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Utah Court of Appeals

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Scott Williams; Brian S. Platt; Strong and Hanni; Attorney for Defendant.
James C. Haskins; Thomas N. Thompson; Haskins and Associates LLC; Attorney for Appellant.

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UTAH COURT OF APPEALS

GLADE TERRY and KAIRLE TERRY, Plaintiffs and Appellants, **vs.** C. WILLIAM BACON, M.D.; CENTRAL UTAH CLINIC, P.C., and UTAH VALLEY REGIONAL MEDICAL CENTER, Defendants and Appellees.	Appellate Court No. 20100893-CA District Court No. 070402917 (Oral Argument Requested)

BRIEF OF APPELLANT

Appeal from a judgment entered by the
Fourth Judicial District Court
In and For Utah County, State of Utah
Honorable Samuel McVey

Scott Williams (#3498)
Briant S. Platt (#11819)
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
Telephone: (801) 532-7080
Facsimile: (801) 596-1508

James C. Haskins (#1406)
Thomas N. Thompson (#3243)
HASKINS & ASSOCIATES, L.L.C.
136 East South Temple, Suite 1420
Salt Lake City, Utah 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

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UTAH APPELLATE COURTS
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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78A-103(2)(j) (2009).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

A. Whether the District Court erred in determining that the attorney-client privilege between the Plaintiffs and their former attorney herein was properly waived, allowing their former attorney to testify against them and in support of the Respondent's position that this case was settled and that the Plaintiffs consented to the alleged settlement.

Standard of Review: This is a question of law which is reviewed for correctness. *See Doe v. Marat,* 984 P.2d 980, 982 (Utah 1999).

B. Whether the rule in *Reese v. Tingey Construction*, 177 P.3d 605 (Utah 2008), refusing to enforce mediated settlements unless those agreements are reduced to writing, should be extended to apply to this case.

C. Whether there was any meeting of the minds between the Plaintiffs and the Respondents herein, such that the Plaintiffs net recovery pursuant to an alleged settlement amounts to only $64.58.

Standard of Review: Whether there has been a meeting of the minds between parties to a contract is a question of fact which is reviewed for clear error.

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O'Hara v. Hall, 628 P.2d 1289, 1290 (Utah 1981).

D. Whether the disparity between the Plaintiff's injuries and the amount of the alleged settlement is so great as to require a remand to determine whether that disparity should shock the conscience of the court and allow the Plaintiff Glade Terry to present his case to the Trial Court on the merits.

Standard of Review: The Plaintiffs have discovered no case specifically addressing the standard of review with respect to this issue. *But see McBride v. Jones,* 615 P.2d 431, 433 (Utah 1980) ("[W]here . . . there is substantial likelihood that the proof may show that a party was so cheated, imposed upon, or unfairly dealt with that it should shock the conscience of the court to allow it to stand, the court should resolve doubts in favor of permitting the parties to present their evidence and have the issues determined.")

STATEMENT OF THE CASE

A. **Nature of the Case.** This is an appeal from the Trial Court's Orders entered June 22, 2010, and September 30, 2010, which granted the Respondents' Motion to Enforce Settlement Agreement.

B. **Course of the Proceedings Below.** This medical malpractice

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action was commenced on September 26, 2007, wherein the Plaintiff Glade Terry asserted damages for injuries suffered as the result of back surgery and other actions of the Respondents herein.[1] The Respondents C. William Bacon and Central Utah Medical Clinic, P.C., did not file an Answer to the Complaint at any time; but on October 24, 2007, they filed a Motion to Compel Arbitration and Stay the Proceedings. On October 26, 2007, the Plaintiff's then attorney, James McConkie, filed a reply to that Motion conceding "that Plaintiffs do not oppose Defendant's Motion to Compel Arbitration." Then, on November 9, 2007, the Plaintiffs and the remaining Respondent in the case, Utah Regional Medical Center, entered into a Stipulated Motion to Stay Proceedings and to Enforce Arbitration Agreement. Accordingly, on November 13, 2007, the Court entered an Order staying the proceedings as to Utah Regional Medical Center and ordering that the Plaintiffs immediately submit their claims against the Medical Center to arbitration. So far as Plaintiff is aware, this was never done.

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[1]The Plaintiff's wife, Kairle Terry, asserted in the same Complaint a cause of action for loss of consortium, and the Plaintiffs have not appealed the adverse ruling on that issue. Additionally, during the course of the proceedings, the Plaintiffs informally raised a negligent infliction of emotional distress claim on behalf of Kairle Terry. The adverse ruling on that issue has also not been appealed; however, if the Plaintiffs prevail in this appeal, the consortium claim would also be at issue in any remand to the District Court because Kairle's consortium claim is "derivative from the cause of action existing in behalf of the injured person." Utah Code Ann. § 30-2-1(5)(a) (2010).

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One year and four months later, on April 30, 2009, because there had been no action in the case, the Court entered its Notice of Intent to Dismiss the Case. On May 11, 2009, the Plaintiffs' original counsel, Mr. McConkie, filed a statement with the court stating that the case was still active but also indicated that the Plaintiffs were seeking new counsel. Mr. McConkie simultaneously withdrew from the case.

Subsequently, on August 21, 2009, the Respondents C. William Bacon and Central Utah Clinic filed a Motion to Enforce Settlement Agreement with the Court and, on May 10, 2010, the Court held an evidentiary hearing on whether the Plaintiffs had, in fact, agreed to settle their case for the sum of $15,000. The Court found that they had, and entered its Order dated June 22, 2010, disposing of the malpractice claims of the Plaintiff Glade Terry. The remaining issues in the case with respect to Plaintiff Kairle Terry were resolved adversely to her in the Court's subsequent Order dated September 30, 2010. This appeal followed.

C. Statement of Facts[2].

1. Over a prolonged period of time, Plaintiff Glade Terry experienced

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[2]The pertinent allegations in the Complaint are set forth *verbatim*. The Defendants C. William Bacon and Central Utah Clinic, P.C., filed no answer at any time during the course of the proceedings. The Defendant Utah Valley Medical Center filed an Answer denying the material allegations of the Complaint, and the case against that Defendant was ordered to proceed to arbitration.

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consistent right sciatic nerve pain and other back and leg pain for which he sought medical treatment, pain medications, and nerve block injections. (Complaint, ¶ 6; R. 7)

2. Plaintiff's treating physician, Defendant C. William Bacon, M.D., advised the Plaintiff to undergo back surgery to relieve the pain. (Complaint, ¶ 7; R. 7)

3. On or about October 17, 2005, the Plaintiff Glade Terry was admitted to Utah Valley Regional Medical Center for surgery. Defendant William Bacon, M. D., performed an L5-S1 right sided discectomy, transforaminal lumbar interbody fusion with complete unroofing foraminotomy. (Complaint, ¶ 8; R.. 6-7)

4. Following the surgery, Plaintiff Glade Terry reported to Defendant C. William Bacon, M.D., that he was experiencing significant buttocks and leg pain. Defendants William C. Bacon, M.D., Central Utah Clinic and Utah Valley Regional Medical Clinic failed to properly evaluate Plaintiff Glade Terry's physical complaints and take appropriate medical interventions for a period of about six weeks. As time progressed, the pain became more severe, and Plaintiff Glade Terry permanently lost sensation and motion in his lower extremities, particularly on his right side. (Complaint, ¶ 9, R. 6)

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5. Thereafter, Plaintiff Glade Terry was referred to the University of Utah Medical Center where he was attended to by John Braun, M.D. Plaintiff was diagnosed with extraordinary weakness in the right quadricep and distally in the lower extremity. He was also diagnosed with significant pain and paresthesias globally in the right leg. (Complaint, ¶ 10; R. 6)

6. Based upon the foregoing symptoms, John Braun, M.D., and his colleagues determined that the bone graft performed by Defendant C. William Bacon, M.D., surrounding Plaintiff's nerve root in the foramen and extra-foraminal area may be causing Plaintiff's paralysis, physical symptoms and pain. (Complaint, ¶ 11, R. 6)

7. Plaintiff Glade Terry underwent a revision surgery of his L5-S1 on or about December 19, 2005 and thereafter was discharged to rehabilitation in hopes that Plaintiff would regain increased mobility and function. (Complaint, ¶ 12; R. 5)

8. Post-surgery, Plaintiff Glade Terry continued to experience permanent paralysis in his right lower extremities for which he uses a brace for foot drop. He also suffers from severe and unrelenting pain in his lower right extremities. (Complaint, ¶ 13; R. 5)

9. The Defendants herein failed to perform the October, 2005 surgery

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properly. After the surgery, Defendants failed to properly evaluate Plaintiff Glade Terry's physical condition. Thereafter, they failed to timely recommend appropriate interventions; and otherwise failed to meet the acceptable standards of care. (Complaint, ¶ 16; R. 4-5)

10. All Defendants herein asserted reliance on the Plaintiff Glade Terry's agreement to submit this dispute to arbitration, and by Order filed November 13, 2007, the Court ordered the proceedings stayed as to Defendant Utah Regional Medical Center, and ordered that the Plaintiffs "shall immediately submit their claims against Defendant Utah Regional Medical Center to binding arbitration pursuant to the Utah Uniform Arbitration Act . . .". (R. 20, 27, 30)

11. On April 30, 2009, the Court issued its Notice of Intent to Dismiss this case for lack of activity. (R. 46)

12. On May 11, 2009, Plaintiffs' former counsel, James McConkie, filed his withdrawal as counsel for the Plaintiff. (R. 48)

13. On August 21, 2009, the Defendants C. William Bacon and Central Utah Clinic filed a motion with the court to enforce an alleged settlement agreement between those Defendants and the Plaintiffs. (R. 63) The Defendants alleged that the Plaintiffs' former attorney, James McConkie, had accepted on behalf of the Plaintifffs the sum of $15,000 as "a complete settlement and

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resolution of the Plaintiff's claims against Dr. Bacon and Central Utah Clinic." (R. 80)

14. On September 9, 2009, the Plaintiffs filed their opposition to the motion, asserting, *inter alia*, that the Plaintiffs did not waive their attorney-client privilege with respect to communications with attorney James McConkie, and that they had at no time agreed to settle this case for $15,000. (R. 88) The Plaintiffs' opposition included the Affidavit of Glade Terry, who denied under oath that he at any time agreed to settle his case for $15,000. (R. 91)

15. On January 7, 2010, the Plaintiffs' former attorney, James McConkie, filed an attorney's lien in this action, asserting fees and costs against the Plaintiffs in the sum of $8,335.00. In addition to such fees and costs, pursuant to the retainer agreement signed by the Plaintiffs' former attorney and the Plaintiffs, there was purportedly due and owing from the Plaintiffs an attorney fee in the sum of $5,000.00 due to a contingent fee arrangement. (R. 107)

16. At the hearing, prior to hearing any evidence, the Court stated that "[t]he court finds in this case that at least the proffered facts would be that – on behalf of the defendant would be that Mr. McConkie had some authority from his client to accept a $15,000.00 offer. . . . So based on that, I believe the attorney-client privilege would be lifted . . .". (R. 180 at p. 15)

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17. Mr. McConkie testified that he first discussed settlement with Plaintiff Glade Terry in August, 2008. He also testified that, on December 29, 2008, he "explained to client the situation, gave me permission to settle for $15,000." (R. 180 at 20)

18. Mr. McConkie also testified in response to a question from the Plaintiff's new counsel as follows:

Q Well, isn't it true that there were conversations that you had with the clients where they had refused to accept the $15,000 and, thus, you did not propound that agreement to them?

A I remember speaking with my clients. I remember them telling me they did not wish to settle. I don't have a recollection about whether I sent them the document or not. I'd have to check the file and ask my paralegal.

(R. 180 at 24.)

19. The Plaintiff Kairle Terry testified as follows:

Q Did your husband ever agree to settle this matter for $15,000?

A. No.

(R. 180 at 30)

20. The Plaintiff Kairle Terry also testified, as to the December 29, 2008,

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telephone conversation, as follows:

Q Tell me what – to the best of your recollection, tell me what he communicated during that phone conversation that took place in December of 2008.

A. As I heard him discuss it with Mr. McConkie, he said, no, it was not acceptable. What was being offered, he would not accept the settlement, as he understood it, and – it was just – it was a negative answer.

Q Prior to this December conversation, had you ever personally heard of the figure of $15,000 being proposed as a settlement from your lawyer?

A No.

Q Did you ever see a settlement agreement – a written settlement agreement?

A No.

(R. 180 at 34)

21. The Plaintiff Glade Terry testified as follows:

Q Did you ever communicate to your lawyer that you would accept the sum of $15,000 as and for settlement in full of your case against Dr.

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Bacon?

A No, I did not.

. . .

Q Do you remember – was it in December of 2008 that you first heard – which was about a year and a half ago – first heard that they had offered $15,000 to settle this case?

A No, it was before that.

Q Was it?

A Yes.

Q And what did you tell Mr. McConkie at that time?

A I told him – he explained what the figures amounted to and I told him I could not accept that.

Q What did he tell you about that?

A He told me that it would be $15,000 and he would need $9,000 and I would end up with $6,000. And I says, "I cannot do that, not with all my injuries."

Q The discussion that you had with him in December that he claims is the time that you settled this case, did you tell him at any time during the course of that conversation that you would even entertain that sum

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as a settlement?

A No. I told him we could not accept that.

. . .

Q Did you have another conversation with counsel, Mr. McConkie, again about the settlement?

A We talked several times.

Q Do you remember when the next one was?

A No, I don't.

Q And the – the conversation that took place after the December conversation, was that some time in January of 2009?

A It would have been, yes, when we returned from Mexico.

. . .

Q Did he – did Mr. McConkie tell you why he called you?

A Yes. He wanted to cash the check.

Q And what did you tell him?

A I told him, "Don't cash that check for $15,000, that's not enough."

(R. 180 at 40-42)

22. The Plaintiff Glade Terry also testified as follows:

Q And when you received this telephone conversation from [Mr.

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McConkie] initially about settlement, the $15,000 didn't come up, did it?

A Yes, it did, and I was dissatisfied with Mr. McConkie's practice and that's when I went to Mr. Jim Haskins.

. . .

Q Isn't it true that there were discussions about the probability – the possibility of settling the case and a certain amount was not yet determined?

A Yes, that was said, uh-huh.

Q And you were willing to enter into settlement negotiations, were you not?

A Not at that time.

Q For any amount?

A For no amount, that's right.

Q All right. And so what you're asking, then – or what you're telling us now is that you never really authorized Mr. McConkie to settle for any amount?

A That is correct.

Q And so when Mr. McConkie presented the $15,000 and said, "Will

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you accept this, you said, without any equivocation, "No"?

A That is correct, I said "No."

R. 180 at 42-43.

23. Mr. McConkie then testified as follows:

Q You've heard the testimony from Mr. Terry wherein he absolutely denies that he accepted the sum of $15,000 as a settlement. And just please respond.

A . . . I remember that it was a difficult decision, and that was one of the reasons I wanted to talk to him and give him some time to think about it. And my recollection – and I noted it in my notes – was that although it was a difficult situation, he agreed that I could take that amount and pay off the costs, which were about $8,000 at that point, and essentially give him the balance. And that's my best recollection.

(R. 180 at 47)

24. The Trial Court determined that Mr. McConkie's testimony was credible and also that it was corroborated by his reference to his notes, which the Court stated were admissible as "past recollection recorded. The Court also determined that Mr. McConkie's testimony was corroborated by his telephone call to opposing counsel, Mr. Williams, "and then the almost contemporaneous

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remittal of a settlement check some 11 days after the December 29th telephone conversation. " Based on these findings and rulings, the Court determined that "there was authorization given to Mr. McConkie by Mr. Terry to accept a settlement offer of $15,000 from the – from this one defendant [Glade Terry]". (R. 180 at 54)

25. The Trial Court also determined that Mr. McConkie spoke only to Glade Terry on the phone, and not to Kairle Terry. (R. 180 at 56) Ultimately however, as to her claims, the Court (1) ruled that Kairle Terry's claim for consortium was derivative of the claims of Glade Terry; and (2) denied Kairle Terry's informal request to amend the complaint to add a claim for negligent infliction of emotional distress, upon the ground that any such claim was "legally insufficient and futile." (R. 148-149)

26. By letter dated October 12, 2010, Plaintiff's former counsel, James McConkie, submitted a letter to Plaintiff's new counsel asserting that, pursuant to his attorney lien in the case, the Plaintiff's new counsel was required to "disburse $14,935.42 to Parker & McConkie from the funds that Plaintiff's acquired through settlement of the above-referenced matter." Since the total amount of the putative settlement check was $15,000.00, if Mr. McConkie's attorney lien is honored in the amount claimed, the resulting amount to be distributed to the Plaintiffs would

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be $64.58.[3]

SUMMARY OF ARGUMENT

I. THE TRIAL COURT ERRED IN OVERRULING THE PLAINTIFFS' OBJECTION TO THE TESTIMONY OF THEIR FORMER COUNSEL IN THIS CASE ON THE BASIS OF THE ATTORNEY-CLIENT PRIVILEGE.

The Trial Court's allowing of the testimony of the Plaintiffs' former counsel in opposition to his former client's violated the attorney-client privilege, was erroneous as a matter of law, and should not have been permitted.

II. THE RULE IN *REESE V. TINGEY CONSTRUCTION* WHICH REFUSED TO ENFORCE MEDIATED SETTLEMENTS UNLESS THOSE AGREEMENTS ARE REDUCED TO WRITING, SHOULD BE EXTENDED AND APPLIED TO THIS CASE.

Settlement agreements in mediation which are not reduced to writing are not enforceable under the Utah Supreme Court's Ruling in *Reese v. Tingey Construction*, 177 P.3d 605 (Utah 2008), and that doctrine should be extended to the settlement in this case inasmuch as the parties all agreed to submit this case to binding arbitration and such arbitration awards are by law required to be reduced to writing.

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[3]The Plaintiffs have or will shortly move the District Court to supplement the record herein with the letter from Mr. McConkie pursuant to Utah R. App. P. 11(h).

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III. THERE WAS NO MEETING OF THE MINDS REGARDING THE PUTATIVE SETTLEMENT OF THIS CASE BETWEEN THE PARTIES, WHERE THE PLAINTIFF'S INJURIES ARE PERMANENT AND SUBSTANTIAL, WHILE THE NET RECOVERY TO THEM IS ONLY $64.58, AND THE PARTIES ARE IN FUNDAMENTAL DISAGREEMENT WHETHER ANY SETTLEMENT WAS ACTUALLY ENTERED INTO.

The parties have diametrically opposed views whether any settlement actually occurred in this case. Because the Court made no finding of any kind determining that any party was disingenuous, lying, or acting in bad faith, it is clear error to conclude that the parties in fact entered into a settlement agreement, because there was no meeting of the minds regarding the fundamental question whether any settlement was ever reached.

IV. THE DISPARITY BETWEEN THE PLAINTIFF'S INJURIES AND THE RECOVERY OF ONLY $64.58 UNDER THE TERMS OF THE PUTATIVE SETTLEMENT HEREIN IS OUTRAGEOUS AND THE CASE SHOULD BE REMANDED TO THE TRIAL COURT TO DETERMINE WHETHER THE DISPARITY SHOCKS THE CONSCIENCE OF THE COURT.

The Trial Court should be permitted to determine whether the disparity between the Plaintiff's actual injuries and the putative settlement which essentially deprived the Plaintiff of any recovery at all shocks the conscience of the Court.

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ARGUMENT

I. THE TRIAL COURT ERRED IN OVERRULING THE PLAINTIFFS' OBJECTION TO THE TESTIMONY OF THEIR FORMER COUNSEL IN THIS CASE ON THE BASIS OF THE ATTORNEY-CLIENT PRIVILEGE.

In overruling the Plaintiffs' objection to the testimony of their former attorney regarding the alleged existence of a settlement agreement, the Trial Court concluded that

> by stating – at least raising this issue of whether Mr. McConkie was authorized to enter into this agreement, that the Plaintiff has indeed put that – put Mr. McConkie's performance as an attorney in issue, at least in small part here. And that would justify going into the matter and it would not be precluded under Rule 504 of the Utah Rules of Evidence. So I will allow the questioning.

In so ruling, the Court erred as a matter of law. First, of course, the Plaintiffs did not put their attorney's conduct in issue; the Respondents did. Second, under Rule 504, "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services. . . ." This broad general privilege protects from disclosure a wide array of attorney-client communications. And the Utah statute governing attorney-client privilege is even more emphatic:

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> An attorney cannot, without the consent of his client, be examined as to any communication made by the client to the attorney or any advice given regarding the communication in the course of the professional employment.

Utah Code Ann. § 78B-1-137 (2008).

As the Utah Supreme Court has noted,

> The attorney-client privilege "is intended to encourage candor between attorney and client and promote the best possible representation of the client." *Gold Standard, Inc. v. American Barrick Resources (USA), Inc.,* 801 P.2d 909, 911 (Utah 1990). It is the oldest of the common law privileges protecting confidential communications. *See Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981) [citations omitted]. The privilege is recognized in Rule 504 of the Utah Rules of Evidence as well as by statute . . . .

Doe v. Maret, 984 P.2d 980, 982-983 (Utah 1999). The attorney-client privilege is universally recognized as one which protects statements made in settlement negotiations from disclosure. *See, e.g., Kaufmann v. Kaufmann,* 934 So.2d 1073, 1079 (Ala. Ct. App. 2005) (referring to "the privileged nature of settlement negotiations"); *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.,* 332 F.3d 976, 977 (6th Cir. 2003) ("statements made in furtherance of settlement are privileged and protected from third party discovery"); *Russo v. Nagel*, 817 A.2d 426, 433 (N. J. Super A.D. 2003) ("statements made during settlement negotiations are privileged").

Rule 504(d) sets forth five narrow exceptions to the privilege. None of

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these are applicable to the present case and thus the Trial Court erred in determining that the attorney-client privilege did not apply to the testimony of the Plaintiff's former attorney offered in support of the opposing parties.

Rule 504(d)(3) provides that no privilege exists "as to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer. Here, however, the Plaintiffs have not at any time alleged any breach of duty by their former lawyer to them[4], no action has been filed against the lawyer by the clients and, indeed, the issue regarding the settlement was raised by the defendants herein, not by the Plaintiffs. Under these circumstances, the exceptions of Rule 504(d) have no applicability to the disclosures made by the former attorney for the clients because the clients have taken no affirmative steps to waive the privilege, and their attorney should not have been permitted to testify. *See, e.g., State v. Jeffries*, 893 N.E. 2d 487 (Ohio 2008) ("attorney may not testify regarding a communication made to him by his client"); *Hawgood v. Hawgood*, 294 N.E. 2d 681, 685 (Ohio Com. Pl. 1973) (same); *Shong v. Farmer's & Merchants' State Bank*, 70 N.W. 2d 907, 910 (N.D. 1955) ("where the relationship of attorney and client exists, the attorney may not testify in an action unless the

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[4]Indeed, as noted by the Plaintiff's new counsel during the hearing, "we have never assailed Mr. McConkie's conduct in any way, other than it's my client's position that he did not settle this case, a major malpractice case, for $15,000."

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privilege has been waived"); *Patella v. State*, 294 S.W. 571 (Tex. Crim. App. 1927).

In Utah, it has been held that Utah's Alternative Dispute Resolution Act protects against disclosure of mediation communications, and thus the appellant's attorney could not be deposed regarding the content of the mediation. *Reese v. Tingey Construction*, 177 P.3d 605, 607 (Utah 2008). Notably, the original policy reasons behind this rule as to alternative dispute resolution is strikingly similar to the Utah Supreme Court's statement of the policy reasons justifying the attorney-client privilege quoted above. With regard to alternative dispute resolution, Utah has by statute provided that mediation proceedings are designed to "encourage informal and confidential exchange among the persons present to facilitate resolution of the dispute." Utah Code Ann. § 78-31b-8.[5]

Before the Trial Court, the Defendants relied upon *Buffalo Wings Factory, Inc., v. Mohd*, 622 F. Supp. 2d 325 (E. D. Va. 2007), as support for their position that the attorney-client privilege in that case was waived. That case, however, was a clear case of "cold feet," inasmuch as the District Court had actually entered an earlier and voluntary consent order which outlined the express terms of the

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[5]Repealed and replaced by Utah Code Ann. § 78B-6-203(2)(b) (2008), which contains similar language regarding the confidentiality of mediation proceedings.

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settlement. Subsequently, the Defendants sought relief from the consent order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and – unlike the situation in the present case – the Defendants affirmatively argued that "their attorney, Martin Mooradian . . . lied to them and entered into the Consent Order without Defendants' permission." *Id.* at 329. As a direct result of that affirmative attack on their attorney, the Court ruled that the attorney-client privilege had been waived, because under federal law, "if a client assails his attorney's conduct of the case . . . the privilege as to confidential communications is waived, since the attorney . . . has a right to defend himself under the circumstances." *Id.* Here, there has been no such affirmative attack on the Plaintiff's former attorney; rather, the former attorney, in support of the respondents, has attacked the Plaintiff's recollection of the settlement negotiations. The difference is that in *Buffalo Wings*, the defendants committed affirmative acts which amounted to a waiver of the attorney-client privilege; while the Plaintiffs here have undertaken no such affirmative acts. For this reason, and because the *Buffalo Wings* case involves an interpretation and analysis of federal law and not Utah law, that case is distinguishable and inapposite.

For these reasons it is respectfully submitted that the Trial Court erred in allowing the plaintiffs' former attorney to testify against them and over their

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objection.

II. THE RULE IN *REESE V. TINGEY CONSTRUCTION,* WHICH REFUSED TO ENFORCE MEDIATED SETTLEMENTS UNLESS THOSE AGREEMENTS ARE REDUCED TO WRITING, SHOULD BE EXTENDED AND APPLIED TO THIS CASE.

Confidentiality of settlement agreements was of key importance to the Court's decision in *Reese v. Tingey Construction,* 177 P.3d 605 (Utah 2008), which held that oral agreements not reduced to writing in mediated cases were not enforceable in Utah courts. It is respectfully submitted that the *Reese* rule should be extended and applied to this case and the alleged oral agreement should not be enforced.

In so holding, the Utah Supreme Court pointed out that "[a] court cannot enforce the terms of an oral agreement reached in mediation without requiring parties to disclose, and the court to consider, confidential settlement negotiations. Absent the existence of an exception, we are not prepared to invade the confidentiality protections afforded parties to mediation in this manner. A rule permitting courts to enforce only written mediation agreements provides a court with the means to use its power to enforce the terms of a written agreement or to determine whether the terms of the written agreement have been violated, without

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requiring it to delve into the confidential process that led to the creation of the agreement." *Id.* at 609.

The Court noted that the Alternative Dispute Resolution Act as it was then written did not absolutely require that settlement agreements in mediation be reduced to writing, but nevertheless the Court established a prospective and hardline rule that mere oral agreements reached in mediation would not be enforced. *Reese v. Tingey Construction,* 177 P.3d 605, 609 (Utah 2008).

The instant case was not, of course, one ultimately involving arbitrators who rendered any decision, but this is in spite the fact that *all* parties agreed that the arbitration agreement signed by the Plaintiff Glade Terry would be applied herein, and in spite of the fact that the Court entered an Order requiring the Plaintiff to proceed immediately to arbitration as to at least one of the defendants. (R. 33) Under these circumstances, it is respectfully submitted that the *Reese* requirement that mediated settlements must be reduced to writing to be enforceable ought to be applied to this case. First, the parties all agreed to arbitrate their disputes. Second, the alleged oral settlement agreement was never reduced to writing, and the parties now dispute whether such an agreement was ever authorized at all by the Plaintiffs. Third, the same policy reasons underlying the Utah Supreme Court's insistence on written settlement stipulations in the context of mediation

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apply with special force to the facts of this case. That is because what happened here – with the plaintiff's attorney testifying *against* them and on behalf of their opponents – is the very danger the Utah Supreme Court sought so resolutely to avoid, and the confidentiality requirements of the attorney-client privilege were invaded as a result.

Finally, it should be noted that the actual Arbitration Agreement signed by the Plaintiff, Glade Terry, provides that as part of the arbitration process the parties could "resolve any claim by . . . working directly with each other to try and find a solution that resolves the Claim." (R. 13) The arbitration agreement further provides that "the decision shall be consistent with the Utah Uniform Arbitration Act."[6] (R. 13) That Act plainly contemplates that decisions pursuant to the Act shall be in writing. *See* Utah Code Ann. § 78B-11-101, *et seq.* (2008). Thus, Utah Code Ann. § 78B-11-120, governing awards, requires that "an arbitrator shall make a record of an award. The record must be signed or otherwise authenticated by any arbitrator who concurs with the award. The arbitrator or the arbitration

---

[6]Utah Code Ann. § 78B-11-110 (2008) provides that "[a] person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the manner agreed between the parties." It is submitted that the Plaintiffs' Reply to Defendants' Motion to Compel Arbitration (R. 27), and the Stipulated Motion to Stay Proceedings and to Enforce Arbitration Agreement (R.30) triggered the provisions of the Act and initiated the arbitration proceeding.

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organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding." This is part of the procedure that all parties – the plaintiffs and all defendants – agreed to. Once the arbitration process was initiated, the arbitration provisions themselves mandated that any award be in writing. That was not done in this case, and the result was a disregarding of the parties' stipulated motion to stay the proceedings and enforce the arbitration agreement, and a putative oral agreement which the parties cannot even agree existed.

For the above reasons, this case should be remanded to the Trial Court with directions to Order the parties to submit to the arbitration process, which will result in the written agreement contemplated by the Uniform Arbitration Act.

III. THERE WAS NO MEETING OF THE MINDS REGARDING THE PUTATIVE SETTLEMENT OF THIS CASE BETWEEN THE PARTIES, WHERE THE PLAINTIFF'S INJURIES ARE PERMANENT AND SUBSTANTIAL, WHILE THE NET RECOVERY TO THEM IS ONLY $64.58, AND THE PARTIES ARE IN FUNDAMENTAL DISAGREEMENT WHETHER ANY SETTLEMENT WAS ACTUALLY ENTERED INTO.

The parties have diametrically opposed views concerning the existence of any settlement agreement in this case. The only evidence offered on this issue consists of (1) the conflicting affidavits of the Plaintiff Glade Terry and the

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attorney for the Defendants R. 71, 91; and (2) the conflicting testimony of the plaintiff's former attorney, Mr. McConkie, and the plaintiffs concerning whether or not any agreement was reached at all (R. 180 at 17, *et seq.*; R. 180 at 23, *et seq.*; R. 180 at 44, *et seq.*) Basic to contract principles is the requirement that there must be a "meeting of the minds" in order to form a contract. *See, e.g., DCH Holdings, LLC v. Nielsen*, 220 P.3d 178, 183 fn 3 (Utah Ct. App. 2009). The Court below made no finding that any party was disingenuous, lying, or acting in bad faith in relating their sworn recollections concerning settlement discussions. Under these circumstances, it is clear error to conclude, as did the trial court, that the plaintiffs agreed to accept the sum of $15,000 for their substantial injuries. There can have been no meeting of the minds between the parties, inasmuch as at least two essential terms were in dispute: (1) whether there was any settlement agreement at all; and (2) whether, if so, it was for the sum of $15,000, which would have left the Plaintiffs with virtually nothing after taking into consideration Mr. McConkie's expenses and attorney fees. Because there was no meeting of the minds, there also was no settlement agreement, and the Plaintiffs should be entitled to have their malpractice claims heard on the merits.

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IV. THE DISPARITY BETWEEN THE PLAINTIFF'S INJURIES AND THE RECOVERY OF ONLY $64.58 UNDER THE TERMS OF THE PUTATIVE SETTLEMENT HEREIN IS OUTRAGEOUS AND THE CASE SHOULD BE REMANDED TO THE TRIAL COURT TO DETERMINE WHETHER THE DISPARITY SHOCKS THE CONSCIENCE OF THE COURT.

The material allegations contained in the Complaint in this case stand undenied by the Defendants. Therein, it has been alleged that the Plaintiff, over a prolonged period of time, experienced consistent nerve, back and leg pain and other back and leg pain for which he sought an array of medical treatments, including pain medications, and nerve block injections. (R. 7) At the best of Defendant C. William Bacon, M. D., the Plaintiff underwent back surgery, which was unsuccessful. (R. 6-7) When the Plaintiff's physician and the other defendants failed to properly evaluate the Plaintiff's continuing complaints to them, his condition deteriorated, until the pain became even more severe and the Plaintiff *permanently* lost sensation and motion in his lower extremities. (R. 6) The Plaintiff then sought advice help from Dr. John Braun at the University of Utah, who advised him that the bone graft performed by Defendant C. William Bacon, M.D., surrounding Plaintiff's nerve root in the foramen and extra-foraminal area may be causing Plaintiff's paralysis, physical symptoms and pain. (R. 5) This second surgery also did not relieve the Plaintiff's symptoms, however,

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and now he continues to experience permanent paralysis in his right lower extremities for which he uses a brace for foot drop. He also suffers from severe and unrelenting pain in his lower right extremities. (R. 5) Given these substantial injuries, even assuming there was a settlement agreement for $15,000, virtually the entire sum would be expended on the Plaintiff's attorney fees and costs, leaving him with no compensation whatsoever for his injuries and his continuing pain.

It is submitted that the essential concession of the case by the Plaintiff's former attorney is an outrageous injustice which ought to shock the conscience of the court, permit the decision below to be vacated, and allow the parties to pursue their remedies in mediation. Courts have not hesitated to grant such relief where the disparity between the injuries suffered and the actual recovery for those injuries is outrageously less than would be necessary to make the plaintiff whole. *See, e.g., Young Candy & Tobacco Co. v. Montoya*, 372 P.2d 703, 707 (Ariz. 1962) (damages adjustable if they are "so manifestly unfair, unreasonable and outrageous as to shock the conscience of the Court"); *United Oklahoma Bank v. Moss*, 793 P.2d 1359, 1364 (Okla. 1990) (sale price is so grossly inadequate that it shocks the conscience fo the Court); *In re Food Barn Stores, Inc.*, 107 F.3d 558, 564 (8th Cir. 1997) (same); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark. 2003) (verdict can be set aside where it is so great as to shock the conscience of the

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court); *Am Trim, L.L.C. v. Oracle Corp.*, 383 F.3d 462, 475 (6th Cir. 2004) (compensatory damages award can be set aside if it is "so excessive or inadequate as to shock the conscience of the court).

Here, the parties have not addressed this issue because the Trial Court heard only the issue as to whether or not a settlement had been reached. The Plaintiff should be allowed to put on his evidence to show that the award is so inadequate as to shock the conscience of the court.

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CONCLUSION

For the above reasons, it is respectfully submitted that the Trial Court's enforcement of a putative settlement agreement herein should be reversed, and this case should be remanded to the Trial Court with directions that the case should be submitted to arbitration pursuant to the Arbitration Agreement executed by the parties.

DATED this 11th day of April, 2011.

Thomas N. Thompson
Attorney for Plaintiffs

James C. Haskins
Attorney for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April, 2011, I caused to be served by HAND DELIVERY two true and correct copies of the foregoing Brief of Appellant, as follows:

Scott Williams
Briant S. Platt
Strong & Hanni
3 Triad Center #500
Salt Lake City, Utah 84180

Thomas N. Thompson

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PLAINTIFFS' ADDENDUM

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ORDER ON DEFENDANT'S SUPPLEMENTAL BRIEFING IN SUPPORT OF DEFENDANT'S MOTON TO ENFORCE SETTLEMENT AGREEMENT AND DISMISSAL OF CASE (Filed September 30, 2010)

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FILED
SEP 2010
4TH JUDICIAL DIST. COURT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

GLADE TERRY and KAIRLE TERRY, Plaintiffs, v. C. WILLIAM BACON, M.D.; CENTRAL UTAH CLINIC, P.C. and UTAH VALLEY REGIONAL MEDICAL CENTER, Defendants.	**ORDER ON DEFENDANT'S SUPPLEMENTAL BRIEFING IN SUPPORT OF DEFENDANT'S MOTION TO ENFORCE SETTLEMENT AGREEMENT AND DISMISSAL OF CASE** Civil No: 070402917 Judge Samuel D. McVey

The Court on June 22, 2010, in its Order Enforcing Settlement Agreement, reserved judgment as to Mrs. Kairle Terry's claims for loss of consortium and negligent infliction of emotional distress. The Court requested the parties to provide information concerning the relevant laws for each claim. Defendants C. William Bacon, M.D., Central Utah Clinic, P.C. and Utah Valley Regional Medical Center submitted a supplemental briefing in support of the motion to enforce settlement agreement. Ms. Terry did not respond. The Court, having carefully reviewed the briefing, makes the following Order.

II. Analysis

A. Relevant Law regarding Whether the Claim for Loss of Consortium by Mrs. Terry is Derivative of the Claims of Mr. Terry

Whether a settlement agreement entered into by an injured spouse bars the non-injured spouse's derivative loss of consortium claim is an issue of first impression in Utah. The courts in a majority of jurisdictions have held that a release signed by the injured spouse does not deprive

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the non-injured spouse of his or her loss of consortium claim. 2-11 Damages in Tort Action § 11.02(e) (2010). The courts in a minority of jurisdictions have "held that the consortium claim is purely derivative and wholly dependent on the primary claim, and is extinguished upon the termination of the primary claim by settlement or release." *Id.* Furthermore, "[i]n some jurisdictions in which the claim is regarded as 'derivative,' it is treated as 'independent' insofar as it is subject to special defenses not available against the injured person." RESTATEMENT (SECOND) OF JUDGMENTS, § 48 (1982).

In Utah, a non-injured spouse's action for loss of consortium is created by statute. Utah law states that a "spouse's action for loss of consortium shall be derivative from the cause of action existing in behalf of the injured person." UTAH CODE ANN. § 30-2-11(5)(a) (2010). As a loss of consortium claim clearly is derivative, the question that remains is whether the claim should be treated as "derivative" and "dependent," such as to be purely derivative, or "derivative" and "independent." The former approach would bar Mrs. Terry's loss of consortium claim, while the latter would allow it. As a claim for loss of consortium is created by statute, the Court interprets the statute and analyzes any relevant case law to discover which approach was intended.

When interpreting a statute, this Court's purpose "is to evince the true intent and purpose of the Legislature." *State v. Martinez*, 2002 UT 80, P 8, 52 P.3d 1276 (internal quotation marks omitted). The "best evidence" of a statute's meaning "is the plain language of the statute itself." *Id.* However, the "plain language analysis is not so limited that we only inquire into individual words and subsections in isolation; our interpretation of a statute requires that each part or section be 'construed in connection with every other part or section so as to produce a *harmonious whole*.' " *Anderson v. Bell*, 2010 UT 47, P9 (Utah 2010) (quoting *Sill v. Hart*, 2007

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UT 45, P 7, 162 P.3d 1099 (emphasis added)) (quoting *State v. Maestas*, 2002 UT 123, P 54, 63 P.3d 621). Significantly, " 'the purpose of the statute' has an influence on the plain meaning of a statute." *Anderson*, 2010 UT at P9 (quoting *R&R Indus. Park, L.L.C. v. Utah Prop. & Cas. Ins. Guar. Ass'n*, 2008 UT 80, PP 23, 36, 199 P.3d 917).

Analyzing the statute as a "harmonious whole," as well as the purpose of the statute, and the sparse relevant case law in Utah, the Court holds that a loss of consortium claim is "purely derivative and wholly dependent" on the injured spouse's claim and is barred by an injured spouse's settlement of his or her claims. 2-11 Damages in Tort Action § 11.02(e). The Court's reasoning follows.

First, as already discussed, Utah law defines a loss of consortium claim as derivative from the underlying injury claim. A thorough analysis of the statute as a whole suggests that the loss of consortium claim is derivative and dependent, so as to be purely derivative. Significantly, the statute strongly links the underlying injury claim with the loss of consortium claim in several important aspects. For example, the loss of consortium claim "may not exist in cases where the injured person would not have a cause of action" (UTAH CODE ANN. § 30-2-11(5)), the two actions must be pled at the same time (*Id.* at § 30-2-11(4)(a)), their statutes of limitations run concurrently (*Id.* at § 30-2-11(3)), the loss of consortium claim is "subject to the same defenses, limitations, immunities, and provisions applicable to the claims of the injured person," (*Id.* at § 30-2-11(4)(b)), both claims are subject to reduction through comparative fault (*Id.* at § 30-2-11(6)), and the sum of the damages for both claims cannot exceed any applicable statutory limit for noneconomic claims. (*Id.* at § 30-2-11(7)).

The legislative history discusses the purpose of the statute, further illuminating its meaning. The purpose of the statute "is to compensate spouses of injured persons for losses

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suffered by the spouse." House Floor Debate, General Sess. HB0320 (1997). However, the statute was to "limit the availability of [loss of consortium] to only the most serious cases," preventing a dramatic increase in litigation. *Id.* Furthermore, the bill sponsor emphasized that "no other state in the country would limit the remedy in this way." *Id.*

Additionally, the Court of Appeals of Utah has held that a non-injured spouse's loss of consortium claim ceased to exist when the underlying injury claim failed. *Fox v. Brigham Young Univ., Inc.*, 2007 UT App 406, P24 (Utah Ct. App. 2007). The Court quoted the Utah statute, reasoning that a "spouse's action for loss of consortium . . . [is] derivative from the cause of action in behalf of the injured person[,] and . . . it may not exist in cases where the injured person would not have a cause of action." *Id.* This Court sees no reason why the result would be different when an underlying injury claim fails and when an underlying injury claim is settled. In both cases, the underlying injury claim has been extinguished, and a derivative loss of consortium claim cannot be maintained.

Viewing the provisions of the statute as a harmonious whole and in light of the statute's legislative history and relevant case law, this Court views barring a non-injured spouse's loss of consortium claim after the underlying injury claim has been settled as most compatible with Utah law. Thus, Mr. Terry's settlement of his claims bars Mrs. Terry's loss of consortium claim.

B. Whether the Claim of Negligent Infliction of Emotional Distress can be Sustained as a Matter of Law at this Point in the Proceeding

The Court denies Mrs. Terry leave to amend her complaint to add a claim for negligent infliction of emotional distress. Rule 15(a) of the Utah Rules of Civil Procedure states that after a party has filed responsive pleadings, "a party may amend his pleading only by leave of court or

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by written consent of the adverse party; and leave shall be freely given when justice so requires." However, "a party may not amend a complaint to add a claim that is legally insufficient or futile." *Smith v. Grand Canyon Expeditions Co.*, 2003 UT 57, P33 (Utah 2003) (quoting *Kasco Servs. Corp. v. Benson*, 831 P.2d 86, 92-93 (Utah 1992)).

The Supreme Court of Utah adopted the test for negligent infliction of emotion distress outlined in the Restatement (Second) of Torts (1965). *Johnson v. Rogers*, 763 P.2d 771, 785 (Utah 1988). "Subsection (2) of section 313 is clear in its requirement that those seeking to recover for emotional distress caused by witnessing injury to others must be within the zone of danger created by the defendant's breach of duty." *Hansen v. Sea Ray Boats*, 830 P.2d 236, 240 (Utah 1992). The Supreme Court of Utah has also noted "that the rules in section 313 have 'no application where the emotional distress arises solely because of harm or peril to a third person, and the negligence of the actor has not threatened the plaintiff with bodily harm in any other way.' " *Id.* Additionally, "[a] plaintiff cannot recover for negligent infliction of emotional distress unless the plaintiff is a direct victim of the defendant's negligence. This rule applies regardless of whether the plaintiff's emotional distress resulted from fear for her own safety or from witnessing harm to another. That is, the [defendant's' negligence must have placed [the plaintiff] in actual physical peril for her to recover for negligent infliction of emotional distress." *Straub v. Fisher & Paykel Health Care*, 1999 UT 102, P14 (Utah 1999).

In this case, Mrs. Terry's claim for negligent infliction of emotional distress is legally insufficient and futile. Mrs. Terry's alleged emotional distress "arises solely because of harm or peril" to her husband, and the defendant's alleged negligence "has not threatened [Mrs. Terry] with bodily harm in any other way." *Hansen*, 830 P.2d at 240. Basically, Mrs. Terry is not "a direct victim of the defendant's [alleged] negligence." *Straub*, 1999 UT at P14. The defendant's

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alleged negligence never placed Mrs. Terry "in actual physical peril." *Id.* Therefore, the Court denies Mrs. Terry leave to amend the complaint to add a claim for negligent infliction of emotional distress.

III. Conclusion

The Court bars Mrs. Terry's loss of consortium claim because it is purely derivative on Mr. Terry's settled underlying injury claim. Additionally, the Court denies Mrs. Terry leave to amend the complaint to add a claim for negligent infliction of emotional distress because even if it was it allowed, it would fail as a matter of law, making it legally insufficient and futile.

There being no other claims pending, this matter is dismissed.

DATED this 29 of Sept, 2010

BY THE COURT:

Samuel D. McVey
District Court Judge

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CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 070402917 by the method and on the date specified.

MAIL: JAMES C HASKINS 136 E SOUTH TEMPLE STE 1420 SALT LAKE CITY, UT 84111
MAIL: BRANDON B HOBBS 299 S MAIN ST 15TH FLOOR SALT LAKE CITY UT 84111
MAIL: MICHAEL J MILLER 3 TRIAD CENTER STE 500 SALT LAKE CITY UT 84180
MAIL: R. SCOTT WILLIAMS 3 TRIAD CENTER STE 500 SALT LAKE CITY UT 84180

Date: 9/30/10

Cali Stephens

Deputy Court Clerk

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ORDER ENFORCING SETTLEMENT AGREEMENT (Filed June 22, 2010)

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FILED
JUN 22 2010
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

R. Scott Williams #3498
Briant S. Platt, #11819
STRONG & HANNI
Attorneys for Respondents
C. William Bacon, M.D., and
Central Utah Clinic, P.C.
3 Triad Center, Suite 500
Salt Lake City, UT 84180
Telephone: (801) 532-7080
Facsimile: (801) 596-1508
swilliams@strongandhanni.com
bplatt@strongandhanni.com

IN THE FOURTH JUDICIAL DISTRICT IN AND FOR UTAH COUNTY

STATE OF UTAH

GLADE TERRY and KAIRLE TERRY, Claimants, vs. C. WILLIAM BACON, M.D.; CENTRAL UTAH CLINIC, P.C. and UTAH VALLEY REGIONAL MEDICAL CENTER, Respondents.	**ORDER ENFORCING SETTLEMENT AGREEMENT** Civil No. 070402917 Judge: Samuel McVey

Defendants' Motion to Enforce an oral settlement agreement in the sum of $15,000 came up for oral argument and evidentiary hearing on May 10, 2010 with James Haskins appearing for Plaintiffs and R. Scott Williams appearing for Defendants.

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Defendants initially called as a witness, James W. McConkie, the former attorney for Plaintiffs, and Plaintiffs objected on the grounds of attorney/client privilege. Consequently, oral argument was heard concerning the ability of Mr. McConkie to testify with respect to issues involving any prior settlement.

Having heard the arguments of counsel, the Court ruled as a matter of law that Plaintiffs had placed communications with their attorney "at issue" in this judicial proceeding and therefore the Court deems that the attorney/client privilege is waived to the extent of testimony presented on the issue of whether a settlement agreement had been reached between Plaintiffs and Defendants through their individual attorneys. Consequently, Mr. McConkie was permitted to testify with respect to evidence regarding the possibility of a settlement that may have existed in this case.

The Court having otherwise heard the testimony of the witnesses presented at the hearing and reviewed the memoranda and listened to the arguments of counsel; Now Therefore It Is Hereby Ordered as follows:

1. **Settlement Enforced as to Mr. Glade Terry**

The settlement agreement is hereby enforced and the Court rules that the parties did agree to settle the above-mentioned case between Plaintiff Glade Terry and Defendants Dr. William Bacon and the Central Utah Clinic for the total amount of $15,000. Consequently, the settlement will be effective as of early January 2009, and Mr. Terry is ordered to sign the original

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Release and Settlement Agreement forwarded to Mr. McConkie on January 9, 2009. The Court reaches the ruling for the following reasons:

a. The Court finds that the testimony of James W. McConkie is credible and corroborated in part with his notes that he used to record the substance of the conversations between Mr. Terry and Mr. McConkie. These notes are admissible as present recollection recorded under Rule 803 (5) of the Utah Rules of Evidence. The Court is persuaded Mr. McConkie obtained the requisite authorization to settle the claim for $15,000 and that Mr. Glade Terry did express intent to be bound by Mr. McConkie's actions in accepting that settlement offer of $15,000.

b. The subsequent telephone call testified to by the Affidavit of R. Scott Williams wherein he learned that the settlement offer had been accepted by the Plaintiffs and consequently ordered the settlement check, which was ultimately delivered to Mr. McConkie, along with a Stipulation and Order of Dismissal of the case, also persuades the Court of the existence of the settlement and that a "meeting of the minds" occurred with respect to the settlement sum of $15,000.

c. There is a long history in Utah law that oral agreements to settle should be enforced as a matter of public policy, and that settlement agreements are favored.

d. There was not sufficient testimony about the lack of competency on the part of Mr. Terry.

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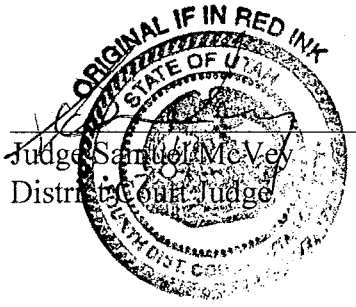
2. **Enforcement of Settlement Agreement Reserved as to Mrs. Kairle Terry**

The Court hereby reserves for the present, the issue of whether a settlement agreement was reached between Plaintiff Kairle Terry and Defendants. The Court has asked the parties to provide information concerning the following issues with respect to that portion of the Motion, including:

1. Relevant law with respect to whether the claim for loss of consortium by Mrs. Terry is derivative of the claims of Mr. Terry; and

2. Whether the claims of negligent infliction of emotional distress can be sustained as a matter of law at this point in the proceeding.

DATED this 22 day of ~~May~~ June, 2010.



Judge Samuel McVey
District Court Judge

APPROVED AS TO FORM:

(#3243)
James Haskins

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UTAH APPELLATE COURTS
MAY 26 2011

James C. Haskins (#1406)
Thomas N. Thompson (#3243)
HASKINS & ASSOCIATES, L.L.C.
Attorney for Appellant
136 East South Temple, Suite 1420
Salt Lake City, Utah 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

IN THE UTAH COURT OF APPEALS

GLADE TERRY and KAIRLE TERRY, Plaintiffs and Appellants, vs. C. WILLIAM BACON, M.D., CENTRAL UTAH CLINIC, P.C., and UTAH VALLEY REGIONAL MEDICAL CENTER, Respondents and Appellees.	**CERTIFICATE OF SERVICE OF BRIEF OF APPELLANTS** Trial Court No. 070402917 Appellate Court No. 20100893-SC

I hereby certify that a true and correct copy of the Plaintiff's Brief of Appellants was served on the 26th day of May, 2011, by HAND DELIVERY to the offices of the attorney for Utah Valley Regional Medical Center, as follows:

Brandon B. Hobbs
RICHARDS, BRANDT, MILLER & NELSON
Attorneys at Law
299 South Main Street, Suite 1500
Salt Lake City, Utah 84110-2465

DATED this 26th day of May, 2011.

Thomas N. Thompson
Attorney for Plaintiffs and Appellants

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Certificate of Service of Brief of Appellants was served on the 26th day of May, 2011, as follows:

BY HAND DELIVERY TO:

Brandon B. Hobbs
RICHARDS, BRANDT, MILLER & NELSON
Attorneys at Law
299 South Main Street, Suite 1500
Salt Lake City, Utah 84110-2465

BY FIRST CLASS MAIL TO:

R. Scott Williams
Briant S. Platt
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180

DATED this 26th day of May, 2011.

Thomas N. Thompson

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