

2011

Ruth B. Hardy Revocable Trust v. Eagle Mountain Lots, LLC: Errata

Utah Court of Appeals

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James C. Swindler; Wayne G. Petty; Prince, Yeates & Geldzahler; Attorneys for Appellees.
Gerald H. Kinghorn; Jeremy R. Cook; Parsons Kinghorn Harris; Attorneys for Appellant.

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**IN THE COURT OF APPEALS OF THE
STATE OF UTAH**

**RUTH B. HARDY REVOCABLE TRUST,
DELCON CORPORATION PROFIT SHARING
PLAN FBO A. WESLEY HARDY AKA DELCON
CORP. PSP FBO A. W. HARDY, FINESSE
P.S.P., MJS REAL PROPERTIES LLC AKA
MJS REALPROPERTIES, UINTAH
INVESTMENTS, LLC AKA UINTAH
INVESTMENTS, DAVID D. SMITH, STEVEN
CONDIE, DAVID L. JOHNSON, BERRETT PSP,
VW PROFESSIONAL HOMES PSP, TY
THOMAS, AND D.R.P. MANAGEMENT PSP,**

Plaintiffs and Appellees,

vs.

**EAGLE MOUNTAIN LOTS, L.L.C. AKA EAGLE
MOUNTAIN LOTS, LLC, GRANT BYBEE,
BB&S, LLC, ROBERT A. JONES DBA BB&S,
LLC, THE CIRCLE OF BUILDERS, L.L.C.,
ROYAL RICHARDS, HOMESPIN, LLC, EAGLE
MOUNTAIN CITY AND JOHN DOES I-X,**

Defendants and Appellants.

Case No. 20110339 CA

ERRATA

James C. Swindler (#3177)
Wayne G. Petty (#2596)
Prince, Yeates & Geldzahler
175 East 400 South, Suite 900
Salt Lake City, Utah 84111

Attorney for Appellees

Gerald H. Kinghorn
Jeremy R. Cook
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Salt Lake City, UT 84111

Attorneys for Appellant Eagle Mountain
City

On October 17, 2011, Appellees filed their Brief. Appellees, through their counsel, submit this errata sheet to correct a typographical error within the text of the Brief. The corrected text (with corrected text underlined>) should read as follows:

Page 22, first paragraph, fourth line: Utah Code Ann. § 25-6-9(4)...

DATED this 20th day of October, 2011.

PRINCE, YEATES & GELDZAHLER



James C. Swindler (#3177)

Wayne G. Petty (#2596)

175 East 400 South, Suite 900

Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2011, I served a copy of the foregoing by mail to the following:

Gerald H. Kinghorn
Jeremy R. Cook
Parsons Kinghorn Harris
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111



Addendum A

FILED
DISTRICT COURT
UINTAH COUNTY, UTAH

MAY - 9 2011

BY CV

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY, STATE OF UTAH

Richard V. Thomas,
Plaintiff,

vs.

Ashley Regional Medical Center; Si Hutt,
individually; John Griffith, MD, individually;
David Perry, MD, individually; David
Richards, MD, individually; Kimberly
Kobernick, RN, individually; Debbie
Spafford, individually,

Defendants.

RULING AND ORDER ON
DEFENDANTS' MOTION TO
DISMISS PLAINTIFF'S
AMENDED COMPLAINT AND
PLAINTIFF'S MOTION FOR
LEAVE TO AMEND
COMPLAINT

Case No. 110800013

Judge EDWIN T. PETERSON

This matter is before the Court on the Defendants' Motion to Dismiss Plaintiff's Amended Complaint and Plaintiff's Motion for Leave to Amend Complaint.

The Defendants bring this Motion pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure. The Defendants argue the Complaint should be dismissed because res judicata bars the causes of action, the defamation and intentional infliction of emotional distress claims are barred by the one year statute of limitation and the Plaintiff failed to plead fraud with particularity.

Previously, the Plaintiff filed a complaint in case number 080925868 on December 16, 2008. The complaint alleged that Ashley Regional Medical Center's (ARMC) administration and medical staff engaged in fabrication and falsification of records and testimony regarding his

care of patients. The complaint alleged ARMC did this in an effort to deprive him of his clinical privileges and medical staff membership. The December 16, 2008, complaint brought claims of breach of contract, breach of covenant of good faith and fair dealing, defamation and restraint of trade. On January 6, 2010, the Court dismissed the complaint for failure to prosecute.

On January 7, 2011, the Plaintiff filed a new Complaint in this case which is virtually identical to the complaint filed in case number 080925868 except that additional individual ARMC employees are named and new claims for fraud, negligence and intentional infliction of emotional distress were alleged. The new Complaint is based on the same allegation as the previous complaint: that the Plaintiff was the victim of a concerted effort to fabricate criticisms of his care of patients in October 2008 in order to improperly remove him from the medical staff at ARMC.

First, the Defendants argue the Complaint is barred by res judicata under both claim preclusion and issue preclusion. Claim preclusion “bars a party from prosecuting in a subsequent action a claim that has been fully litigated previously.” *Snyder v. Murray City Corp.*, 73 P.3d 325 (Utah 2003). Here, the claim of breach of contract, breach of covenant of good faith and fair dealing, defamation and restraint of trade have already been litigated. Therefore, they are barred by res judicata. Issue preclusion “prevents the relitigation of issues that have been once litigated and determined in another action even though the claims for relief in the two actions may be different.” *Penrod v. Nu Creation Creme, Inc.*, 669 P.2d 873, 875 (Utah 1983). Here, the Plaintiff’s claims clearly pertain to the issues raised in the December 16, 2008, complaint. Those issues have been previously litigated and are therefore barred by res judicata.

Second, the Defendants argue the Plaintiff’s defamation and intentional infliction of

emotional distress claims are barred by the one year statute of limitation. Utah Code Ann. § 78B-2-302(4) provides a one year statute of limitation for libel, slander, false imprisonment or seduction. An intentional infliction of emotional distress claim tied to the same operative facts that give rise to a defamation claim also has a one year statute of limitation. *Russell v. Thompson Newspapers, Inc.*, 842 P.2d 896, 906-07 (Utah 1992). Here, the Plaintiff alleges the incident giving rise to the claims for defamation and intentional infliction of emotional distress occurred in October of 2008. Clearly, those claims are barred by the one year statute of limitations.

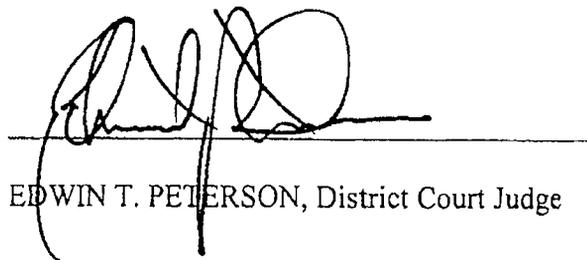
Finally, the Defendants argue the Plaintiff failed to plead fraud with particularity as required by Rule 9(b) of the Utah Rules of Civil Procedure. Plaintiff's Complaint alleges the Defendants maliciously and in bad faith made incomplete or false entries in unspecified medical records, or maliciously and in bad faith presented information to others which they knew to be incomplete or false. These claims do not satisfy the particularity requirement of Rule 9(b).

Next, the Plaintiff filed a Motion for Leave to Amend his Complaint. Rule 15(a) of the Utah Rules of Civil Procedure allows a court discretion in allowing an amended pleading, and instructs that leave shall be freely given when justice so requires. Here, justice does not require allowing the Plaintiff to amend his Complaint. The Complaint has already been amended once. Furthermore, the Plaintiff's claims have already by litigated in a previous complaint. The Plaintiff had ample opportunity to pursue his claims but failed to do so and the claims were dismissed. The Defendants have been defending against the Plaintiff's allegations since December of 2008. Allowing an amendment to a complaint that has already been amended and is virtually identical to a complaint previously litigated would not do justice to the Defendants. Therefore, the Plaintiff's Motion for Leave to Amend is denied.

The Defendants' Motion to Dismiss Plaintiff's Amended Complaint is granted. The dismissal of the Plaintiff's Complaint resolves the other Motions subsequently filed and the Court will not consider them.

Dated this 9th day of MAY, 2011.

BY THE COURT:



EDWIN T. PETERSON, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 110800013 by the method and on the date specified.

MAIL: RICHARD V THOMAS MD 38 E 100 N SUITE A VERNAL, UT 84078

MAIL: ROBERT R HARRISON 10 EXCHANGE PLACE 11TH FLR POB 45000 SALT LAKE CITY UT 84145

Date: 5-9-11



Deputy Court Clerk

Addendum B

COPY
FILED DISTRICT COURT
Third Judicial District

DEC 16 2008

SALT LAKE COUNTY

By _____ Deputy Clerk

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Attorneys for Plaintiff

**IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH**

RICHARD THOMAS, M.D.

Plaintiff,

v.

ASHLEY REGIONAL MEDICAL
CENTER; SI HUTT, individually; and
BRUCE GUYANT, individually;

Defendants.

**VERIFIED COMPLAINT
AND DEMAND FOR JURY TRIAL**

Case No. 080925868

Judge Peuler

Plaintiff Richard Thomas, M.D. by and through the undersigned counsel, hereby complains against Defendants, and alleges as follows:

PARTIES

1. Richard Thomas, M.D. is a physician practicing obstetrics and gynecology ("OB/GYN") in Vernal, Utah.

2. Defendant Ashley Regional Medical Center (“Ashley Regional”) is a private medical facility wholly owned by LifePoint Hospitals and located in Vernal, Utah.

3. Defendant Si Hutt (“Hutt”) is the CEO of Ashley Regional.

4. Defendant Bruce Guyant (“Guyant”) is the Regional Director of Physician Recruiting for LifePoint Hospitals.

JURISDICTION AND VENUE

5. This Court has original jurisdiction over this matter pursuant to UTAH CODE ANN. § 78A-5-102 (formerly UTAH CODE ANN. § 78-3-4).

6. Venue in this action is proper in this Court pursuant to Utah Code Ann. § 78B-3-304 (formerly UTAH CODE ANN. § 78-13-4) and § 78B-3-307 (formerly UTAH CODE ANN. § 78-13-7), as Defendant Guyant is located in Salt Lake County, Utah.

GENERAL ALLEGATIONS

7. Dr. Thomas, has clinical privileges and medical staff membership at Ashley Regional.

8. Dr. Thomas has practiced as an OB/GYN at Ashley Regional since November 2004.

9. Dr. Thomas’ practice relies on referrals from other physicians and the community for new patients. Dr. Thomas’ practice is particularly reliant on referrals from Ashley Regional’s medical staff. Patients seeking an OB/GYN physician are unwilling to consider care from a physician who may not be practicing in the community in the near future because they desire continuity of care throughout their pregnancy. Physicians and persons in the community will not

refer new patients to an OB/GYN if they believe that the OB/GYN's practice will close in the near future and that the OB/GYN will not be available to care for the patient for the duration of a pregnancy and the delivery of the baby.

**MEDICAL STAFF BYLAWS, THE FAIR HEARING PLAN
AND MEDICAL STAFF RULES AND REGULATIONS**

10. Dr. Thomas' clinical privileges and medical staff membership at Ashley Regional are governed by Medical Staff Bylaws ("the Bylaws"), the Fair Hearing Plan, and the Medical Staff Rules and Regulations ("Staff Rules").

11. The Bylaws, ¶ 8.3-1 provide for summary suspension of a practitioner's clinical privileges:

whenever a practitioner's conduct requires that immediate action be taken to protect the life of any patients or to reduce the substantial likelihood of immediate injury or damage to the health and safety of any patient,

13. The Bylaws, ¶ 8.3-2 provide that after a summary suspension, the Medical Executive Committee ("the MEC") shall be promptly convened to review and consider the action taken. The MEC may recommend to the Board of Trustees modification, continuance, or termination of the terms of the summary suspension.

14. The Bylaws, ¶ 8.3-3 provide that if the MEC recommends corrective action then the practitioner shall be entitled to the procedural rights of Article IX of the Bylaws and the Fair Hearing Plan.

15. The Bylaws, ¶14.3 contain the following clause with respect to the confidentiality of information:

Information, with respect to any practitioner, submitted, collected, or prepared by any representative of this or any other health care facility or organization or Medical Staff for the purpose of achieving and maintaining quality patient care, reducing morbidity and mortality, or contributing to clinical research shall, to the fullest extent permitted by law, be confidential and shall not be disseminated to anyone other than a representative, nor used in any way except as provided herein or except as otherwise required by law. Such confidentiality shall also extend to information of like kind that may be provided by third parties. This information shall not become part of any particular patient's file or of the general hospital records.

16. The Bylaws, ¶ 14.5-1 contain the following clause with respect to the activities that are covered by the confidentiality clause contained in the Bylaws, ¶ 14.3:

The confidentiality and immunity provided by this Article shall apply to all acts, communications, reports, recommendations, or disclosures performed or made in connection with this or any other health care facility's or organization's activities concerning, but not limited to:

* * * * *

- (c) Corrective action.
- (d) Hearings and appellate reviews.
- (e) Other hospital department, committee, or Medical Staff activities related to Process Improvement activities and appropriate professional conduct.

17. Section II of the Staff Rules governs Medical Records including the Content of the progress notes and directs that progress notes are to be recorded at the time of observation.

18. Section 3.3 of the Fair Hearing Plan provides:

The practitioner who requested the hearing shall be entitled to be accompanied and represented at the hearing by an appointee of the Medical Staff in good standing or by a member of his local professional society.

19. Section 3.4.1 of the Fair Hearing Plan provides that Dr. Thomas may call witnesses on his own behalf.

20. Section 3.8 of the Fair Hearing Plan provides:

Request for a postponement of a hearing shall be granted by the Hearing Officer, only upon a showing of good cause and only if the request is made as soon as practical.

EFFORTS TO REPLACE DR. THOMAS

18. As a member of the medical staff, Dr. Thomas began experiencing friction with Ashley Regional and its CEO Defendant Hutt. As a result of this friction Defendant Hutt and Ashley Regional decided to push Dr. Thomas out.

19. In August 2008 Defendant Hutt attended a confidential medical staff meeting. The medical staff attending the meeting are referral sources for Dr. Thomas. During the meeting Hutt advised the medical staff that Dr. Thomas was “not going to make it” and stated that he was actively recruiting another OB/GYN to replace Dr. Thomas.

20. In furtherance of its efforts to push Dr. Thomas out, Ashley Regional began recruiting for a new OB/GYN physician to join Ashley Regional’s medical staff. Sometime during the summer or fall of 2008, Defendant Guyant, mass e-mailed a recruiting notice stating as follows:

OB-GYN—The Hospital had 27% grown year over year from 2006 over 2007. Many young families are moving to the area for work. Dr. Griffith has a full practice as does Dr. Breitenbach (FP/OB). Dr. Anderson (FP/OB is on track to deliver about 60 babies this year. Dr. Thomas, OB/GYN—who arrived 2 years before Dr. Thomas (sic) is struggling and it appears he may not stay in the community. The new physician would replace Dr. Thomas, as there probably is not room for 5 OBs on staff.

21. Upon information and belief, the information contained in the recruiting notice was provided to Defendant Guyant by Ashley Regional and/or Defendant Hutt.

SURGERY AND CARE OF PATIENT B.S.

22. On October 8, 2008, Dr. Thomas performed a vaginal hysterectomy on a patient identified as B.S. During the surgery the anesthetist noted that B.S.'s blood pressure fluctuated. This fluctuation continued as B.S. recovered post-operatively. The fact that B.S.'s blood pressure was fluctuating was communicated by the recovery nurse to the Kimberly Kobernick, the medical floor nurse who assumed care of B.S. upon her transport from recovery to the medical floor. On the medical floor, B.S.'s blood pressure continued to fluctuate. At some point her vital signs became unstable. Dr. Thomas was notified. An ultrasound confirmed internal bleeding and B.S. was taken immediately from the medical floor for emergency surgery. Dr. Thomas performed the emergency surgery and successfully arrested the bleeding.

23. During the emergency surgery Dr. Thomas observed that B.S.'s platelet count was dangerously low. Platelets were unavailable at Ashley Regional. After consultation with the on call physician for the Ashley Regional Intensive Care Unit, Dr. Thomas arranged for B.S. to be transferred by air to Intermountain Medical Center in Salt Lake City to receive platelets and further treatment.

24. Subsequent to the surgery Dr. Thomas discovered that Kobernick falsified entries to B.S.'s chart to make it appear that she had properly monitored B.S. and alerted Dr. Thomas in a timely fashion to the patient's declining blood pressure and suspected blood loss. Kobernick's chart notes also contain inconsistencies suggesting she was with the patient in the patient's

hospital room when in fact B.S. was in surgery.

25. Upon discovering the deliberate misrepresentations and inconsistencies made by Kobernick in B.S.'s chart, Dr. Thomas dictated an extensive chart note documenting his care of B.S. and the decision to return her to the operating room and the misrepresentations and inconsistencies in Kobernick's chart notes. Ashley Regional subsequently extracted this chart note from the electronic medical record for a period of several weeks, after which it was then reinserted into her chart.

SUMMARY SUSPENSION

26. On October 8, 2008, following B.S.'s transfer to Salt Lake City Ashley Regional asked Dr. Thomas to voluntarily agree to the summary suspension of his clinical privileges and medical staff membership pending peer review. Dr. Thomas reluctantly agreed to the summary suspension.

27. After Dr. Thomas agreed to the suspension Defendant Hutt disseminated confidential information concerning his suspension to Ashley Regional's medical staff. Rumors concerning Dr. Thomas' suspension quickly spread through the community and through healthcare facilities as distant as Salt Lake City. The rumors included rumors and innuendo that Dr. Thomas had lost his medical license and harmed a patient.

SURGERY AND CARE OF PATIENT C.P.

28. On October 1, 2008, Dr. Thomas performed an abdominal hysterectomy and salpingo-oophorectomy on a patient identified as C.P. The surgery was remarkable due to extensive pelvic adhesions involving the bowel. Despite these difficulties the patient tolerated

the procedure well and there were no complications.

29. C.P. had a protracted postoperative course involving respiratory problems related to her history of tobacco use. She then began to exhibit bowel symptoms on October 6, 2008 at which time Dr. Thomas ordered imaging tests including x-rays and a CT scan on October 7, 2008. David M. Perry, M.D. reviewed the x-rays (shot around 12:00 a.m. on October 7, 2008 and the CT of the abdomen and pelvis (shot around 5:00 p.m., October 7, 2008). Dr. Perry noted the presence of free intraperitoneal air and free fluid in his chart notes. Free intraperitoneal air and free fluid does not necessarily implicate a bowel perforation. Additionally, this CT was performed with contrast dye and nothing in Dr. Perry's report indicates leakage into the peritoneal cavity. Nothing in Dr. Perry's chart note for that date indicates that he advised Dr. Thomas that he suspected a bowel perforation or that he recommended that C.P. be returned to surgery. Additionally there was no sign of an abscess mentioned in his report.

30. A finding of a perforated bowel is a serious finding. The proper standard of care for a radiologist, upon suspecting a perforated bowel, would have been to advise the surgeon of the suspicion of perforated bowel immediately, recommend return to surgery, and document advising the surgeon of the perforated bowel and document the recommendation of a return to surgery in his radiology report.

31. On October 8, 2008, Dr. Thomas' privileges were summarily suspended as discussed in ¶ 26, above. Care of C.P. was then transferred to another surgeon.

32. On October 9, 2008 C.P. underwent a second CT ordered by C.P.'s newly assigned surgeon. Dr. Perry allegedly spoke with the CT technician who indicated additional

peritoneal fluid and air was present and that he believed the patient had a perforated bowel and recommended that she return to surgery. Dr. Perry dictated a chart note concerning this CT on October 10, 2008 and again made no mention of a suspected bowel perforation. In fact, Dr. Perry's chart notes make no mention of a suspected bowel perforation until his radiology report concerning chest x-rays taken on October 9, 2008 and dictated on October 13, 2008.

33. C.P. became acutely ill on October 10, 2008 and she returned to surgery that afternoon. Subsequent to this second surgery C.P. developed respiratory distress and was transferred to Salt Lake City for further treatment at the Intermountain Medical Center Shock Trauma Intensive Care Unit.

34. On October 15, 2008 Dr. Perry amended his October 7, 2008 chart note and falsely stated that he informed Dr. Thomas that the first CT study demonstrated free intraperitoneal air and that he was concerned that the patient had a bowel perforation. He further states that on October 9, 2008 he spoke with Defendant Hutt and falsely advised Hutt that he had informed Dr. Thomas that he was concerned that C.P. had a perforated bowel. The original October 7, 2008 chart note was extracted from both the patient's hard copy medical record as well as the hospital's electronic medical record for C.P.

PEER REVIEW

35. Ashley Regional sought peer review of Dr. Thomas' care of B.S., C.P. and five other patients through CIMRO Quality Healthcare Solutions. Ashley Regional did not provide CIMRO with Dr. Thomas' chart note documenting the inconsistencies and misrepresentations contained in Kobernick's charts for patient B.S. Ashley Regional did not provide CIMRO with

Dr. Perry's original chart note of October 7, 2008 for patient C.P., which makes no mention of advising Dr. Thomas of a potentially serious finding of a perforated bowel, nor makes a recommendation that C.P. return to surgery. CIMRO conducted its peer review without these necessary documents.

36. In October 2008, after receiving CIMRO's peer review, the MEC conducted an MEC peer review meeting. At the meeting, Dr. Thomas brought the extraction of Dr. Perry's October 7, 2008 chart note to Defendant Hutt's attention. Dr. Thomas also advised Defendant Hutt that if Dr. Perry had truly suspected a perforated bowel on October 7, 2008 then the October 7 chart note was substantively deficient. Defendant Hutt refused to acknowledge wrongdoing on the part of either Dr. Perry, himself or Ashley Regional in permitting the potentially deficient chart note to be extracted and amended seven days later.

37. On October 27, 2008, after the MEC peer review meeting, Ashley Regional advised Dr. Thomas by letter that the MEC had decided to recommend that Dr. Thomas' clinical privileges and medical staff membership be revoked.

38. On October 30, 2008, Dr. Thomas requested a hearing under the Fair Hearing Plan by letter. This request was reiterated on November 7, 2008 by a letter from counsel to Michael Olsen, M.D. the Chief of Staff of Ashley Regional and Chairperson of the MEC.

39. On December 2, 2008, Ashley Regional provided notice of a hearing scheduled for December 18, 2008 at Ashley Regional. The notice indicated, in part, that the MEC's decision was based on a lack of adequate clinical judgment and decision making as evidenced by his care of B.S. and C.P.

40. On December 11, 2008, Dr. Thomas requested a postponement of the fair hearing. Dr. Thomas demonstrated good cause for the postponement on the basis that Dr. Thomas was unable to secure physician representation and witnesses to testify on his behalf at the Fair Hearing due to the proximity of the holidays.

FIRST CAUSE OF ACTION
Breach of Contract by Ashley Regional

41. Paragraphs 1-40 of Plaintiff's complaint are incorporated and realleged.

42. The Bylaws, the Fair Hearing Plan, and the Staff Rules create a contractual relationship between Dr. Thomas and Ashley Regional.

43. Ashley Regional has breached this contractual relationship in numerous ways including but not limited:

- a. Ashley Regional, maliciously and in bad faith did not provide CIMRO with Dr. Thomas' chart note documenting the inconsistencies and misrepresentations contained in Kobernick's charts for patient B.S.;
- b. Ashley Regional, maliciously and in bad faith did not provide CIMRO with Dr. Perry's original chart note of October 7, 2008 for patient C.P., which makes no mention of advising Dr. Thomas of a potentially serious finding of a perforated bowel, nor makes a recommendation that C.P. return to surgery;
- c. Ashley Regional by and through Defendant Hutt maliciously and in bad faith disclosed confidential information regarding Dr. Thomas' summary suspension to Ashley Regional's medical staff.

d. Ashley Regional, despite good cause shown, denied a postponement of the Fair Hearing to permit Dr. Thomas to arrange for physician representation and witnesses to testify on his behalf.

44. Ashley Regional's breaches of the parties contractual relationship has caused, and is continuing to cause, Dr. Thomas direct and substantial economic damage for which Dr. Thomas seeks actual damages in an amount to be proven at trial. Furthermore, Ashley Regional's breaches demonstrate that Dr. Thomas will not receive a fair hearing and accordingly Dr. Thomas seeks relief in the form of injunctive relief enjoining Ashley Regional from proceeding with the hearing.

SECOND CLAIM FOR RELIEF

Breach of Implied Covenant of Good Faith and Fair Dealing by Ashley Regional

45. Paragraphs 1-44 of Plaintiff's Complaint are incorporated and realleged.

46. Implied in every contract is an implied covenant of good faith and fair dealing, which Ashley Regional has breached by and through their actions to push Dr. Thomas out.

47. Said conduct has caused and is continuing to cause Dr. Thomas direct and substantial economic damage for which Dr. Thomas seeks actual damages in an amount to be proven at trial.

THIRD CAUSE OF ACTION

Defamation by all Defendants

48. Paragraphs 1-47 of Plaintiff's Complaint are incorporated and realleged.

49. Dr. Thomas' practice relies on referrals from other physicians and the community for new patients. Patients seeking an OB/GYN physician are unwilling to consider care from a

physician who may not be practicing in the community in the near future because they desire continuity of care throughout their pregnancy. Physicians and persons in the community will not refer new patients to an OB/GYN if they believe that the OB/GYN's practice will close in the near future and that the OB/GYN will not be available to care for the patient for the duration of a pregnancy and the delivery of the baby. In August 2008 Defendant Hutt attended a confidential medical staff meeting. The medical staff attending the meeting are referral sources for Dr. Thomas. During the meeting Hutt advised the medical staff that Dr. Thomas was "not going to make it" and that he was recruiting an OB/GYN to replace Dr. Thomas

50. Furthermore, sometime during the late summer or fall of 2008, Defendant Guyant, posted a recruiting notice on the internet stating as follows:

OB-GYN—The Hospital had 27% grown year over year from 2006 over 2007. Many young families are moving to the area for work. Dr. Griffith has a full practice as does Dr. Breitenbach (FP/OB). Dr. Anderson (FP/OB is on track to deliver about 60 babies this year. Dr. Thomas, OB/GYN—who arrived 2 years before Dr. Thomas (sic) is struggling and it appears he may not stay in the community. The new physician would replace Dr. Thomas, as there probably is not room for 5 OBs on staff.

51. Upon information and belief, the information contained in the recruiting notice was provided to Defendant Guyant by Ashley Regional and/or Defendant Hutt.

52. The aforesaid defamatory statements constituted the dissemination of a known falsehood, or of information, with a reckless disregard for whether or not it is true or false, and were made in bad faith.

53. Said conduct has caused and is continuing to cause Dr. Thomas direct and special damages for which Dr. Thomas seeks actual damages in an amount to be proven at trial.

FOURTH CAUSE OF ACTION
Restraint of Trade by all Defendants

54. Paragraphs 1-53 of Plaintiff's Complaint are incorporated and realleged.
55. Defendants actions to push Dr. Thomas out demonstrate that Defendants conspired to restrain Dr. Thomas's trade and that they were acting with malice and bad faith.
56. Said conduct has caused and is continuing to cause Dr. Thomas direct and substantial economic damage for which Dr. Thomas pursuant to Utah's Antitrust Act found in UTAH CODE ANN. § 76-10-9111 *et seq*, seeks treble damages in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Dr. Thomas prays for judgment against the Defendants as follows:

1. For the FIRST CLAIM FOR RELIEF, Dr. Thomas requests that the Court award actual damages in an amount to be determined at trial and injunctive relief enjoining Ashley Regional from maintaining his summary suspension and proceeding with the fair hearing;
2. For the SECOND CLAIM FOR RELIEF, Dr. Thomas requests that the Court award actual damages in an amount to be determined at trial;
3. For the THIRD CLAIM FOR RELIEF, Dr. Thomas requests that the Court award actual damages in an amount to be determined at trial;
4. For the FOURTH CLAIM FOR RELIEF, Dr. Thomas requests that the Court award treble damages in an amount to be determined at trial;
5. That Dr. Thomas be awarded his reasonable attorney fees and costs;
6. Interest at the highest allowable rate; and

7. For such other and further relief as Dr. Thomas is entitled to and the Court deems just and proper.

JURY TRIAL DEMANDED

Plaintiff respectfully requests this matter be tried to a jury.

DATED this 16 day of December, 2008.

STIRBA & ASSOCIATES



PETER STIRBA
DARIN GOFF
R. BLAKE HAMILTON
Attorneys for Plaintiff

Plaintiffs Address

Richard Thomas, M.D.
175 North 100 West, Suite 105
Vernal, UT 84078

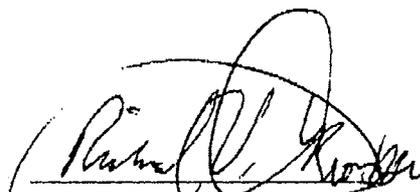
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VERIFICATION

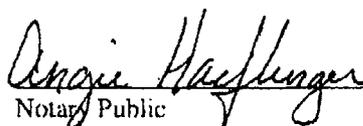
STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

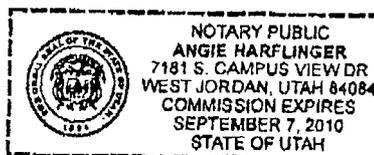
I, Richard Thomas, M.D., being duly sworn, state that I have personal knowledge of the facts set forth in the foregoing VERIFIED COMPLAINT and that the facts set forth therein are accurate and complete to the best of my knowledge and belief.

DATED: DECEMBER 16, 2008


Richard Thomas, M.D.

Subscribed, sworn to and acknowledged before me by Richard Thomas, M.D., whose identity is known to me or proven to me on the basis of satisfactory evidence, this 16 day of December, 2008.


Notary Public



Addendum C

JAN 13 2011

BY _____

RICHARD V. THOMAS
38 East 100 North, Suite A
Vernal, UT 84078
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Plaintiff *Pro Se*

IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR
UINTAH COUNTY, STATE OF UTAH

<p>RICHARD V. THOMAS, MD Plaintiff, v. ASHLEY REGIONAL MEDICAL CENTER; SI HUTT, individually; JOHN GRIFFITH, MD, individually; DAVID PERRY, MD, individually; DAVID RICHARDS, MD, individually; KIMBERLY KOBERNICK, RN, individually; DEBBIE SPAFFORD, individually, Defendants.</p>	<p>AMMENDED COMPLAINT AND DEMAND FOR JURY TRIAL</p> <p>Case No: 110800013 Judge: Clark McClellan</p>
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COMES NOW, Plaintiff Richard V. Thomas, MD, hereby complains against
Defendants, and alleges as follows:

PARTIES

1. Plaintiff, Richard V. Thomas, MD, is a physician practicing obstetrics and gynecology
(OB/GYN) in Vernal, UT.

2. Defendant Ashley Regional Medical Center (ARMC) is a private medical facility wholly owned by LifePoint Hospitals, Inc. and located in Vernal, Utah.
3. Defendant Si Hutt (Hutt) is the CEO of ARMC.
4. Defendant John Griffith, MD (Griffith) is a physician practicing obstetrics and gynecology (OB/GYN) in Vernal, Utah.
5. Defendant David Perry, MD (Perry) is a physician practicing radiology in Vernal, Utah.
6. Defendant David Richards, MD (Richards) is a physician practicing general surgery in Vernal, Utah.
7. Defendant Kimberly Kobernick, RN (Kobernick) is a registered nurse practicing in Vernal, Utah.
8. Defendant Debbie Spafford is the Risk Management Director of ARMC and resides in Vernal, Utah.

JURISDICTION AND VENUE

9. This Court has original jurisdiction over this matter pursuant to Utah Code Ann. §78A-5-102.
10. Venue in this action is proper in this Court pursuant to Utah Code Ann. §78B-3-304 and §78B-3-307.

GENERAL ALLEGATIONS

11. Plaintiff had clinical privileges and medical staff membership at ARMC from November 2004 to October 2008.

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12. Plaintiff practiced as an OB/GYN at ARMC from November 2004 to October 2008.
 13. Griffith was the only other OB/GYN on staff at any time at ARMC between November 2004 and October 2008.
 14. Griffith was in direct competition with the Plaintiff.
 15. Griffith held the position of OB Department Head in October 2008.
 16. Griffith was a member of ARMC's Medical Executive Committee (MEC) in October 2008.
 17. According to Article XII ¶ 12.2-1 of ARMC's Bylaws, CEO Hutt is considered an "ex-officio" member of the MEC.
 18. Griffith, Richards and the Plaintiff used the same billing and practice management contractor, Carepoint Network, in 2008.
 19. The Plaintiff was approached by the President of Carepoint Network, Kent Mecham (Mecham), and suggested that the Plaintiff employ similar billing techniques as those being employed by Griffith.
 20. The Plaintiff stated to Mecham that he felt such billing practices constituted fraud and he would not go forward with such practices.
 21. Mecham admitted to the Plaintiff that he disclosed the fact that the Plaintiff felt the billing practices constituted fraud to both Griffith and Hutt.
 22. During 2008, Hutt was dissatisfied with the financial condition of the Plaintiff's practice.
 23. At no time did Hutt discuss the specific financial condition of the Plaintiff's practice directly with the Plaintiff.

24. In August of 2008, Hutt attended a medical staff meeting in which he informed those attending that the Plaintiff was “not going to make it” and that he was actively recruiting another OB/GYN to replace the Plaintiff.

25. The Plaintiff was not present in the above mentioned meeting.

26. Sometime during 2008, Lifepoint Hospitals, using information received from Hutt, distributed a recruiting notice stating as follows:

OB-GYN – The Hospital had 27% grown year over year from 2006 over 2007. Many young families are moving to the area for work. Dr. Griffith has a full practice as does Dr. Breitenbach (FP/OB). Dr. Anderson (FP/OB) is on track to deliver about 60 babies this year. Dr. Thomas, OB/GYN – who arrived 2 years before Dr. Thomas (sic) is struggling and it appears he may not stay in the community. The new physician would replace Dr. Thomas, as there probably is not room for 5 OB’s on staff.

27. On the morning of October 8, 2008, the Plaintiff performed a vaginal hysterectomy on a patient to be identified as X.

28. After surgery, X was transferred to the medical surgical floor and her care was assumed by Kimberly Kobernick, RN.

29. On the medical surgical floor, X’s blood pressure fluctuated and her vital signs became unstable.

30. The Plaintiff was notified of the fluctuating blood pressures and unstable vital signs and ordered an ultrasound to be performed.

31. The ultrasound confirmed internal bleeding and patient X was taken immediately to emergency surgery, performed by the Plaintiff and assisted by Richards.

32. During the emergency surgery, the Plaintiff successfully arrested the bleeding.
33. In the evening of October 8, 2008, Hutt and Dr. Michael Olsen, Medical Chief of Staff at ARMC, met with the Plaintiff and summarily suspended his clinical privileges at ARMC.
34. Subsequent to his suspension, the Plaintiff reviewed and found inconsistencies and fraudulent misrepresentations made in patient X's record made by nurse Kobernick.
35. Immediately upon finding inconsistencies and fraudulent misrepresentation made in the patient's record, the Plaintiff notified Chief of Staff Michael Olsen.
36. Upon information and belief, the Plaintiff's clinical privileges at ARMC were summarily suspended due to the malicious and fraudulent misrepresentations made by Richards and Kobernick.
37. At the Fair Hearing the MEC was represented by Griffith.
38. The MEC met on October 23, 2008 to gather information so as to be able to determine if termination of the Plaintiff's privileges and medical staff membership was justified.
39. Hutt participated in the MEC's final recommendation to terminate the privileges and medical staff membership of the Plaintiff.
40. CIMRO is an organization that offers independent peer review.
41. CIMRO's review consisted of answers to prepared questions posed by ARMC, authored by Spafford.
42. Article XIV ¶ 14.1(b) of ARMC's Bylaws states:

“MALICE means the dissemination of a known falsehood, or of information, with a reckless disregard for whether or not it is true or false.”

FIRST CAUSE OF ACTION
Breach of Contract by ARMC

43. Paragraphs 1-42 of Plaintiff's Complaint are incorporated and realleged.
44. Clinical privileges and medical staff membership at ARMC are governed by Medical Staff Bylaws, The Fair Hearing Plan, and the Medical Staff Rules and Regulations.
45. The Medical Staff Bylaws, The Fair Hearing Plan, and the Medical Staff Rules and Regulations create a contractual relationship between the Plaintiff and ARMC.
46. The Medical Staff Bylaws, The Fair Hearing Plan, and the Medical Staff Rules and Regulations provide a contractual right to a fair peer review process, including an impartial tribunal.
47. Article XIV ¶ 14.3 of ARMC's Bylaws states:
- “Information, with respect to any practitioner, submitted, collected, or prepared by any representative of this or any other health care facility or organization or Medical Staff for the purpose of achieving and maintaining quality patient care, reducing morbidity and mortality, or contributing to clinical research shall, to the fullest extent permitted by law, be confidential and shall not be disseminated to anyone other than a representative, nor used in any way except as provided herein or except as otherwise required by law. Such confidentiality shall also extend to information of like kind that may be provided by third parties. This information shall not become part of any particular patient's file or of the general hospital records.”
48. Article XIV ¶ 14.5-1 of ARMC's Bylaws states the following with respect to the activities that are covered by Article XIV ¶ 14.3 of ARMC's Bylaws:
- “The confidentiality and immunity provided by this Article shall apply to all acts, communications, reports, recommendations, or disclosures performed or made in connection with this or any other health care facility's or organization's activities concerning but not limited to: ... (c) Corrective action; (d) Hearings and appellate reviews; (e) Other hospital

department, committee, or Medical Staff activities related to Process Improvement activities and appropriate professional conduct.”

49. On October 9, 2008, Hutt disseminated confidential information, as defined by ARMC’s Bylaws, regarding the Plaintiff, to multiple employees of ARMC.
50. On January 9, 2009, while being accompanied by Spafford, Plaintiff discovered forged medical documents in the medical records department of ARMC.
51. On January 9, 2009, upon discovery of the forged medical documents by the Plaintiff, Spafford was immediately notified.
52. After discovering the forged medical records, while the Plaintiff was preparing his defense for the fair hearing, he was prohibited access to original patient records, both electronic and official hard copy, at ARMC.
53. When Spafford was asked why the Plaintiff could not have access to patient records, Plaintiff was told that ARMC’s attorney had instructed them not to allow the Plaintiff to even view the medical records in either official electronic or hard copy.
54. Article III, ¶ 3.3 of The Fair Hearing Plan states, in part:

“The practitioner who requested the hearing shall be entitled to be accompanied and represented at the hearing by an appointee of the Medical Staff in good standing or by a member of his local professional society.”
55. The Plaintiff was not given the option to be represented by an appointee of the Medical Staff or by a member of his local professional society during the Fair Hearing process.
56. Article VIII, ¶ 8.1 of The Fair Hearing Plan states, in part:

“None of the parties shall be represented by an attorney at any hearing or appellate review.”

57. During the appellate review the attorney representing ARMC was present.
58. During the appellate review the attorney representing ARMC testified to the Board of Trustees on behalf of ARMC.
59. During the appellate review the attorney representing the Board of Trustees of ARMC was present.
60. During the appellate review the Plaintiff was denied the opportunity to be represented by an attorney.
61. ARMC violated the Plaintiff's rights to a fair peer review process and an impartial tribunal in the following ways:
 - a. Notwithstanding the presentation of genuine issues of disputed material facts by the Plaintiff, ARMC, through Spafford, knowingly went forward and provided CIMRO with incomplete, altered, and fraudulent medical records.
 - b. ARMC failed to adequately investigate the issues of disputed material facts made by the Plaintiff prior to submitting information to be reviewed by CIMRO.
 - c. At no time prior to the original fair hearing date, was the Plaintiff provided with any specific allegations to which he could formally respond to the MEC.
 - d. Up to two days prior to the originally scheduled fair hearing, the Plaintiff had not been provided with any medical records by ARMC for his experts to review.

- e. After requesting patient records to provide to the Plaintiff's expert witnesses, Defendant Spafford maliciously and in bad faith provided the Plaintiff with incomplete and fraudulent patient records.
- f. CIMRO was provided a letter from Griffith discussing his concern in regards to the technique that was used in the procedure of one of the cases being reviewed, which negated CIMRO's position of independence.
- g. The information against the Plaintiff was presented to the MEC by Griffith, a direct competitor to the Plaintiff.
- h. The Plaintiff was not allowed to cross-examine witnesses whose testimony was relied upon by the MEC.
- i. Hutt participated in the MEC decision making process while actively recruiting another physician to replace the Plaintiff.
- j. The information against the Plaintiff, presented to the MEC, was incomplete and contained altered and fraudulent medical records.
- k. In making its decision to terminate the privileges and medical staff membership of the Plaintiff, the MEC substantially relied on the opinions of CIMRO.

62. ARMC's breaches of its contractual relationship with the Plaintiff have caused, and continue to cause, economic damage which the Plaintiff seeks actual damages in an amount to be proven at trial.

SECOND CAUSE OF ACTION

Breach of Implied Covenant of Good Faith and Fair Dealing by ARMC

63. Paragraphs 1-62 of Plaintiff's Complaint are incorporated and realleged.
64. Implied in every contract is a covenant of good faith and fair dealing.
65. ARMC breached its covenant of good faith and fair dealing with the Plaintiff.
66. Said breach by ARMC has caused and is continuing to cause the Plaintiff direct and substantial economic damage for which the Plaintiff seeks actual damages in an amount to be proven at trial.

THIRD CAUSE OF ACTION

Defamation by all Defendants

67. Paragraphs 1-66 of Plaintiff's Complaint are incorporated and realleged.
68. In August 2008, Hutt maliciously commented in a medical staff meeting that the Plaintiff was "not going to make it", and that he was recruiting an OB/GYN to replace the Plaintiff.
69. In 2008, LifePoint e-mailed a recruiting notice stating in part that the Plaintiff, "...is struggling and it appears he may not stay in the community. The new physician would replace Dr. Thomas, as there probably is not room for 5 OB's on staff."
70. Perry maliciously and in bad faith entered into patient Y's medical record accusations about the Plaintiff's care that were known to be false.
71. Richards maliciously and in bad faith gave information to representatives of ARMC and the MEC about the Plaintiff's care of patient X which he knew to be false.

72. Kobernick maliciously and in bad faith entered into patient X's medical record information about the Plaintiff's care of patient X which she knew to be incomplete and false.
73. Kobernick maliciously and in bad faith gave information to representatives of ARMC and the MEC about the Plaintiff's care of patient X which she knew to be incomplete and false.
74. Griffith maliciously and in bad faith presented information to the MEC which he knew to be incomplete and false.
75. Spafford maliciously and in bad faith supplied information to CIMRO which she knew to be incomplete and false.
76. The aforesaid defamatory statements constitute the dissemination of a known falsehood, or of information, with a reckless disregard for whether or not it is true or false, and were made in bad faith.
77. Said conduct has caused and is continuing to cause the Plaintiff direct and special damages for which the Plaintiff seeks actual damages in an amount to be proven at trial.

FOURTH CAUSE OF ACTION
Restraint of Trade by all Defendants

78. Paragraphs 1-77 of Plaintiff's Complaint are incorporated and realleged.
79. Defendants' actions to try and replace the Plaintiff maliciously and through a sham peer review process demonstrate that the Defendants conspired to restrain the Plaintiff's trade and that they were acting with malice and in bad faith.

80. Said conduct has caused and is continuing to cause the Plaintiff substantial economic damage for which the Plaintiff seeks treble damages, in accordance with Utah State Law, in an amount to be proven at trial.

FIFTH CAUSE OF ACTION
Negligence by All Defendants

81. Paragraphs 1-80 of Plaintiff's Complaint are incorporated and realleged.

82. Because of the potential consequences of the situation, the Defendant's owed the Plaintiff a legal duty to exercise a high standard of care in the gathering and authentication of facts that were to be used in a peer review process.

83. All Defendants were made aware by the Plaintiff that the information gathered for the peer review process was incomplete and not factually true.

84. Notwithstanding the expressed concerns of the Plaintiff, the Defendants went forward and used the incomplete and fraudulent information maliciously and in bad faith.

85. As a direct result, said conduct has caused and is continuing to cause the Plaintiff substantial economic damage for which the Plaintiff seeks damages in an amount to be proven at trial.

SIXTH CAUSE OF ACTION
Fraud by all Defendants

86. Paragraphs 1-85 of Plaintiff's Complaint are incorporated and realleged.

87. Perry maliciously and in bad faith entered into a patient's medical record accusations about the Plaintiff that were known to be false.

88. Kobernick maliciously and in bad faith entered into a patient's medical record information about the Plaintiff she knew to be incomplete and false.
89. Si Hutt maliciously and in bad faith ordered an independent CIMRO review of medical records he knew to be incomplete and false.
90. Spafford maliciously and in bad faith sent medical records to CIMRO which she knew to be incomplete and false.
91. The defendants intended CIMRO to offer a review of medical records they knew to be incomplete and false.
92. CIMRO reasonably relied on the incomplete and false information that was presented to them and issued a review based on said information.
93. Griffith maliciously and in bad faith presented information to the MEC which he knew to be incomplete and false, including the CIMRO review.
94. Said conduct has caused and is continuing to cause the Plaintiff direct damages for which the Plaintiff seeks actual damages in an amount to be proven at trial.

SEVENTH CAUSE OF ACTION
Intentional Infliction of Emotional Distress by all Defendants

95. Paragraphs 1-94 of Plaintiff's Complaint are incorporated and realleged.
96. The malicious introduction of incomplete and fraudulent information into medical records was performed by the Defendants intentionally and with reckless disregard.

97. This same incomplete and fraudulent information was maliciously and in bad faith used in the Plaintiff's peer review process.
98. The defendants knew or should have known that these actions would foreseeably cause the Plaintiff severe emotional distress.
99. The Plaintiff suffered and continues to suffer severe emotional distress as a direct result.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays for judgment against the Defendants as follows:

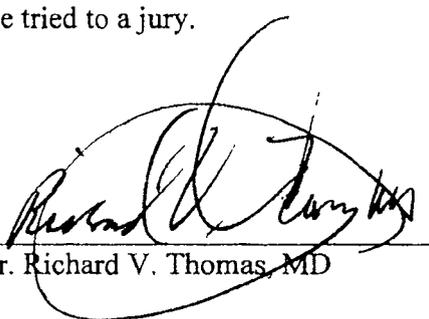
100. For the FIRST CAUSE OF ACTION, the Plaintiff requests that the Court award actual damages in an amount to be determined at trial.
101. For the SECOND CAUSE OF ACTION, the Plaintiff requests that the Court award actual damages in an amount to be determined at trial.
102. For the THIRD CAUSE OF ACTION, the Plaintiff requests that the Court award actual damages in an amount to be determined at trial.
103. For the FOURTH CAUSE OF ACTION, the Plaintiff requests that the Court award treble damages in an amount to be determined at trial.
104. For the FIFTH CAUSE OF ACTION, the Plaintiff requests that the Court award actual damages in an amount to be determined at trial.
105. For the SIXTH CAUSE OF ACTION, the Plaintiff requests that the Court award actual damages in an amount to be determined at trial.

106. For the SEVENTH CAUSE OF ACTION, the Plaintiff requests that the Court award damages in an amount to be determined at trial.
107. That the Plaintiff be reinstated to the medical staff of ARMC, with all rights and privileges that he had prior to his summary suspension.
108. That the Plaintiff's professional record be cleared with any and all state, national or professional databanks that keep record of such data.
109. That the Plaintiff's hospital file record be cleared of any and all information in relation to this peer review process.
110. That the Plaintiff be awarded reasonable attorney fees and court costs;
111. Interest at the highest allowable rate; and
112. For such other and further relief as the Plaintiff is entitled to and the Court deems just and proper.
113. The Plaintiff also respectfully requests the right to amend this complaint if so justified during the course of discovery.

JURY TRIAL DEMANDED

114. The Plaintiff respectfully requests this matter be tried to a jury.

DATED this 12th day of January, 2011.



Dr. Richard V. Thomas, MD

CERTIFICATE OF SERVICE

I certify that I served a copy of the attached AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL, by placing a true and correct copy in an envelope addressed to:

Ashley Regional Medical Center
150 West 100 North
Vernal, UT 84078

Si Hutt
150 West 100 North
Vernal, UT 84078

John Griffith, MD
South Medical Office Building
150 West 100 North, Suite 104
Vernal, UT 84078

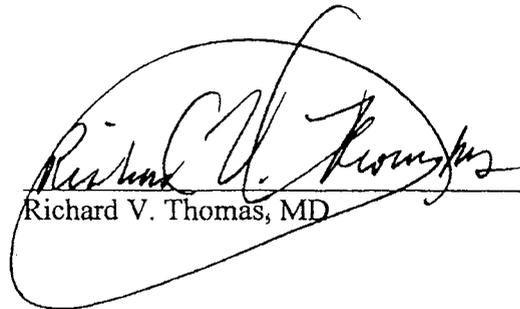
David Perry, MD
150 West 100 North
Vernal, UT 84078

David Richards, MD
175 North 100 West
Vernal, UT 84078

Kimberly Kobernick, RN
1666 East 4000 South
Vernal, UT 84078

Debbie Spafford
150 West 100 North
Vernal, UT 84078

and deposited the same, sealed, with first class postage prepaid thereon, in the United States Mail at Vernal, Utah, on the 12th day of January, 2011.



Richard V. Thomas, MD