

2007

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

Utah Court of Appeals

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UTAH COURT OF APPEALS

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

Appellant,

vs.

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

Appellee and Third Party Plaintiff,

vs.

MOUNTAIN WEST ANESTHESIA, LLC,

Third Party Defendant.

BRIEF OF APPELLANT

Appellate Case No. 20070110

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STATEMENT OF JURISDICTION

This appeal is taken from a final order of the Second District Court.

The Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(j), § 78-2-2(4), and § 78-2a-3(2)(j).

ISSUES PRESENTED FOR REVIEW

1. Whether the district court's interpretation of two separate release agreements, executed at different times and containing fundamentally inconsistent terms and provisions, was in error or whether the agreements can somehow be harmonized and enforced consistent with the district court's reasoning. (R. at 1660-95, 1871-78).

“Questions of contract interpretation not requiring resort to extrinsic evidence are matters of law, and on such questions we accord the trial court's interpretation no presumption of correctness.” Sackler v. Savin, 897 P.2d 1217, 1220 (Utah 1995). “We review [a] district court's decision to grant summary judgment for correctness, granting no deference to the district court. Swan Creek Village Homeowners v. Warne, 134 P.3d 1122, 1126 (Utah 2006).

2. Whether the district court improperly granted summary judgment deeming the contested release agreements unambiguous but then looking

beyond the four corners and the plain language of the agreements in endeavoring to establish an intent inconsistent with that expressed therein. (R. at 1632-1654, 1871-1878).

Questions of contract interpretation are reviewed for correctness with no deference accorded to the trial court. Sackler v. Savin, 897 P.2d 1217, 1220 (Utah 1995). “We review the district court’s entry of summary judgment for correctness. We recognize that “[s]ummary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Wilcox v. Anchor Wate Co., ___ P.3d ___ (Utah 2006).

“If, however, the meaning of a contract must be determined by the consideration of extrinsic evidence, that raises a question of fact for the trier of fact that will preclude summary judgment.” Interwest Construction v. Palmer, 923 P.2d 1350, 1359 (Utah 1996).¹

3. Whether the district court erred in ruling that a secret indemnity agreement executed between the Defendants can be invoked as a shield to abrogate Plaintiff’s claims on the basis that the effect of the undisclosed

¹ Reference to extrinsic evidence to ascertain the parties’ intent creates “a question of fact to be resolved by the trier of fact, therefore precluding [a] grant of summary judgment.” WebBank v. American General Annuity Service Corp., 54 P.3d 1139, 1142 (Utah 2002).

accord would ostensibly result in an impermissible circuitry of action. (R. at 1632-1654, 1660-1695, 1871-1878).

Questions of contract interpretation are reviewed for correctness with no deference accorded to the trial court. Sackler v. Savin, 897 P.2d 1217, 1220 (Utah 1995). “We review [a] district court's decision to grant summary judgment for correctness, granting no deference to the district court.” Swan Creek Village Homeowners v. Warne, 134 P.3d 1122, 1126 (Utah 2006).

DETERMINATIVE LAW

Since the primary issues raised on appeal all concern the force and effect of certain contractual provisions interpreted by the district court, there are no explicitly dispositive statutes, ordinances, rules, or regulations. Nevertheless, the following case law would inform the Court’s adjudication of this matter:

“Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Because entitlement to summary judgment is a question of law, we accord no deference to the trial court's resolution of the legal issues presented. In reviewing a grant of summary judgment, we view the facts

and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” Peterson v. Sunrider Corp., 48 P.3d 918, 924 (Utah 2002)(internal citation omitted).

“[S]ummary judgment may not be granted if . . . an ambiguity exists in the contract and there is a factual issue as to what the parties intended.”

Id. “When a contract is clear on its face, extraneous or parol evidence is generally not admissible to explain the intent of the contract.” Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983). “When ambiguity does exist, the intent of the parties is a question of fact to be determined by the jury.” Plateau Min. Co. v. Utah Div. of State Lands and Forestry, 802 P.2d 720, 725 (Utah 1990).

STATEMENT OF THE CASE

Nature of the Case

This case arises from a serious incident of medical malpractice that occurred on July 18, 2000, at McKay-Dee Hospital, leaving the patient, Terry F. Ward, mentally impaired and permanently disabled.

Prior to filing a complaint Terry Ward’s wife, Plaintiff Vickie Lynn Ward, agreed to a settlement with the anesthesiologist who participated in her husband’s operation, John Luckwitz, MD, an employee of Third Party

Defendant Mountain West Anesthesia, LLC (hereinafter “Mountain West”). In connection with this settlement, Mrs. Ward executed a release agreement on March 16, 2001. A second release containing different provisions and expressly purporting to supersede the first release was subsequently executed on March 29, 2001.

Mrs. Ward then brought an action against Defendant McKay-Dee Hospital (hereinafter “McKay-Dee”) under a theory of ostensible agency. Mrs. Ward asserted that the hospital is vicariously liable for the negligence that resulted in Mr. Ward’s catastrophic injuries since McKay-Dee both selected and procured the anesthesia services for the ill-fated procedure. McKay-Dee and Mountain West sought and obtained summary judgment relying on certain provisions taken from the first of those two different March 2001 release agreements.

Plaintiff appeals the trial court’s grant of summary judgment in favor of Defendants McKay-Dee and Mountain West. The disposition of this appeal turns on the current legal effect of the two separate releases.

Relevant Facts

1. On or about July 18, 2000, Terry F. Ward was admitted to McKay-Dee Hospital for routine hernia repair surgery. (R. at 580, 743).

2. The operation was performed by Dr. Steven J. Carabine. (R. at 743).
3. Dr. Carabine was assisted during the procedure by anesthesiologist Dr. John Luckwitz. (R. at 743).
4. Terry Ward never met Dr. Luckwitz until just moments before the surgery. (R. at 575, 583).
5. Dr. Luckwitz was selected and/or assigned to participate in the surgery by McKay-Dee Hospital. (R. at 573-575, 579, 597).
6. As an anesthesiologist working at McKay-Dee Hospital, Dr. Luckwitz customarily received assignments from the Hospital specifying which surgeries he would participate in on any given day. (R. at 574, 579, 597-598).
7. Prior to Terry Ward's surgery, Mr. Ward was considered to be "a very healthy gentleman without underlying medical conditions." (R. at 575).
8. During Terry Ward's surgery, severe complications arose resulting in, among other things, cardiac arrest and permanent brain injury. (R. at 581, 758).
9. Claims arising from Dr. Luckwitz's participation in the surgery were subsequently settled, and a final Release and Settlement Agreement

memorializing the same was executed on March 29, 2001. (R. at 1683-1695).

10. The final Release and Settlement Agreement (“Final Agreement”) was executed by Vickie L. Ward, as Permanent Guardian and Conservator of the Estate of Terry F. Ward, and by Scottsdale Insurance Company, as agent for Dr. John Luckwitz and Mountain West Anesthesia. (R. at 1683-84, 1695).

11. Under the terms of the Final Agreement, all claims against McKay-Dee Hospital were expressly reserved. (R. at 1685).

12. The Final Agreement includes a complete integration clause explicitly affirming that there are no other valid or binding arrangements or agreements of any kind between any of the parties:

This Agreement contains the *entire agreement* between the Claimant, the Insured, and the Insurance Company . . . There are *no other understandings or agreements, verbal or otherwise* . . . between the Parties.

(R. at 1692) (emphasis added).

13. The Final Agreement additionally provides:

The Parties . . . 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.

(R. at 1693) (emphasis added).

14. A preliminary settlement document entitled “Settlement Agreement and General Release” (“preliminary agreement”) was executed on March 16, 2001, two weeks before the Final Agreement. (R. at 1681).

15. The preliminary agreement contained a boilerplate indemnification clause not incorporated into the Final Agreement. (R. at 1678-1681, 1683-1695).

16. Plaintiff has maintained that pursuant to the express terms of the Final Agreement, the preliminary agreement was superseded and is of no legal effect. (R. at 1660-1675).

17. Notwithstanding the disputed validity of the preliminary agreement, like the Final Agreement, it likewise articulates the parties’ unequivocal intent of preserving Plaintiffs’ claims against McKay-Dee Hospital:

Nothing in this Release shall be construed as releasing Ward’s claims against . . . McKay Dee Hospital, and/or its employees.

(R. at 1678) (emphasis added).

18. McKay-Dee Hospital is not a party to either the Final Agreement or the preliminary agreement, and nothing in either document suggests that McKay-Dee Hospital was an express or intended third-party beneficiary, or

had any standing to invoke or enforce the same. (R. at 1678-1681, 1683-1695).

19. At the time the preliminary agreement and the Final Agreement were negotiated and executed, 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. (R. at 1455-1476).

20. In February 2004, Plaintiff filed an Amended Complaint asserting, among other things, a claim against McKay-Dee Hospital under a theory of ostensible agency, claiming that McKay-Dee was vicariously liable for the acts and omissions of Dr. Luckwitz. (R. at 759-760).

21. Several years after the action below was brought, both Mountain West and McKay-Dee later invoked the secret indemnification agreement that they had amongst themselves to argue that Plaintiff could not pursue an ostensible agency claim against McKay-Dee Hospital claiming it would result in a so-called "circuitry of action." (R. at 1404-1416, 1479-1485, 1501-1519, 1877).

22. On November 13, 2006, the trial court heard oral argument on a summary judgment motion filed by Mountain West and joined by McKay-

Dee Hospital, which posited, among other things, that the preliminary agreement remained enforceable and could be harmonized with the Final Agreement which explicitly purported to superseded it, and that the secret indemnity agreement between Mountain West and McKay-Dee Hospital could be invoked to create a circuitry of action precluding Plaintiff's claims notwithstanding their failure to inform Plaintiff of the agreement at the time the Final Agreement was negotiated. (R. at 1871-1878).

23. The trial court subsequently entered an order granting summary judgment. (R. at 1886-1889).

24. Plaintiff filed a Notice of Appeal seeking review of the trial court's grant of summary judgment. (R. at 1890-1892).

SUMMARY OF THE ARGUMENT

The trial court's grant of summary judgment motion is premised on a disputed indemnification clause found in the preliminary agreement but not incorporated into the Final Agreement. Plaintiff contends that pursuant to several separate merger and integration clauses contained in the Final Agreement, the entire preliminary agreement was superseded and rendered invalid.

Plaintiff argues that since the trial court found no ambiguity in the terms of the final agreement, it had a duty to ascertain and to enforce the parties' intent consistent with the plain language thereof. By ignoring and giving no effect to the multiple merger and integration mechanisms, however, the trial court failed to do that. Additionally, the trial court entertained and relied on extrinsic evidence to arrive at an outcome inconsistent with these same contractual provisions by purporting to "harmonize" the Final Agreement with the preliminary agreement to preserve the disputed indemnification provision.

Plaintiff alternatively argues that if both the Final Agreement and the preliminary agreement remain valid notwithstanding the multiple integration clauses, and if extrinsic evidence is to be freely considered in determining their underlying intent, then it is clear that one of the central components of the settlement was to preserve, to the fullest extent, Plaintiff's claims against McKay-Dee Hospital. The settlement between Plaintiff and Mountain West was not to be interpreted or applied in any way that would impede those claims.

Mountain West, however, subsequently came forward endeavoring to impede Plaintiff's claims against McKay-Dee by claiming that if

Plaintiff recovers from McKay-Dee, Mountain West may in turn have to indemnify McKay-Dee on the basis of an alleged arrangement that McKay-Dee and Mountain West have with each other. Mountain West failed to disclose its arrangement vis-à-vis McKay-Dee to Plaintiff during settlement, but now wants to employ the terms of that agreement, in concert with the separate terms of the preliminary settlement with Plaintiff to prevent Plaintiff from pursuing her separate claims against McKay-Dee lest Mountain West incur some liability to McKay-Dee.

Finally, Plaintiff contends that the concept of “circular litigation” relied upon by the trial court in this case is erroneous because it essentially requires a prospective adjudication of circumstances and claims that may or may not actually ripen into an actual conflict. Additionally, in the case at issue, the trial court simply assumes the existence and validity of an ostensible indemnification arrangement between Mountain West and McKay-Dee, but fails to make any explicit findings on the record that it ever actually reviewed such a document and could legitimately conclude as a matter of law that it is enforceable and that no viable defenses to its application in this context exist. There was no argument and no briefing regarding this side agreement and its validity or applicability.

Summary judgment was inappropriately granted for all of these reasons.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT PREMISED ON AN INCORRECT DETERMINATION OF THE LEGAL EFFECT OF THE PRELIMINARY AGREEMENT VIS-À-VIS THE FINAL AGREEMENT.

Paramount to this Court's review is a determination of the legal effect of the preliminary agreement which provides the critical underpinning of the trial court's summary judgment ruling. The preliminary agreement contains a disputed indemnification clause not incorporated into the parties' Final Agreement, upon which the trial court's grant of summary judgment motion was premised.

If this Court agrees with Plaintiff that the entire preliminary agreement has been integrated and superseded by the Final Agreement, the Court need not proceed to determine the particular scope and effect of the contested indemnification clause, and attempt to divine the parties' understandings and intentions with respect to the same.

"The lower court's interpretation of a contract presents a question of law, which we review for correctness. We also review for correctness the

trial court's grant of summary judgment and afford no deference to its legal conclusions." Tom Heal Commercial Real Estate, Inc. v. Overton, 116 P.3d 965, 967 (Utah App. 2005).

"When reviewing a trial court's grant of a motion for summary judgment, this court . . . considers all evidence and reasonable inferences derived therefrom in the light most favorable to the losing party below." Bear River Mutual Ins. Co. v. Williams, 153 P.3d 798 (Utah App. 2006).

A. The preliminary agreement was explicitly superseded by the express terms of the Final Agreement.

"A basic tenet of contract law is that prior negotiations and agreements merge into the final written agreement on the subject." Panos v. Olsen and Associates Const., Inc., 123 P.3d 816, 819 (Utah App. 2005) (citations omitted). "Importantly, courts apply a presumption that a writing which on its face appears to be an integrated agreement is what it appears to be." The Cantamar, L.L.C. v. Champagne, 142 P.3d 140, 147 (Utah App. 2006).

"If contract terms are clear and unambiguous, we normally interpret them according to their plain and ordinary meaning without resorting to extrinsic evidence." Homer v. Smith, 866 P.2d 622, 629 (Utah App. 1993) (citations omitted).

In the present matter, the language incorporated by the parties in their Final Agreement makes apparent that they intended it to be a final and fully integrated expression of the settlement reached:

The Parties . . . 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.

(R. at 1693).

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.

(R. at 1692).

The viability of Mountain West's summary judgment motion, however, was entirely contingent upon the application of a boilerplate indemnification provision recited in the preliminary agreement but excluded in the Final Agreement. (R. at 1871-1877). In granting summary judgment then, the district court completely ignored the two express and separate merger/integration clauses found in the Final Agreement. Instead, the district court purported to "harmonize" the preliminary agreement with the Final Agreement, rather than simply interpreting the merger/integration

clauses in accordance with their plain, unambiguous terms. (R. at 1871-1877)

In essence, the district court's ruling suggests that while the Final Agreement expressly disclaims all other "promises, inducements, or agreements," and establishes itself as the, "entire agreement between the Claimant, the Insured, and the Insurance Company," there really are, in fact, ancillary agreements, and the Final Agreement is *not* the conclusive integrated agreement that it purports to be. Id. The district court, for instance, erroneously suggests that the agreements can be "harmonized" and that the multiple integration/merger clauses of the Final Agreement do not supersede the indemnification clause of the preliminary agreement because the Final Agreement does not specifically and separately disclaim the indemnification clause. Id. There is no legitimate authority for such a proposition, and this Court should not uphold a standard whereby every provision of a preliminary arrangement not ultimately incorporated into a final arrangement is presumed to remain in force despite an express integration clause unless the final agreement specifically addresses and invalidates each such preliminary provision separately.

Even the case law cited by the district court fails to support this misguided notion. For example, the district court looks to Acequia, Inc. v. Prudential Ins. Co. of America 226 F.3d 798 (7th Cir. 2000), to support the proposition that an original contract remains in force unless expressly superseded by a later agreement. (R. at 1873). While Acequia does indeed deal with the issue of the force and effect of two separate agreements between the disputing parties, unlike the present case, neither agreement includes the type of express merger/integration clause that the Final Agreement in this matter uses to memorialize the parties' accord. In fact, in this case, we have not just one, but several distinct clauses purporting to close the loop and rendering the Final Agreement just that, a final and complete agreement. (R. at 1692-1693). Likewise, Lincoln Elec. Co. v. St. Paul Fire and Marine Ins. Co. 210 F.3d 672 (6th Cir. 2000), relied on by the trial court, is inapposite to the present case for the same reasons.

B. If the Final Agreement is unambiguous, as the trial court declares, its terms must be given effect and interpreted in accordance with their plain meaning and without resort to external, contradictory evidence.

“If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement.” Bailey-Allen Co., Inc. v. Kurzet, 945 P.2d 180,190 (Utah

App. 1997); also Homer v. Smith, 866 P.2d 622, 629 (Utah App. 1993).

Additionally, this Court has held, “If the language within the four corners of the contract is unambiguous a court determines the parties’ intentions from the plain meaning of the contractual language as a matter of law.”

Panos at 820.

In the present matter, the trial court cannot find the terms of the Final Agreement unambiguous on the one hand, but then simply disregard or situationally suspend those terms on the other without correction by this Court on review. The Defendants, in pursuit of summary disposition, advanced all manner of carefully selected extrinsic and parol evidence to urge the trial court to superimpose parts of the preliminary agreement on the Final Agreement in violation of multiple merger/integration clauses.

The trial court should have resisted: “In interpreting unambiguous contracts, we do not consider a party’s subjective intent, but rather assume its intent is accurately reflected in the plain meaning of the terms used. 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.*” Tom Heal at 968 (emphasis added) (internal citations omitted). “[R]egardless of whether the parties may have had

preliminary agreements . . . we will assume that a writing dealing with the same subject was intended by the parties to supersede any prior or contemporaneous agreements.” Novell, Inc. v. Canopy Group, Inc., 92 P.3d 768, 772 (Utah App. 2004) (citations omitted).

If Mountain West indeed considered an indemnification provision like the one set out in the preliminary agreement fundamental to its interests in settling with Plaintiff, it had an affirmative obligation to either see that such a provision was negotiated for and incorporated into the Final Agreement, or at very least to see that the Final Agreement was not expressly and comprehensively integrated, as it clearly was in this case. (R. at 1692-1693). The parties to a contract “have a duty to make certain that their agreements have in fact been fully included in the final document.” Panos at 819-820. This Court has found the failure to do so fatal to the type of relief sought by the Defendants: “[This] may seem harsh but serves the purpose of preserving the integrity of the final document and encouraging the diligence of the parties.” Embassy Group, Inc. v. Hatch, 865 P.2d 1366, 1370 (Utah App. 1993).

As it stands, Defendants concede, as they must in order to qualify for summary disposition and to avoid the need for a jury determination, that the

language of the Final Agreement and the preliminary agreement is unambiguous. But they are then forced to prop up their position arguing for the parallel application of the preliminary agreement with the Final Agreement using all manner of extrinsic evidence in an effort to subtly undermine the merger and integration mechanisms of the Final Agreement.

The plain language of the Final Agreement should be respected and the district court's summary judgment ruling overturned.

II. ALTERNATIVELY, IF BOTH AGREEMENTS REMAIN VALID, AND IF EXTRINSIC EVIDENCE IS TO BE CONSIDERED, THEN IT IS EVIDENT THAT THE PARTIES INTENT WAS THAT THE SETTLEMENT NOT IMPEDE PLAINTIFF'S CLAIMS AGAINST McKAY-DEE HOSPITAL.

In virtually identical fashion, the preliminary agreement and the Final Agreement both provide:

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

(R. at 1678).

Yet Mountain West, by pursuing summary judgment below, has essentially sought to have the agreements judicially construed in such a fashion as to affect the release of Plaintiff's claims against McKay-Dee Hospital. Together with McKay-Dee, Mountain West advanced a theory on

summary judgment that relied on a disputed provision contained exclusively in the earlier of the two agreements. What the preliminary agreement could not do directly with respect to dispensing of this litigation, Defendants sought to do circuitously by using the preliminary agreement as a key character in a Parade of Horribles along with a secret indemnification agreement that the Defendants concluded amongst themselves. This theory, based on prospective interpretations of potential contractual disputes, gives rise to what they call “circular indemnification”, which will be addressed *infra*.

On the other hand, the context of the specific reservation of claims against McKay-Dee Hospital, which figures prominently in both memorializations of the settlement, suggests the substantial weight and importance the parties attached to that provision. Indeed, in adjudicating a similar motion earlier, the trial court declared:

To me, it’s absolutely clear when I read these two agreements that Mrs. Ward never intended – and any [sic] of the parties never intended to release McKay-Dee Hospital . . . it’s very clear to me that this settlement was not designed to include the hospital.

(R. at 1908: 44, 45).

Additionally, the attorney representing Plaintiff during the settlement negotiations provided deposition testimony that the merger/integration provisions were intended to be taken at face value, and that the overarching intent was that no aspect of the settlement with Mountain West was to interfere with Plaintiff's pursuit of remedies against McKay-Dee Hospital. (See R. at 1909: 51). The 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.

III. THE TRIAL COURT ERRED IN ITS TREATMENT OF A SECRET INDEMNIFICATION AGREEMENT CONCLUDED AMONGST THE DEFENDANTS AS A COMPONENT OF THEIR DEFENSE TO PLAINTIFF'S CLAIMS.

A. There is arguably no actual existing case or controversy that would justify the application of the theory of "circular litigation" since Mountain West's claim is entirely speculative at this point.

"[A] judgment can be rendered only in a **real controversy** between adverse parties." Salt Lake County v. Bangerter, 928 P.2d 384, 385 (Utah 1996) (emphasis added). Thus, "courts will not issue advisory opinions or examine a controversy until such a clash **actually occurs**". Moab Citizens Alliance v. Grand County, 118 P.3d 879, 881-82 (Utah App. 2005)

(emphasis added); also State v. Herrera, 895 P.2d 359, 371 (Utah 1995); Boyle v. National Union Fire Ins. Co., 866 P.2d 595, 598 (Utah App.1993).

In the present matter however, the trial court granted summary judgment in part reasoning that if the indemnification clause of the preliminary agreement survives the merger/integration clause of the Final Agreement, then there is a “chain of indemnity agreements [that] creates circular litigation.” (R. at 1877). The trial court continues, “[I]n 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.” Id. The trial Court then looks to Burkett v. Schwendiman, 773 P.2d 42 (Utah 1989), to justify “dismissing a claim upon which no meaningful relief can be granted.” (R. at 1877).

The underlying problem, however, is that a determination that “no meaningful relief can be granted” because of ostensible “circular litigation,” is contingent upon a prospective adjudication of facts and circumstances that have not and may never occur, and where no presently actionable controversy exists. The actual theory of “circular litigation” has apparently never been accepted by Utah courts, as the neither the trial court

nor the Defendants can reference any Utah case law accepting this premise. To grant summary judgment then, the trial court must simply make assumptions about whether and how prospective, as yet non-existent, future claims will arise and be resolved. This is reversible error.

B. The trial court's grant of summary judgment is premised on a bald assumption regarding the force and validity of a contract between Mountain West and McKay-Dee.

There is nothing in the record or in the trial court's final order to suggest that the court has ever even examined the indemnification agreement allegedly concluded between Mountain West and McKay-Dee to actually determine whether or not it would, in fact, be applicable to the facts and circumstances present in this matter and create a "circuitry of litigation." It simply accepts, at face value, the self-serving representations of the Defendants regarding their alleged arrangement.

The trial court apparently assumes that there are no viable contract defenses that would or could render their agreement inapplicable or unenforceable in this case. It makes no explicit findings evident in the record about that agreement, but still purports to rule as a matter of law that it is a legitimate link in an ostensible "indemnification chain" precluding

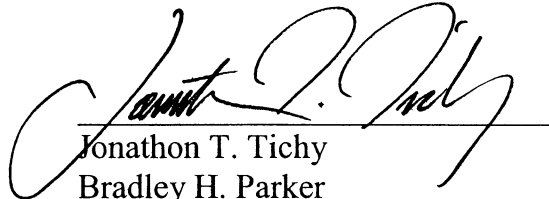
Plaintiff from pursuing a claim against McKay-Dee Hospital. This too is reversible error.

CONCLUSION

For all the foregoing reasons, this Court should overturn the trial court's grant of summary judgment and remand this case for trial on the merits.

DATED this 25TH day of May, 2007.

PRINCE YEATES & GELDZAHLER

A handwritten signature in black ink, appearing to read "Jonathon T. Tichy", is written over a horizontal line.

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

ADDENDUM

- | | |
|---------------------|--|
| Attachment A | Ruling Granting Mtn. West Anesthesia's Motion for Summary Judgment (November 29, 2006) |
| Attachment B | Release and Settlement Agreement (March 29, 2001) |
| Attachment C | Settlement Agreement and General Release (Mar 16, 2001) |

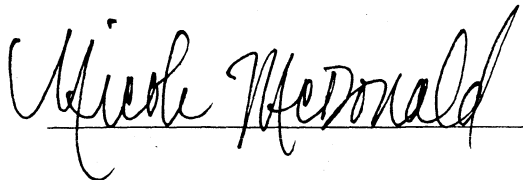
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of May 2007, I caused to be served by Hand-delivery, a true and correct copy of the foregoing to the following:

JoAnn E. Bott
MANNING CURTIS BRADSHAW & BEDNAR
10 Exchange Place, 3rd Floor
Salt Lake City, Utah 84111

Merrill F. Nelson
KIRTON & McCONKIE
60 East South Temple, Suite 1800
Salt Lake City, Utah 84145
Attorneys for Appellees and Third Party Plaintiffs

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

A handwritten signature in cursive script, reading "Mike McDonald", is written over a horizontal line.

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

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.

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Prince, Yeates & Geldzahler

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

Civil No. 010907610
Judge Ernie W. Jones

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.

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.

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.

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.

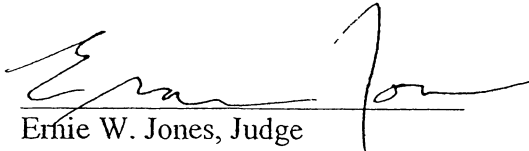
“If the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.” *Green River Canal Co. v. Thayn*, 84 P.3d 1134, 1140 (Utah 2003). The Court has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

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

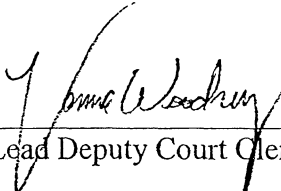
Certificate of Mailing

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

Bradley H. Parker
James W. McConkie
Counsel for Plaintiffs
175 East 400 South, Suite 900
Salt Lake City, Utah 84111

George A. Hunt
Counsel for Mountain West Anesthesia
P.O. Box 45678
Salt Lake City, Utah 84145

JoAnn E. Carnahan
Julia M. Houser
Counsel for IHC Health Services, Inc.
P.O. Box 4050
Salt Lake City, Utah 84111



Lead Deputy Court Clerk

RELEASE AND SETTLEMENT AGREEMENT

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

I. RECITALS

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

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

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

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

NOW, THEREFORE, it is agreed as follows:

II. RELEASE

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

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

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

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

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

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

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

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

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

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

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

IV. ASSIGNMENT AND FUNDING OF PERIODIC PAYMENT OBLIGATION

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

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

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

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

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

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

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

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

V. NO CHANGES IN PERIODIC PAYMENTS

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

VI. ENTIRE AGREEMENT

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

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

VII. READING OF AGREEMENT

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

VIII. FUTURE COOPERATION

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

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

IX. DRAFTING OF DOCUMENT AND RELIANCE BY CLAIMANT

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

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

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

X. WARRANTY OF CAPACITY TO EXECUTE AGREEMENT

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

XI. COURT APPROVAL

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

XII. CONTROLLING LAW

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

Dated: 3-29-01

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

Dated: 4/3/01

Kameron Jones
Duly Authorized Representative for Scottsdale Insurance Company

Approved as to Form and Content:

Dated: 3-29-01

Lloyd Hardcastle
Lloyd Hardcastle, Counsel for Claimant

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 16th 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
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neurological injury and damage; loss of cognitive abilities, loss of bodily function and function of organs, glands, structures, tissues and muscles; loss of consortium; psychological or emotional damage, distress or anxiety; loss or impairment of earning capacity, loss of wages and salary and all other employment and income losses of every kind and character; hospital, surgical, medical, nursing and drug expenses and all other expenses arising from bodily injury or impairment; punitive damages; attorney fees and legal costs; and claims of every other kind and character against Insured and all other persons or entities for whose conduct they may be liable arising from or relating to acts and omissions committed prior to the date of this Settlement Agreement.

3. General Release.

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

4. Warranty of Capacity to Execute Agreement.

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

5. Disclaimer of Liability.

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

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

6. Entire Agreement and Successors in Interest.

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

7. Indemnification.

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

8. Confidentiality.

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

9. Representation of Comprehension of Document.

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

10. Court Approval

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

DATED this 16 day of March, 2001.

Vickie Lynn Ward
VICKIE LYNN WARD

STATE OF UTAH

COUNTY OF JANES

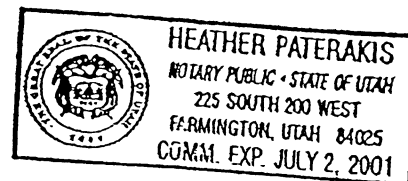
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On the 16 day of March, 2001, personally appeared before me VICKIE LYNN WARD, who being first duly sworn on oath, acknowledged to me that she is the person named in the foregoing Settlement Agreement and General Release, and that she executed the same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