patients before, during, and following the administration of anesthesia, including the reporting of defective equipment.
- D. Reporting of incompetent IHC employees to IHC administration;
- E. Maintaining adequate records as set forth in IHC policies, rules and regulations; and
- F. Meeting licensure and accreditation requirements and complying with IHC's corporate Medicare/Medicaid compliance program.

2.4 Group Integration and Professional Capacity. Group represents and warrants that the list of Providers in Appendix A includes all shareholders and employees of Group; that the shareholder and employee Providers listed in Appendix A have sufficient capacity to provide at least ninety per cent (90%) of Services to Facility; and that the shareholder and employee

Providers listed in Appendix A will provide services to Facility as their first priority under this Agreement.

- 2.5 Group Commitment to Region and Facility. Group agrees that those shareholder and employee Providers listed in Appendix A will work substantially all their regularly-scheduled shifts at IHC facilities within the geographic region included in Appendix D, "IHC Urban North Region." Nothing in this section shall preclude the shareholder or employee Providers listed in Appendix A from rendering professional coverage at other IHC facilities including those located in other IHC Regions in order to accommodate volume fluctuations, to provide vacation and/or sick relief or, with written approval of designee of the Facility ("Facility Medical Director"), from providing infrequent, incidental professional services to non-IHC facilities.

ARTICLE III GROUP RESPONSIBILITIES

- 3.1 Services to Facility Group agrees to provide to the Facility the following and such additional Services as the parties may agree or as may be requested by the Facility Medical Director pursuant to the terms and provisions of this Agreement:
- A. Manage Department. Group shall assist in the supervision and management of the Department in conformance with Facility bylaws, medical staff bylaws, and policies and procedures established from time to time by the Facility, applicable standards of the Joint Commission on Accreditation of Health Care Organizations (JCAHO), and federal, state and local laws and regulations. Group shall conduct periodic reviews to insure compliance with the foregoing and with quality management, quality assurance, and audit programs of the Facility and its medical staff.
 - B. Department Records. Group shall keep or cause to be kept in the Department accurate and complete Department budgets and records, including an adequate filing system. The Group shall cause the Department to comply with all Facility, governmental and JCAHO record keeping and recording requirements including attending appropriate meetings as required by Facility Medical Director, or his/her agent, and participating in quality care studies, quality improvement efforts, and producing regular reports as directed. Group shall cause to be maintained on a current basis proper records of services provided by the Department, and shall provide such records and reports as may be requested by the Facility Medical Director.
 - C. Schedule for Services. With the approval of Facility Medical Director, Group shall assist in establishing schedules for all services provided by the Department in a manner which insures that the safety and needs of patients and their attending physicians take precedence over other concerns.

- D. Personnel. Group shall assist in the clinical supervision of the work of Facility employees in the Department consistent with Facility policies and procedures. Group shall advise the Facility with respect to the selection, retention, and termination of all non-physician personnel supplied by Facility who may be required for the proper operation of the Department. Group shall assist in the provision of professional training, supervision, and direction to all such Department non-physician personnel.
- E. Supervision of Certified Registered Nurse Anesthetists ("CRNAs"). Group shall provide clinical oversight and supervision consistent with the current standard of care for anesthesia for all CRNAs under contract with the Group who hold privileges at Facility. Group shall be in full compliance with Medicare/Medicaid billing requirements relating to the level and nature of supervision of CRNAs.
- F. Education. Group shall participate in such educational programs conducted by Facility or medical staff necessary to assure the Facility's overall compliance with accreditation and Medicare/Medicaid requirements and shall perform such other reasonable teaching functions within the Facility as Facility Medical Director may request.
- G. Quality Management. As part of IHC's overall quality management program, Group shall assist in establishing procedures to assure the consistency and quality of all services provided in the Department by physician and non-physician personnel and shall participate in IHC's overall quality management program, including initiatives to identify, measure, stabilize and improve key processes related to Services provided in the Department. Group agrees to develop, maintain and report annually on measures of quality of patient care and on initiatives taken to improve quality of care.
- H. Enhancing Department Services. Group shall assist in reviewing, recommending, and initiating new professional services and new technologies that will enhance clinical effectiveness, patient satisfaction, and efficiency of the Services contemplated by this Agreement and offered by the Facility to the general public, referring physicians, and the medical staff of the Facility.
- I. Budgets. Group shall assist Facility in managing the Department in a cost-effective manner. As requested by Facility Medical Director, Group shall assist in the preparation of operating and capital budgets for the Department (including projections of both revenue and expenses) and shall use its best efforts to perform all of its obligations under this Agreement in accordance with the Department budget.
- J. Standard of Performance. Group shall exercise its best efforts in the conduct of its professional activities in accordance with usual and customary standards including

JCAHO standards, Facility and medical staff bylaws, and policies and procedures. In order to meet these standards and to maintain personal alertness and attention to patient care, each Provider shall refrain from the use of alcohol, prescription drugs which may impair judgment or function, or controlled substances immediately prior to or during the time on duty and when on call.

- K. Professional Demeanor and Dress. Providers shall maintain a professional demeanor and harmonious working relationship with patients, the medical staff, IHC clinical and administrative support staff, and other members of the health care community. Providers shall maintain dress and grooming standards consistent with IHC policy.
- L. Advice on Third-Party Services. Group shall assist in advising the Facility concerning the need for and the selection of qualified outside parties for the performance of such Department tests or procedures that cannot be appropriately or economically performed in Facility and assist in arranging for the procurement of the services of such qualified outside parties at the expense of Facility. Group shall not engage in direct purchasing or otherwise contract any liability on behalf of Facility and shall neither charge to the credit of the Facility nor incur any obligations or enter into any agreement for or on behalf of the Facility in the operation of the Department or otherwise, except as provided above.
- M. Resolving Complaints. Group agrees to work cooperatively with Facility Medical Director to resolve complaints arising from members of HPI or Affiliated Managed Care Plans, patients, or from other members of Facility medical staff, employees, and administrative staff.

- 3.2 Exclusive Agreement. With the exception of the provisions specified in Section 2.5, Group agrees not to provide professional service at any non-IHC facility or clinic while this Agreement is in effect. With the exception of the provisions in Section 4.3, Group agrees to be responsible for the provision of 100% of the Anesthesia Services at the Facility.
- 3.3 Non-discrimination. In rendering or providing care to inpatients and outpatients of the Facility, Group agrees not to discriminate on the basis of race, color, creed, national origin, or source of payment.
- 3.4 Services to HPI. Group and each Provider agrees to meet the responsibilities and obligations included in Appendix E, "Participating Provider Services Agreement."
- 3.5 Coverage Obligation. Consistent with the requirements and qualifications for a Level II trauma center and any such subsequent change in trauma center designation for Facility, Group shall provide continuous professional coverage twenty-four (24) hours per day, seven (7) days per week through Providers on site or on-call according to schedules that reasonably meet the needs of the patients and medical staff of the Facility as determined by the Facility Medical Director and the Group Medical Director. The minimum on-site staffing to be provided by Group for each OB procedure rooms, and pain service) at each facility, and the anesthetizing location

(operating rooms, labor/delivery rooms, minimum on call coverage to be provided for each anesthesia service requiring an on-call schedule including but not limited to services requiring a special call obligation such as OB anesthesia, cardiac anesthesia, pediatric anesthesia, trauma service or organ transplant service are set forth in Appendix C, "Coverage and Availability" and will be determined jointly by the Facility Medical Director and the Group Medical Director.

3.6 Division Director and Group Medical Director

- A. Division Director. Group shall appoint a Division Director with authority to act for and bind Group in all matters relevant to this Agreement. The Division Director shall be accountable to the Facility Medical Director for the performance of the Group's obligations under this Agreement. The Division Director shall be responsible to ensure that Group abides by the administrative rules and regulations of the Facility, complies with Medicare/Medicaid requirements, provides information regarding the budgetary and other needs of the Department, assists in the development of administrative regulations pertinent to the Department, and cooperates with the administration in the effective management of the Department and the Facility.
- B. Group Medical Director. In consultation with and subject to the approval of Facility Medical Director and consistent with the medical staff bylaws, Group also shall appoint a medical director ("Group Medical Director"). The Group Medical Director shall hold active medical staff privileges and shall work all his/her regularly-scheduled shifts at one or more of the licensed entities included as part of Facility. Unless approved in writing by Facility Medical Director, Group Medical Director shall hold no other office or governance responsibilities in any other ambulatory or inpatient health care facility. It is the intent of the parties that, consistent with the Facility medical staff bylaws, Group Medical Director serve as chairman of the Department.

3.7 Professional Liability Insurance and Indemnification

- A. Workers' Compensation and Professional Liability Insurance. The Group and/or each Provider shall, at his/her and/or Group's own expense, obtain and maintain appropriate workers' compensation coverage for Providers, and shall provide and maintain adequate professional liability and malpractice insurance in such amounts and with such companies as shall be required by the Facility board(s) of trustees ("Facility Board") for members of the medical staff; and shall provide the Facility with annual written proof of continued coverage for each Provider listed in Appendix A. The Group further agrees to insure that, upon cancellation, termination, or alteration of such coverage for any Provider, that Provider's insurance carrier will directly and immediately notify the Facility of such cancellation, termination, or alteration. Facility shall not be required to provide such insurance nor shall Facility be liable for the payment of any premiums on

such insurance. Facility shall not be liable in damages for any claims or suits arising from the performance of Group's Services hereunder.

B. Extended Coverage. If the Group's or any Provider's professional liability insurance coverage is in a claims made policy form, Group agrees to provide evidence to Facility of continued coverage for claims which arise from services provided during the term of this contract, either by:

1. Evidence of the continued effect of the claims made policy for five (5) years after the termination of this contract, or
2. Evidence of an extended reporting period endorsement or "tail insurance" if the claims made policy is terminated at any time up to five (5) years after the termination of this contract.

C. Indemnification. The purpose of this section is to define and clarify the responsibilities of each of the parties with respect to liability which may be imposed solely by reason of the activities of the Group and the Facility relating to this Agreement.

1. Group shall indemnify and hold harmless the Facility, its employees, agents, or representatives against any and all liability for injury, loss, claims, or damages arising from the intentional or negligent operations, acts, or omissions of the Group, its employees, agents, and representatives while engaged in clinical activities i.e. performing Anesthesia services within the scope of this Agreement. Furthermore, Group shall indemnify and hold harmless the Facility, its employees, agents, or representatives against all costs and expenses, including but not limited to, reasonable legal expenses, which are incurred by or on behalf of the Facility in connection with the defense of such claims against the Group.
2. In the event that a court of competent jurisdiction makes a final determination in a case that the Facility and Group share the liability for all or part of any injury, loss, or claim for damages by a third-party (or an agent, employee, or representative of the parties hereto), related to clinical services, each party shall bear its respective comparative negligence share of the damages, and each party shall also pay its own respective costs and expenses incurred as a co-defendant. Where such claims are settled out of court with no determination of comparative negligence, the parties agree to arbitrate their comparative negligence. If the parties are unable to resolve their differences informally, then such dispute shall be subject to the arbitration provisions in Section 7.2 of this Agreement.

3.8 Billing and Charges.



A. Services to Facility. Under this Agreement it is contemplated that Group will provide both "services to Facility" as defined in 42 C.F.R. Section 405.480 and "services to patients" as defined in 42 C.F.R. Section 415.102. Except for Group Medical Director compensation as set forth in Section 3.9, Group expressly agrees and undertakes to provide all "services to Facility" required under this Agreement without separate fee or payment from Facility of any kind in consideration of Group's obligation as a medical staff member.

B. Charges and Billing. Group shall code, bill, collect and service each account resulting from any and all services performed by the Group hereunder for "physician's services to individual patients" as described in 42 C.F.R. Section 415.102. Group shall handle all components of the billing and collection process, including the preparation of insurance claim forms and the processing thereof with appropriate insurance carriers; provided, however, that Facility shall provide Group with such information as may be reasonably required by Group to complete such insurance claim forms.

Notwithstanding the foregoing, Group agrees to cooperate with IHC in efforts to simplify and coordinate billing information sent to members and/or patients.

C. Prohibition Against Billing for Services to Provider. The Group shall not bill individual patients for "Physician Services To A Provider" as described in 42 C.F.R. Section 415.55. Group shall pay Facility an amount equal to any and all amounts of claimed Medicare reimbursement disallowed or denied to Facility by the Medicare program for failure to comply with this provision.

D. Charity Care. Group agrees to provide medically-necessary care to patients regardless of their ability to pay and strictly without regard to race, sex, religion, national origin, handicapping condition, or other criteria unrelated to medical need and the medical resources of Facility. Group agrees to provide such services in accordance with the requirements of the Emergency Medical Treatment and Active Labor Act ("EMTALA") and the Facility's charity care policy as set forth in Appendix F, "IHC Admission, Collection, and Charity Policy."

3.9 Compensation

A. Compensation for Medical Director Services. The Group agrees to accept as payment in full for the performance of the duties of the Group Medical Director and other medical directors at individual facilities ("Group Assistant Medical Director(s)") under this Agreement the amount specified in Appendix G, "Compensation for Medical Director Services."

B. Participation in Health Plans. As a condition of this Agreement, Group shall seek, obtain, and maintain the right to participate in such health plans or third-party reimbursement arrangements as may be required by the Facility, which shall include,

but not be limited to, IHC Health Plans and Affiliated Managed Care Plans as defined in Appendix E, "Participating Provider Services Agreement." Notwithstanding the foregoing, nothing herein shall require Group to participate in non-IHC Health Plans, non-Affiliated Managed Care Plans and non-Medicare/Medicaid plans unless, for health maintenance organizations (HMOs), the level and amount of compensation per unit/procedure is at or above the level of compensation per unit/procedure received from IHC SelectMed or unless, for Preferred Provider Organizations (PPOs), other insurance plans and third-party administrators, the level and amount of compensation per unit/procedure is at or above the level of compensation/procedure received from IHC Health Choice and are subject to similar reimbursement policies such as acceptance of ASA Relative Value Guide, etc.

- C. Direct Billing by Group for Services to Patients. Except as provided in Section 3.9 A and B, Group shall look exclusively to the patients or those persons or third-party payors responsible for their Services as the sole source of compensation hereunder. Group shall be solely responsible for billing individual patients directly for "Physician's Services to Individual Patients" as described in 42 C.F.R. Section 415.102. Group, in its sole discretion, may assign any rights it has hereunder to bill individual patients directly for such Services.

3.10 Non-disclosure. Group agrees not to divulge to third parties, without the written consent of Facility, any information identified by Facility as confidential which is obtained from or through Facility in connection with the performance of this Agreement unless:

- A. The information is known to Group prior to obtaining the same from Facility;
- B. The information is, at the time of disclosure by Group, then in the public domain; or
- C. The information is obtained by Group from a third-party who did not receive same, directly or indirectly, from Facility and who has no obligation of secrecy with respect thereto.

Group further agrees that it will not, without prior written consent of Facility, disclose to any third-party any information developed or obtained by Group in the performance of this Agreement identified by Facility as confidential except to the extent that such information falls within one (1) of the categories described in A, B, or C above.

Group and each Provider agree to comply and will require its/his/her agents, employees, and representatives to comply with the IHC confidentiality and non-disclosure agreement, a copy of which is included as Appendix H, "IHC Access and Confidentiality Agreement," prior to performing any Services under this Agreement.

ARTICLE IV IHC RESPONSIBILITIES

4.1 Facilities, Equipment, Supplies, Services, and Personnel.



- A. Equipment, Supplies and Services. During the term of this Agreement, Facility shall, at its expense, determine and make the following available as needed for the proper provision of Services:
1. Facilities, equipment, and supplies for the delivery of Services, as determined by the Facility in consultation with the Group.
 2. Customary upkeep and maintenance to keep such equipment and facilities in good order and repair and in compliance with all governmental statutes, rules, regulations and ordinances;
 3. Administrative services to Group, including, for example, surgical attire and laundry thereof, utilities, local telephone through Facility's switchboard, housekeeping, and record keeping; and
 4. Supplies used by the Group in the performance of its duties including, for example, pharmaceuticals, contrast media, reagents, and other such supplies.
- B. Non-physician Personnel. All non-physician personnel needed for the provision of Services shall be employed by Facility in appropriate personnel classifications. All such employees shall be under the administrative and executive control of Facility and under the technical and medical supervision of Group. Facility agrees to consult with Group on the selection, retention, number, availability, and necessary qualifications of non-physician personnel assigned to assist in the provision of Services, and shall within the framework of Facility policies, cause appropriate non-physician personnel to be scheduled and available in the Department.

4.2 Compensation.

- A. Compensation for Medical Director Services. Facility agrees to pay Group for the performance of the duties of the Group Medical Director and Group Assistant Medical Director(s) under this Agreement the amounts specified in Appendix G, "Compensation for Medical Director Services."
- B. Payment for Services Rendered to IHC Health Plans and Affiliated Managed Care Plans. HPI agrees to pay or HPI will obligate Affiliated Managed Care Plans to pay Group for the provision of Covered Services to Members in accordance with the definitions and provisions set forth in Appendix E, "Participating Provider Services Agreement."

- 4.3 Exclusive Agreement. IHC agrees that the Group shall be the exclusive provider of Anesthesia Services to Facility and that the Group shall exclusively establish anesthesia schedules, anesthesia work assignments and anesthesia staffing for all services provided by the Department. Both IHC and Facility agree not to contract with any other physician

specialist or any group of physicians for the provision of Anesthesia Services at Facility while this Agreement is in effect. Notwithstanding the foregoing, Anesthesiologists having staff privileges at Facility on the effective date of this Agreement and not affiliated with the Group (See Appendix A) on the effective date of this Agreement, may provide Anesthesia Services at Facility on a separate, individual patient or surgeon request basis in accordance with the Facility Bylaws and subject to the exclusive and efficient scheduling by the Group.

4.4

Professional Liability Insurance and Indemnification

- A. The Facility shall indemnify and hold harmless Group, its managers, Members, Contract Providers, employees, agents, and representatives against any and all liability for injury, loss, claims, or damages arising from the intentional or negligent operations, acts, or omissions of the Facility, its employees, agents, or representatives. Furthermore, the Facility shall indemnify and hold harmless the Group, its employees, agents, or representatives against all costs and expenses, including but not limited to, reasonable legal expenses, which are incurred by or on behalf of Group in connection with the defense of such claims against Facility.
- B. The Facility shall indemnify and hold harmless the Group, its members, employees, agents, or representatives against any and all liability for injury, loss, claims, or damages arising from the negligent operations, acts, or omissions of the Group, its employees, agents, and representatives while engaged, in good faith, in non-clinical activities, eg. sitting on a Facility committee, engaging in peer review for the Facility, within the scope of this Agreement. Furthermore, Facility shall indemnify and hold harmless the Group, its members, employees, agents, or representatives against all costs and expenses, including but not limited to, reasonable legal expenses, which are incurred by or on behalf of Group in connection with the defense of such claims against Group or Group's members, employees, agents, or representatives.
- C. In the event that a court of competent jurisdiction makes a final determination in a case that the Facility and Group share the liability for all or part of any injury, loss, or claim for damages by a third-party (or an agent or employee of the parties hereto), each party shall bear its respective comparative negligence share of the damages, and each party shall also pay its own respective costs and expenses incurred as a co-defendant. Where such claims are settled out of court with no determination of comparative negligence, the parties agree to arbitrate their comparative negligence. If the parties are unable to resolve their differences informally, then such dispute shall be subject to the arbitration provisions in Section 7.2 of this Agreement.

4.5

Non-disclosure. Facility agrees not to divulge to third parties, without the written consent of Group, any information obtained from or through Group in connection with the performance of this Agreement unless:



- A. The information is known to Facility prior to obtaining the same from Group;
- B. The information is, at the time of disclosure by Facility, then in the public domain; or
- C. The information is obtained by Facility from a third-party who did not receive same, directly or indirectly, from Group and who has no obligation of secrecy with respect thereto.

Facility further agrees that it will not, without prior written consent of Group, disclose to any third-party any information developed or obtained by Facility in the performance of this Agreement except to the extent that such information falls within one (1) of the categories described in A, B, or C above.

ARTICLE V GOVERNMENT POLICIES

- 5.1 State and Federal Laws. The parties recognize that this Agreement at all times is subject to applicable state, local, and federal law including but not limited to the Social Security Act, and the Rules and Regulations and policies of the Department of Health and Human Services, and all public health and safety provisions of state law and regulation. The parties further recognize that this Agreement shall be subject to amendments in such laws and regulations and to new legislation such as new federal or state economic stabilization program or health insurance programs. Any provisions of law that invalidate, or otherwise are inconsistent with, the terms of this Agreement or that would cause either or both of the parties to be in violation of law, shall be deemed to supersede the terms of this Agreement, provided, however, that the parties shall exercise their best efforts to accommodate the terms and intent of this Agreement to the greatest extent possible consistent with the requirements of law.
- 5.2 Anti-Discrimination The parties agree to abide by all applicable anti-discrimination laws, including state and federal laws prohibiting discrimination against any employee or applicant or recipient of services on the basis of race, religion, color, sex, national origin, disability, or age.
- 5.3 Medicare.
 - A. Access to Books and Records. Upon written request made prior to the expiration of four (4) years after furnishing of Services set forth in this Agreement, Group shall make available to the Comptroller General, Secretary, Department of Health and Human Services or any other duly authorized representatives, a copy of this Agreement and the books, documents and records necessary to certify the nature and extent of the costs incurred hereunder. Group also agrees that this requirement

shall be contained in any subcontract for Ten Thousand Dollars (\$10,000.00) or more over a twelve (12) month period made with a related organization or individual to carry out any of its duties under this Agreement.

- B. Effects of Material Breach. In the event of any material breach of this Section by Group, Facility shall have the right to terminate this Agreement under Section 6.3 by giving Group written notice of termination. In addition to any and all other obligations of Group under this Agreement, Group shall pay Facility an amount of money equal to any and all amounts of claimed Medicare reimbursement disallowed or denied by the Medicare program for failure to comply with this Article.
- C. Ownership. The ownership and right of control of all reports, records, and supporting documents prepared in connection with the operation of the Department shall vest exclusively in Facility provided, however, that Group shall have right of access to such reports, records, and supporting documentation as shall be provided by Utah law and Facility policies.
- D. Legal Compliance. Group agrees to participate in the implementation and maintenance of IHC's corporate compliance plan, specifically as it relates to Medicare/Medicaid and third-party payor compliance as summarized in Appendix I, "IHC Payor Compliance Policy." As appropriate, Group agrees to undertake its own payor compliance efforts. The parties acknowledge that, although the Group is obligated to provide medical services for the benefit of the Facility and the community as specified in this Agreement, there is no obligation of the Group to refer patients exclusively to facilities of IHC Health Services, Inc. Notwithstanding any unanticipated effect of any of the provisions herein, neither party will intentionally conduct itself under the terms of this Agreement in a manner to constitute a violation of the Medicare/Medicaid fraud and abuse provisions of the Social Security Act.

ARTICLE VI TERM AND TERMINATION

- 6.1 Term. The initial term of this Agreement shall be one (1) year, commencing on January 1, 2000. This Agreement will automatically renew from year to year ending at the completion of the third one-year term on December 31, 2002. As used in this Agreement, the word "Term" refers to both the initial term and any extension terms. Except for termination of this Agreement under Sections 6.2 and 6.3, this Agreement shall continue in effect after December 1, 2002 and until IHC has renewed the Agreement with the Group or entered into another agreement to replace the Group.
- 6.2 Termination without Cause. The initial term and each extension term shall be subject to the condition that either Facility or Group may terminate this Agreement without penalty by giving the other party one hundred eighty (180) calendar days prior notice in writing.

6.3 Termination for Cause by Either Party. Either Party may terminate this Agreement upon thirty (30) calendar days written notice to the other Party in the event that the other Party commits any material breach of this Agreement which is not cured within such thirty (30) calendar day notice period including but not limited to breach of any of the provisions of Article II, "Group Qualifications and Composition," Article III, "Group Responsibilities"; or Article IV, "IHC Responsibilities."

6.4- Obligations Surviving Termination. Upon termination of this Agreement, as provided above, neither party shall have any further obligation hereunder except for:

- A. Obligations accruing prior to the date of termination; and
- B. Obligations, promises, or covenants contained herein which are expressly made to extend beyond the term of this Agreement, including, without limitation, professional liability extended coverage, confidentiality of information, indemnities, releases and Medicare/Medicaid access to books and records provisions and continued provision of clinical services as set forth in Appendix E, "Participating Provider Services Agreement."

ARTICLE VII GENERAL PROVISIONS

7.1 Amendments and Applicable Law. This Agreement may be amended only by a written instrument executed by the parties hereto, and shall be construed in accordance with and governed by the laws of the State of Utah.

7.2 Arbitration. Any dispute or claim that arises out of or relates to this Agreement, that cannot be resolved informally between the parties will be resolved through binding arbitration conducted in Salt Lake City, Utah. The arbitration will be governed by the Utah Arbitration Act, §78-31a-1 et seq. Utah Code Annotated 1953, and the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). Unless the parties agree otherwise, the parties will select an arbitrator from the AAA's panel of retired judges, following the procedure provided for by the AAA's Commercial Arbitration Rules. The parties will share equally all administrative fees and arbitrator's fees, costs, and expenses; but each party will bear its own costs and expenses for witnesses and legal representation.

7.3 Assignment and Subcontracting. This Agreement shall not be assignable by either party hereto without the written consent of the other party, except in the case of a corporate reorganization by IHC. Any subcontract entered into by Group with any subgroup or any person or organization for the performance of this Agreement or any portion thereof without the prior written consent of Facility shall be void. Consent will not be given to any proposed subcontract, as mentioned above, which would relieve Group of its responsibilities under this

Agreement. Group shall furnish Facility Medical Director evidence of each subcontract or similar document for each Provider listed in Appendix A who is not an employee of Group.

7.4 Authorization. Each party represents and warrants to the other that the execution and performance of this Agreement is, in the case of the Facility, duly authorized by Facility's Board of Trustees and, in the case of the Group, not in conflict with any prior contract; and that this Agreement constitutes such party's valid obligation, enforceable according to the terms of the Agreement, subject only to the potential effect of the federal bankruptcy laws and other limitations arising under Utah and federal law.

7.5 Non-Waiver. None of the conditions of this Agreement shall be considered waived by Facility unless waiver is given in writing. No such waiver shall be a waiver of any past or future default, breach, or modification of any of the conditions of the Agreement unless expressly stipulated in such waiver.

7.6 Notices. Any notices required or permitted hereunder shall be sufficiently given if sent by registered or certified mail, postage prepaid, addressed or delivered as follows:

A. To the Group: Douglas J. Reinhart, M.D.
Division Director
2571 S. 1825 East
Ogden, UT 84401

B. To the Facility: Facility Medical Director
IHC Urban North Region
3939 Harrison Boulevard
Ogden, UT 84409-0370

or any other addresses as shall be furnished in writing by either party. Any such notice shall be deemed to have been given, if mailed as provided herein, as of the date postmarked.

7.7 Section Headings. The headings and subheadings of sections contained in this Agreement are used for convenience and ease of reference and shall not limit the scope or intent of the section.

7.8 Severability. In the event any provision of this Agreement is rendered invalid or unenforceable by any proper act of the federal or state government or declared null and void by any court of competent jurisdiction, the remainder of the provisions hereof shall remain in full force and effect.


7.9 Taxes. Group, and not Facility, shall pay and be liable for any federal, state, or local tax which may be imposed in connection with the receipt of any compensation for or in relation to Group's performance under this Agreement.

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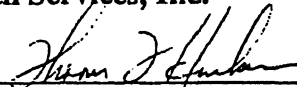
7.10 Entire Agreement. This Agreement, together with any appendices and exhibits that are incorporated into this Agreement, any amendments properly made to this Agreement, and any written approvals issued by Facility Medical Director under Section 2.5 of this Agreement, constitute the entire agreement of the parties, and supersede all prior understandings and agreements of the parties relating to the subject matter of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement which is effective as of the 17 day of Feb. 1999.2000.

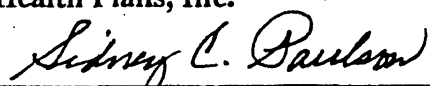
Group:

By: 
DIRECTOR, NORTHERN DIVISION
MOUNTAIN WEST ANESTHESIA

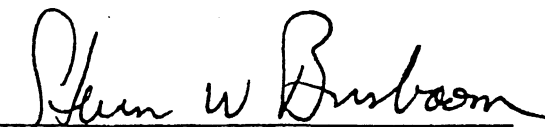
IHC Health Services, Inc.

By: 
Thomas F. Hanrahan, Vice President
Urban North Region

IHC Health Plans, Inc.

By:  2/15/00
Sidney C. Paulson, Vice President
IHC Health Plans
IHC Care, Inc.
IHC Group, Inc.

McKay Dee Surgical Center Joint Venture

By: 



Tab D

**IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
 OGDEN DEPARTMENT, STATE OF UTAH**

2006 NOV 29 A 13:45

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

Plaintiff,

vs.

STEVEN J. CARABINE, M.D.; IHC
 HEALTH SERVICES, Inc., a Utah
 corporation dba McKAY-DEE
 HOSPITAL, and JOHN DOES 1-10.

Defendants.

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

Third Party Plaintiff,

vs.

MOUNTAIN WEST ANESTHESIA, LLC,

Third Party Defendant.

JUDICIAL DISTRICT COURT

**RULING GRANTING MTN.
 WEST ANESTHESIA'S
 MOTION FOR SUMMARY
 JUDGMENT**

Civil No. 010907610
 Judge Ernie W. Jones

NOV 29 2006

On November 13, 2006, the Court heard oral argument on a motion for summary judgment filed by Mountain West Anesthesia, LLC ("Mountain West") and joined in by IHC Health Services ("McKay-Dee Hospital"). After the hearing, the Court took the matter under advisement. Having now carefully considered the parties' memoranda and oral argument, the Court grants the motion.

Ruling granting Mountain West Anesthesia's Motion f



VD19338943

010907610

CARABINE, STEVEN J MD

Ruling Granting Mountain West's Motion for Summary Judgment
No. 010907610

On July 18, 2000, Terry F. Ward was injured during an operation at McKay-Dee Hospital. Prior to filing any complaint, Plaintiff settled its claims against Mountain West and Dr. Luckwitz, the anesthesiologist for the operation. Mrs. Ward then filed the current complaint, raising claims against McKay-Dee Hospital and Dr. Carabine, the surgeon who performed the operation. Mrs. Ward's claims against both McKay-Dee Hospital and Dr. Carabine have since been dismissed. The Court then allowed Mrs. Ward to amend her complaint to include a claim against McKay-Dee Hospital under a theory of ostensible agency. This claim is one for vicarious liability based on Dr. Luckwitz's alleged negligence. This is the only cause of action remaining.

While the underlying basis for liability in Mrs. Ward's cause of action is negligence, the controlling issues in this motion are issues of contract. Mrs. Ward settled with Mountain West and, in exchange for \$1,000,000, executed a general release on March 16, 2001 ("release #1"). In this release, Mrs. Ward agreed to indemnify Mountain West for any future claims based on the alleged negligence of Dr. Luckwitz. On March 29, 2001, Mrs. Ward executed another release ("release #2"). This release does not include an indemnification clause. This case pivots on the current legal effect of these two releases. The facts material to this determination are not in dispute.

I. Release #1 is an Enforceable Agreement.

Mrs. Ward claims that release #1 is not enforceable as it was signed by only Mrs. Ward and her counsel. A contract must be in writing and signed only if and to the extent required by the statute of frauds. A contract within the statute of frauds must be evidenced by a writing and signed by the party to be charged. Utah Code Ann. § 25-5-4. In this case, Mrs. Ward agreed to both release her claims against Mountain West and to

indemnify them for any subsequent payments based on Dr. Luckwitz's alleged negligence. Mrs. Ward, as the party to be charged under the indemnity agreement, signed as required by Utah Code Ann. § 25-5-4(1)(b). The statute of frauds is satisfied. *See* Restatement (Second) Contracts § 135 (explaining that when a contract is within the statute of frauds and is signed by fewer than all of the parties "the contract is enforceable against the signers but not against the others).

Mrs. Ward signed release #1 in exchange for Mountain West's agreement "to pay Ward the total sum of one million dollars (\$1,000,000)." *See* Release #1 at § 1. Mrs. Ward acknowledged receipt of payment. *Id.* at §§ 1, 2. Although Mountain West did not sign release #1, Mountain West had rendered performance. On March 16, 2001, the time of release #1, the parties exchanged performances in a legally binding contract.

II. Release #2 Supplements Release #1.

Mrs. Ward argues that release #2 rescinded or superceded release #1. Specifically Plaintiff cites "a time-honored maxim of contract law that a later agreement regarding a given subject matter supersedes an earlier agreement pertaining to those issues." Releases are contracts and the Court applies general contract principles. *Horgan v. Indus. Design Corp.*, 657 P.2d 751, 753 (Utah 1982).

Parties to any contract "may, by a new and later agreement, rescind it in whole or in part, alter or modify it in any respect, add to or supplement it, or replace it by a substitute." 17A Am. Jur. 2d *Contracts* § 500. The parties' intention regarding the effect of the later agreement on the prior agreement is controlling. *Id.* Generally, however, the original contract remains in force except as expressly superseded or contradicted by the later agreement. *Id.*; *Acequia, Inc. v. Prudential Ins. Co. of Am.*, 226 F.3d 798 (7th Cir.

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2000) (holding that when the examination of the language of the contracts along with their attendant circumstances reveal that the parties did not intend the new contract to supercede the prior contract, the prior contract remains in force insofar as it can be harmonized with the later contract); *Lincoln Elec. Co. v. St. Paul Fire and Marine Ins. Co.*, 210 F.3d 672 (6th Cir. 2000) (same).

In this case, the clear language of the two releases, along with the circumstances surrounding their making, show that the parties did not intend release #2 to either rescind or supercede release #1. Release #2 supplements release #1, providing for a structured annuity not addressed in release #1. Nowhere in release #2 is indemnity either waived or mentioned. The Court also notes the correspondence between Mr. Hardcastle, Mrs. Ward's previous lawyer, and counsel for defendants making arrangements to sign release #1. This correspondence discusses the need for "an additional release," one to which Mountain West would not be a party, to provide for the annuity between Mrs. Ward and the insurance company. Mrs. Ward's lawyer stated "[i]t is my understanding that we will also need to sign a Release with the annuity company to finalize this matter . . . If you have any questions or concerns regarding the language of either of these two releases, please feel free to contact me." See Mr. Hardcastle's March 13, 2001 Letter (emphasis added). Because release #2 neither supercedes release #1 nor contradicts release #1's indemnity provision, the Court harmonizes the two releases. The Court finds that Mountain West and Mrs. Ward intended release #2 to supplement release #1, leaving release #1's indemnity provisions intact.

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III. The Reservation of Claims against McKay-Dee Hospital Does Not Affect Mountain West's Contractual Right to Indemnification.

Mrs. Ward released all claims against Mountain West and Dr. Luckwitz. *See* Release #1 at § 2. Mrs. Ward did not release her claims against the other defendants. *Id.* The release states “[n]othing in this Release shall be construed as releasing Ward’s claims against Dr. Steven J. Carabine, McKay Dee Hospital, and/or its employees.” *Id.* Mrs. Ward seeks to recover damages from McKay Dee Hospital based on Dr. Luckwitz’s alleged negligence. Mountain West is contractually obligated to indemnify McKay Dee Hospital for any damages its anesthesiologists cause—in this case, Dr. Luckwitz. Pursuant to this contract, McKay Dee filed a third party complaint against Mountain West for indemnification. Mountain West, in turn, claims that release #1 requires Mrs. Ward to indemnify it for any money Mountain West pays out to McKay Dee based on Dr. Luckwitz’s alleged negligence.

Mrs. Ward argues that the indemnification clause in release #1 should not apply in this case because the parties “intended that nothing in the settlement should in any way compromise or hinder Plaintiff’s claim against McKay-Dee Hospital.” *See* P.’s Opp. Memo at ¶ 5. The Court disagrees. The releases state that nothing in them “shall be construed as releasing” Mrs. Ward’s claims against McKay Dee Hospital or Dr. Carabine. This is not a question of whether Mrs. Ward released her claims against McKay Dee Hospital or Dr. Carabine. Both releases expressly limited their own scope to exclude those claims. The Court has already ruled on this matter. However, limiting the scope of the release does not guarantee an unimpeded right to recover from McKay Dee Hospital or require either McKay Dee Hospital or Mountain West to lay down their contractual rights to indemnification.

When interpreting a contract, the Court “must first attempt to harmonize all of the contract’s provisions and all of its terms when determining whether the plain language of the contract is ambiguous.” *Gilmor v. Macey*, 121 P.3d 57, 65 (Utah Ct. App. 2005) (quoting *Wagner v. Clifton*, 62 P.3d 440 (Utah 2002)). It is well-established “that a contract should be interpreted so as to harmonize all of its provisions and all of its terms, which terms should be given effect if it is possible to do so.” *LDS Hosp. v. Capitol Life Ins. Co.*, 765 P.2d 857, 858 (Utah 1988). In this case, the argument that the reservation of claims provision conflicts with and trumps the application of the indemnification provision fails, as both are easily harmonized. At the time the parties signed the releases, Mrs. Ward had potential claims against Dr. Carabine for his negligence and against McKay Dee for its own negligence. The releases did not release either claim. Mrs. Ward in fact brought these claims. Neither claim was based on vicarious liability for Dr. Luckwitz and neither, if successful, would have triggered the indemnification clause. Only after both claims were dismissed, did Mrs. Ward amend her complaint to claim that McKay Dee Hospital is vicariously liable for Dr. Luckwitz’s alleged negligence. The fact that Mrs. Ward did not release McKay Dee Hospital in her settlement with Mountain West does not protect her from the application of Mountain West’s contractual right to indemnification.

“If the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.” *Green River Canal Co. v. Thayn*, 84 P.3d 1134, 1140 (Utah 2003). The Court has previously found the language of the releases unambiguous. Under the unambiguous language of release #1, the Court finds

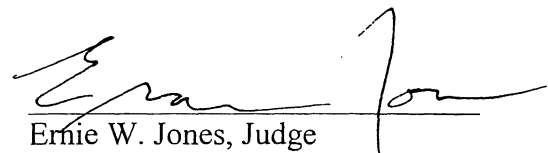
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that the parties intended that Mountain West would not be required to pay any subsequent amounts based on the incident of Dr. Luckwitz's alleged negligence. The Court finds no justification to eviscerate the hold harmless provision intended to give this intention effect.

III. The Chain of Indemnity Agreements Creates Circular Litigation.

Dismissing a claim upon which no meaningful relief can be granted is appropriate. See *Burkett v. Schwendiman*, 773 P.2d 42 (Utah 1989) (dismissing an appeal of a one year license suspension because the suspension had expired); *Maryland Cas. Co. v. Employers Mut. Liab. Ins. Co.*, 208 F.2d 731 (2d. Cir. 1953) (dismissing claim against employer for the employee's negligence where settlement with employee created a "complete circuity of action"). The Court has already found that the indemnity agreement in release #1 is enforceable under its plain terms. Accordingly, in the event Mrs. Ward is awarded damages against McKay Dee Hospital, McKay Dee Hospital has a contractual right to indemnification from Mountain West, which has a contractual right to indemnification from Mrs. Ward. Mrs. Ward cannot obtain any further meaningful judicial relief. The Court, therefore, dismisses Mrs. Ward's claim against McKay Dee Hospital. Counsel for Mountain West will please prepare the appropriate order.

Dated this 29 day of November, 2006.


Ernie W. Jones, Judge

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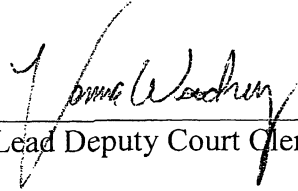
Certificate of Mailing

I hereby certify that on 29 of November, 2006, I mailed a copy of the
foregoing memorandum decision to counsel, as follows:

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