

2007

Vickie Lynn Ward v. IHC Health Services; Mountain West Anesthesia LLC : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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

Case No. 20070110-CA

Appeal from a Final Judgment of the Second District Court of Weber County
State of Utah, Judge Ernie W. Jones

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to U.C.A. § 78-2a-3(2)(j).

STATEMENT OF ISSUES PRESENTED

1. Whether the district court correctly interpreted the settlement agreement to enforce Mountain West's right of indemnification against plaintiff.

Standard of Review: Correctness. *Green v. State Farm Fire & Casualty Co.*, 2005 UT App 564, ¶ 16, 127 P.3d 1279, 1282.

Preservation of Issue: The issue was raised in defendants' motions for summary judgment (R. 1400-15, 1479-84) and decided by the district court (R. 1871-77).

2. Whether the district court correctly granted summary judgment to defendants on the basis of circular indemnity that precludes recovery by plaintiff.

Standard of Review: Correctness. *Green v. State Farm Fire & Casualty Co.*, *supra*.

Preservation of Issue: The issue was raised in defendants' motions for summary judgment and decided by the district court, as cited above.

DETERMINATIVE LEGAL PROVISIONS

None; the legal issues are governed by common law principles of contract interpretation.

STATEMENT OF THE CASE

This is a medical malpractice action. Plaintiff settled with the anesthesiologist and his employer (Mountain West) for \$1 million, agreeing to indemnify them from any further liability in the case. (R. 1418, 1420.) Plaintiff then sued the hospital for the same

injury, seeking to hold the hospital vicariously liable for the anesthesiologist's negligence under a theory of apparent agency. (R. 756.) The hospital thereafter filed a third-party complaint seeking indemnification under an agreement with Mountain West. (R. 1163.) Mountain West then filed a counterclaim against plaintiff for indemnification under the settlement agreement. (R. 1179.)

Mountain West filed a motion for summary judgment on its indemnification claim against plaintiff (R. 1400-15), and the hospital joined in that motion, seeking summary judgment on its own indemnification claim against Mountain West (R. 1479-84). The district court granted summary judgment, enforcing both indemnification agreements and dismissing plaintiff's claim against the hospital on the basis that circular indemnity precludes recovery of further damages by plaintiff. (R. 1871-77; Addendum, hereafter "Add.," at 1.) Plaintiff appeals from that ruling. (R. 1890.)

STATEMENT OF FACTS

Plaintiff's husband was injured during hernia surgery at McKay-Dee Hospital ("Hospital"). Plaintiff claims that the injury was caused by negligence in the administration of anesthesia. (R. 758.) Anesthesia services were provided by Dr. John Luckwitz, an employee of Mountain West Anesthesia ("Mountain West"), which had contracted with the Hospital to provide the services. Under this Hospital-Based Independent Contractor Agreement for Anesthesia Services ("Hospital Agreement") (R. 1455, Add. 8), Mountain West and its physician-employees are designated independent contractors of the Hospital. As such, Mountain West agreed to "indemnify and hold harmless" the Hospital "against any and all liability for injury, loss, claims, or damages

arising from the . . . negligent operations, acts, or omissions of . . . its employees . . . while performing Anesthesia services” at the Hospital. (Add. 20.)

After evaluation of the claim, Mountain West and Dr. Luckwitz entered into a settlement agreement with plaintiff, dated March 16, 2001. (“Settlement Agreement,” R. 1418, Add. 30.) In exchange for a payment of \$1 million, which plaintiff expressly acknowledged as sufficient compensation for the injury, plaintiff released all claims against Mountain West and Dr. Luckwitz and expressly agreed to indemnify them from all claims of plaintiff or others arising from this incident. (Add. 32.) Plaintiff reserved potential claims against the surgeon, Dr. Steven Carabine, and the Hospital. (Add. 30.)

Two weeks later, plaintiff entered into a separate agreement with the Scottsdale Insurance Company, the liability insurer of Mountain West (R. 1440), for the structured payment of the settlement proceeds beyond the initial \$393,000 that was paid to cover attorney fees and expenses. (“Scottsdale Agreement,” R. 1423, Add. 34.)

Plaintiff thereafter filed this action against the Hospital and Dr. Carabine, alleging that their negligence caused her husband’s injury. (R. 1.) Following discovery, the Hospital moved for summary judgment on the basis that plaintiff had failed to produce any evidence of negligence by the Hospital or its employees. (R. 193, 218, 620.) The district court ordered dismissal of all negligence claims against the Hospital (R. 717), and the parties stipulated to dismissal of all negligence claims against Dr. Carabine (R. 720).

However, plaintiff continued to pursue the Hospital, filing a Third Amended Complaint alleging that the Hospital is vicariously liable for the negligence of Dr.

Luckwitz. (R. 756.) Plaintiff alleges a theory of ostensible agency, even though that theory is not recognized under Utah hospital law, and Dr. Luckwitz is an employee of Mountain West and merely an independent contractor of the Hospital. (R. 756-58, 1459.)

To avoid vicarious liability for the negligence of Dr. Luckwitz, the Hospital filed a motion for summary judgment asserting its right to indemnification from Mountain West, a right that would trigger plaintiff's indemnification of Mountain West, requiring dismissal of plaintiff's claim. (R. 991.) Plaintiff opposed the motion on the basis that the Hospital could not assert the rights of Mountain West, a nonparty to the action, under the Settlement Agreement. (R. 995.) The district court denied summary judgment, urging interlocutory appeal of the issue (R. 1075), but this Court denied the appeal (R. 1161).

The Hospital accordingly filed a Third-Party Complaint to join Mountain West and assert the Hospital's right of indemnification under the Hospital Agreement. (R. 1163.) Mountain West does not contest its obligation to indemnify the Hospital. (R. 1189, 1411.) Rather, Mountain West filed a counterclaim seeking to establish its own right to indemnification from plaintiff under the Settlement Agreement. (R. 1179.) Plaintiff filed a motion to dismiss the counterclaim on the basis that indemnification liability was conjectural (R. 1195-98); however, the district court denied the motion (R. 1237).

Mountain West subsequently filed a motion for summary judgment on its contractual right to indemnification from plaintiff, demonstrating that such indemnity would preclude any award of damages to plaintiff from the Hospital. (R. 1400-15, 1707.) The Hospital joined Mountain West's motion and renewed its own prior motion, showing

that the circular indemnity resulting from the Hospital Agreement and the Settlement Agreement required dismissal of plaintiff's claim because the requested relief could not be granted. (R. 1479.) Following oral argument and consideration of the parties' respective memoranda, the district court granted the motions for summary judgment. (R. 1871-81, Add. 1.) The court reasoned that, given the parties' respective contractual rights to indemnification, "Mrs. Ward cannot obtain any further meaningful judicial relief." (Add. 7.)

Plaintiff appealed from that final order of summary judgment. (R. 1890.) The Utah Supreme Court thereafter transferred the case to this Court. (R. 1896, 1902.)

SUMMARY OF ARGUMENT

The central issue is enforcement of the indemnity provision in the Settlement Agreement. That provision plainly requires plaintiff to indemnify Mountain West for all claims arising from the alleged negligence of Dr. Luckwitz. The Hospital's claim for indemnification from Mountain West, under the Hospital Agreement, arises from the negligence of Dr. Luckwitz because plaintiff seeks to hold the Hospital vicariously liable for that alleged negligence. Therefore, plaintiff is obligated to indemnify Mountain West for its indemnification of the Hospital covering any liability to plaintiff for the negligence of Dr. Luckwitz.

The Settlement Agreement was not merged into or superseded by the Scottsdale Agreement because neither agreement specifically so states. The two agreements have distinct purposes and subject matter. The purpose of the Settlement Agreement was to fix the total settlement amount (allowing the initial payment for attorney fees and costs)

and to provide for release and indemnification of Mountain West and Dr. Luckwitz. The purpose of the Scottsdale Agreement, between plaintiff and the insurer, was to establish an annuity for the balance of the payments to plaintiff. The two agreements are separately integrated and enforceable.

The district court did not err in reviewing extrinsic evidence of the parties' intent regarding the Scottsdale Agreement because that evidence merely confirms the absence of any ambiguity in the agreement.

Plaintiff's reservation of claims against the Hospital does not preclude enforcement of the indemnity provision because the reservation clause does not guarantee recovery or bar assertion of defenses. Plaintiff fully executed the reservation clause by asserting claims against the Hospital for both direct and vicarious liability. In fact, it is plaintiff's vicarious liability claim against the Hospital that triggered the succession of indemnity claims by the Hospital and Mountain West.

Finally, the district court correctly entered summary judgment for the Hospital because, under the circuitry of indemnity claims by the Hospital and Mountain West, plaintiff can recover no more than the \$1 million she has already received. Liability for any damage award against the Hospital would be shifted by indemnification to Mountain West and then back to plaintiff, leaving plaintiff ultimately in a position of suing herself. The law bars such fruitless claims.

ARGUMENT

POINT I: THE DISTRICT COURT CORRECTLY INTERPRETED THE SETTLEMENT AGREEMENT TO ENFORCE MOUNTAIN WEST'S RIGHT OF INDEMNIFICATION AGAINST PLAINTIFF.

Contracts are interpreted, as a matter of law, to effectuate the intent of the contracting parties. The parties' intent is determined from the plain meaning of the contractual language. *See, e.g., Green River Canal Co. v. Thayn*, 2003 UT 50, ¶ 17, 84 P.3d 1134, 1140; *Pack v. Case*, 2001 UT App 232, ¶ 16, 30 P.3d 436, 440. "Indemnity contracts are subject to the same rules of construction as other contracts; thus we read the contract as a whole and harmonize and give effect to all provisions." *Pavoni v. Nielsen*, 2000 UT App 74, ¶ 24, 999 P.2d 595, 599.

A. The Settlement Agreement Requires Plaintiff to Indemnify Mountain West.

Here, the indemnity language of the Settlement Agreement, set forth in ¶ 7, is clear and unambiguous:

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
[Add. 32, emp. add.]

The clear intent of the parties was to effectuate a final and complete settlement of plaintiff's claim that would protect Mountain West from paying any additional money for any claim arising from the alleged negligence of Dr. Luckwitz.

This broad language of indemnity plainly applies to the Hospital's claim for indemnification from Mountain West. The Hospital's claim arises from the alleged

negligence of Dr. Luckwitz because plaintiff seeks to hold the Hospital vicariously liable for that negligence. Accordingly, the Settlement Agreement requires plaintiff to indemnify Mountain West from the Hospital's indemnity claim, which arises from plaintiff's claim of vicarious liability against the Hospital. *See Freund v. Utah Power & Light Co.*, 793 P.2d 362, 371-2 (Utah 1990) (enforcing plain language of indemnity agreement).

B. The Settlement Agreement Was Not Superseded by the Scottsdale Agreement.

Plaintiff attempts to avoid the indemnity requirement in the Settlement Agreement by arguing that the Settlement Agreement was “explicitly superseded” by the Scottsdale Agreement. (Br. of App. 14-17.) However, nothing in the language of the two agreements supports this argument.

The Settlement Agreement gives no indication that it was merely “preliminary,” or that it constituted mere “negotiations,” or that it would be “superseded” by a subsequent agreement. To the contrary, ¶ 6 of the Settlement Agreement expressly provides that it constitutes the entire agreement on the matters covered:

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 [Add. 32.]

The matters set forth include the \$1 million settlement payment, the release of all claims against Mountain West, and the indemnification of Mountain West for any future claim against Mountain West arising out of the incident. Nowhere does the Settlement Agreement refer or even allude to a subsequent agreement. Moreover, in ¶ 9, “Ward

represents that she has relied upon the legal advice of her attorney . . . , 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.” (Add. 32.)

Neither does the language of the Scottsdale Agreement give any indication of intent to supersede the Settlement Agreement. The Scottsdale Agreement does not even mention the prior Settlement Agreement, let alone “explicitly supersede” it. Plaintiff refers to the integration clause, which states: “This Agreement contains the entire agreement between the [parties] *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.” (Add. 43, emp. add.) However, the matters set forth in the Scottsdale Agreement pertained to the terms for a structured payout of the settlement proceeds beyond the initial \$390,000 that went toward attorney fees and costs. Accordingly, the Scottsdale Agreement contains the “entire agreement” with regard to the annuity. Nowhere does the Scottsdale Agreement rescind plaintiff’s obligation to indemnify Mountain West, as set forth in the Settlement Agreement.

Utah law is clear that one contract will not merge into a later one unless “the later contract fully covers [the] earlier one,” and “the two contracts are between the same parties.” *Foote v. Taylor*, 635 P.2d 46, 48 (Utah 1981). For example, in *Foote*, the court held that an agreement to purchase restaurant and theatre equipment did not merge into a subsequent agreement to lease the restaurant and theatre premises because the parties to the two agreements were not identical, and the subject matter of the two agreements was different. Accordingly, the two agreements were separately enforceable. *Id.* Similarly,

in *James Constructors, Inc. v. Salt Lake City Corp.*, 888 P.2d 665 (Utah App. 1994), this Court held that a construction indemnity contract was not merged into or superseded by a subsequent stipulation of the parties because the stipulation resolved only specified legal claims, which did not include enforcement of the right to indemnity. Therefore, the claimant could recover attorney fees under both agreements. *Id.* at 674. *See also Harper v. Great Salt Lake Council, Inc.*, 1999 UT 34, ¶ 18, 976 P.2d 1213, 1218 (no merger of contracts regarding the same property because the second contract did not include both parties to the first contract); *Pavoni v. Nielsen*, 2000 UT App 74, ¶¶ 36-37, 999 P.2d 595, 601 (warranty in earnest money agreement did not merge into subsequent deed); *Ford v. American Express Financial Advisors, Inc.*, 2004 UT 70, 98 P.3d 15 (discussing the same considerations for a substituted contract under Minnesota law).

Applying this law to the present case, the Settlement Agreement was not merged into or superseded by the Scottsdale Agreement. The Settlement Agreement provided for the total settlement amount, the release of Mountain West, and plaintiff's indemnification of Mountain West for any future claim against Mountain West arising from the same incident. The subsequent Scottsdale Agreement, entered into between plaintiff and the liability insurance company, does not mention the Settlement Agreement, or the total settlement amount, or plaintiff's indemnity obligation; rather, it merely provides for plaintiff to receive an annuity for the amount remaining after payment of attorney fees and costs. Accordingly, the Scottsdale Agreement neither "fully covers" the subject matter, *Foote, supra*, nor includes the same parties, *Harper, supra*, as the Settlement Agreement. Because the two agreements pertain to different subject matter and do not

include the same parties, the Scottsdale Agreement does not supersede the Settlement Agreement. Therefore, the indemnity provision in the Settlement Agreement remains enforceable against plaintiff.¹

C. The District Court Did Not Err In Considering Extrinsic Evidence.

Plaintiff argues that the district court erred in considering extrinsic evidence to conclude that the Settlement Agreement was not superseded by the Scottsdale Agreement. (Br. of App. 17-20.) However, plaintiff does not cite to any specific evidence. In any event, plaintiff's argument finds no support in the law. (See Brief of Appellee Mountain West, Point III, incorporated by this reference.)

The case of *Novell v. Canopy Group, Inc.*, 2004 UT App 162, 92 P.3d 768, cited by plaintiff, supports consideration of extrinsic evidence, even on summary judgment, to determine the existence of ambiguity in successive contracts:

Courts determine whether a term is ambiguous as a matter of law. . . .

. . . [I]f the language of the contract is ambiguous such that the intentions of the parties cannot be determined by the plain language of the agreement, extrinsic evidence must be looked to in order to determine the intentions of the parties. If a contract is ambiguous, the court may consider the parties' actions and performance as evidence of the parties' true intention.

. . . .

¹ Plaintiff cites *Panos v. Olsen and Associates Const., Inc.*, 2005 UT App 446, 123 P.3d 816, 819 for the undisputed point that "prior negotiations and agreements merge into the final written agreement *on the subject*." (Emp. add.) However, that principle, typically applied to deeds, has no application here because, as shown above, the Settlement Agreement does not contain mere "negotiations" of the parties, but contains the final agreement of the parties on *different subject matter* from that contained in the Scottsdale Agreement. Therefore, the Settlement Agreement is an independent, separately-enforceable contract.

To determine whether a contract term is ambiguous, a court is not limited to the document itself; rather, the court may look to all the attendant circumstances surrounding the execution of the document [*Id.* ¶¶ 20-21, citations omitted.]

In *Novell*, the district court considered extrinsic evidence concerning the negotiations and drafting of the final agreement to determine that no ambiguity existed. *Id.* ¶ 22. This Court approved the consideration of extrinsic evidence and affirmed the summary judgment. *Id.* ¶ 29. *See also Ringwood v. Foreign Auto Works, Inc.*, 671 P.2d 182, 183 (Utah 1983) (“In determining whether an agreement was intended to supersede a prior agreement, a court may consider extrinsic evidence as to the circumstances of the transaction, including the purpose for which the contested agreement was made.”).

In the present case, the language of the Settlement Agreement and Scottsdale Agreement is clear and unambiguous. No resort to extrinsic evidence is required to conclude that the Settlement Agreement was not superseded by the Scottsdale Agreement. However, neither did the district court err by reviewing contemporaneous correspondence of counsel to confirm that conclusion. That correspondence between counsel for plaintiff and the liability insurer shows that both parties contemplated “two settlement agreements,” the first to authorize the initial payment of funds and the second to establish an annuity for the balance of the funds. The second agreement was not intended to supersede the first. (R. 1530-34, 1545, 1550, 1552.) The district court cited this evidence only to support its conclusion, under “the clear language of the two releases,” that the Scottsdale Agreement neither supersedes nor contradicts the Settlement

Agreement. (Add. 4.) Accordingly, the court did not err in reviewing extrinsic evidence.²

D. Enforcement of the Indemnity Provision Is Not Barred by Plaintiff's Reservation of Claims Against the Hospital.

Plaintiff argues that her reservation of claims against the Hospital in the Settlement Agreement precludes enforcement of the indemnity clause in that same Agreement. (Br. of App. 20-22.) However, plaintiff reads too much into the reservation provision and cites no legal authority for her interpretation that reservation must trump indemnity.

The reservation clause states: “Nothing in this Release shall be construed as *releasing* Ward’s claims against Dr. Steven J. Carabine, McKay-Dee Hospital, and/or its employees.” (Add. 30, emp. add.) However, the district court did not hold that plaintiff “released” her claim against the Hospital. In fact, plaintiff filed this action claiming negligence against the Hospital, and when that claim was dismissed for lack of evidence, plaintiff amended her complaint to allege vicarious liability against the Hospital. Accordingly, plaintiff has already exercised and executed her reservation rights in the Settlement Agreement.

Contrary to plaintiff’s argument, the reservation clause *does not guarantee recovery* against the Hospital, it merely reserves a right of action. The reservation clause does not prevent the Hospital from asserting its right to indemnification under the

² Plaintiff asserts that Mountain West “had an affirmative obligation” to place an indemnity provision in the Scottsdale Agreement. (Br. of App. at 19.) However, no additional provision was necessary in view of the indemnity provision in the Settlement Agreement.

Hospital Agreement, and neither does it preclude Mountain West from, in turn, asserting its own protections under the indemnity agreement with plaintiff. As the district court concluded, the reservation clause “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.” (Add. 5.)

Plaintiff herself triggered the indemnity provision in the Settlement Agreement when she amended her complaint to sue the Hospital for the alleged negligence of Dr. Luckwitz, who is a Mountain West employee. Plaintiff’s reservation of a right to sue the Hospital for its own negligence does not ensure a right to recover against the Hospital for Dr. Luckwitz’ negligence. Plaintiff already received \$1 million for the negligence of Dr. Luckwitz and, by agreeing to indemnify Mountain West, promised to seek no more. The district court merely enforced that promise. (Add. 6.) *See Nelson v. Corporation of the Presiding Bishop*, 935 P.2d 512, 514 (Utah 1997) (“[P]laintiff may not recover a windfall by receiving more than his actual damages. Generally, if the servant is released after paying the full amount of plaintiff’s damages, all liability is satisfied and there is no cause of action against the master.”); *Williams v. Greene*, 506 P.2d 64, 65 (Utah 1973) (injured employee who settled with employer was barred from obtaining “double payment” from physician; plaintiff “impales himself on the horns of his self-made dilemma”).³

³ Plaintiff decries “a Parade of Horribles” that includes “a secret indemnification agreement” between the Hospital and Mountain West that supposedly was not disclosed at the time of the Settlement Agreement. (Br. of App. 21.) However, plaintiff cites nothing in the record suggesting a cover-up and no authority establishing a legal duty of

In sum, the district court correctly interpreted the Settlement Agreement to enforce the indemnity provision against plaintiff.

POINT II: THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE BASIS THAT CIRCULAR INDEMNITY PRECLUDES FURTHER RECOVERY BY PLAINTIFF.

Plaintiff argues that the indemnity provision in the Settlement Agreement does not require summary judgment for defendants because the circular litigation is “entirely speculative” and presents no actual controversy. (Br. of App. 22-24.) While this argument forestalled summary judgment prior to joinder of Mountain West as a party, it carries no weight now.

Utah law plainly disfavors wasteful and useless litigation. For example, in *Burkett v. Schwendiman*, 773 P.2d 42 (Utah 1989), cited by the district court, appeal of a license suspension was dismissed as moot after expiration of the suspension period because the requested judicial relief could not be granted. Whether under principles of mootness or

(cont.)

disclosure. Moreover, plaintiff overlooks the language of general release in ¶ 3 of the Settlement Agreement:

Ward hereby . . . expressly waives and assumes the risk of any and all claims for damages against the 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 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*. [Add. 31, emp. add.]

Accordingly, by accepting \$1 million for Dr. Luckwitz’ negligence from Mountain West, and promising to seek no more, plaintiff assumed the risk that she would be barred from seeking more through the “back door” of a vicarious claim against the Hospital.

purely prudential considerations, circular indemnity similarly requires dismissal or denial of the original claim because the claimant can recover nothing.

For example, in *Moore v. Southwestern Electric Power Co.*, 737 F.2d 496 (5th Cir. 1984), a worker was electrocuted, and the employer's insurer paid a settlement in exchange for a release and promise of indemnity. The worker's family then sued the power company, which filed a third-party complaint against the employer for statutory indemnity. The employer then counter-claimed against the family for contractual indemnity under the settlement agreement. The court held that defendants were entitled to judgment as a matter of law because "plaintiffs' claim was extinguished by virtue of the two indemnification obligations." *Id.* at 498. "When circular patterns of indemnity develop, Texas courts resolve the matter by denying recovery to plaintiffs." *Id.* at 501. Other jurisdictions apply the same remedy for circular claims that can result in no recovery for the claimant.⁴

In the present case, plaintiff sued the Hospital claiming vicarious liability for the negligence of Mountain West's employee; the Hospital joined Mountain West and claimed a right to indemnification under the Hospital Agreement; and Mountain West completed the circle by claiming a right to indemnification from plaintiff under the

⁴ See, e.g., *Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583, 594 (8th Cir. 2002) ("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"); *Maryland Casualty Co. v. Employers Mutual Liability Ins. Co.*, 208 F.2d 731, 732-33 (2nd Cir. 1953) ("circuitry of action" among insurers and tortfeasor constituted a complete defense to the claim for contribution); *Estate of Bruce v. B.C.D., Inc.*, 396 F. Supp. 157, 165 (D. Iowa 1975) ("circuitry of actions is evident from . . . the pleadings"; "given the viability of the indemnity and hold harmless theories, this litigation need go no further").

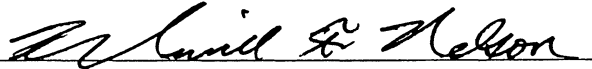
Settlement Agreement. The circuitry of claims is evident, creating an actual controversy regarding *rights to indemnification* that the district court properly resolved on summary judgment. Because plaintiff can recover nothing from the Hospital that would not ultimately come back out of her own pocket, the court correctly denied her claim as a matter of law.⁵

CONCLUSION

Based on the foregoing, this Court should affirm the district court's order of summary judgment for the Hospital.

RESPECTFULLY SUBMITTED this 25th day of June, 2007.

KIRTON & McCONKIE

By: 
Merrill F. Nelson
Justin W. Starr
Attorneys for Defendant/Third-Party
Plaintiff/Appellee IHC Health Services, Inc.

⁵ Finally, plaintiff asserts that the district court failed to examine and make findings regarding the Hospital Agreement. (Br. of App. 24-25.) However, this argument is barred as raised for the first time on appeal. *E.g., West One Bank v. Life Ins. Co.*, 887 P.2d 880, 882 n.1 (Utah App. 1994). In any event, no interpretation of the Hospital Agreement was required because Mountain West does not dispute its contractual obligation to indemnify the Hospital. Moreover, findings of fact are unnecessary in connection with summary judgment. *E.g., Taylor v. Estate of Taylor*, 770 P.2d 163, 168 (Utah App. 1989).

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 IHC Health Services, Inc., dba McKay-Dee Hospital** to be mailed through United States mail, postage prepaid, to the following:

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IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

2006 NOV 29 A 10:45

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.

SECOND JUDICIAL 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



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CARABINE,STEVEN J MD

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.

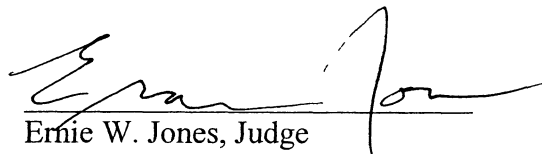
“If the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.” *Green River Canal Co. v. Thayn*, 84 P.3d 1134, 1140 (Utah 2003). The Court has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

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 "HPP"), 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.

- 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.



- 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.

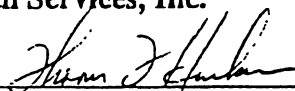
7.10 Entire Agreement. This Agreement, together with any appendices and exhibits that are incorporated into this Agreement, any amendments properly made to this Agreement, and any written approvals issued by Facility Medical Director under Section 2.5 of this Agreement, constitute the entire agreement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

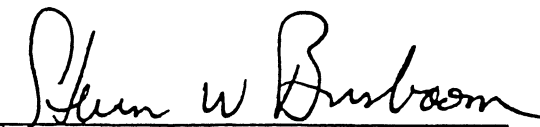
IHC Health Services, Inc.

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: 

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
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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 warrant 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

Ward Release
March 2000
Page 3

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

6. Entire Agreement and Successors in Interest.

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

7. Indemnification.

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

8. Confidentiality.

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

9. Representation of Comprehension of Document.

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

10. Court Approval

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

DATED this 16 day of March, 2001.

Vickie Lynn Ward
VICKIE LYNN WARD

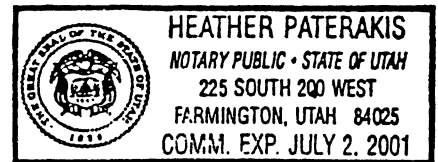
STATE OF UTAH)
) ss.
COUNTY OF DAVIS)

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

Heather Paterakis
NOTARY PUBLIC

APPROVED AS TO FORM:

SCHWAB & HARDCASTLE



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

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

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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.

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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

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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 it's 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