2010

Alpine Orthopaedic Specialists, L.L.C. v. Utah State University and Intermountain Health Care, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ALPINE ORTHOPAEDIC SPECIALISTS, L.L.C.,

Plaintiff/Appellant,

v.

UTAH STATE UNIVERSITY and INTERMOUNTAIN HEALTH CARE, INC.,

Defendants/Appellee.

No. 20100865

Appeal from First Judicial District Court, Cache County, Honorable Clint S. Judkins, District Court No. 060102502

Related to Appeal No. 20100275

BRIEF OF APPELLEE INTERMOUNTAIN HEATH CARE, INC.

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April 12, 2011

VIA HAND DELIVERY

Clerk of Court
Utah Court of Appeals
450 South State Street
Salt Lake City, UT 84101

Re: *Alpine Orthopaedic Specialists v. Utah State University, et al.*
No. 20100865; Related No. 20100275; District Court No. 060102502

Clerk of Court:

This office represents defendant/appellee Intermountain Health Care, Inc. in the above matter. In the Brief of Appellee Intermountain Health Care, Inc. filed April 11, 2011, Addenda A & C are documents found in the record; however, the copies attached to the brief do not reflect the record numbers. The applicable record numbers are as follows:

Addendum A: Order Granting Intermountain Health Care, Inc.'s Motion for Summary Judgment and Denying Plaintiff's Rule 56(f) Motion (R. 1523-25)

Addendum C: Alpine's Joint Memorandum in Support of Rule 56(f) Motion and Opposition to Intermountain Health Care, Inc.'s Motion for Summary Judgment (R. 1437-51)

Very truly yours,

Snell & Wilmer

Troy L. Booher

TLB/pc
cc: Peter Stirba
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Robert D. Barclay

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Statement of Issues and Standards of Review

On March 13, 2001, Utah State University ("USU") entered into a contract with Alpine Orthopedic Specialists, L.L.C., under which Alpine would provide athletic team physician services ("Alpine contract"). (R. 102-11.) The Alpine contract had a 5-year term that renewed automatically "unless otherwise agreed upon." (R. 104.) On April 13, 2005, USU informed Alpine that USU had failed to comply with the Utah Procurement Code, Utah Code section 63-56-408,[1] when it failed to request competitive proposals before entering into the Alpine contract. (R. 1078-79.) USU did not cancel the Alpine contract, but required that any renewal would be subject to Alpine's submitting the most competitive proposal. (R. 1079.) In 2006, both Alpine and Intermountain Health Care, Inc. submitted proposals to provide team physician services, and USU awarded the contract to Intermountain. (R. 1079.)

Alpine challenged USU's determination that to renew the Alpine contract USU had to request competitive proposals. (R. 1129.) USU rejected Alpine's challenge. Alpine did not appeal USU's final decision within the period specified in Utah Code section 63-56-817(1). (R. 1217-19.) Thus, Alpine is now bound by USU's determination that any contract for team physician services after April 2006 required competitive proposals under Utah Code section 63-56-408.

At issue here are Alpine's claims against Intermountain for intentional interference with contract and economic relations, for which Alpine seeks damages stemming from the fact that USU did not allow the Alpine contract to renew automatically, but instead requested competitive proposals and ultimately awarded a new contract to Intermountain.

[1] The applicable 2005 version of the Code is substantively the same as the 2010 version.

Alpine failed timely to appeal USU's decision to award the contract to Intermountain. Thus, Alpine does not, and now cannot, contend that, given the submitted proposals, Intermountain should not have been awarded the new contract.

Issue 1: Whether Alpine's claims fail as a matter of law because they seek damages that Alpine failed to mitigate by appealing USU's decision to request competitive proposals for the position of team physician.

Standard of Review: This court reviews the grant of summary judgment for correctness. Salt Lake County v. Holliday Water Co., 2010 UT 45, ¶ 14, 234 P.3d 1105.

Alternative Grounds to Affirm: The court may affirm on "any legal ground or theory apparent on the record." Bailey v. Bayles, 2002 UT 58, ¶ 10, 52 P.3d 1158.

Alpine concedes that its claims for intentional inference with contract and intentional interference with economic relations involve "essentially the same elements." (AOB at 9.) Those elements include Intermountain's allegedly acting with an improper purpose or improper means to cause USU to request competitive proposals rather than allowing the Alpine contract to renew automatically. Yet USU's witnesses testified that they required competitive proposals, not because of anything Intermountain did, but because USU had concluded that the Alpine contract should have been subject to competitive proposals in 2001. In response, Alpine states only that the Alpine contract was procured lawfully, implying that USU was incorrect in its decision to require competitive proposals. (R. 1442.) But regardless of whether competitive proposals were required—which they were—Alpine's response does not dispute that USU's decision had nothing to do with Intermountain's alleged improper means or purpose.

Issue 2: Whether summary judgment is appropriate on claims of intentional inference with contract and economic relations where the moving party presents evidence that it played no role in the loss of contract and the nonmoving party does not dispute that fact.

Standard of Review: This court reviews the grant of summary judgment for correctness. Salt Lake County v. Holliday Water Co., 2010 UT 45, ¶ 14, 234 P.3d 1105.

As an alternative, Alpine moved under Rule 56(f) for additional time to retain an expert before the court ruled on Intermountain's motion for summary judgment. According to Alpine, its expert would provide an opinion concerning whether Intermountain violated some professional standard. Despite having had years to retain an expert, Alpine did not identify either an expert or any evidence possessed by Intermountain that Alpine's expert would need before he or she could provide such an opinion.

Issue 3: Whether a district court abuses its discretion in denying a motion for discovery under Rule 56(f) where the nonmoving party has in its possession the evidence it wishes to present in opposing summary judgment.

Standard of Review: This court reviews the denial of a motion for discovery under Rule 56(f) for abuse of discretion. Salt Lake County v. Western Dairymen Coop., Inc., 2002 UT 39, ¶ 16, 48 P.3d 910.

Determinative Provisions

Determinative provisions are attached at Addendum B.

Statement of the Case

I. Nature of the Case

This case involves Alpine's claims that Intermountain tortiously interfered with the Alpine contract. Alpine's alleged damages all stem from USU's decision to request competitive proposals under the Utah Procurement Code for the position of team physician instead of allowing the Alpine contract to renew automatically after its initial five-year term.

This appeal involves whether Alpine's claims fail as a matter of law both because Alpine failed to appeal USU's determination that the position of team physician required competitive proposals and because there is no evidence that USU's decision to request competitive proposals was caused by Intermountain rather than USU's interpretation of the Utah Procurement Code. This appeal also involves whether the district court abused its discretion in denying a request for discovery under Rule 56(f) where the moving party, Alpine, possessed the "discovery" allegedly needed.

II. Course of Proceedings

Alpine's complaint alleges that Intermountain intentionally interfered with Alpine's economic relations and contracts. Alpine's claims are based upon its allegation that Intermountain induced USU to breach the Alpine contract by requesting competitive proposals for the position of team physician after the five-year term of the Alpine contract expired. (R. 254-57.) Alpine also alleges that USU breached the Alpine contract by requesting the same competitive proposals under the Utah Procurement Act. (R. 250-54.)

On April 9, 2009, the district court granted Alpine's motion for partial summary judgment declaring that the Alpine contract was enforceable because USU had "ratified and affirmed" the contract. (R. 1085.) But the court also ruled that ratification was necessary because USU had failed to comply with the Utah Procurement Code when it entered into the Alpine contract in 2001, meaning any contract involving team physician services requires competitive proposals. (R. 1083.)

USU then filed a motion for summary judgment on the ground that Alpine's claims directed at USU were untimely. (R. 1218.) Under Utah Code section 63-56-815(1), a contractor may challenge a request for competitive proposals to provide the services it currently provides, but that contractor must challenge the request in district court either within 14 days of a final administrative decision or within 20 days of learning of the facts giving rise to the challenge. Utah Code Ann. § 63-56-817(1). The district court here ruled that Alpine's claim that USU had breached the Alpine contract by requesting competitive proposals was untimely because Alpine filed its complaint in this case well beyond both deadlines. (R. 1218.)

The district court certified its order granting USU's motion for summary judgment as final under Rule 54(b). (R. 1523.) Alpine appealed, and that appeal is pending in this court with case number 20100275.

Intermountain also filed a motion for summary judgment on three separate grounds. First, Intermountain argued that there was no evidence that its unsuccessful attempts in 2005 to recruit one of Alpine's doctors—Dr. Finnoff—caused Dr. Finnoff to leave Alpine for a job in Oregon in 2005. In support, Intermountain provided the sworn testimony of Dr. Finnoff himself, who testified that he did not believe Intermountain had

acted improperly and "did not interfere with his relationship with Alpine." (R. 1444.) In opposition, Alpine did not dispute those facts, but instead merely stated that Dr. Finnoff is not an expert on standards of professionalism and was unqualified to provide a legal conclusion. (R. 1444.)

Second, Intermountain argued that there was no evidence that Intermountain's alleged improper means or purpose caused USU to request competitive proposals, but instead USU independently determined that competitive proposals were required under the Utah Procurement Code, a legal conclusion later confirmed by the district court. (R. 1442.) Specifically, Dale Mildenberger, USU's head athletic trainer, testified that USU's motivations in requesting competitive proposals for team physician were that (i) USU should have requested competitive proposals before entering into the Alpine contract in 2001, and (ii) USU wanted to ensure that it was not dependent upon a single physician. (R. 1442.) In response, Alpine did not provide evidence to dispute those facts, but instead stated only that the Alpine contract was bid lawfully in 2001, a fact that, if true, would not indicate that Intermountain improperly caused USU to believe otherwise. (R. 1442.)

Third, Intermountain argued that Alpine had failed to mitigate its damages by timely appealing USU's decision to request competitive proposals. (R. 1236.) Alpine's claimed damages fell into three categories, each of which allegedly resulted from the termination of the Alpine contract: (i) damage to Alpine's reputation and goodwill; (ii) Alpine's alleged loss of revenue because it no longer provides care to team members; (iii) Alpine's alleged loss of referrals from team members and physicians. (R. 1448-49.) In response, Alpine argued that it attempted to mitigate its damages by submitting a

proposal to continue as team physician, but Alpine did not dispute that it failed timely to appeal USU's decision that competitive proposals were required under Utah law. (R. 1450.)

Alpine also filed a motion under Rule 56(f) requesting the opportunity to retain an expert and conduct additional discovery to assist its expert before responding to the motion for summary judgment. (R. 1446.) Alpine expressed its intent to hire an expert who would opine that Intermountain violated some unidentified professional standard in attempting (unsuccessfully) to recruit Dr. Finnoff. (R. 1446-47.) Alpine did not argue, and does not argue here, that it needed to "discover" any evidence that Alpine did not possess before its expert could formulate that opinion.

The district court denied Alpine's request under Rule 56(f) on the ground that even if Alpine could retain an expert who might testify that Intermountain violated some professional standard, it would not preclude summary judgment. (R. 1524.) The court then granted the motion for summary judgment on numerous grounds: "Plaintiff has not set forth any specific facts showing that Intermountain intentionally interfered with Plaintiff's existing or potential economic relations, that Intermountain acted with an improper purpose or by improper means, or that Intermountain caused any injury to Plaintiff." (R. 1524.) A copy of the court's order is at Addendum A. Alpine appealed.

III. Statement of Facts

On March 13, 2001, Alpine and USU entered into the Alpine contract, under which Alpine was to provide team physician services to USU athletes. (R. 1438.) The Alpine contract's initial term was for five years. (R. 1438.)

Dr. Finnoff

Dr. Finnoff provided team physician services for Alpine from May 2001 to March 2005. Dr. Finnoff testified that by 2005 he was dissatisfied with his work at Alpine because he was required to work long hours and received what he considered to be inadequate support and insufficient pay. (R. 1240.) Dr. Finnoff terminated his employment with Alpine in March 2005 to take a position in Bend, Oregon, with a clinic that was closely affiliated with the U.S. Ski Team. (R. 1240.)

A year before Dr. Finnoff left for Oregon, Dr. Finnoff communicated with Intermountain about the possibility of employment at Logan Regional Hospital. (R. 1443.) At that time, Dr. Finnoff knew "that there was a possibility that Alpine Orthopaedics may not have a contract on a permanent basis by virtue of his conversations with Mr. Mildenberger," USU's head athletic trainer (R. 1443.) Dr. Finnoff had two brief conversations with Intermountain's Jana Huffman. (R. 1443.) In those conversations, Ms. Huffman said that, although Intermountain did not have the USU team physician contract, if it came up for bid, Intermountain would bid on it. (R. 1241.) No one from Intermountain guaranteed or represented that Intermountain would be awarded that contract in the future. (R. 1241.)

In the spring of 2004, Intermountain made an offer of employment to Dr. Finnoff. (R. 1443.) Dr. Finnoff declined the offer because, among other reasons, the proposed salary was inadequate, he was subject to a noncompete agreement with Alpine, and he and his wife did not want to live in Logan long term. (R. 1443.)

Dr. Finnoff testified that he did not believe that Intermountain did anything improper in recruiting him and did not interfere with his relationship with Alpine.

(R. 1444.) Dr. Finnoff explained his reasons for terminating his employment with Alpine as follows: "I didn't know if the contract with USU would stay [at Alpine], I had a good opportunity to work in a clinic [in Oregon] seeing the type of athletes that I was very interested in, they had a close affiliation with the U.S. ski team, and they were in a place we both liked, my wife did not like Logan, and I wouldn't have to work evenings and weekends, and the salary looked like it would be similar, competitive" with his salary at Alpine. (R. 1241.) Alpine did not dispute any of those facts concerning Dr. Finnoff in its summary judgment papers. (R. 1443-44.)

USU's Reason for Requesting Competitive Proposals

According to Dale Mildenberger, USU's head athletic trainer, USU's motivation for rebidding the team physician contract in the spring of 2006 was twofold: (i) the Alpine contract had not been bid lawfully in 2000; and (ii) USU needed to protect itself and not be dependent on any one individual physician. (R. 1442.) Alpine did not dispute in its summary judgment papers that Intermountain did not cause USU to believe competitive proposals were required or to request competitive proposals.

Alpine's Failure to Appeal USU's Decision

On February 17, 2006, USU issued a request for proposals for team physician services. (R. 1237.) On March 20, 2006, Alpine wrote to Bud Covington, USU's Chief Procurement Officer, asserting a right under the Alpine contract to continue as USU team physician for five more years and asking USU to clarify its rationale for issuing a request for competitive proposals. (R. 1237.) On March 22, 2006, USU's Athletic Director, Randy Spetman, responded to Alpine's letter, stating that USU would "continue to solicit proposals as initiated by its [request for proposals] and award a contract as outlined

therein." (R. 1439.) He also advised Alpine that the Alpine contract had expired on March 12, 2006. (R. 1439.)

On March 30, 2006, Alpine wrote a letter to Mr. Covington "formally appeal[ling] the decision of USU" to request competitive proposals under the Utah Procurement Code and requesting a "formal opinion" from USU. (R. 1237-38.) Acting as Chief Procurement Officer for USU, Mr. Covington rejected Alpine's appeal on April 14, 2006. (R. 1439.) Mr. Covington advised Alpine that it had a right to judicial review of the decision as provided in the Utah Procurement Code. (R. 1439.) Mr. Covington's decision was hand-delivered to Alpine on April 14, 2006. (R. 1439.) Alpine did not seek judicial review of USU's decision to request proposals. (R. 1440.)

Alpine submitted a proposal to continue providing team physician services on March 28, 2006. (R. 1439.) By letter dated May 18, 2006, USU advised Alpine that it had awarded the new contract to Intermountain. (R. 1440.) The major factors influencing USU's award of the contract to Intermountain were Intermountain's detailed plan for multiple-site and multiple-event coverage, as well as its identification of the particular personnel who would provide coverage. (R. 1442.) Prior to USU's issuance of the request for competitive proposals, Intermountain's only communications with USU concerning the team physician contract consisted of its expressions of interest in bidding for the contract should it come up for bid. (R. 1240.)

Alpine did not seek timely judicial review of USU's decision to award the team physician contract to Intermountain. (R. 1440.) Instead, Alpine filed this lawsuit on November 2, 2006—177 days after May 18, 2006—well outside the 20-day statute of limitations in Utah Code § 63-56-817(1). (R. 1238.)

Summary of Argument

Alpine's claims against Intermountain for intentional interference with contract and economic relations fail as a matter of law for at least three reasons. First, Alpine's claimed damages stem from USU's decisions to request competitive proposals and to award the contract to Intermountain. Yet Alpine did not timely appeal either decision. Thus, even if Alpine were correct that USU should not have requested competitive proposals, Alpine nonetheless failed to mitigate its damages by appealing USU's decisions within the time periods specified in Utah Code section 63-56-815(1).

Second, Alpine provided no evidence that Intermountain improperly interfered with the Alpine contract. Alpine contends that USU had no legal basis for requiring competitive proposals. Again, even if that were correct, it does not indicate that Intermountain caused USU to conclude that competitive proposals were required. In addition, Alpine provided no evidence that Intermountain improperly interfered with Alpine's relationship with its team physician, Dr. Finnoff. Intermountain unsuccessfully recruited Dr. Finnoff in 2004, a year before Dr. Finnoff left Alpine for a position in Bend, Oregon. Dr. Finnoff testified that Intermountain not only did nothing improper, but also had nothing to do with his decision to take the position in Oregon. Because Alpine does not dispute those facts, Alpine's claims for intentional interference fail as a matter of law.

Third, Alpine's proposed discovery with its motion under Rule 56(f) would have made no difference. Alpine wanted time to retain an expert to submit an opinion concerning whether Intermountain violated some professional standard in unsuccessfully attempting to hire Dr. Finnoff. Apart from never explaining why it needed additional time to retain an expert or what is needed to "discover" prior to such an expert's being

able to provide an opinion, the expert's opinion would have been beside the point. There is no evidence linking Intermountain's unsuccessful attempt to hire Dr. Finnoff in 2004 with USU's request for competitive proposals in 2006. This court should affirm.

Argument

I. Alpine's Claims Fail as a Matter of Law Because Alpine Failed to Mitigate Its Damages

In response to Intermountain's motion for summary judgment, Alpine conceded that its alleged damages stemmed only from the loss of the contract: "Alpine's claims involve only USU's breach of the 2001 PSA [the Alpine contract] and Intermountain Healthcare's interference with the 2001 PSA." (R. 1439.) In the opening brief, Alpine confirms that its damages all stem from "Alpine losing the USU team physician services contract." (AOB at 12.)

Yet Alpine does not claim that USU should not have awarded the contract to Intermountain given the proposals USU actually received, but instead argues that USU should not have sought competitive proposals for the contract in the first place. (AOB at 12.) USU formally decided that issue on April 14, 2006, and Alpine never appealed that decision. Thus, assuming Alpine is correct in its argument before this court—i.e., USU incorrectly decided that competitive proposals were required under the Utah Procurement Code—Alpine had a means of avoiding its injury by timely appealing USU's decision under the Utah Procurement Code.

The Utah Procurement Code provides: "In the event of a timely protest under Subsection . . . 63-56-815(1),[2] the state shall not proceed further with the solicitation or

[2] Utah Code section 63-56-815(1)(a) provides the district court jurisdiction over an action between "the state" and a "contractor, prospective or actual, who is aggrieved in

with the award of the contract until all administrative and judicial remedies have been exhausted." Utah Code Ann. § 63-56-802. If Alpine had timely filed its action against USU under the Utah Procurement Code, USU would have been prevented from awarding the team physician contract to Intermountain until judicial resolution of Alpine's claims.[3] The status quo would have remained in effect, and Alpine would have suffered none of its alleged damages. Intermountain would not have become the provider of team physician services unless and until a court had determined that USU properly (i) refused to renew the Alpine contract and (ii) awarded the contract to Intermountain. In short, under Alpine's theories advanced in this lawsuit, Alpine would have suffered none of its claimed damaged had Alpine timely appealed USU's decisions.

Under Utah law, Alpine had the duty to mitigate its damages. A plaintiff "may not, either by action or inaction, aggravate the injury occasioned by the breach." Utah Farm Prod. Credit Ass'n v. Cox, 627 P.2d 62, 64 (Utah 1981); Reid v. Mut. of Omaha Ins. Co., 776 P.2d 896, 906 (Utah 1989) (recognizing that mitigation of damages is

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connection with the solicitation or award of a contract." Utah Code Ann. § 63-56-815(1)(a). Alpine is an actual contractor who claims to have been aggrieved by the request for proposals and award of the team physician contract to Intermountain.

[3] In fact, Alpine could have stayed USU's actions at the solicitation stage if it had sought judicial review of USU's decision to move forward with the request for proposals on April 14, 2006. Alpine had 14 days to appeal that ruling which would have prevented USU from moving forward with the request for proposals until a court determined that it was appropriate to do so.

Now, however, Alpine's claims against USU are barred by the statute of limitations in Utah Code section 63-56-817(1), which gives an "aggrieved" party "20 calendar days" to initiate an action after it knows or should have known of the facts giving rise to the action. As the district court noted, Alpine knew or should have known of its claim by at least May 18, 2006 when it received notice that the team physician contract had been awarded to Intermountain. Alpine did not file its claim until November 2, 2006, well after the 20-day statute of limitations had run.

required in tort cases as well as contract cases). To satisfy that duty, a plaintiff must make "reasonable efforts and expenditures." Madsen v. Murrey & Sons Co., 743 P.2d 1212, 1214 (Utah 1987) (recognizing that a plaintiff is not entitled to damages "which could have been avoided if the aggrieved party had acted in a reasonably diligent manner in attempting to lessen his losses as a consequence of that breach"). The duty to mitigate damages prevents a plaintiff from recovering "any item of damage arising from the wrongful conduct which could have been avoided or minimized by reasonable means." Angelos v. First Interstate Bank, 671 P.2d 772, 777 (Utah 1983).

As a matter of law, Alpine failed to mitigate its damages, and it is now barred from any relief. This court should affirm on that alternative ground, a ground that is at issue in Alpine's separate appeal involving USU, No. 20100275.

II. Alpine's Intentional Interference Claims Also Fail as a Matter of Law on Their Merits

To succeed on its claims of intentional interference with economic relations and intentional interference with contract, Alpine had to satisfy "essentially the same elements." (AOB at 9.) Those elements are: (i) intentional interference with existing or potential economic relations; (ii) for an improper purpose or by improper means; (iii) causing injury. Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982). Here, Alpine provided no evidence that Intermountain caused it any injury or acted with improper purpose or means.

Causation

Alpine presented no evidence that Intermountain interfered in any way with Alpine's relationships with Dr. Finnoff and USU. Based on the sworn testimony of the

people involved, Intermountain did not cause Dr. Finnoff to leave his employment with Alpine. Although Intermountain made an offer of employment to Dr. Finnoff, he rejected that offer because, among other reasons, the salary Intermountain offered was insufficient. Dr. Finnoff then waited a year before accepting a position in Oregon. Dr. Finnoff testified that Intermountain did nothing to interfere with his relationship with Alpine. Alpine did not dispute those facts in its summary judgment papers and provided no evidence to the contrary. A copy of Alpine's memorandum in opposition to Intermountain's motion for summary judgment is at Addendum C. It sets forth both Intermountain's statement of facts and Alpine's responses, which fail to dispute with admissible most of Intermountain's facts.

Likewise, there is no evidence that Intermountain interfered with the relationship between Alpine and USU. USU representatives testified that USU made the decision to rebid the team physician contract for its own reasons. And Alpine never explains how Intermountain's failed effort to recruit Dr. Finnoff in the spring of 2004 could possibly have been the reason for USU's decision to request competitive proposals two years later. As Mr. Mildenberger testified, Intermountain was awarded the contract in 2006 because it offered a superior plan for coverage of USU athletic events and because it identified particular health care professionals as the people who would be responsible for the treatment of USU athletes. Alpine provided no evidence that Intermountain interfered with Alpine's contractual or economic relations. Without such evidence, Alpine's claims fail as a matter of law.

Improper Purpose

In addition, there is no evidence that Intermountain had an improper purpose. "Parties are not liable for intentional interference with economic relations unless they act with an improper purpose or by improper means." Imperial Mobile Home Park, L.L.C. v. Kelsch, 1998 Utah App. LEXIS 171, *3 (Utah Ct. App. Nov. 27, 1998). Alpine alleges that Intermountain's efforts to be awarded the team physician contract and its recruitment of Dr. Finnoff were undertaken for the primary purpose of injuring Alpine. But "[c]ompetition is not an improper purpose." Overstock.com, Inc. v. SmartBargains, Inc., 2008 UT 55, ¶ 19, 192 P.3d 858. Alpine and Intermountain competed in Cache Valley, each offering orthopedic and related services to the public. Intermountain's desire to gain competitive advantage over Alpine by becoming the team physician for USU does not constitute an improper purpose. The improper purpose test is not applicable to the conduct of competitors in the marketplace who "struggle for personal advantage" and "inevitably damage one another." Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 307 (Utah 1982). For that reason, Alpine's claims fail as a matter of law.

Instead, Alpine must prove that Intermountain's "predominant purpose was to injure plaintiff." St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 201 (Utah 1991) (recognizing that "spite and a desire to do harm to the plaintiff for its own sake" are required for an interference claim). There is no evidence that Intermountain attempted to recruit Dr. Finnoff or to obtain the team physician contract for the primary purpose of harming Alpine. Any harm suffered by Alpine was merely the byproduct of Intermountain's legitimate competitive activity to secure benefits for itself. Leigh Furniture, 657 P.2d at 307 ("legitimate long-range economic motivation" is not tortious

interference). There is no evidence that injury to Alpine was Intermountain's purpose, let alone its "predominant purpose," as it must have been for Alpine's claim to succeed. Ferguson v. Williams & Hunt, 2009 UT 49, ¶ 36, 221 P.3d 205 ("recognizing that plaintiff's "conclusory assertion" about defendant's motivation was inadequate to support a claim for interference). Alpine's claims of tortious interference therefore fail as a matter of law for that additional reason.

Improper Means

"Improper means are present where the means . . . are contrary to law, such as violations of statutes, regulations, or recognized common law rules." St. Benedict's, 811 P.2d at 201. "Improper means include violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood" or the violation of "an established standard of a trade or profession." Id. There is no evidence that Intermountain did any of those.

It was neither unlawful nor unethical for Intermountain to attempt to recruit Dr. Finnoff. In fact, over the last decade, Alpine successfully recruited a number of Intermountain physicians. Alpine's Rule 30(b)(6) witness testified that it is neither illegal nor improper for a hospital to recruit physicians from Alpine. (R. 1260.)

Nor was it unlawful or unethical for Intermountain to offer to donate training room supplies to USU as part of its proposal for the team physician contract. As Intermountain's Ms. Huffman testified: "We tried to prepare a response that set us apart as a provider. One of the things that we felt like would set us apart would be the donation of supplies to Utah Sate University." (R. 1318.) The donation of supplies, like the recruitment of professionals, was a legitimate and completely ethical act of competition.

Therefore, Alpine has provided no evidence of either improper means or improper purpose. For that additional reason, Alpine's claims fail as a matter of law.

III. The District Court Did Not Abuse Its Discretion in Denying Alpine's Request for Discovery Under Rule 56(f)

Recognizing that it had insufficient evidence to oppose summary judgment, Alpine argues that the district court abused its discretion in failing to provide Alpine additional time to conduct discovery. Specifically, Alpine claims that it needed additional time to retain an expert who then could provide an opinion that Intermountain breached some professional standard by asking Dr. Finnoff whether he wanted to leave Alpine and join Intermountain, an invitation Dr. Finnoff declined. (AOB at 13-15.) Alpine's argument fails for three reasons.

First, denial of a Rule 56(f) motion is not an abuse of discretion—or is per se harmless—where summary judgment is appropriate on a ground other than the subject of the Rule 56(f) motion. Jones v. Bountiful City Corp., 834 P.2d 556, 561 (Utah Ct. App. 1992); American Towers Owners Ass'n, Inc. v. CCI Mech., Inc., 930 P.2d 1182, 1195 (Utah 1996); Brown v. Glover, 2000 UT 89, ¶ 38, 16 P.3d 540. Here, Dr. Finnoff testified that he left Alpine a year after Intermountain tried to recruit him for reasons that had nothing to do with Intermountain's offer of employment. Dr. Finnoff explained his reasons for terminating his employment with Alpine as follows: "I didn't know if the contract with USU would stay [at Alpine], I had a good opportunity to work in a clinic [in Oregon] seeing the type of athletes that I was very interested in, they had a close affiliation with the U.S. ski team, and they were in a place we both liked, my wife did not like Logan, and I wouldn't have to work evenings and weekends, and the salary looked

like it would be similar, competitive" with his salary at Alpine. (R. 1241.) Thus, even if Intermountain had violated some professional standard in attempting to recruit Dr. Finnoff, that violation had no causal relationship with Dr. Finnoff's departure.

Second, Alpine's proposed expert opinion would have made no difference because the "professional standard" test has no application in the commercial setting. Intermountain has located no Utah cases holding that violation of a professional standard constitutes an improper means, let alone holding that violation of a professional standard in the commercial setting constitutes an improper means, as Alpine contends here. As Judge Posner has explained, "the established standards of a trade or profession in regard to competition, and its ideas of unethical competitive conduct, are likely to reflect a desire to limit competition for reasons related to the self-interest of the trade or profession rather than the welfare of its customers or clients." Speakers of Sport, Inc. v. ProServ, Inc., 178 F.3d 862, 867 (7th Cir. 1999). For that reason, "the tort of interference with business relationships should be confined to cases in which the defendant employed unlawful means to stiff a competitor." Id. Here, Alpine and Intermountain were competitors, and it is undisputed that Intermountain did nothing illegal. Therefore, even if Intermountain had violated some unspecified professional standard—which it did not—that violation would not save Alpine's intentional interference claims.

Third, the district court did not abuse its discretion in denying the motion for discovery under Rule 56(f) because Alpine did not explain why it should have taken Alpine three years to retain an expert and produce an expert opinion, nor did it identify any information its hypothetical expert would have needed had he or she been retained. In other words, Alpine did not request with its Rule 56(f) motion to discover evidence in

the control of Intermountain that Intermountain had refused to provide. Energy Mgmt. Servs., L.L.C. v. Shaw, 2005 UT App 90, ¶ 12, 110 P.3d 158 (where other party controls the information, the party must request the information and that request must be denied). Nor did Alpine explain what information it needed, why it could not have discovered that information previously, or how that information would preclude summary judgment. Aspenwood, L.L.C. v. C.A.T., L.L.C., 2003 UT App 28, ¶¶ 19-23, 73 P.3d 947.

Rule 56(f) provides relief to a party "[w]hen affidavits are unavailable" to oppose summary judgment based on the party's inability to complete fact discovery. Utah R. Civ. P. 56(f). Pursuant to that rule, "should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court . . . may order a continuance to permit affidavits to be obtained." Id. To comply with Rule 56(f), the party must show that "facts essential to justify" its opposition are "within the other movant's exclusive knowledge or control," necessitating further time for discovery. Campbell, Maack & Sessions v. Debry, 2001 UT App 397, ¶ 9, 38 P.3d 984.

This case has been pending since November 2006, and Alpine first asserted claims against Intermountain in its amended complaint in July 2007. After nearly three years of fact discovery, Intermountain's production of hundreds of pages of documents, and numerous depositions, Alpine does not explain what discovery is lacking. Instead, all of the information Alpine's expert needs to form an opinion about a professional standard is,

and always has been, within Alpine's control. Alpine provides no explanation why it waited three years to find an expert on what it has always claimed to be a key issue.[4]

Rule 56(f) was not designed to protect a party from its own tardiness in selecting experts. It was designed rather to enable parties to complete fact discovery before having to respond to summary judgment motions. Alpine has had ample opportunity to secure an expert, provide him or her with pertinent factual material and obtain an affidavit in order to oppose summary judgment. Reeves v. Geigy Pharm., Inc., 764 P.2d 636, 639 (Utah Ct. App. 1988) (denying Rule 56(f) request where counsel gave "no explanation . . . for her inability to obtain opposing affidavits during the lengthy period from the summer of 1985 through April 1986, after completion of the depositions and receipt of responses to interrogatories and requests for documents"); Debry, 2001 UT App 397, ¶ 12 (recognizing that where the "expert possessed sufficient information to form an opinion," a Rule 56(f) request seeking time to allow the expert to submit an affidavit should be denied).

Moreover, it is doubtful that there is a qualified expert to express the opinion Alpine wants—that Intermountain's recruitment of Dr. Finnoff violated the established standards of the profession. Alpine's Rule 30(b)(6) witness testified as follows: "Q. Do you think it's improper for a hospital to recruit physicians from Alpine? A. No. Q. Do you think it's improper for Alpine to recruit physicians from a hospital? A. No." (R.

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[4] That issue—Dr. Finnoff's recruitment—has been known to Alpine at least since it filed its First Amended Complaint in July 2007. (R. 535 ("IHC, for an improper purpose and with improper means, . . . intentionally interfered with Plaintiff's existing and prospective economic relations, by and through its attempted recruitment of Dr. Jon Finnoff, during the time when Dr. Finnoff was an employee and business partner of Alpine O.S., and during the time when the Agreement was in full force and effect.").)

1260.) And there were an expert to provide such an opinion, Alpine had ample opportunity to obtain an affidavit from an expert before it submitted its opposition to the motion for summary judgment. Alpine cannot rely on Rule 56(f) to cure its failure to present a genuine issue of material fact to oppose summary judgment.

Utah courts have repeatedly upheld the denial of Rule 56(f) motions under similar circumstances. For example, in Campbell, Maack & Sessions v. Debry, the court affirmed the trial court's denial of relief where the Rule 56(f) movant argued she had not yet retained an expert to analyze facts developed over years of discovery. In that case, as in this case, the Rule 56(f) movant had nearly three years to conduct discovery which "was more than adequate to uncover any available evidence that would support her . . . claim." 2001 UT App 397, ¶¶ 11-14. And in that case, as here, the movant's Rule 56(f) affidavit failed to explain why she was unable to submit evidentiary affidavits in opposition to the motion for summary judgment. Id. ¶ 14.

Likewise in Jensen v. Smith, 2007 UT App 152, 163 P. 3d 657, the court rejected a Rule 56(f) application by a party who professed to need more time to retain an expert to oppose a motion for summary judgment. Jensen held that two and a half years of discovery was ample for the Rule 56(f) movant to gather the facts and then retain and prepare an expert witness. Id. ¶¶ 4-5. Here, the district court did not abuse its discretion in failing to allow Alpine to conduct "discovery" consisting of locating and obtaining an opinion from an expert it could have secured three years ago. This court should affirm.

Conclusion

This court should affirm the district court's entry of summary judgment on Alpine's claims against Intermountain. Alpine failed to mitigate its damages by

appealing the decisions made by USU that Alpine claims caused the damages it seeks here. Alpine also failed to provide any evidence that Intermountain had an improper purpose or acted through an improper means, let alone that anything Intermountain did caused USU to request competitive proposals for the position of team physician, the decision at the root of all of Alpine's alleged injuries.

This court also should affirm the district court's denial of Alpine's request for additional discovery under Rule 56(f) because that rule is designed to allow a nonmoving party to obtain information it does not possess to oppose summary judgment, but it is not designed to provide a nonmoving party an extension to present evidence within its own control. Regardless, the proposed evidence here would have made no difference as a matter of law. This court should affirm.

DATED this 11th day of April, 2011.

SNELL & WILMER L.L.P.

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Certificate of Service

I hereby certify that on the 11th day of April, 2011, two true and correct copies of **Brief of Appellee Intermountain Health Care, Inc.** were served via U.S. Mail, postage-prepaid, upon the following:

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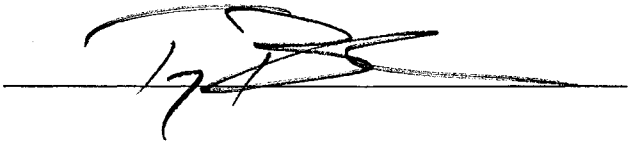

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Tab A

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IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR

CACHE COUNTY, STATE OF UTAH

ALPINE ORTHOPAEDIC SPECIALISTS, L.L.C., Plaintiff, v. UTAH STATE UNIVERSITY and INTERMOUNTAIN HEALTHCARE, INC., Defendants.	**ORDER GRANTING INTERMOUNTAIN HEALTH CARE, INC.'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S RULE 56(f) MOTION** Case No. 060102502 Judge Clint S. Judkins

On August 18, 2010, the Court heard oral argument on the motion for summary judgment of defendant Intermountain Health Care, Inc. ("Intermountain") and the Rule 56(f) motion of plaintiff Alpine Orthopaedic Specialists, L.L.C. ("Plaintiff"). Katherine A. Carreau of Snell & Wilmer L.L.P. appeared on behalf of Intermountain, and R Blake Hamilton of Stirba &

Associates appeared on behalf of Plaintiff. Based upon the supporting and opposing memoranda and exhibits thereto, the argument of counsel, and the record in this matter, and for good cause appearing,

IT IS HEREBY ORDERED that

1. Plaintiff's Rule 56(f) Motion is DENIED. Plaintiff failed to demonstrate any specific fact demonstrating that Intermountain intentionally interfered with Plaintiff's existing or potential economic relations or that Intermountain caused an injury to Plaintiff. Permitting Plaintiff more time under Rule 56(f) to engage an expert to opine on what would be proper or improper in business recruiting would not create a genuine issue of material fact for trial. Plaintiff's Rule 56(f) request relates to only one element of the claims against Intermountain and would not create a genuine issue of material fact for trial with regard to the other elements of Plaintiff's claims.

2. Intermountain's Motion for Summary Judgment is GRANTED, and all claims against Intermountain Health Care, Inc. are hereby dismissed with prejudice. Pursuant to Rule 56, to defeat summary judgment, Plaintiff was required to set forth facts to show there is a genuine issue of disputed material fact for trial. Plaintiff has not set forth any specific facts showing that Intermountain intentionally interfered with Plaintiff's existing or potential economic relations, that Intermountain acted with an improper purpose or by improper means, or that Intermountain caused any injury to Plaintiff.

On January 29, 2010, the Court granted summary judgment in favor of Utah State University on all claims against it. This order adjudicates all remaining claims in this case and as such constitutes the final order and judgment in this case.

DATED this 20 day of Sept., 2010.

BY THE COURT:

/S/ CLINT S. JUDKINS

Honorable Clint S. Judkins
Judge, First Judicial District Court

Tab B

1 of 2 DOCUMENTS

UTAH CODE ANNOTATED

*** ARCHIVE DATA ***

*** STATUTES CURRENT THROUGH THE 2005 SECOND SPECIAL SESSION ***
*** ANNOTATIONS CURRENT THROUGH 2006 UT 7, 2006 UT APP 33 ***
*** FEBRUARY 9, 2006(FEDERAL CASES) ***

TITLE 63. STATE AFFAIRS IN GENERAL
CHAPTER 56. UTAH PROCUREMENT CODE
PART 4. SOURCE SELECTIONS AND CONTRACT FORMATION

Utah Code Ann. § 63-56-408 (2005)

§ 63-56-408. Use of competitive sealed proposals in lieu of bids -- Procedure

(1) (a) When, according to rules established by the Procurement Policy Board, the chief procurement officer, the head of a purchasing agency, or a designee of either officer above the level of procurement officer determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the state, a contract may be entered into by competitive sealed proposals.

(b) (i) Competitive sealed proposals may be used for the procurement of services of consultants, professionals, and providers as defined by the policy board by rule, whether or not the determination described in this subsection has been made.

(ii) The policy board shall make rules establishing guidelines to assure maximum practicable competition in those procurements, including the relative importance, if any, of the fee to be charged by an offeror.

(iii) The rules may provide that it is either not practicable or not advantageous to the state to procure certain types of supplies, services, or construction by competitive sealed bidding or competitive sealed proposals.

(2) (a) Proposals shall be solicited through a request for proposals.

(b) Public notice of the request for proposals shall be given in accordance with policy board rules.

(3) (a) Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation.

(b) A register of proposals shall be prepared in accordance with policy board rules and shall be open for public inspection after the contract is awarded.

(4) The request for proposals shall state the relative importance of price and other evaluating factors.

(5) (a) As provided in the request for proposals and under policy board rules, discussions may be conducted with responsible offerors who submit proposals for the purpose of assuring full understanding of, and responsiveness to, solicitation requirements.

(b) Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the contract is awarded for the purpose of obtaining best and final offers.

(c) In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

(6) (a) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into consideration price and the evaluation factors set forth in the request for proposals.

(b) No other factors or criteria shall be used in the evaluation.

(c) The contract file shall contain the basis on which the award is made.

HISTORY: C. 1953, 63-56-21, enacted by L. 1980, ch. 75, § 1; 1983, ch. 299, § 1; 1993, ch. 232, § 9; renumbered by L. 2005, ch. 25, § 39.

NOTES: AMENDMENT NOTES. --The 2005 amendment, effective May 2, 2005, renumbered this section, which formerly appeared as § 63-56-21.

1 of 2 DOCUMENTS

UTAH CODE ANNOTATED

*** ARCHIVE DATA ***

*** STATUTES CURRENT THROUGH THE 2005 SECOND SPECIAL SESSION ***
*** ANNOTATIONS CURRENT THROUGH 2006 UT 7, 2006 UT APP 33 ***
*** FEBRUARY 9, 2006(FEDERAL CASES) ***

TITLE 63. STATE AFFAIRS IN GENERAL
CHAPTER 56. UTAH PROCUREMENT CODE
PART 8. LEGAL AND CONTRACTUAL REMEDIES

Utah Code Ann. § 63-56-802 (2005)

§ 63-56-802. Effect of timely protest

In the event of a timely protest under Subsection 63-56-801(1), 63-56-810(1), or 63-56-815(1), the state shall not proceed further with the solicitation or with the award of the contract until all administrative and judicial remedies have been exhausted or until the chief procurement officer, after consultation with the head of the using agency or the head of a purchasing agency, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the state.

HISTORY: C. 1953, 63-56-46, enacted by L. 1980, ch. 75, § 1; 1987, ch. 92, § 126; renumbered by L. 2005, ch. 25, § 71.

NOTES: AMENDMENT NOTES. --The 2005 amendment, effective May 2, 2005, renumbered this section, which formerly appeared as § 63-56-46, and updated references.

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UTAH CODE ANNOTATED

*** ARCHIVE DATA ***

*** STATUTES CURRENT THROUGH THE 2005 SECOND SPECIAL SESSION ***
*** ANNOTATIONS CURRENT THROUGH 2006 UT 7, 2006 UT APP 33 ***
*** FEBRUARY 9, 2006(FEDERAL CASES) ***

TITLE 63. STATE AFFAIRS IN GENERAL
CHAPTER 56. UTAH PROCUREMENT CODE
PART 8. LEGAL AND CONTRACTUAL REMEDIES

Utah Code Ann. § 63-56-815 (2005)

§ 63-56-815. Jurisdiction of district court

(1) The district court shall have jurisdiction over an action, whether the action is at law or in equity, between the state and:

(a) a bidder, offeror, or contractor, prospective or actual, who is aggrieved in connection with the solicitation or award of a contract;

(b) a person who is subject to a suspension or debarment proceeding; and

(c) a contractor, for any cause of action which arises under, or by virtue of a contract.

(2) The provisions of Title 63, Chapter 30d, Part 4, Notice of Claim Against a Governmental Entity or a Government Employee, and Section 63-30d-601 do not apply to actions brought under this chapter by an aggrieved party for equitable relief or reasonable costs incurred in preparing or appealing an unsuccessful bid or offer.

HISTORY: C. 1953, 63-56-59, enacted by L. 1980, ch. 75, § 1; 2002, ch. 178, § 3; 2004, ch. 267, § 37; renumbered by L. 2005, ch. 25, § 84.

NOTES: AMENDMENT NOTES. --The 2002 amendment, effective May 6, 2002, substituted the current statutory references for "63-30-2 through 63-30-19" and added the language beginning "by an aggrieved party" at the end of Subsection (2) and made a stylistic change.

The 2004 amendment, effective July 1, 2004, in Subsection (2), substituted the language beginning "Title 63, Chapter 30d" and ending "Section 63-30d-601" for "Sections 63-30-11, 63-30-12, 63-30-14, 63-30-15, and 63-30-19."

The 2005 amendment, effective May 2, 2005, renumbered this section, which formerly appeared as § 63-56-59.

1 of 1 DOCUMENT

UTAH CODE ANNOTATED

*** ARCHIVE DATA ***

*** STATUTES CURRENT THROUGH THE 2005 SECOND SPECIAL SESSION ***
*** ANNOTATIONS CURRENT THROUGH 2006 UT 7, 2006 UT APP 33 ***
*** FEBRUARY 9, 2006(FEDERAL CASES) ***

TITLE 63. STATE AFFAIRS IN GENERAL
CHAPTER 56. UTAH PROCUREMENT CODE
PART 8. LEGAL AND CONTRACTUAL REMEDIES

Utah Code Ann. § 63-56-817 (2005)

§ 63-56-817. Statutes of limitations

(1) Any action under Subsection 63-56-815(1)(a) shall be initiated as follows:

(a) within 20 calendar days after the aggrieved person knows or should have known of the facts giving rise to the action; provided, however, that an action with respect to an invitation for bids or request for proposals shall be initiated prior to the opening of bids or the closing date for proposals unless the aggrieved person did not know and should not have known of the facts giving rise to the action prior to bid opening or the closing date for proposals; or

(b) within 14 calendar days after receipt of a final administrative decision pursuant to either Section 63-56-806 or Section 63-56-813, whichever is applicable.

(2) Any action under Subsection 63-56-815(1)(b) shall be commenced within six months after receipt of a final administrative decision pursuant to Section 63-56-806 or Section 63-56-813, whichever is applicable.

(3) The statutory limitations on an action between private persons on a contract or for breach of contract shall apply to any action commenced pursuant to Subsection 63-56-815(1)(c), except notice of appeals from the Procurement Appeals Board pursuant to Section 63-56-814 concerning actions on a contract or for breach of contract shall be filed within one year after the date of the Procurement Appeals Board decision.

HISTORY: C. 1953, 63-56-61, enacted by L. 1980, ch. 75, § 1; 1981, ch. 259, § 6; renumbered by L. 2005, ch. 25, § 86.

NOTES: AMENDMENT NOTES. --The 2005 amendment, effective May 2, 2005, renumbered this section, which formerly appeared as § 63-56-61, and updated references throughout the section.

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Tab C

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IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY

STATE OF UTAH, LOGAN DEPARTMENT

ALPINE ORTHOPAEDIC SPECIALISTS, L.L.C., a Utah Corporation, Plaintiff, v. UTAH STATE UNIVERSITY, and INTERMOUNTAIN HEALTHCARE, INC., Defendants.	**ALPINE'S JOINT MEMORANDUM IN SUPPORT OF RULE 56(f) MOTION AND OPPOSITION TO INTERMOUNTAIN HEALTHCARE, INC.'S MOTION FOR SUMMARY JUDGMENT** Case No. 060102502 Judge Clint S. Judkins **SUBJECT TO PROTECTIVE ORDER REGARDING CONFIDENTIAL INFORMATION**

Plaintiff, Alpine Orthopaedic Specialists, L.L.C. ("Alpine"), by and through undersigned counsel of record, and pursuant to Utah R. Civ. P. 56 and 7, hereby submits this Joint Memorandum in Support of Rule 56(f) Motion and Opposition to Intermountain Healthcare, Inc ("IHC") Motion for Summary Judgment.

STATEMENT OF FACTS IN DISPUTE[1]

Pursuant to Rule 7(c)(3)(B), Alpine disputes the following facts from IHC's Motion for Summary Judgment:

1. Alpine and USU entered into the Personal Services Agreement on March 13, 2001. Under that Agreement, Alpine was to provide team physician services to USU athletes. First Amended Complaint at ¶ 8. The initial term of the Personal Services Agreement was for five years, and it expired in March 2006. Personal Services Agreement (Exhibit A to IHC's Memorandum) at ¶ 3.1; Deposition of Robert Lee Doty (August 10, 2009) ("Doty Dep.") at 45. (Excerpts of Dr. Doty's deposition are collected in Exhibit B to IHC's Memorandum.)

Response: Alpine had a valid contract with USU; assured USU that it would continue to provide services according to the terms of the contract; and, the contract was to renew and expire in March 2011. (April 9, 2009 Mem. Decision.)

[1] IHC's statement of facts includes a number of irrelevant, inadmissible and immaterial details. However, except as described below, Alpine does not contest those facts for purposes of this Motion only. Alpine reserves the right to contest all of IHC's assertions of fact in the future.

4. On March 22, 2006, USU's Athletic Director, Randy Spetman, responded to Alpine's March 20 letter stating that USU would "continue to solicit proposals as initiated by its ... RFP and award a contract as outlined therein." He also advised Alpine that the Personal Services Agreement had terminated on March 12, 2006. First Amended Complaint at ¶ 12.

Response: The PSA did not terminate on March 12, 2006. The PSA contains an automatic renewal provision, and thus does not terminate until March of 2011. This Court has determined that the PSA is binding and enforceable. (April 9, 2009 Mem. Decision.)

5. Alpine responded to the RFP with a proposal on March 28, 2006. Covington Dep. at 118 and Ex. 18 thereto.

Response: Alpine attempted only to legally mitigate damages associated with USU's breach of the PSA and, therefore, responded to the 2006 RFP. Alpine's claims involve only USU's breach of the 2001 PSA and Intermountain Healthcare's interference with the 2001 PSA. (Pl. First Am. Compl.; April 9, 2009 Mem. Decision.)

7. Acting as Chief Procurement Officer for USU, Mr. Covington rejected Alpine's appeal on April 14, 2006. Mr. Covington held that the Personal Services Agreement was issued in violation of the Utah Procurement Code. He advised Alpine that it had a right to judicial review of the decision as provided in the Code. Mr. Covington's decision was hand-delivered to Alpine on April 14, 2006. Nelson Dep. at 151 and Ex. 29 thereto; Covington Dep. at 92 and Ex. 10 thereto.

Response: Alpine denies that a valid sole source determination had not been made when the PSA was executed. This Court held that the Defendant's sole source determination was ratified properly under the UPC and, therefore, ***all*** provisions of the PSA are valid and binding, including the automatic renewal provision. (*See* April 9, 2009, Mem. Decision.)

8. Alpine did not seek judicial review of USU'S decision to solicit proposals.

Response: The March 2001 PSA is a binding contract. (April 9, 2009 Mem. Decision.) Pursuant to Utah Code Ann. § 63G-6-815 and 63G-6-817(3), as a contractor, any cause of action Alpine has that arises under, or by virtue of, a contract is subject to a six year statute of limitations. Accordingly, Alpine did not need to seek judicial review within 14 days, and any characterization otherwise is legally flawed.

9. By a letter dated May 18, 2006, USU advised Alpine that it had awarded the new team physician contract to IHC. First Amended Complaint at ¶ 68.

Response: The March 2001 PSA is a binding contract. (April 9, 2009 Mem. Decision.) Awarding any contract for team physician services to IHC was done in breach of the March 2001 PSA.

10. Alpine did not seek judicial review of USU's decision to award the team physician contract to IHC. Order Granting Defendant Utah State University's Motion for Summary Judgment (January 29, 2010).

Response: The March 2001 PSA is a binding contract. (April 9, 2009 Mem. Decision.) Pursuant to Utah Code Ann. § 63G-6-815 and 63G-6-817(3), as a contractor, any

cause of action Alpine has that arises under, or by virtue of, a contract is subject to a six year statute of limitations. Accordingly, Alpine did not need to seek judicial review within 14 days, and any characterization otherwise is legally flawed.

11. Alpine filed this lawsuit on November 2, 2006, 177 days after May 18, 2006 and well outside the 20-day statue of limitations in Utah Code § 63G-6-817(1).

Response: The March 2001 PSA is a binding contract. (April 9, 2009 Mem. Decision.) Pursuant to Utah Code Ann. § 63G-6-815 and 63G-6-817(3), as a contractor, any cause of action Alpine has that arises under, or by virtue of, a contract is subject to a six year statute of limitations. Accordingly, Alpine was well within the relevant statute of limitations.

15. IHC never saw or had knowledge of the terms of the Personal Service Agreement prior to this litigation. Deposition of Teri Chase-Dunn (October 1, 2009) ("Chase-Dunn Dep.") at 73-74. (Excerpts of Ms. Chase-Dunn's deposition are collected in Exhibit 6 to IHC's Memorandum.) *See also* Deposition of Jana Huffman (October 1, 2009) ("Huffman Dep.") at 38. (Excerpts of Ms. Huffman's deposition are collected in Exhibit 7 to IHC's Memorandum.)

Response: This statement is clearly untrue. In 2001, Alpine and IHC entered into a Letter of Agreement so that Alpine could present a proposal to USU. The Letter of Agreement stated that Alpine would provide a sports medicine physician, and that IHC would provide student health and other services. Further, IHC's Request for Provider ("RFP") for 2006 was prepared in 2005. According to the RFP, IHC knew that Alpine had the contract, the length of

the contract was five years and would be bid in the spring of 2006. (A true and correct copy of the 2006 RFP is attached hereto as Exhibit "A")

16. According to Dale Mildenberger, USU's head athletic trainer, the University's motivation for re-bidding the team physician contract in the spring of 2006 was twofold: (a) the Personal Services Agreement had not been bid lawfully in 2000; and, (b) USU needed to protect itself and not be dependent on any one individual physician. Deposition of Dale Mildenberger (April 16, 2007) ("Mildenberger Dep.") at 138-40. (Excerpts of Mr. Mildenberger's deposition are collected in Exhibit 8 to IHC's Memorandum.)

Response: The Personal Services Agreement was bid lawfully in 2000. (April 9, 2009 Mem. Decision.)

17. As a result of the RFP process, IHC was awarded the team physician contract.

Response: The March 2001 PSA is a binding contract. (April 9, 2009 Mem. Decision.) Awarding any contract for team physician services to IHC was done in breach of the March 2001 PSA.

18. The major factors influencing USU's award of the team physician contract to IHC were IHC's detailed plan for multiple-site, multiple-event coverage. Mildenberger Dep. at 194.

Response: *The Salt Lake Tribune* reported that the major factors influencing USU's award of the team physician contract to IHC were "a number of extras, including $59,000 in physical therapy equipment, $100,000 in bandages, wraps, and other supplies. ... As a public

institution we couldn't simply ignore the donation of equipment and supplies. ..." (A true and correct copy of the November 3, 2006 article is attached hereto as Exhibit "B")

23. A year before, in the spring of 2004, Dr. Finnoff communicated with IHC about the possibility of employment at Logan Regional Hospital. These communications consisted of two brief conversations with Jana Huffman. Finnoff Dep. at 102-05; Huffman Dep. at 67. At the time, Dr. Finnoff knew "that there was a possibility that Alpine Orthopaedics may not have a contract on a permanent basis by virtue of his conversations with Mr. Mildenberger. Finnoff Dep. at 62.

Response: IHC knew that USU was very happy with its team physician services when Alpine was providing the services and that USU was not likely to change providers. IHC wanted to hire Dr. Finoff in an effort to obtain the USU team services contract. Deposition of Jonathan Finoff at 63, attached hereto as Exhibit "C".

25. In the spring of 2004, IHC made an offer of employment to Dr. Finnoff. Dr. Finnoff declined the offer because, among other reasons, the proposed salary was inadequate, he was subject to a non-compete agreement with Alpine, and he and his wife did not want to live in Logan long-term. Finnoff Dep. at 64.

Response: IHC wanted to see Dr. Finoff's employment contract with Alpine to determine if there was a way to break the contract in order to have Dr. Finoff work with IHC. Finoff Dep. at 65.

26. Dr. Finnoff testified that he did not believe that it was improper for IHC to recruit him. Finnoff Dep. at 116.

Response: Dr. Finoff is not an expert on the standards of professionalism within the medical community and, therefore, is not qualified to give an opinion on whether IHC's conduct was improper. Improper is a term with legal significance in this case, and Dr. Finoff is unqualified to give an opinion stating a legal conclusion.

27. Dr. Finnoff testified that IHC did not interfere with his relationship with Alpine. Finnoff Dep. at 71.

Response: Dr. Finoff is not an expert on the standards of professionalism within the medical community and, therefore, is not qualified to give an opinion on whether IHC's conduct interfered. Interfere is a term with legal significance in this case, and Dr. Finoff is unqualified to give an opinion stating a legal conclusion.

SUMMARY JUDGMENT STANDARD

The civil rule governing summary judgment provides, in pertinent part:

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Utah R. Civ. P. 56(c).

When reviewing a motion for summary judgment, "[t]he law requires that, as much as is possible, the trial court view the facts and reasonable inferences drawn therefrom in a light most favorable to the nonmoving party." *Surety Underwriters v. E & C Trucking, Inc.*, 10 P.3d 338,

345 (Utah 2000). *See also Lach v. Deseret Bank*, 746 P.2d 802, 804 (Utah App. 1987) ("In considering a summary judgment motion, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment."). The Court may not grant a motion for summary judgment unless "it is clear from the undisputed facts that the opposing party cannot prevail." *Lach*, 746 P.2d at 804. (citing *Frisbee v. K & K Const. Co.*, 676 P.2d 387, 389 (Utah 1984)). "A genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ on whether defendant's conduct measures up to the required standard." *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah, 1982) (citing *Singleton v. Alexander,* 19 Utah 2d 292, 431 P.2d 126 (1967)).

Further, the nonmoving party can petition the court to deny or continue the motion for summary judgment in order to discover facts essential to the claims. "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Utah R. Civ. P. 56(f).

ARGUMENT

In this case, it is necessary to prove that IHC acted with improper means or purpose, which can be established by showing that IHC's means violated established professional standards of the medical profession. *Overstock.com, Inc. v. SmartBargains, Inc.*, 192 P.3d 858,

864 (Utah 2008). Alpine anticipates obtaining expert reports to show that IHC's means in this case violated accepted standards of the profession.

"Rule 56(f) motions opposing a summary judgment motion on the ground that discovery has not been completed should be granted liberally unless they are deemed dilatory or lacking in merit." *Salt Lake County v. Western Dairymen Co-op.*, 48 P.3d 910, 917 (Utah 2002). Alpine's Motion in the present case should be granted since it is neither "dilatory" nor "lacking in merit."

A party's Rule 56(f) motion for a continuance is not dilatory if the party has (1) already initiated discovery proceedings, (2) diligently seeks access to information that is within the sole control of the adverse party, and (3) is denied an adequate opportunity to conduct the desired discovery. *Id.* In this case, Alpine has been diligent in initiating and responding to discovery proceedings. On June 1, 2010, this Court granted Alpine's motion for enlargement of time extending the deadlines on the current scheduling order. The parties have submitted an Amended Scheduling Order stating that Alpine's expert reports are to be filed 30 days after the Court's decision on this motion. The deadline for expert reports has not passed and, therefore, Alpine has not delayed in conducting discovery or neglected its discovery duties. Alpine has sought this information diligently and the information reviewed by the expert has been in IHC's possession. Should this Court grant this Motion, Alpine would be denied an adequate opportunity to pursue discovery that would allow Alpine to prove essential elements of its claim; namely the standards of professional conduct and whether they were breached.

A Rule 56(f) motion has merit when it targets core issues that might defeat the pending summary judgment motion. *Id.* A core issue in this case is whether IHC violated professional standards and intentionally interfered with economic relations and contract. Professional opinion is needed to determine the proper professional standards and whether those standards were violated. Expert testimony in this area would create a material issue of fact sufficient to survive a motion for summary judgment and would likely allow Alpine to prevail at trial. Since the expert testimony might defeat the pending summary judgment motion, Alpine's Rule 56(f) motion has merit and should be granted.

Alpine alleges two claims against IHC -- intentional interference with economic relations and intentional interference with contract. Alpine must prove essentially the same elements for both of these claims. *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 200 (Utah 1991) (recognizing that the tort of intentional interference with economic relations "protects both existing contractual relationships and prospective relationships of economic advantage not yet reduced to a formal contract.") Thus, Alpine must show that "(1) that [IHC] intentionally interfered with [Alpine's] existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to [Alpine]." *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982). Here, it is clear that IHC intentionally interfered with Alpine's existing or potential economic relations by and through its attempted recruitment of Dr. John Finnoff during the time when Dr. Finnoff was an employee and business partner of Alpine O.S., and during the time when the Agreement was in full force and effect. It is also clear that IHC's

intentional interference injured Alpine. Furthermore, through future expert witness testimony, Alpine will be able to establish that IHC acted with an improper means or purpose.

I. IHC Intentionally Interfered With Alpine And IHC's Intentional Interference Injured Alpine.

In this case, it is clear that IHC intentionally interfered with Alpine's existing or potential economic relations by and through its attempted recruitment of Dr. John Finnoff during the time when Dr. Finnoff was an employee and business partner of Alpine O.S., and during the time when the Agreement was in full force and effect. IHC recruited Dr. Finoff and attempted to lure him away from Alpine. IHC even offered to look at Dr. Finoff's employment contract with Alpine to see if it could help him break his contract. IHC recruited Dr. Finoff when he was employed at Alpine and working as the team physician for USU. IHC wanted to hire Dr. Finoff in an attempt to secure the USU team physician services contract.

In *Leigh*, the court determined that driving away existing or potential customers is "the archetypal injury that this cause of action was devised to remedy." 657 P.2d at 306. IHC's intentional interference with Dr. Finoff injured Alpine because it led to Dr. Finoff leaving Alpine and to Alpine losing the USU team physician services contract. Furthermore, USU is beloved in the community and the team physician is a high profile position. The contract is desirable because it brings in more patients by referral and reputation. Alpine has been harmed economically by the loss of the USU team physician services contract. Alpine has been injured not only by the loss of money from USU directly, but also by the referrals and reputation that

comes through being the team physician. *See* Affidavit of Derk G Rasmussen Dated June 8, 2010, attached as Exhibit "D" hereto.

II. Alpine Will Be Able to Establish Through Expert Witness Testimony That IHC Violated An Established Standard Of Profession And, Thus, Acted With Improper Means Or Purpose.

Improper means or purpose is defined as "means used to interfere with a party's economic relations [that] are contrary to law, such as violations of statutes, regulations or recognized common law rules. Improper means include violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation or disparaging falsehood. Means may also be improper or wrongful because they violate an established standard of trade or profession." *Overstock.com, Inc. v. SmartBargains, Inc.*, 192 P.3d 858, 864 (Utah 2008). In this case, Alpine anticipates that through expert witness testimony, it will be able to establish that IHC violated an established standard of profession and, thus, acted with improper means or purpose. (Affidavit of R. Blake Hamilton attached hereto as Exhibit "E")

III. Alpine Has Attempted To Mitigate Damages.

Mitigation of damages is intended to "prevent one against whom a wrong has been committed from recovering any item of damage arising from the wrongful conduct which could have been avoided or minimized by reasonable means." *Angelos v. First Interstate Bank of Utah,* 671 P.2d 772, 777 (Utah 1983). However, the burden of proving plaintiff has not mitigated its damages and that its award should be correspondingly reduced is on the defendant. *John Call Engineering, Inc. v. Manti City Corp.*, 795 P.2d 678, 680 (Utah Ct. App. 1990)

In this action, IHC cannot meet its burden of proving that Alpine failed to mitigate its damages. Alpine attempted to mitigate damages by submitting a proposal to USU's RFP, even though Alpine was under no obligation to do so, and let USU know of this position. Regardless, USU unlawfully breached its contract with Alpine by failing to honor the automatic renewal provision. Alpine attempted to mitigate the damages caused by USU's breach by submitting a proposal to the new RFP.

CONCLUSION

Accordingly, Alpine respectfully requests this Court deny IHC's Motion for Summary Judgment.

DATED this 8 day of June 2010.

STIRBA & ASSOCIATES

By: _____

PETER STIRBA
R. BLAKE HAMILTON
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of June, 2010, I caused to be served a true copy of the foregoing **ALPINE'S JOINT MEMORANDUM IN SUPPORT OF RULE 56(F) MOTION AND OPPOSITION TO INTERMOUNTAIN HEALTHCARE, INC.'S MOTION FOR SUMMARY JUDGMENT** by the method indicated below, to the following:

Robert D. Barclay Assistant Attorney General 155 Old Main, Utah State University Logan, Utah 84322-1465	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Facsimile ( ) Email
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