

2004

Kathryn Cannon, as surviving spouse, Lane Cannon and Roland Cannon, as surviving children and legal heirs of Gary R. Cannon, deceased v. Salt Lake Regional Medical Center, Inc., John and Jane Does 1 through X and Doe Business Entities 1 through V : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Douglas G. Mortensen; Matheson, Mortensen, Olsen and Jeppsen; Attorneys for Plaintiffs/
Appellants

David W. Slagle; Elizabeth L. Willey; Bradley R. Blackham; Snow, Christensen and Martineau;
Attorneys for Salt Lake Regional Medical Center Inc. (Appellee)

Recommended Citation

Brief of Appellant, *Kathryn Cannon, as surviving spouse, Lane Cannon and Roland Cannon, as surviving children and legal heirs of Gary R. Cannon, deceased v. Salt Lake Regional Medical Center, Inc., John and Jane Does 1 through X and Doe Business Entities 1 through V: Brief of Appellant*, No. 20040486 (Utah Court of Appeals, 2004).

https://digitalcommons.law.byu.edu/byu_ca2/5031

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

Douglas G. Mortensen, #2329
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
Telephone: (801) 363-2244

Attorneys for Plaintiffs/Appellants

IN THE UTAH COURT OF APPEALS

KATHERYN CANNON, as surviving
spouse, LANE CANNON and ROLAND
CANNON, as surviving children and legal
heirs of GARY R. CANNON, deceased,

Plaintiffs/Appellants,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X and DOE BUSINESS
ENTITIES 1 THROUGH V,

Respondents/Appellees.

Case No. 2:0040486-CA

 **UTAH COURT OF APPEALS**
BRIEF

UTAH
DOCUMENT
K F U
50

.A10
DOCKET NO. 2:0040486-CA

**INTERLOCUTORY APPEAL FROM DISCOVERY ORDER ENTERED BY THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY PER THE
HONORABLE JUDITH S.H. ATHERTON ON MAY 21, 2004.**

David W. Slagle, #2975
Elizabeth L. Willey, #5639
SNOW, CHRISTENSEN &
MARTINEAU
Attorneys for Salt Lake Regional
Medical Center Inc. (Appellee)
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145
(801) 521-9000

Douglas G. Mortensen, #2329
MATHESON, MORTENSEN, OLSEN
& JEPPSON, P.C.
Attorneys for Plaintiffs/Appellants
648 East 100 South
Salt Lake City, Utah 84102
Telephone: (801) 363-2244

FILED
UTAH APPELLATE COURTS
OCT 01 2004

Douglas G. Mortensen, #2329
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
Telephone: (801) 363-2244

Attorneys for Plaintiffs/Appellants

IN THE UTAH COURT OF APPEALS

KATHERYN CANNON, as surviving
spouse, LANE CANNON and ROLAND
CANNON, as surviving children and legal
heirs of GARY R. CANNON, deceased,

Plaintiffs/Appellants,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X and DOE BUSINESS
ENTITIES 1 THROUGH V,

Respondents/Appellees.

Case No. 2:0040486-CA

**INTERLOCUTORY APPEAL FROM DISCOVERY ORDER ENTERED BY THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY PER THE
HONORABLE JUDITH S.H. ATHERTON ON MAY 21, 2004.**

David W. Slagle, #2975
Elizabeth L. Willey, #5639
SNOW, CHRISTENSEN &
MARTINEAU
Attorneys for Salt Lake Regional
Medical Center Inc. (Appellee)
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145
(801) 521-9000

Douglas G. Mortensen, #2329
MATHESON, MORTENSEN, OLSEN
& JEPPSON, P.C.
Attorneys for Plaintiffs/Appellants
648 East 100 South
Salt Lake City, Utah 84102
Telephone: (801) 363-2244

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
ISSUES PRESENTED	1
STATEMENT OF THE CASE	1
STATUTE WHOSE INTERPRETATION MAY BE DETERMINATIVE	3
SUMMARY OF ARGUMENT	4
APPLICABLE STANDARD OF REVIEW	4
ARGUMENT	5
I. THE INCIDENT REPORTS CONTAIN CRITICAL FACTUAL INFORMATION WHICH CANNOT BE OBTAINED BY MRS. CANNON IN ANY OTHER WAY.	5
II. FACTUAL INFORMATION CONTAINED IN INCIDENT REPORTS IS NOT PROTECTED BY PEER-REVIEW AND SHOULD BE MADE AVAILABLE TO ALL PARTIES IN A MEDICAL NEGLIGENCE LAWSUIT	6
III. THE COMPETING INTERESTS IN THIS CASE SHOULD BE RESOLVED IN FAVOR OF DISCLOSURE.	11
IV. THE AFFIDAVIT OF LINDA WRIGHT PROVIDES INADEQUATE BASIS FOR SUSTAINING THE CLAIM OF PRIVILEGE.	15
V. THE HOSPITAL'S SUGGESTION THAT THE FACTS CONTAINED IN ITS INCIDENT REPORTS WERE INTENDED SOLELY FOR PRIVILEGED CARE-REVIEW USE IS REBUTTED BY THE HOSPITAL'S OWN TRAINING VIDEO.	18

VI.	PRODUCTION OF THE INCIDENT REPORTS SHOULD BE COMPELLED HERE BECAUSE THE SAME HOSPITAL WAS ORDERED TO PRODUCE <i>AND DID PRODUCE</i> INCIDENT REPORTS IN A SIMILAR CASE INVOLVING A PATIENT WHO FELL JUST ONE DAY BEFORE MR. CANNON'S FALL.	20
VII.	THE DISTRICT COURT'S INITIAL RULING ON THE INCIDENT REPORTS PROVIDE NO BASIS FOR THE HOSPITAL'S REFUSAL TO COOPERATE IN CONTINUING DISCOVERY CONCERNING THE DISSEMINATION AND USE OF THE INCIDENT REPORTS.	22
	CONCLUSION	23
	REQUESTED RELIEF	24
	ADDENDUM	25

TABLE OF AUTHORITIES

STATUTES

UCA §26-25-3	2
§78-2-2(4) Utah Code Annotated	1
UCA §78-7-25(1)	3

CASE AUTHORITIES

<u>Adams v. St. Francis Regional Med. Ctr.</u> , 955 P.2d 1169, 1187 (Kan. 1998)	13
<u>Arlington Memorial Hospital Foundation Inc. v. Barton</u> , 952 SW.2d 927, 929-930 (Texas App. 1997)	15
<u>Barnes v. Whittington</u> , 751 SW 2d 493 (Tex. 1988)	10
<u>Benedict v. Community Hosp.</u> , 10 Va. Cir. 430 (1988)	8
<u>Benson v. IHC Hospitals, Inc.</u> , 866 P.2d 537 (Utah 1993)	18
<u>Bradburn v. Rockingham Memorial Hospital</u> , 45 Va. Cir. 356; 1998 Va. Cir. Lexus 85 (1998)	7
<u>Chicago Trust Co. v. Cook County Hospital</u> , 698 NE.2d 641, 649 (Ill. App.1 Dist. 1998)	17
<u>Cochran v. St. Paul Fire & Marine Ins. Co.</u> , 909 F. Sup. 641 (W. D. Ark. 1995)	10
<u>Columbia/HCA Healthcare Corporation v. Eighth Judicial District Court of Clark County Nevada</u> , 936 P.2d 844 (1997)	9
<u>Greenwood v. Wierdsma</u> , 741 P.2d 1079 (Wyo. 1987)	11
<u>Hill v. Sandhu</u> , 129 F.R.D. 548 (D. Kansas, 1990)	12
<u>In re Osteopathic Medical Center of Texas</u> , 16 SW.3d 881 (Texas App.- Ft. Worth 2000)	16

<u>Marbury v. Madison</u> , 1 Cranch 137, 177 (1803)	14
<u>May v. Wood River Township Hospital</u> , 257 Ill. App. 3d 969, 629 NE 2d 170, 174 (1994)	10
<u>Memorial Hospital, The Woodlands v. McCown</u> , 927 SW.2d 1 (Tex. 1996) ...	16
<u>Moretti v. Lowe</u> , 592 A.2d 855 (RI. 1991)	11
<u>National Bank of Commerce v. HCA Health Services</u> , 800 SW 2d 694 (Ark. 1990)	9
<u>Northeast Community Hospital v. Gregg</u> , 815 SW.2d 320 (Texas App. - Ft. Worth 1991)	17
<u>Porter v. Snyder</u> , 115 F.R.D. 77 (D. Kansas 1987)	12
<u>Romero v. Cohen</u> , 679 NYS 2d 264 (1998)	10
<u>Rushton v. Salt Lake County</u> , 977 P.2d 1201, 1203 (Utah 1999)	4
<u>Taylor EX REL CT v. Johnson</u> , 977 P.2d 479, 480 (Utah 1999)	4
<u>Trinity Medical Center v. Holum</u> , 544 NW 2d 148 (N. D. 1996)	10
<u>Trujillo v. Jenkins</u> , 840 P.2d 777, 778-79 (Utah 1992)	4
<u>United States v. Nixon</u> , 417 U.S. 683, 710, 94 S Ct. 3090, 3108, 41 L.Ed 2d 1039 (1974)	12

STATEMENT OF JURISDICTION

This Court has jurisdiction to decide this appeal pursuant to §78-2-2(4) Utah Code Annotated and the order of the Utah Supreme Court entered herein on June 16, 2004.

ISSUES PRESENTED

1. Are a hospital's factual incident reports, created contemporaneously with an event causing injury to a patient, discoverable?
2. Is further discovery surrounding the use of the Hospital's incident reports in this case appropriate?
3. Should the hospital be compelled to cooperate in further discovery concerning the dissemination and use of its incident reports?

STATEMENT OF THE CASE¹

This is an interlocutory appeal from an order of the district court declaring the Hospital's incident reports privileged. The appeal also seeks a ruling and clarification as to Mrs. Cannon's right to pursue further discovery pertaining to the discoverability of the incident reports.

¹All references to the District Court records shall be cited as "R. ____ ." Defendant Salt Lake Regional Medical Center, Inc. shall be referred to as "the Hospital." The Plaintiffs/Appellants shall be referred to herein as "Mrs. Cannon."

During the early morning of May 18, 2001, patient Gary Cannon sustained a subdural hematoma from a fall in his hospital room on Unit 4C of Salt Lake Regional Hospital. Three days later, he died from this injury. On the day the incident occurred, incident reports were prepared by members of the nursing staff.

On December 17, 2002, Mrs. Cannon submitted in formal discovery a request for “each ‘incident report’ and other documentation of Mr. Cannon’s fall during the early morning hours of May 18, 2001.” On February 24, 2003, the Hospital formally refused to honor this request, claiming the reports were protected by the care review privilege found in UCA §26-25-3. (R. 59).

On October 20, 2003, Mrs. Cannon filed a motion to compel production of the incident reports. (R. 58-67). On November 17, 2003, the Hospital filed a memorandum in opposition to the motion (R. 68-89) and on December 8, 2003, Mrs. Cannon filed a reply memorandum supporting her motion (R. 101-159). After holding the matter under advisement for several months, the district court issued its ruling denying Mrs. Cannon’s motion to compel production of the incident reports. It’s denial of Mrs. Cannon’s motion was based entirely on a conclusory assertion in an affidavit of the hospital’s risk manager that the incident reports were “not created or used for any purpose other than for evaluating or improving . . . health care.” The district court stated: “in the absence to any evidence to the contrary, this Court finds that the reports are privileged.” (R. 174).

Immediately following the district court's denial of her motion, Mrs. Cannon undertook additional discovery to test the accuracy of the assertion of the hospital's risk manager. She attempted to depose the risk manager and to depose all persons with information as to the identity of persons who had seen or used the incident reports. (See Exhibits "A" and "B", attached). Mrs. Cannon also served two requests for admissions and two interrogatories seeking concession that the attorneys defending the hospital in this action had seen the incident reports. The hospital refused to cooperate in any of these discovery efforts. (See Exhibits "C" and "D", attached). (R. 339-344, 396-401). A motion to compel is pending².

STATUTE WHOSE INTERPRETATION MAY BE DETERMINATIVE

§26-25-3, Utah Code Annotated (1996) provides:

All information, interviews, reports, statements, memoranda, or other data furnished by reason of this chapter, and any findings or conclusions resulting from

²This second motion to compel was submitted for decision on April 2, 2004. UCA §78-7-25(1) provides:

A judge of a trial court shall decide all matters submitted for final determination within two months of submission, unless circumstances causing the delay are beyond the judge's personal control.

Despite this statute, no decision has yet been issued. Copies of the briefs pertaining to this pending motion to compel discovery are attached hereto as Exhibits "H, I, J, and K."

those studies are privileged communications and are not subject to discovery, use, or receipt into evidence in any legal proceeding of any kind or character.

SUMMARY OF ARGUMENT

The Hospital's incident reports contain factual information recorded contemporaneously with an event causing injury to a patient. In fairness, the factual information contained therein should be made available to the patient's representatives. In any event, the incident reports should not be declared privileged on the basis of a conclusory assertion of the Hospital's risk manager that the incident reports have been used only for care review purposes.

APPLICABLE STANDARD OF REVIEW

The district court's decision that the incident reports are privileged was a conclusion of law (based on the district court's interpretation of UCA §26-25-3) which must be reviewed for correctness, without according any deference to the district court's ruling. See Rushton v. Salt Lake County, 977 P.2d 1201, 1203 (Utah 1999); Taylor EX REL CT v. Johnson, 977 P.2d 479, 480 (Utah 1999); and Trujillo v. Jenkins, 840 P.2d 777, 778-79 (Utah 1992).

ARGUMENT

I

THE INCIDENT REPORTS CONTAIN CRITICAL FACTUAL INFORMATION WHICH CANNOT BE OBTAINED BY MRS. CANNON IN ANY OTHER WAY.

The incident reports Mrs. Cannon seeks were written by persons with first hand knowledge and/or clear recent recollection of the event on the very day it occurred. They are factual in nature. They contemporaneously record important information such as when the patient fell, when and by whom he was discovered and what observations were made concerning his position, location and condition following the fall. They also likely include accurate reporting of when various care providers arrived on the scene to begin assisting in the patient's care.

For several reasons, including prelitigation rules and requirements governing health care malpractice claims in Utah, plaintiffs are denied opportunity to obtain statements from key hospital employees until long after an event has occurred. By then, memories have grown dim or nonexistent. In this case, Mrs. Cannon has not yet been able to depose witnesses to an event which occurred approximately 2 ½ years ago. It is likely that when the care providers on duty at the time of Mr. Cannon's fall are identified and deposed, they will claim they no longer have clear recollections of what occurred when.

Although the patient's hospital chart has been produced, the entries it contains relating to the decedent's fall are terse and in some respects both unclear and inconsistent. For example, there are indications that Mr. Cannon was heard to yell for help. The records made available to date are unclear as to whether that call for help was heard before or after Mr. Cannon's body was heard hitting the floor. It is impossible to tell from the chart that has been produced whether Mr. Cannon attempted to activate his call button or whether he otherwise called for help before the fall occurred. It is also impossible to ascertain from the chart exactly when Mr. Cannon fell and when his fall was discovered by his care providers.

II.

FACTUAL INFORMATION CONTAINED IN INCIDENT REPORTS IS NOT PROTECTED BY PEER-REVIEW PRIVILEGE AND SHOULD BE MADE AVAILABLE TO ALL PARTIES IN A MEDICAL NEGLIGENCE LAWSUIT.

Mrs. Cannon's counsel is aware of no Utah authority declaring incident reports either non discoverable or privileged. Courts in other jurisdictions have found such incident reports to be fully discoverable.

For example, in Bradburn v. Rockingham Memorial Hospital, 45 Va. Cir. 356; 1998 Va. Cir. Lexus 85 (1998), plaintiff sued a hospital for injuries sustained

as the result of a fall from a hospital bed. The plaintiff there sought production from the hospital of all “incident reports or accident reports” prepared immediately after the incident. The hospital refused to produce the documents on the claim they were privileged under a Virginia statute similar to Utah’s peer-review statute. On appeal, the Court determined that the incident reports were discoverable. The Virginia court’s analysis included the following observations and findings:

The plaintiff’s contention is that these Incident Reports are not part of the deliberative quality control process and are not within the scope of the privilege as intended by the legislature. . . . [I]t was never the position of the legislature to extend a quality assurance privilege to routine, factual reports which record the time, place, date, witnesses and observations relating to a particular incident. . . . [T]he privilege is meant to protect the give and take of the deliberative process and the self-searching review conducted by quality control committees.

* * * *

The Defendant cites to . . . court opinions which have held that incident reports such as the one involved here are covered by the quality assurance deliberative privilege

After reviewing all of these decisions and the evidentiary record established on in the hearing on the instant motion, **this Court continues to believe that . . . records such as these, which are standard incident reports that are filed for any accident occurring at a medical facility, are not shielded from discovery by the provisions of §8.01-581.17 because they do not rise to the level as contemplated by the statute of being**

quality assurance deliberative documents. They are simply recitations of the accident that occurred, the witnesses that were present, and other objective facts that can be ascertained from the eye witnesses to the incident. As such, they are much more akin to the ordinary hospital records, which are exempted from the reach of this privilege

It is certainly clear that the legislature has determined as a matter of public policy . . . that many of the documents utilized in, by, and with quality assurance organizations within medical facilities are to be exempt from discovery . . . in order to facilitate the free flow of information between staff personnel and quality assurance committees. Although that is a commendable objective and needs to be adhered to whenever the deliberative process is involved, it appears to be an impermissible reading of the statute to extend this privilege to cover all factual reports or incident reports of accidents that happen at a hospital simply because they are sent to a quality assurance committee.

The basis of this Court's decision was set forth very well by Judge Coulter in his decision in Benedict v. Community Hosp., 10 Va. Cir. 430 (1988), when he stated:

The argument that all field work, the incident reports, the questions concerning falls that might precede a peer-review meeting should be free from discovery . . . must yield to the more compelling mandate of the statute's last sentence. Otherwise, all documents could become privileged simply by the committee requiring their production or attaching them to the minutes. As stated in Johnson: "Almost anything could come within such broad and limitless sweep." *Id.* at page 436.

Therefore, the defendant Rockingham Memorial Hospital, will be ordered to produce within ten days of this Order copies of all incident reports that have been requested by the Plaintiff.

(98 Va. Cir. 356 at 359-60)(emphasis added).

When a car collision occurs, the investigating officer generally takes statements from all parties and witnesses. These are available to everyone and are some of the first things obtained during the investigation of a case. When a mishap or incident occurs in a hospital, employees of the hospital typically document what happened through incident reports. These incident reports are often the best source of contemporaneous information about the incident. They are part of the hospital routine and are not part of the peer-review process. They should be obtainable as part of the routine investigation of the case.

Peer-review or quality assurance committees exist in every hospital to review, ensure and improve the quality of patient care. Those committees do not exist to hide negligence. Recent decisions around the country have allowed discovery of incident reports or other statements taken during an investigation and have distinguished those reports from the actual proceedings of a peer-review committee. See, e.g., Columbia/HCA Healthcare Corporation v. Eighth Judicial District Court of Clark County Nevada, 936 P.2d 844 (1997); National Bank of Commerce v. HCA Health Services, 800 SW 2d 694 (Ark. 1990); Cochran v. St. Paul Fire & Marine Ins. Co., 909 F. Sup. 641 (W. D. Ark. 1995); Trinity Medical

Center v. Holum, 544 NW 2d 148 (N. D. 1996); Romero v. Cohen, 679 NYS 2d 264 (1998). These and other cases illustrate the importance of distinguishing between records and incident reports which are prepared in the routine course of hospital business and records generated during the proceedings of a true peer-review committee. Many documents may end up as evidence in committee deliberations; however, they are not privileged if the documents were "routine accumulative information." See Barnes v. Whittington, 751 SW 2d 493 (Tex. 1988).

If a hospital were allowed to furnish all information concerning an incident to a peer-review committee and then invoke a statutory privilege, it could insulate itself from disclosure of all relevant facts except those matters actually contained in a patient's record. Allowing a hospital to suppress the discovery of basic information by hiding harmful facts behind the peer-review privilege would stifle any incentive for advancing the cause of a patient's well-being - the very goal peer-review statutes are designed to promote. See May v. Wood River Township Hospital, 257 Ill. App. 3d 969, 629 NE 2d 170, 174 (1994).

A privilege should not outweigh the search for the truth. The Rhode Island Supreme Court has aptly found:

In enacting our peer-review statute, the legislature recognized the need for open discussions and candid self-analysis in peer-review meetings to insure that medical care of high quality will be available to the public.

That public purpose is not served, however, if the privilege created in the peer-review statute is applied beyond what was intended and what is necessary to accomplish the public purpose.

Moretti v. Lowe, 592 A.2d 855 (RI. 1991).

Plaintiffs are entitled to the same information as defendants regarding incidents in hospitals. Defendants should not be allowed to hide basic factual information behind the cloak of a peer-review statute. Proceedings of peer-review committees can be adequately protected without denying parties access to truthful, contemporaneously-created factual information contained in routine incident reports.

III.

THE COMPETING INTERESTS IN THIS CASE SHOULD BE RESOLVED IN FAVOR OF DISCLOSURE.

In Greenwood v. Wierdsma, 741 P.2d 1079 (Wyo. 1987), the Wyoming Supreme Court found that Wyoming's care review statute was not intended to abrogate claims against hospitals by making it impossible for a plaintiff to gather the requisite evidence to prove them. Similarly, Utah's legislature did not intend to make it impossible for a plaintiff to prove a case of negligence against a hospital for failing to prevent an unattended patient fall. The care review statute was not

designed to “exempt from discovery all relevant information, thereby precluding the possibility of proving negligence.” *Id.* at 1089. It may well be that the facts necessary to prove the hospital’s negligence in this case are found only in the incident reports.

It is well-established that privileges should be narrowly construed because they are in derogation of the common law and because they tend to thwart the right of every man’s evidence and defeat the very purpose of the adversary system - to obtain the truth. United States v. Nixon, 417 U.S. 683, 710, 94 S Ct. 3090, 3108, 41 L.Ed 2d 1039 (1974).

In Hill v. Sandhu, 129 F.R.D. 548 (D. Kansas, 1990), the court concluded that although incident reports may be considered by care review committees, the fact that they contain contemporaneous statements of fact remove them from the realm of privilege. The court noted, as our Supreme Court did in Benson, that unfairness would result if any document became privileged simply because it was submitted to a care review committee. The court noted the inequity of full one side having access to the very documents it seeks to preclude the other side from seeing. The court concluded that it would be inequitable to permit defendants to use the privileged information in the preparation of their defense while precluding plaintiffs access to the same information. *Id.* at 551. See also, Porter v. Snyder, 115 F.R.D. 77 (D. Kansas 1987) (Also holding incident reports are not subject to

the care review privilege).

Other courts have expressed grave concern over the constitutionality of broadly construing care review statutes:

In the present case the legislature granted a peer review privilege to health care providers to maintain staff competency by encouraging frank and open discussions and thus improving the quality of medical care in Kansas.

We must weigh that privilege against the Plaintiffs right to due process and the judicial need for the fair administration of justice. There can be no question that in granting the privilege, the legislature did not intend to restrict or eliminate plaintiff's right to bring a medical malpractice action against a health care provider. To allow the hospital here to insulate from discovery the facts and information which go to the heart of the plaintiffs' claim would deny the plaintiffs that right and, in the words of the federal court, 'raise significant constitutional implications.'

Adams v. St. Francis Regional Med. Ctr., 955 P.2d 1169, 1187 (Kan. 1998) citing to Hill v. Sandhu, 129 F.R.D. 548, 551 (D. Kan. 1990).

Finally, the United States Supreme Court addressed an extremely important privilege in United States v. Nixon, 418 U.S. 683 (1974). The issue was whether the presidential privilege "trumped" a subpoena from the special prosecutor for the Nixon tapes. The court first noted that it is "emphatically the province and duty of the judicial department to say what the law is." *Id.* at 703 citing Marbury v. Madison, 1 Cranch 137, 177 (1803). Next, the court considered the purpose of

the presidential privilege. It acknowledged that:

Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.

Id. at 705. The Supreme Court recognized that the rationale behind the privilege included the need for privacy, candor and exemption from liability for public dissemination. Significantly, those are the very factors which cause health care providers to assert the care review privilege. Despite the national and international importance of protecting presidential decision-making processes, the court found clear constitutional limitations applicable to the privilege. Its findings are germane, if not controlling, here. Specifically, the court found

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. . . .
[T]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the Rules of Evidence.

* * * *

[T]he allowance of the privilege to withhold evidence that is demonstrably relevant . . . would cut deeply into the guarantee of due process of law and gravely impair the basic functions of the court.

Id. at 709, 712.

The public interest in protecting the decision-making processes of the president of the United States is undoubtedly of greater significance than the

deliberations of a hospital's care review committee. The highest court in the land has declared that no privilege trumps the constitutional right of due process and procedural fairness. Where public confidence depends on full disclosure of all the facts, a privilege, even the presidential privilege, must yield.

IV.

THE AFFIDAVIT OF LINDA WRIGHT PROVIDES INADEQUATE BASIS FOR SUSTAINING THE CLAIM OF PRIVILEGE.

The Hospital claims that the affidavit of its risk manager, Linda Wright, establishes that the requirements of Utah's care review statute "are satisfied and that any incident report addressing Mr. Cannon's fall is privileged." (Hospital's memorandum, p.3) (R. 70). The Hospital cites Arlington Memorial Hospital Foundation Inc. v. Barton, 952 SW.2d 927, 929-930 (Texas App. 1997) for the proposition that an affidavit which tracks statutory language establishes that the peer-review privilege applies and shifts the burden to the party seeking discovery to controvert the affidavit. That case does not support the proposition. On the contrary, it and several other Texas decisions specifically require that an affidavit asserting the privilege must be accompanied by copies of the documents allegedly subject to the privilege, for the court's in-camera review. *Id*; See also In re Osteopathic Medical Center of Texas, 16 SW.3d 881 (Texas App.- Ft. Worth

2000); Northeast Community Hospital v. Gregg, 815 SW.2d 320 (Texas App. - Ft. Worth 1991); Memorial Hospital, The Woodlands v. McCown, 927 SW.2d 1 (Tex. 1996).

In the case cited by the hospital, the affidavit was accompanied not only by the documents sought to be protected from discovery but also by the hospital's bylaws, rules and regulations. (952 SW.2d at 930). Here, Ms. Wright's affidavit was not accompanied by the incident reports claimed to be privileged nor by the hospital's bylaws, rules, regulations or protocols. Without such documentation, there is no corroboration of the risk manager's naked assertion that the incident reports were created specifically and solely for care review purposes.

In the Texas cases, the affidavits of the parties claiming privilege specifically asserted that the documents in question were confidential and that only the peer-review committees and their authorized representatives had access to them. Linda Wright's affidavit comes short of making that assertion. Ms. Wright's affidavit does *not* aver that no persons other than those charged with quality assurance responsibilities see the incident reports. Significantly, she does not assert that the reports were kept from the hospital's counsel. If the hospital's counsel has been allowed to see the incident reports, then one side to this suit has an extremely unfair advantage. The incident reports reveal to that side but not the other what actually occurred and who knows exactly what about the

incident and about the patient's pre and post mishap treatment. Further, the reports may indicate where further investigation and discovery should go, who should testify and what their testimony will be. The incident reports give one side a knowledge of the basic critical facts while keeping the other side in the dark.

All of the Texas cases and those from other jurisdictions dealing with the issue indicate that (1) the burden to establish the privilege is on the party seeking to shield information from discovery; (2) the party asserting the privilege is obliged to prove, by competent evidence, that the privilege applies to the information sought and (3) the documents in question ought in all cases to be produced for in-camera review by the court.

We believe a trial court's proper course, followed here, is to examine each document at issue to determine whether it, specifically, has been made part of the peer-review process. As it does so, the court should keep in mind that the simple act of stamping the word "confidential" on a piece of paper does not, in itself, invoke the protection of the Act. The trial judge must be told, how, when and why the stamp was used

Chicago Trust Co. v. Cook County Hospital, 698 NE.2d 641, 649 (Ill. App. 1 Dist. 1998). At least one court has found it to be an abuse of discretion for a trial court to fail to perform an in-camera review of the documents claimed to be subject to a care review privilege. See Northeast Community Hosp. v. Gregg, 815 SW.2d 320, (Texas App. - Ft. Worth 1991).

V.

**THE HOSPITAL'S SUGGESTION THAT THE FACTS
CONTAINED IN ITS INCIDENT REPORTS WERE
INTENDED SOLELY FOR PRIVILEGED CARE-REVIEW
USE IS REBUTTED BY THE HOSPITAL'S OWN TRAINING
VIDEO.**

In Benson v. IHC Hospitals, Inc., 866 P.2d 537 (Utah 1993), our Supreme Court declared that “only material and information prepared *specifically* for submission to a peer-review committee” are subject to privilege. It further declared:

An obvious concern is whether §26-25-3 privileges only documents *prepared specifically* to be submitted for review purposes or whether the privilege also includes documents that *might* or *could* be used in the review process. The statutes' rationale tends to favor only the former scenario. Otherwise, an argument could be advanced that all medical documents prepared by hospital personnel are created to improve health care rendered by a hospital, and therefore, the care review privilege would apply to all such documents.

866 P.2d at 540. The foregoing analysis is identical to the analysis of the courts from other jurisdictions cited in plaintiffs' memorandum in chief. Clearly, Utah aligns itself with those authorities in favor of disclosure.

In its Benson decision, our Supreme Court also dealt with another legitimate concern: that documents which should be part of a patient's medical record are labeled as privileged documents and removed from the medical record.

[T]he Bensons express the concern that certain documents that should be in the medical record are missing. They allege that the hospital is labeling documents privileged that actually belong in the medical record. Therefore, it will also be necessary on remand for the trial court to determine what documents exist that should have been produced but were

not. If indeed there are documents that should be in the medical record that are not found there, then the statutory privileges are being abused, and that information and those documents are discoverable. Because petitioners [IHC Hospitals, Inc. and Dr. Madsen] are asserting privileges, it is their burden to show that nothing is missing from the medical record.

866 P.2d at 540.

It has been established through formal discovery that nurses working at the hospital are shown a training videotape entitled "Patient Falls: Panic or Prevention?". That videotape has been produced in discovery. It specifically states, with respect to patient falls:

All circumstances and findings should be documented in the patient's chart and on the incident report form.

Clearly, the hospital's own standards require that "all circumstances and findings . . . be documented in the patient's chart". It is precisely because the facts and circumstances surrounding Mr. Cannon's fall are not documented in the patient's chart that Mrs. Cannon seeks production of the incident reports. The patient's chart in this case contains extremely sparse, incomplete information concerning the circumstances surrounding his fall. It does not reveal whether Mr. Cannon attempted to activate his call button or whether he otherwise called for help before the fall occurred. It does not reveal when Mr. Cannon fell nor when his fall was discovered by his care providers. It is unclear whether Mr. Cannon was heard to yell for help before or after his body was heard hitting the floor.

Benson is still good law as to the hospital's having the burden of establishing that

the requested documents do not belong in the medical record. Clearly, the facts and circumstances surrounding the patient's fall belong in the patient's chart. The hospital's own training videotape so states.

The Hospital should not be allowed to benefit from a practice of labeling as privileged information which its own training film unequivocally states should be a part of the patient's medical records.

VI.

PRODUCTION OF THE INCIDENT REPORTS SHOULD BE COMPELLED HERE BECAUSE THE SAME HOSPITAL WAS ORDERED TO PRODUCE *AND DID PRODUCE* INCIDENT REPORTS IN A SIMILAR CASE INVOLVING A PATIENT WHO FELL JUST ONE DAY BEFORE MR. CANNON'S FALL.

The plaintiffs in this case are the surviving heirs of a man who sustained fatal injuries from an unattended fall while a patient at Salt Lake Regional Hospital on May 18, 2001. Just one day before Mr. Cannon's mishap, another patient at this hospital sustained injuries from an unattended fall. That patient's injuries also proved fatal. In the suit brought by his family (see Exhibit "E", attached), the hospital was and is represented by the same law firm which represents it here

The other case is pending before Judge William Bohling as Case No. 020910871. The plaintiffs in that case (the "Adam case") sought to compel production of incident reports concerning the patient's fall. After the motion to compel was fully briefed, Judge Bohling issued his decision granting the motion to compel (see Exhibit "F", attached). In

response to that order, the hospital did in fact produce its incident reports pertaining to the fall of patient Melville Adam. (See Exhibit "G", attached).

The hospital argues that memorandum decisions concerning hospital incident reports from other jurisdictions are "inapposite". This cannot be said about the decision in the Adam case. A comparison of the two cases reveals the facts to be virtually identical: same hospital; same time period; same problem (unattended patient fall); same result (death from subdural hematoma/massive brain injury); same applicable law.

The fact that the hospital has already produced incident reports in the companion case renders highly suspect its current risk manager's bald assertion that the incident reports in this case were created and used solely for the purposes set forth in Utah's care review statute. Denying the plaintiffs' motion to compel in this case will render the hospital free to pick and choose when it wishes to hide behind the privilege. It will produce incident reports it deems favorable in one case and keep them suppressed in another case when the facts they reveal harm its case or rebut its defenses. The unfairness produced by inconsistent application of the privilege is palpable.

For consistency and fairness, this Court should grant the motion to compel, as Judge Bohling did in the companion case.

VII.

THE DISTRICT COURT'S INITIAL RULING ON THE INCIDENT REPORTS PROVIDE NO BASIS FOR THE HOSPITAL'S REFUSAL TO COOPERATE IN CONTINUING DISCOVERY CONCERNING THE DISSEMINATION AND USE OF THE INCIDENT REPORTS.

The district court's minute entry indicates it relied entirely on the affidavit of Linda Wright as the factual basis for its finding that the incident reports are privileged. After referring to statements in that affidavit, the district court stated:

In the absence of any evidence to the contrary, this Court finds that the reports are privileged.

(R. 174). There is absolutely no statement or implication in the minute entry suggesting Mrs. Cannon may not try to gather contrary evidence.

The district court had ample opportunity in its minute entry to foreclose any discovery into the accuracy of Linda Wright's affidavit assertions. It chose not to close the door on such discovery. On the contrary, the minute entry seems to invite discovery. Mrs. Cannon should at the least be allowed to interrogate Linda Wright as to the Hospital's apparent violation of its own standard concerning documentation of circumstances surrounding patient falls. Mrs. Cannon should also be allowed to discover the identity of all persons who have seen the incident reports and the purpose of their seeing the reports.

Linda Wright's affidavit was crafted in a way to conceal whether the Hospital's own counsel has had access to the incident reports. If the Hospital's counsel has had access to those reports, denying access to Mrs. Cannon's counsel would be grossly

unfair. At the very least, the incident reports should have been produced for the Court's in-camera review. So too should the Hospital's bylaws, and all rules and protocols pertaining to patient rights, patient records and the use of information contained in incident reports.

CONCLUSION

The incident reports contain basic factual information about a mishap which caused a patient's death. It is not fair for only one party to have that basic information. The hospital's own training video states that everything known about a patient's fall and the circumstances surrounding it should be documented in the patient's chart. Keeping information contained in the incident reports out of a patient's chart violates the hospital's own policy.

The hospital's affidavit falls short of meeting the burden imposed on a party claiming privilege. It is conclusory in nature. It was crafted in a way to conceal whether the hospital's own counsel has had access to the incident reports. If they have had access, denying access to Mrs. Cannon's counsel would be grossly unfair. At the very least, the incident reports should have been produced for the court's in camera review. So too should the hospital's bylaws, and all rules and protocols pertaining to patient rights, patient records and the use of information contained in incident reports. The hospital has failed to meet its burden.

The hospital should not be allowed to benefit from a practice of labeling as confidential information which should clearly be a part of the patient's medical records.

Finally, constitutional considerations require that limits be placed upon privileges in order to protect the due process rights of litigants. Assertion of privilege in this case should not be allowed to thwart the very purpose of the adversary system of justice - the ascertainment of truth. The competing interests here should be resolved in favor of disclosure.

RELIEF REQUEST

Mrs. Cannon asks this Court to compel production of the Hospital's incident reports concerning Gary Cannon's fall. In the alternative, Mrs. Cannon asks this Court to compel the Hospital to cooperate fully in continuing efforts to discover the actual dissemination and use of such incident reports. Mrs. Cannon also seeks an award of fees incurred by her in attempting to discover who has seen the incident reports and for what purposes.

DATED this 1 day of October, 2004.



Douglas G. Mortensen
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
Attorneys for Plaintiffs/Appellants

ADDENDUM EXHIBITS

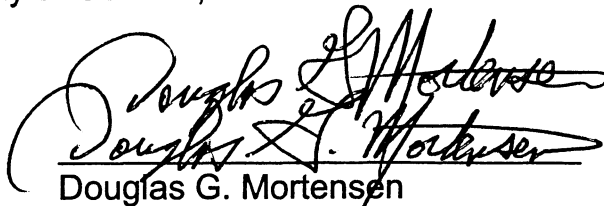
- A. March 18, 2004 Notice of Deposition of Linda Wright
- B. Rule 30(b)(6) Notice of Deposition of Salt Lake Regional Medical Center Representative(s)
- C. Defendant Salt Lake Regional Medical Center, Inc.'s Answers to Plaintiffs' First set of Requests for Admissions
- D. Defendant Salt Lake Regional Medical Center, Inc.'s Answers to Plaintiffs' Second Set of Interrogatories
- E. Complaint and Jury Demand (Iona Adam, et al. v. Salt Lake Regional Medical Center, Inc.)
- F. Minute Entry Decision and Order (Iona Adam, et al. v. Salt Lake Regional Medical Center, Inc.)
- G. Defendant Salt Lake Regional Medical Center's Certification of Compliance With the Court's Order Regarding Plaintiffs' Motion to Compel and Response to Plaintiffs' Request for Production of Documents (Iona Adam, et al. v. Salt Lake Regional Medical Center, Inc.)
- H. Motion to Compel Discovery and for Sanctions and Supporting Memorandum
- I. Defendant Salt Lake Regional Medical Center, Inc.'s Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery and for Sanctions
- J. Plaintiffs' Reply Memorandum Supporting Their Motion to Compel Discovery and for Sanctions
- K. Affidavit as to Costs and Attorneys Fees

Finally, constitutional considerations require that limits be placed upon privileges in order to protect the due process rights of litigants. Assertion of privilege in this case should not be allowed to thwart the very purpose of the adversary system of justice - the ascertainment of truth. The competing interests here should be resolved in favor of disclosure.

RELIEF REQUEST

Mrs. Cannon asks this Court to compel production of the Hospital's incident reports concerning Gary Cannon's fall. In the alternative, Mrs. Cannon asks this Court to compel the Hospital to cooperate fully in continuing efforts to discover the actual dissemination and use of such incident reports. Mrs. Cannon also seeks an award of fees incurred by her in attempting to discover who has seen the incident reports and for what purposes.

DATED this 1 day of October, 2004.



Douglas G. Mortensen

MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
Attorneys for Plaintiffs/Appellants

Mailed by US Mail 2 copies on Oct 1, 2004

to

David W. Slagle
Elizabeth L. Willey
10 Exchange Place, 11th Floor
PO Box 45000
Salt Lake City, Utah 84145

-24-



Exhibit A

Douglas G. Mortensen, USB #2329
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
(801) 363-2244

Attorneys for Plaintiff

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

KATHERYN CANNON, as surviving
spouse of GARY R. CANNON,
deceased, LANE CANNON and
ROLAND CANNON, as surviving children
and legal heirs of GARY R. CANNON,
deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X and DOE BUSINESS
ENTITIES 1 THROUGH V,

Defendants.

**NOTICE OF
DEPOSITION OF
LINDA WRIGHT**

Civil No.: 020914614

Judge Judith S. Atherton

TO THE ABOVE NAMED PARTIES AND THEIR ATTORNEYS:

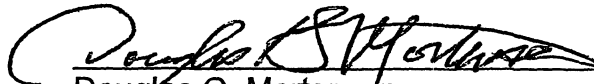
**NOTICE IS HEREBY GIVEN THAT PLAINTIFFS WILL TAKE THE
DEPOSITION OF SALT LAKE REGIONAL MEDICAL CENTER'S RISK MANAGER,
LINDA WRIGHT, before a Certified Court Reporter and Notary Public, on March 31,**

2004 at the law offices of Matheson, Mortensen, Olsen & Jeppson beginning at **2:00 p.m.** and continuing thereafter until completed.

The deposition will be on oral interrogatories and is taken pursuant to Rule 26 and 30 of the Utah Rules of Civil Procedure.

NOTICE IS FURTHER GIVEN that the deposition of Linda Wright may be videotaped to preserve for use at trial.

DATED this 18 day of March , 2004.



Douglas G. Mortensen
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of March, 2004, I caused a true and correct copy of the foregoing to be delivered to the following via the means indicated:

Elizabeth L. Willey
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Federal Express




Exhibit B

Douglas G. Mortensen, USB #2329
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
(801) 363-2244

Attorneys for Plaintiff

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

KATHERYN CANNON, as surviving
spouse of GARY R. CANNON,
deceased, LANE CANNON and
ROLAND CANNON, as surviving children
and legal heirs of GARY R. CANNON,
deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X and DOE BUSINESS
ENTITIES 1 THROUGH V,

Defendants.

**RULE 30 (b)(6) NOTICE OF
DEPOSITION OF SALT LAKE
REGIONAL MEDICAL CENTER
REPRESENTATIVE(S)**

Civil No.: 020914614

Judge Judith S. Atherton

Pursuant to Rule 30(b)(6), URCP, plaintiffs hereby gives notice of their intent to
depose:

1. Each person who has knowledge or information as to the identity of each
person who has seen or may have seen the incident report(s) which Salt

Lake Regional Medical Center has refused to produce in this action;

2. Each and every person who has at any time seen the incident reports Salt Lake Regional Medical Center has refused to produce in this action pertaining to the fall on or about May 18, 2001 of patient Gary R. Cannon, before a Certified Court Reporter and Notary Public, on **March 31, 2004** at the law offices of Matheson, Mortensen, Olsen & Jeppson beginning at **2:30 p.m.** and continuing thereafter until completed.

NOTICE IS FURTHER GIVEN that these depositions may be videotaped to preserve for use at trial.

DATED this 18 day of March , 2004.

A handwritten signature in black ink, appearing to read "Douglas G. Mortensen", is written over a horizontal line.

Douglas G. Mortensen
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of March, 2004, I caused a true and correct copy of the foregoing to be delivered to the following via the means indicated:

Elizabeth L. Willey
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Federal Express

Ann Berumen

Pldg Notice of Deposition - SL Reg Med Ctr Reps.0318

Exhibit C

DAVID W. SLAGLE (2975)
ELIZABETH L. WILLEY (5639)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Salt Lake Regional Medical Center, Inc.
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

KATHRYN CANNON, as surviving spouse
of GARY R. CANNON, deceased, LANE
CANNON and ROLAND CANNON, as
surviving children and legal heirs of GARY
R. CANNON, deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X AND DOE BUSINESS
ENTITIES 1 THROUGH V,

Defendants.

**DEFENDANT SALT LAKE
REGIONAL MEDICAL CENTER,
INC.'S ANSWERS TO PLAINTIFFS'
FIRST SET OF REQUESTS FOR
ADMISSIONS**

Case No. 020914614

Judge Judith S.H. Atherton

Defendant Salt Lake Regional Medical Center, Inc. responds to Plaintiffs' First Set of

Requests for Admissions as follows:

REQUESTS FOR ADMISSIONS

REQUEST NO. 1: Admit that the incident report(s) which you have refused to produce have been seen by your legal counsel in this action.

RESPONSE: Objection. This request seeks information that is privileged and protected by the attorney client and work product privileges. Additionally, defendant refers to statutes and case law cited in Defendant Salt Lake Regional Medical Center, Inc.'s Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery and Defendant Salt Lake Regional Medical Center, Inc.'s Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery and for Sanctions, as the basis for the claimed privilege. Furthermore, Judge Judith Atherton has ruled that the subject document is privileged, and plaintiffs' Motion to Compel its production was denied.

REQUEST NO. 2: Admit that the incident report(s) which you have refused to produce have been seen by David Slagle, Elizabeth Willey or one or more paralegals, legal assistants, law clerks, nurse consultants or other agent, employee or independent contractor employed by Snow, Christensen & Martineau.

RESPONSE: Objection. The request seeks information that is privileged and protected by the attorney client and work product privileges. Additionally, defendant refers to statutes and case law cited in Defendant Salt Lake Regional Medical Center, Inc.'s Memorandum in

Opposition to Plaintiffs' Motion to Compel Discovery and Defendant Salt Lake Regional Medical Center, Inc.'s Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery and for Sanctions, as the basis for the claimed privilege. Furthermore, Judge Judith Atherton has ruled that the document is privileged, and plaintiffs' Motion to Compel its production was denied.

DATED this 14th day of April, 2004.

SNOW, CHRISTENSEN & MARTINEAU

By Elizabeth L. Willey
David W. Slagle
Elizabeth L. Willey
Attorneys for Salt Lake Regional Medical
Center, Inc.

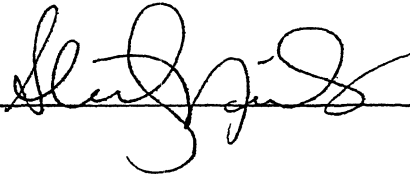
\\scm-prolaw\documents\020440-0051\SN\46391.wpd

CERTIFICATE OF SERVICE

I certify that I am employed by the law offices of Snow, Christensen & Martineau, attorneys for Defendant, Salt Lake Regional Medical Center, that I served the attached **DEFENDANT SALT LAKE REGIONAL MEDICAL CENTER, INC.'S ANSWERS TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSIONS** (Case Number 020914614, Third District Court, Salt Lake County, State of Utah) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Douglas G. Mortensen
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
Attorneys for Plaintiff

and causing the same to be mailed first class, postage prepaid, on the 14th day of April, 2004.



A handwritten signature in black ink, appearing to read 'Douglas G. Mortensen', is written over a horizontal line.

Exhibit D

DAVID W. SLAGLE (2975)
ELIZABETH L. WILLEY (5639)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Salt Lake Regional Medical Center, Inc.
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

KATHRYN CANNON, as surviving spouse
of GARY R. CANNON, deceased, LANE
CANNON and ROLAND CANNON, as
surviving children and legal heirs of GARY
R. CANNON, deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X AND DOE BUSINESS
ENTITIES 1 THROUGH V,

Defendants.

**DEFENDANT SALT LAKE
REGIONAL MEDICAL CENTER,
INC.'S ANSWERS TO PLAINTIFFS'
SECOND SET OF
INTERROGATORIES**

Case No. 020914614

Judge Judith S.H. Atherton

Defendant Salt Lake Regional Medical Center, Inc. responds to Plaintiffs' Second Set of
Interrogatories as follows:

INTERROGATORIES

INTERROGATORY NO. 1: Separately, with respect to each matter propounded in the

requests for admission served concurrently herewith for which your response is other than unqualified admission:

- A. Describe in detail the factual basis for the failure or refusal to unqualifiedly admit the matter;
- B. Identify by name and address each person who has knowledge supporting any ground for the refusal or failures to unqualifiedly admit the matter;
- C. List and describe each document which supports or provides a basis for any ground for your refusal or failure to unqualifiedly admit the matter and, separately, with respect to each document, quote verbatim specific language of the same which you contend supports or provides the basis for such refusal or failure to unqualifiedly admit the matter or produce the document in its entirety.

RESPONSE:

A. Defendant objected to the Request for Admission No. 1 and No. 2 in Plaintiffs First Set of Requests for Admissions, on the basis of attorney client and work product privileges, the statutes and case law cited in Defendant Salt Lake Regional Medical Center, Inc.'s Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery and Defendant Salt Lake Regional Medical Center, Inc.'s Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery and for Sanctions, and the minute entry signed by Judge Judith Atherton wherein she denied plaintiffs Motion to Compel the production of the subject incident report.

B. Counsel for both parties in this action; Judge Judith Atherton.

C. Please refer to cases and statutes cited in Defendant Salt Lake Regional Medical

Center, Inc., Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery and Defendant Salt Lake Regional Medical Center, Inc.'s Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery and for Sanctions, and Judge Judith Atherton's signed and dated Minute Entry. Plaintiffs' counsel can easily read and refer to the cases and statutes cited within defendant's memorandum and the Minute Entry of Judge Judith Atherton.

INTERROGATORY NO. 2: Set forth the name, job title or job description of every person who has seen the incident report(s) you have refused to produce in this action.

RESPONSE: Defendant objects to this interrogatory on the basis that it seeks information that is privileged and protected by the attorney client and work product privileges. Furthermore, defendant objects to the language "refused to produce" as disingenuous, since both counsel are aware that Judge Judith Atherton denied plaintiffs' Motion to Compel production of said report, ruling that it was privileged. Without waiving and subject to said objections, defendant responds as follows: Refer to Affidavit of Linda Wright, filed in conjunction with defendant's Salt Lake Regional Medical Center, Inc.'s Memorandum in Opposition to Plaintiffs' Motion to Compel.

* * *

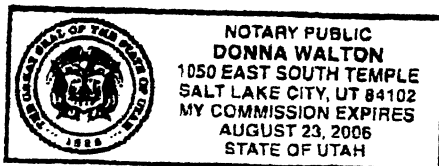
DATED this 16 day of April, 2004.

SALT LAKE REGIONAL MEDICAL CENTER,
INC

By Linda Wright
Linda Wright
Risk Manager

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

Before me, the undersigned Notary Public in and for said County and State, this _____ day of April, 2004, personally appeared Linda Wright, as Risk Manager of Salt Lake Regional Medical Center, Inc., and acknowledged the execution of the above and foregoing DEFENDANT SALT LAKE REGIONAL MEDICAL CENTER, INC.'S ANSWERS TO PLAINTIFFS' SECOND SET OF INTERROGATORIES.



Donna Walton
NOTARY PUBLIC
Residing at: Salt Lake

AS TO OBJECTIONS ONLY:

SNOW, CHRISTENSEN & MARTINEAU

By Elizabeth L. Willey
David W. Slagle
Elizabeth L. Willey
Attorneys for Defendant
Salt Lake Regional Medical Center, Inc

CERTIFICATE OF SERVICE

I certify that I am employed by the law offices of Snow, Christensen & Martineau, attorneys for Defendant, Salt Lake Regional Medical Center; that I served the attached **DEFENDANT SALT LAKE REGIONAL MEDICAL CENTER, INC.'S ANSWERS TO PLAINTIFFS' SECOND SET OF INTERROGATORIES** (Case Number 020914614, Third District Court, Salt Lake County, State of Utah) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Douglas G. Mortensen
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
Attorneys for Plaintiff

and causing the same to be mailed first class, postage prepaid, on the 16th day of April, 2004.

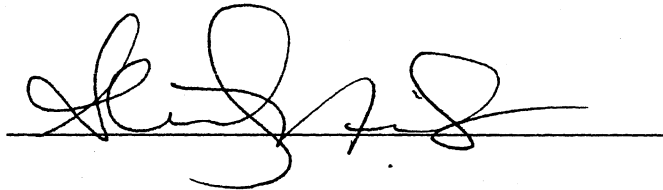
A handwritten signature in black ink, appearing to read "Douglas G. Mortensen", is written over a horizontal line.

Exhibit E

FILED DISTRICT COURT
Third Judicial District

OCT 10 2002

SALT LAKE COUNTY

By

Deputy Clerk

Douglas G. Mortensen, USB #2329
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
(801) 363-2244

Attorneys for Plaintiffs

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

IONA ADAM, as personal representative
and surviving spouse of MELVILLE
GILBERT ADAM, deceased,
FREDERICK JOHN ADAM, DONALD
PAUL ADAM, GARY LYNN ADAM,
STEPHEN LEE ADAM, JAMES L.
ADAM, MARY CAROLYN LIVERMORE
McMAHAN, PATRICIA ELLEN
LIVERMORE HATCH and DAWNELLE
ADAM PACE, as surviving children of
MELVILLE GILBERT ADAM, deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X and DOE BUSINESS
ENTITIES 1 THROUGH V,

Defendants.

**COMPLAINT AND
JURY DEMAND**

Civil No.: 026910871

Judge Bahling

Plaintiffs complain of defendants and allege:

PARTIES AND JURISDICTION

1. This is an action brought under Utah's Wrongful Death Act, UCA §78-11-7 and Utah's Survival of Actions Act, UCA §78-11-12, for damages arising out of the death of Melville Gilbert Adam on May 19, 2001. This action is also brought under Utah's Health Care Malpractice Act, UCA §78-14-1, et seq.

2. The death of Melville Gilbert Adam occurred at Salt Lake Regional Hospital in Salt Lake City, Salt Lake County, Utah on May 19, 2001.

3. Plaintiff is the surviving spouse of Melville Gilbert Adam. She is also the decedent's personal representative. Plaintiff Iona Adam is and at all times material hereto has been a resident of Salt Lake County, Utah.

4. Plaintiffs Frederick John Adam, Donald Paul Adam, Gary Lynn Adam, Stephen Lee Adam, James L. Adam and Dawnelle Adam Pace are adult natural or adopted children of the decedent Melville Gilbert Adam. Plaintiffs Mary Carolyn Livermore McMahan and Patricia Ellen Livermore Hatch are step-children of the decedent who are included as intended beneficiaries of his estate pursuant to the Melville G. Adam Family Inter Vivos Trust signed by the decedent on February 23, 1976.

5. John and Jane Does I through X are persons who may bear or share liability to plaintiffs for the decedent's injury and/or death. When their identities become known, plaintiff may seek leave to join them as named parties in this action.

6. Doe Business Entities I through V are entities ultimately responsible for decision making at defendant Salt Lake Regional Medical Center, Inc. and are ultimately responsible for the safety of patients treated there. Such entities make and/or approve the policies, procedures, protocols and guidelines adopted and/or followed at Salt Lake Regional Medical Center, Inc. Plaintiffs believe and therefore allege that Salt Lake Regional Medical Center, Inc. is owned by a large corporation which owns several hospitals throughout the United States and has its principal place of business in the State of Tennessee. Plaintiffs also believe and allege that the ownership of Salt Lake Regional Medical Center has changed hands in recent years. Plaintiffs are uncertain as to the identity of the Doe Business Entity defendants. Plaintiffs assert that such defendants may bear or share responsibility to them for the decedent's injury and/or death. When the true identities of Doe Business Entity defendants I through V become known, plaintiffs will seek leave to join them as named parties in this action.

7. On or about May 9, 2002, plaintiffs caused a Notice of Intent to Commence Legal Action to be served upon defendant Salt Lake Regional Medical Center, Inc. by Certified Mail, return receipt requested, pursuant to UCA §78-14-8. More than 90 days have elapsed since service of the aforesaid Notice. In addition, on or about May 17, 2002, plaintiffs caused a request to be made with the Utah State Department of Business Regulations, Division of Occupational and Professional

Licensing for a Prelitigation Medical Panel Review Hearing pursuant to UCA §78-14-12.

The requested hearing has been held as required by statute and a Certificate of Compliance issued on September 25, 2002 by DOPL's Regulatory and Compliance Officer, W. Ray Walker. Plaintiffs are therefore entitled to bring this action.

GENERAL ALLEGATIONS

8. On or about May 8, 2001, 74 year old Melville Gilbert Adam was admitted to Salt Lake Regional Medical Center for treatment of heart valve insufficiency.

9. Immediately prior to this admission, Mr. Adam had been a patient at the Evergreen Canyons Rehabilitation Center where he had undergone rehabilitative care following treatment for an infection. While at Evergreen Canyons, Mr. Adam suffered one or more falls.

10. Upon his admission to Salt Lake Regional Medical Center, a large sign was placed on the door of Mr. Adam's room indicating that he was a fall risk. This sign remained on the door of his hospital room from the time of his admission to the time of his demise.

11. On May 11, 2001, Mr. Adam underwent aortic valve replacement and mitral valve repair surgery at the hands of Dr. David A. Bull, M.D. Post-operatively, Mr. Adam made "an excellent recovery", according to Dr. Bull. Mr. Adam was extubated on the evening following surgery. On post-operative day number 2, his monitoring lines

were removed. On post-operative day number 3, his arterial line was removed. On post-operative day number 4, his pacing wires were removed. Dr. Bull believed Mr. Adam would be a good candidate for discharge on May 17 or May 18, 2001. The plan was for Mr. Adam to be returned to Evergreen Canyons for continued convalescence and rehabilitation.

12. Sometime during the early morning hours of May 17, 2001, Mr. Adam fell to the floor of his ICU hospital room and sustained a subdural hematoma to his head. Following Mr. Adam's fall, he remained on the floor of his ICU hospital room for an unknown length of time. Later, a nursing attendant found him on the floor and assisted him in getting back into his bed.

13. Approximately one hour after Mr. Adam was returned to his bed, his blood pressure was checked and found to be considerably elevated at 154/112. His blood pressure was rechecked approximately 10 minutes later and found to be even more elevated, at 174/117. The nursing chart indicates Dr. Bull was notified and medication was given to the patient "as ordered". There is no indication Dr. Bull was informed that the patient had sustained a fall. The only indication is that Dr. Bull was notified of the patient's elevated blood pressure.

14. At approximately 0430 hours, Mr. Adam's blood pressure was again taken. It was 145/115. Approximately 30 minutes later, a nursing attendant discovered Mr. Adam was unable to move his right leg. At that time, a hematoma was noted on the

left side of the back of his head. Hospital records indicate that Dr. Bull was notified and that a CT scan and x-rays were ordered. The Hospital records indicate that at 0540 hours, intubation was ordered. According to the hospital's records, the patient was not intubated until 0615 hours. At 0645 hours, Mr. Adam was taken to radiology for a CT scan. The patient's family was not notified of his acutely grave condition until approximately 7:35 a.m.

15. The CT scan revealed an acute subdural hematoma with a "subtentorial bleed".

16. At the time of his hospitalization and for several years prior thereto, Mr. Adam was completely bald. It was his habit and custom to keep his head shaved and free of any hair whatsoever. Whatever bruising or discoloration may have resulted from his fall during the early morning hours of May 17, 2001, would not have been covered up or disguised by hair, but would have been visible to any reasonably observant care provider.

17. Due to the extensive amount of acute interhemispheric tentorial and right frontal acute subdural hematoma and rapid clinical decline, a decision was made to perform an emergency craniectomy in an effort to remove or reduce pressure on the patient's brain. The patient was taken to the operating room at approximately 9:45. The surgery was begun at approximately 10:35 a.m. It lasted approximately 3 hours. Following the surgery, Mr. Adam had no neurologic improvement. His pupils remained

fixed and dilated. He had no gag reflex. He had no motor responses to pain.

Neurologically, he had only minimal brain stem reflexes.

18. After full discussion with family members, the attending physicians recommended withdrawal of ventilator support. Mechanical support was withdrawn and the patient expired at approximately 7:25 p.m. on May 19, 2001.

19. As a direct and proximate result of the negligence of the defendants, decedent Melville Gilbert Adam suffered severe and excruciating pain, trauma, immobility, discomfort, fear, emotional distress, loss of function and loss of enjoyment of life prior to his demise. In addition, Mr. Adam's untimely death prevented him and/or his heirs from receiving substantial sums of money in retirement benefits, to their special damage.

20. As a further direct and proximate result of the negligence of the defendants, significant medical expenses were incurred for the care of the decedent from the time of his fall to the time of his death and significant funeral and burial expenses were incurred thereafter, to the special damage of the plaintiffs and/or the plaintiffs' collateral source providers.

21. As a further direct and proximate result of the negligence of the defendants, the decedent's surviving spouse, children and step-children have sustained a loss of spousal and parental guidance, affection, society and consortium to their general damage and a loss of financial assistance, income, inheritance, etc. to their

special damage.

COUNT I
(NEGLIGENCE)

22. Plaintiffs adopt and reallege the allegations set forth in paragraphs 1 through 21 hereof as fully and completely as if set forth in full in this count.

23. The defendants, by and through their employees and agents, provided substandard, negligent medical care to Melville Gilbert Adam. But for such substandard, negligent medical care, Mr. Adam would not have fallen and sustained injury to his head nor have died from such head injury.

24. The particulars of the defendants' negligence are under investigation but at this time are believed to include:

- a. Failure to provide a level of care and monitoring expected in an intensive care unit;
- b. Failure to maintain adequate staffing at all critical times during Mr. Adam's care in the intensive care unit;
- c. Failure to take appropriate, reasonable steps to provide a safe environment for Mr. Adam and to prevent him from suffering a fall to the floor while an ICU patient;
- d. Failure to respond in a timely fashion to Mr. Adam's call for

assistance;

- e. Failure to timely discover and appropriate act upon Mr. Adam's fall;
- f. Failure to discover and diagnose in a timely, appropriate fashion the significant injuries sustained by Mr. Adam as a result of his fall;
- g. Failure to provide prompt, appropriate and necessary treatment to Mr. Adam for the injury sustained by him in his fall;
- h. Failure to provide timely, emergent care for Mr. Adam after his significant symptoms were finally discovered;
- i. Failure to prevent the simultaneous administration of both Coumadin and Aspirin, ordered by two different treating physicians without apparent knowledge of the other physician's order;
- j. Failure to timely notify the patient's family of his grave, life-threatening condition;
- k. Failure to take or recommend appropriate pre-mortem and post-mortem action, including an autopsy and/or blood tests to ascertain the level of blood thinning agents in the patient's blood.

COUNT II

(RES IPSA LOQUITUR)

25. Plaintiffs adopt and reallege the allegations set forth in paragraphs 1 through 24 hereof as fully and completely as if set forth in full in this count.

26. At the time of the injury complained of herein, the persons and instrumentalities who/which caused the injuries sustained by the decedent were under the exclusive management and control of the defendants.

27. The injury Melville Gilbert Adam sustained while under the care and treatment of defendants was of a kind which ordinarily would have not occurred in the absence of negligence on the part of the defendants and/or their agents and employees.

28. There is no apparent responsible cause for the injury of which plaintiffs complain other than the negligence of defendants and/or their agents and employees.

29. The failure of defendants to prevent the injury speaks for itself as an act of negligence for which defendants are liable as a matter of law.

COUNT III

(PUNITIVE DAMAGES)

30. Plaintiffs adopt and reallege the allegations set forth in paragraphs 1 through 29 hereof as fully and completely as if set forth in full in this count.

31. Plaintiffs believe and therefore allege that the injury and death of Melville Gilbert Adam may have been caused by conduct manifesting a knowing and reckless indifference toward and disregard for the safety of Mr. Adam. In addition, plaintiffs believe they are entitled to conduct discovery as to whether the defendants engaged in any willful and malicious or intentionally fraudulent conduct with respect to the injury and death of Melville Gilbert Adam.

32. If direct or circumstantial evidence revealed through investigation, formal discovery and/or at trial supports a finding that defendants acted with a knowing and reckless indifference toward and a disregard of Mr. Adam's safety or that their acts or omissions are the result of willful and malicious or intentionally fraudulent conduct, an assessment of exemplary or punitive damages against defendants will be appropriate and is hereby requested.


WHEREFORE, plaintiffs demand judgment against defendants as follows:

- A. For general damages in a reasonable sum;
- B. For special damages for medical and other expenses and for loss of earnings and earning capacity, in amounts as shall be proved at trial;
- C. For interest on all items of special damage as allowed by law;
- D. For exemplary damages in an appropriate sum;
- E. For plaintiffs' costs of suit and such and other relief as the Court may deem proper.

JURY DEMAND

Plaintiffs hereby demand trial by jury and herewith tender the required jury demand fee.

DATED this 8 day of October, 2002.



Douglas G. Mortensen
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
Attorneys for Plaintiffs

Exhibit F

FILED DISTRICT COURT
Third Judicial District

OCT 28 2003

By SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

IONA ADAM, et al.	:	MINUTE ENTRY DECISION AND
		ORDER
Plaintiff,	:	
		CASE NO. 020910871
vs.	:	
SALT LAKE REGIONAL MEDICAL		
CENTER, et al.	:	
Defendant.	:	

Before the Court is Plaintiff's Second Motion to Compel, pursuant to Rule 4-501. Having considered the Motion and the Memoranda submitted by the parties, the Court enters the following decision:

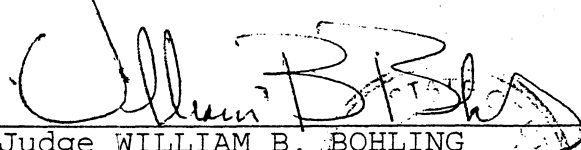
The present Motion seeks to compel Defendants' production of incident reports requested from the Plaintiffs. In denying the request, the Defendant asserted that "if such documents exist, they are not discoverable and are privileged pursuant to § 26-25-3, Utah Code Ann. (1996)." This statutory provision, otherwise known as the care review privilege, "privileges only documents prepared specifically to be submitted for review purposes" and cannot be read so broadly as extending to all "documents that might or could be used in the review process." Benson ex rel. Benson v. IHC

10/30/03

Hospitals, 866 P.2d 537, 540 (Utah 1993). Utah law is clear that the party invoking the privilege must produce evidence establishing its applicability to the documents in question. See id., at 538.

Accordingly, Plaintiff's Motion to Compel is hereby GRANTED. Defendant is hereby ordered to produce either the incident reports as requested, or evidence that the incident reports were created "specifically to be submitted for review purposes." This constitutes the final order of the Court on the matters referenced herein. No further order is required.

DATED this 28 day of October, 2003.


Judge WILLIAM B. BOHLING
District Court Judge

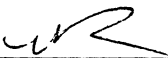
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020910871 by the method and on the date specified.

METHOD NAME

Mail DOUGLAS G MORTENSEN
ATTORNEY PLA
648 E 100 S
SALT LAKE CITY, UT 84102
Mail DAVID W. SLAGLE
ATTORNEY DEF
10 EXCHANGE PLACE, 11TH
FLOOR
SLC UT 84145

Dated this 26 day of Oct, 2003.



Deputy Court Clerk

Exhibit G

DAVID W. SLAGLE - A2975
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
Salt Lake Regional Medical Center
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

IONA ADAM, as personal representative and
surviving spouse of MELVILLE GILBERT
ADAM, deceased, FREDERICK JOHN
ADAM, DONALD PAUL ADAM, GARY
LYNN ADAM, STEPHEN LEE ADAM,
JAMES L. ADAM, MARY CAROLYN
LIVERMORE McMAHAN, PATRICIA
ELLEN LIVERMORE HATCH and
DAWNELLE ADAM PACE, as surviving
children of MELVILLE GILBERT ADAM,
deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES 1
through X and DOE BUSINESS ENTITIES 1
through V,

Defendants.

**DEFENDANT SALT LAKE REGIONAL
MEDICAL CENTER'S CERTIFICATION
OF COMPLIANCE WITH THE
COURT'S ORDER REGARDING
PLAINTIFFS' MOTION TO COMPEL
AND RESPONSE TO PLAINTIFFS'
REQUEST FOR PRODUCTION OF
DOCUMENTS**

Civil No. 020910871

Judge William B. Bohling

Defendant, Salt Lake Regional Medical Center, hereby produces the following documents in
response to plaintiffs' Request for Production of Documents and in compliance with the Court's
Memorandum decision dated October 22, 2003 and October 28, 2003:

1. Defendant has attached a copy of an Unusual Occurrence Report dated May 17, 2001, completed by Nathan Askerlund, LPN.

2. Defendant has attached a copy of an Unusual Occurrence Report dated May 21, 2001, completed by Melissa Hadley.

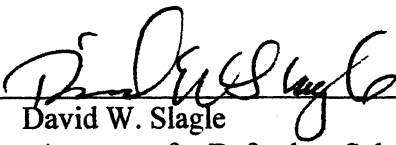
3. Defendant has attached a copy of a document entitled Patient Concern Response dated May 17, 2001.

4. Defendant has attached copies of the nursing records for three other patients that were being cared for by Nathan Askerlund on the night that Mr. Adam sustained his fall. The names and identification data for each of these patients has been redacted.

Defendant believes and hereby certifies that, to the best of its information, knowledge and belief, it has now complied with plaintiffs' Request for Production of Documents and both Court Orders regarding the various motions to compel filed by plaintiffs.

DATED this 31 day of October, 2003.

SNOW, CHRISTENSEN & MARTINEAU

By 
David W. Slagle
Attorneys for Defendant Salt Lake Regional
Medical Center, Inc.

CERTIFICATE OF SERVICE

I certify that I am employed by the law offices of Snow, Christensen & Martineau, attorneys for defendant, Salt Lake Regional Medical Center; that I served the attached **DEFENDANT SALT LAKE REGIONAL MEDICAL CENTER'S CERTIFICATION OF COMPLIANCE WITH THE COURT'S ORDER REGARDING PLAINTIFFS' MOTION TO COMPEL AND RESPONSE TO PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS**

(Case Number 020910871, Before the Third Judicial District Court, Salt Lake County, State of Utah)

upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Douglas G. Mortensen
Matheson, Mortensen, Olsen & Jeppson
648 East 100 South
Salt Lake City, Utah 84102
Attorneys for Plaintiff

Robert Wallace
Plant, Wallace, Christensen & Kanell
136 East South Temple #1700
Salt Lake City, Utah 84111
Attorneys for ICCN and Ann LaPolla, R.N.

and causing the same to be mailed first class, postage prepaid, on the 31 day of October, 2003.

A handwritten signature in black ink, appearing to be 'M. T. ...', is written over a horizontal line.

Exhibit H

Douglas G. Mortensen, USB #2329
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
(801) 363-2244

Attorneys for Plaintiff

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

KATHERYN CANNON, as surviving
spouse of GARY R. CANNON,
deceased, LANE CANNON and
ROLAND CANNON; as surviving children
and legal heirs of GARY R. CANNON,
deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X and DOE BUSINESS
ENTITIES 1 THROUGH V,

Defendants.

**MOTION TO COMPEL
DISCOVERY AND FOR
SANCTIONS
AND
SUPPORTING MEMORANDUM**

Civil No.: 020914614

Judge Judith S. Atherton

Pursuant to Rule 37, URCP, plaintiffs move this court for an order compelling discovery and for an award of costs and reasonable attorneys fees incurred by them in connection with this motion. The discovery sought to be compelled are the depositions

of the Hospital's risk manager and other persons who have seen or who have information as to the identity of persons who have seen the incident reports the Hospital has refused to produce in this case.

This motion is supported by the following memorandum.

MEMORANDUM

STATEMENT OF MATERIAL FACTS

1. Sometime in March of this year, an unsigned, undated minute entry was mailed to counsel in this case. The minute entry reflects a denial of plaintiff's motion to compel the hospital to produce its incident reports concerning the fall and death of patient Gary Cannon.

2. The aforesaid minute entry states in pertinent part:

The only evidence presented in this case is the Affidavit of Linda Wright. Ms. Wright asserts that the "Incident reports are created specifically for submission to the [care review department]," and that "Incident reports are not created or used for any purpose other than for evaluating or improving the health care rendered to patients at Salt Lake Regional Medical Center . . . Incident reports are not included as part of the patient's medical records."

In the absence of any evidence to the contrary, this court finds that the reports are privileged.

3. The minute entry does not preclude discovery into the accuracy of Linda Wright's affidavit assertions.

4. Discovery in this case is continuing. The Hospital itself is conducting massive discovery. In this month alone (March 2004), the Hospital has issued no fewer than 7 medical records subpoenas. Late last month, it deposed a physician treating the decedent's widow. It intends to take the deposition of one of the decedent's treating physicians on March 24. (See subpoena and deposition notices attached to plaintiffs' memorandum opposing defendant's summary judgment motion).

5. On March 18, 2004 plaintiffs caused to be served on the Hospital a Notice of Deposition of Linda Wright and a Rule 30(b)(6) Notice of Deposition of other Hospital representatives. (See Exhibits "A" and "B", attached).

6. On March 19, the Hospital's counsel sent a letter to plaintiffs' counsel stating: "Defendant will not be producing Rule 30(b)(6) deponents or Linda Wright for deposition on March 31, 2004, unless ordered to do so by Judge Atherton." (See Exhibit "C", attached).

7. On March 23, plaintiffs' counsel invited the Hospital's counsel to reverse her position and to make Linda Wright and the Rule 30(b)(6) deponents available for the scheduled March 31 depositions. (See Exhibit "D", attached).

8. The Hospital and its counsel have not reversed their position as to the Linda Wright and Rule 30(b)(6) depositions.

ARGUMENT

I.

THERE IS NO JUSTIFIABLE BASIS FOR THE HOSPITAL'S POSITION

This Court's minute entry invites, rather than precludes, discovery into the accuracy and truthfulness of Linda Wright's affidavit assertions. Plaintiffs have no way of ascertaining the accuracy of those assertions without deposing Ms. Wright and/or other Hospital representatives having knowledge or information concerning the dissemination and use of the incident reports in question.

This Court has not precluded discovery of facts surrounding the incident reports. Although a discovery plan and order filed last Fall suggests that fact discovery was to have been completed by January 15, 2004, the parties, by agreement, have ignored that deadline and it has not been enforced. The deadline was rendered impracticable partially by the continuing pendency of plaintiffs motion to compel the production of the Hospital's incident reports. That motion, filed last October, was not decided until earlier this month. Since January 15, 2004, the Hospital has conducted all manner of discovery, including the issuance of no fewer than 9 medical records subpoenas and the taking of two physician depositions.

In short, discovery has not been completed. Both parties are earnestly endeavoring to discover facts they believe will help them win this case. Some of those

facts are believed to be hidden in the Hospital's incident reports concerning patient Gary Cannon's fall and death. There is no just reason why plaintiffs should not be allowed to conduct discovery to ascertain the legitimacy of the Hospital's claimed privilege.

II.

THE HOSPITAL'S STONEWALLING APPEARS TO BE DRIVEN BY IMPROPER MOTIVES.

Immediately upon receipt of the minute entry, plaintiffs took steps to arrange the deposition of Linda Wright and a Rule 30(b)(6) deposition of hospital representatives having knowledge concerning the dissemination and use of the incident reports. As the Hospital well knows, such depositions are highly time-sensitive. It is important to the plaintiffs that information that they reveal be included in the record before the deadline of the filing of a motion for interlocutory appeal. That deadline is twenty days after entry of the order sought to be reviewed. The Hospital apparently has an interest in preventing such information from being part of the record. Refusing to allow the scheduled March 31 depositions to go forward may prevent the reviewing court from having the benefit of information revealed in those depositions. That appears to be the Hospital's intent and motive. Such motive is improper.

III.

THIS COURT SHOULD COMPEL THE HOSPITAL AND ITS COUNSEL TO COOPERATE IN DISCOVERY AND TO PAY PLAINTIFFS' EXPENSES IN BRINGING THIS MOTION.

Rule 37, URCP, contains provisions relating to the failure to make or cooperate in discovery. Those provisions include the following:

(a)(2)(B) If a deponent fails to answer a question propounded . . . under Rule 30 . . . , or a corporation . . . fails to make a designation under Rule 30(b)(6) . . . , . . . the discovering party may move for an order compelling an answer, or a designation

* * * * *

(a)(4)(A) If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the Court shall, after opportunity for hearing, require that the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the Court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's non disclosure, response or objection was substantially justified or that other circumstances make an award of expenses unjust.

* * * * *

(d) *Failure of party to attend at own deposition* If a party or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) . . . to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper

notice, . . . the Court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under (A), (B), and (C) of subdivision (b)(2) of this Rule. In lieu of any order or in addition thereto, the Court shall require the party failing to act or the party's attorney or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

This is an appropriate occasion for both compelling discovery and for imposing sanctions against the Hospital. After conclusorily declaring that its incident reports are not part of its patient's medical record and were prepared and used only for care review purposes within the contemplation of Utah's care review privilege statute, the Hospital has now taken the position that its own declaration of privilege is beyond question or attack. The Hospital's attempt to assume the power to preclude inquiry into the accuracy of its assertions of privilege should not be countenanced.

CONCLUSION

This Court should compel the Hospital to promptly produce for deposition Linda Wright and all other representatives who have information responsive to plaintiffs' Rule 30(b)(6) deposition notice. This Court should also require the Hospital and/or its counsel to pay plaintiffs' costs and attorneys fees incurred in bringing this motion.

DATED this 24 day of March, 2004.



Douglas G. Mortensen
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2004, I caused a true and correct copy of the foregoing to be delivered to the following via the means indicated:

Elizabeth L. Willey
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145

	U.S. Mail
<input type="checkbox"/>	Facsimile
<input checked="" type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Federal Express



EXHIBIT “A”

Douglas G. Mortensen, USB #2329
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
(801) 363-2244

Attorneys for Plaintiff

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

KATHERYN CANNON, as surviving
spouse of GARY R. CANNON,
deceased, LANE CANNON and
ROLAND CANNON, as surviving children
and legal heirs of GARY R. CANNON,
deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X and DOE BUSINESS
ENTITIES 1 THROUGH V,

Defendants.

**NOTICE OF
DEPOSITION OF
LINDA WRIGHT**

Civil No.: 020914614

Judge Judith S. Atherton

TO THE ABOVE NAMED PARTIES AND THEIR ATTORNEYS:

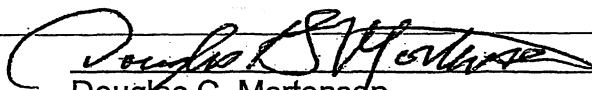
**NOTICE IS HEREBY GIVEN THAT PLAINTIFFS WILL TAKE THE
DEPOSITION OF SALT LAKE REGIONAL MEDICAL CENTER'S RISK MANAGER,
LINDA WRIGHT, before a Certified Court Reporter and Notary Public, on March 31,**

2004 at the law offices of Matheson, Mortensen, Olsen & Jeppson beginning at 2:00 p.m. and continuing thereafter until completed.

The deposition will be on oral interrogatories and is taken pursuant to Rule 26 and 30 of the Utah Rules of Civil Procedure.

NOTICE IS FURTHER GIVEN that the deposition of Linda Wright may be videotaped to preserve for use at trial.

DATED this 18 day of March, 2004.



Douglas G. Mortensen
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of March, 2004, I caused a true and correct copy of the foregoing to be delivered to the following via the means indicated:

Elizabeth L. Willey
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Federal Express




EXHIBIT “B”

Douglas G. Mortensen, USB #2329
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
(801) 363-2244

Attorneys for Plaintiff

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

KATHERYN CANNON, as surviving
spouse of GARY R. CANNON,
deceased, LANE CANNON and
ROLAND CANNON, as surviving children
and legal heirs of GARY R. CANNON,
deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X and DOE BUSINESS
ENTITIES 1 THROUGH V,

Defendants.

**RULE 30 (b)(6) NOTICE OF
DEPOSITION OF SALT LAKE
REGIONAL MEDICAL CENTER
REPRESENTATIVE(S)**

Civil No.: 020914614

Judge Judith S. Atherton

Pursuant to Rule 30(b)(6), URCP, plaintiffs hereby gives notice of their intent to
depose:

1. Each person who has knowledge or information as to the identity of each
person who has seen or may have seen the incident report(s) which Salt

Lake Regional Medical Center has refused to produce in this action;

2. Each and every person who has at any time seen the incident reports Salt Lake Regional Medical Center has refused to produce in this action pertaining to the fall on or about May 18, 2001 of patient Gary R. Cannon, before a Certified Court Reporter and Notary Public, on **March 31, 2004** at the law offices of Matheson, Mortensen, Olsen & Jeppson beginning at **2:30 p.m.** and continuing thereafter until completed.

NOTICE IS FURTHER GIVEN that these depositions may be videotaped to preserve for use at trial.

DATED this 18 day of March , 2004.



Douglas G. Mortensen

MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of March, 2004, I caused a true and correct copy of the foregoing to be delivered to the following via the means indicated:

Elizabeth L. Willey
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Federal Express

Ann Berumen

Plda Notice of Deposition - SL Rea Med Ctr Repts.0318

EXHIBIT “C”

LAW OFFICES
SNOW, CHRISTENSEN & MARTINEAU
A PROFESSIONAL CORPORATION
10 EXCHANGE PLACE, ELEVENTH FLOOR
POST OFFICE BOX 45000
SALT LAKE CITY, UTAH 84145-5000
TELEPHONE (801) 521-9000
FACSIMILE (801) 363-0400
HTTP://WWW.SCMLAW.COM

Elizabeth Willey

to contact writer:
(801) 322-9278
ewilley@scmlaw.com

March 19, 2004

Douglas G. Mortensen
Matheson, Mortensen, Olsen & Jeppson
648 East 100 South
Salt Lake City, UT 84102

Re: *Gary R. Cannon v. Salt Lake Regional Medical Ctr.*

Dear Douglas:

I am in receipt today of the following:

1. Rule 30 (b)(6) Notice of Deposition of Salt Lake Regional Medical Center Representative(s); and
2. Notice of Deposition of Linda Wright

These depositions have been scheduled for March 31, 2004. The 30 (b)(6) Notice specifically asks to depose "each and every individual who has at any time seen the incident reports Salt Lake Regional Medical Center has refused to produce in this action..." The Notice of Linda Wright gives no specific purpose for her deposition. Since Linda Wright, is the Risk Manager at Salt Lake Regional Medical Center, and was not a care giver for decedent, it is assumed that the purpose of her deposition is to question her also about the subject incident report. Please inform me if you intend to depose Linda Wright for any other purpose.

As you will recall, Judge Atherton denied your Motion to Compel Discovery and issued a Minute Entry in this matter wherein she held that the subject incident report was

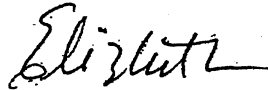
March 19, 2004

Page 2

privileged and therefore not discoverable. Based on Judge Atherton's ruling, please be advised that defendant will not be producing Rule 30 (b)(6) deponents or Linda Wright for deposition on March 31, 2004, unless ordered to do so by Judge Atherton.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU

A handwritten signature in cursive script, appearing to read "Elizabeth", followed by a horizontal flourish.

Elizabeth Willey

EXHIBIT “D”

MATHESON, MORTENSEN, OLSEN & JEPPSON

a Professional Corporation

ATTORNEYS AT LAW

648 EAST FIRST SOUTH
SALT LAKE CITY, UTAH 84102
TELEPHONE (801) 363-2244
TELECOPIER (801) 363-2261

DOUGLAS G. MORTENSEN

March 23, 2004

WRITER'S VOICE MAIL:

994-5601

WRITER'S E-MAIL:

dmort@mmlaw.com

BY E-MAIL ewilley@scmlaw.com
AND FACSIMILE - (801) 363-0400

Elizabeth L. Willey
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145

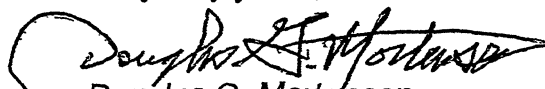
Re: Gary R. Cannon v. Salt Lake Regional Medical Center

Dear Elizabeth:

Judge Atherton's minute entry ruling appears to invite, not preclude, discovery into whether Linda Wright's affidavit assertions are true or false. There is nothing in the minute entry suggesting the plaintiffs are precluded from undertaking to discover the identity of persons who have seen the incident reports or the purposes for which the reports have been seen.

By this letter, which I am both faxing and e-mailing to you this afternoon, I invite you to reverse the position taken in your March 19 letter to me in which you announce that "defendant will not be producing Rule 30(b)(6) deponents or Linda Wright for deposition on March 31, 2004, unless ordered to do so by Judge Atherton." Your office assistant informs me that you are expected to be back in the office this afternoon and in a position to receive this communication. If you do not accept this invitation and communicate to my office by 10:00 a.m. tomorrow morning (either by telephone, e-mail or fax) an indication that Linda Wright and the 30(b)(6) deponents will be made available for the scheduled March 31 depositions, I will file a motion to compel seeking sanctions in the form of costs and attorneys fees.

Very truly yours,



Douglas G. Mortensen

DGM/ab

Letter to Elizabeth Willey.0323

Exhibit I

DAVID W. SLAGLE - A2975
ELIZABETH L. WILLEY - A5639
BRADLEY R. BLACKHAM -A8703
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
Salt Lake Regional Medical Center
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

KATHERYN CANNON, as surviving
spouse of GARY R. CANNON, deceased,
LANE CANNON and ROLAND
CANNON, as surviving children and legal
heirs of GARY R. CANNON, deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X AND DOE BUSINESS
ENTITIES 1 THROUGH V,

Defendants.

**DEFENDANT SALT LAKE REGIONAL
MEDICAL CENTER, INC.'S
MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION TO COMPEL
DISCOVERY AND FOR SANCTIONS**

Civil No. 020914614

Judge Judith S.H. Atherton

Defendant Salt Lake Regional Medical Center, Inc., ("Salt Lake Regional") submits the following memorandum of points and authorities in opposition to plaintiffs' motion to compel discovery and for sanctions.

STATEMENT OF MATERIAL FACTS

1. This is a medical malpractice case arising from treatment and care rendered to decedent Gary Cannon while he was a patient at Salt Lake Regional from May 16, 2001 through May 21, 2001. (Compl.)

2. Plaintiffs commenced this action by filing suit on or around December 16, 2002. (Compl.)

3. On January 6, 2003, plaintiffs served their first set of interrogatories and requests for production of documents on Salt Lake Regional. (Cert. of Serv. of Pls.' First Set of Interrogs. and Req. for Prod. of Docs.)

4. Plaintiffs' First Set of Requests for Production of Documents includes a request for each incident report that may exist regarding Mr. Cannon's fall while he was a patient at Salt Lake Regional. (Pls.' First Req. for Prod. of Docs.)

5. On January 23, 2003, Salt Lake Regional served its first set of interrogatories and requests for production of documents on plaintiffs. (Cert. of Disc. of Salt Lake Reg'l First Set of Interrogs. and Req. for Prod. of Docs.)

6. On January 31, 2003, the Court signed and entered an initial stipulated scheduling order for this case. (Attorney Planning Meeting Report and Stipulated Scheduling Order.)

7. On January 31, 2003, Salt Lake Regional served its Rule 26(a)(1) initial disclosures on plaintiffs. Included in Salt Lake Regional's initial disclosures are the names of a registered nurse and a nurse assistant who provided treatment and care to Mr. Cannon while he was a patient at Salt Lake Regional. (Salt Lake Reg'l Initial Disclosures.)

8. On February 20, 2003, Salt Lake Regional served its Second Set of Requests for Production of Documents on plaintiffs. (Cert. of Disc. of Salt Lake Reg'l Second Set of Req. for Prod. of Docs.)

9. On February 24, 2003, Salt Lake Regional served its responses to plaintiffs' First Set of Interrogatories and Requests for Production of Documents on plaintiffs. (Cert. of Serv. of Salt Lake Reg'l Answers to Pls.' First Set of Interrogs. and Req. for Prod. of Docs.)

10. Salt Lake Regional objected to plaintiffs' request for "each incident report" on the grounds of peer review and the provisions of Utah Code Ann. § 26-25-1 et seq. (1953 as amended.) (Salt Lake Reg'l Answers to Pls.' First Req. for Prod. of Docs.)

11. On March 11, 2003, plaintiffs served their responses to Salt Lake Regional's Second Set of Requests for Production of Documents on Salt Lake Regional. (Cert. of Serv. of Pls.' Resp. to Salt Lake Reg'l Second Set of Req. for Prod. of Docs.)

12. On March 17, 2003, counsel for Salt Lake Regional sent plaintiffs' counsel a letter reminding him that plaintiffs' responses to Salt Lake Regional's First Set of Interrogatories and Requests for Production of Documents were overdue and inquiring as to when Salt Lake Regional could expect to receive plaintiffs' responses. (3/17/03 letter, attached as Exhibit A.)

13. On May 1, 2003, counsel for Salt Lake Regional sent a second letter to plaintiffs' counsel inquiring as to when Salt Lake Regional could expect to receive plaintiffs' responses to Salt Lake Regional's First Set of Interrogatories and Requests for Production of Documents. (5/1/03 Letter, attached as Exhibit B.)

14. On May 9, 2003, plaintiffs served their responses to Salt Lake Regional's First Set of Interrogatories and Requests for Production of Documents on Salt Lake Regional. (Cert. of Serv. of Pls.' Resp. to Salt Lake Reg'l First Set of Interrogs. and Req. for Prod. of Docs.)

15. On September 23, 2003, the Court signed and entered an amended stipulated scheduling order to accommodate the parties' stipulated request for more time to complete discovery. (Order on Am. Planning Meeting Report and Stipulated Scheduling Order.)

16. On October 24, 2003, plaintiffs served their motion to compel production of any incident report that may exist with respect to Mr. Cannon's fall, on Salt Lake Regional. (Pls' First Motion to Compel.)

17. On November 17, 2003, Salt Lake Regional served its memorandum in opposition to plaintiffs' motion to compel production of any existing incident report concerning Mr. Cannon's fall on plaintiffs. Attached to Salt Lake Regional's memorandum is the affidavit of Linda Wright, who is the Risk Manager at Salt Lake Regional. (Salt Lake Reg'l Mem. in Opp'n to Pls.' First Mot. to Compel.)

18. In its memorandum in opposition, Salt Lake Regional pointed out that the medical records are a contemporaneous record of events and that plaintiffs could depose any of Mr. Cannon's health care providers about the treatment and care rendered to Mr. Cannon while he was a patient at Salt Lake Regional. (Salt Lake Reg'l Mem. in Opp'n to Pls.' First Mot. to Compel.)

19. On November 21, 2003, Salt Lake Regional served its Third Set of Requests for Production of Documents on plaintiffs. (Cert. of Disc. of Salt Lake Reg'l Third Set of Req. for Prod. of Docs.)

20. On December 5, 2003, plaintiff served their reply memorandum in support of their motion to compel production of any existing incident reports on Salt Lake Regional. (Pls.' Reply Mem. in Supp. of First Mot. to Compel.)

21. In their reply memorandum, plaintiffs argued that the deposition of Linda Wright may be necessary to determine whether or not any existing incident reports are protected under Utah's care review privilege. (Pls.' Reply Mem. in Supp. of First Mot. to Compel.)

22. On December 22, 2003, plaintiffs served their Rule 26(a)(1) initial disclosures on Salt Lake Regional. (Pls.' Initial Disclosures.)

23. On March 12, 2004, Salt Lake Regional served its Designation of Expert Witnesses on plaintiffs. (Salt Lake Reg'l Designation of Expert Witnesses.)

24. On January 12, 2004, counsel for Salt Lake Regional sent plaintiffs' counsel a letter reminding him that plaintiffs' responses to Salt Lake Regional's Third Set of Requests for Production of Documents were overdue and inquiring as to when Salt Lake Regional could expect to see plaintiffs' responses. (1/12/04 Letter, attached as Exhibit C.)

25. On March 4, 2004, the Court issued a signed Minute Entry denying plaintiffs' motion to compel production of any existing incident reports. The Court concluded in its Minute Entry that such reports are privileged. (Minute Entry, copy attached as Exhibit D.)

26. On March 11, 2004, Salt Lake Regional served supplemental Rule 26(a)(1) initial disclosures on plaintiffs. Included in Salt Lake Regional's supplemental disclosures is the identity of a therapist who was working on the unit at Salt Lake Regional where Mr. Cannon was a patient. (Salt Lake Reg'l Supp. Initial Disclosures.)

27. On March 12, 2004, counsel for Salt Lake Regional sent plaintiffs' counsel a letter and a proposed order reflecting the ruling from the Court's Minute Entry. (3/12/04 letter and proposed order, attached as Exhibit E.)

28. Plaintiffs' counsel has filed an objection to the proposed order on the Court's Minute Entry. (Pls.' Objection to Order on Minute Entry.)

29. On March 17, 2004, counsel for Salt Lake Regional sent plaintiffs' counsel a second letter inquiring as to when Salt Lake Regional could expect to see plaintiffs' responses to Salt Lake Regional's Third Set of Requests for Production of Documents. (3/17/04 Letter, attached as Exhibit F.)

30. On March 18, 2004, plaintiffs served notices of depositions of (1) Linda Wright; (2) each person who has knowledge or information as to the identity of each person who has seen or may have seen any existing incident report; and (3) each and every person who has seen any existing incident report. (Pls.' Rule 30(b)(6) Notice of Dep. of Salt Lake Reg'l Representatives; Pls.' Notice of Dep. of Linda Wright.)

31. On March 19, 2004, counsel for Salt Lake Regional sent plaintiffs' counsel a letter advising him that, pursuant to the Court's Minute Entry regarding the privileged nature of any existing incident reports, the hospital would not produce Ms. Wright or other Salt Lake Regional Hospital representatives for deposition regarding privileged matters without an order from the Court. (3/19/04 Letter, attached as Exhibit G.)

32. Salt Lake Regional has deposed the following individuals:

Dr. Ronald Ward	3/24/04	Gary Cannon's treating physician
-----------------	---------	----------------------------------

Dr. Diana Banks	2/27/04	Kathryn Cannon's treating physician
Kathryn Cannon	10/21/03	Plaintiff
Lane Cannon	10/21/03	Plaintiff
Roland Cannon	10/21/03	Plaintiff

33. Plaintiffs have not taken any depositions in this case.

ARGUMENT

I. SALT LAKE REGIONAL REASONABLY RELIED ON THE COURT'S MINUTE ENTRY AND CASE LAW IN REFUSING TO PRODUCE WITNESSES FOR DEPOSITION QUESTIONING ABOUT PRIVILEGED MATTERS

The Court's Minute Entry provides Salt Lake Regional with a solid basis for denying plaintiffs' requests to depose witnesses about privileged matters. Plaintiffs first requested the privileged incident reports over a year ago in their first set of document requests. When Salt Lake Regional objected to plaintiffs' request, plaintiffs filed a motion to compel. Salt Lake Regional opposed plaintiffs' motion with sound legal authority and the affidavit testimony of Linda Wright. In its memorandum, Salt Lake Regional pointed out that plaintiffs have access to Mr. Cannon's medical records, which are a contemporaneous account of Mr. Cannon's treatment and care at the hospital. Salt Lake Regional also pointed out that plaintiffs could depose any of Mr. Cannon's health care providers about the treatment and care they rendered to Mr. Cannon while he was a patient at Salt Lake Regional.

Rather than pursue fruitful, nonprivileged sources of information, plaintiffs instead chose to forge ahead with their efforts to discover privileged materials. In their reply memorandum in support of their motion to compel incident reports, plaintiffs indicated that Linda Wright may need to be deposed to establish that the care review privilege applies in this case. The Court denied

plaintiffs' motion in a Minute Entry without hearing oral argument. The Court concluded in its Minute Entry that any existing incident reports are privileged. Importantly, the Court did not conclude that Ms. Wright needed to be deposed to establish that the care review privilege applies.

Despite the Court's ruling on the issue, plaintiffs persist in their efforts to discover privileged information about Salt Lake Regional's care review process and any existing incident reports. Salt Lake Regional reasonably relied on the Court's prior Minute Entry in denying plaintiffs' continued attempts to obtain privileged materials. Rule 26 of the Utah Rules of Civil Procedure limits discovery to matters that are not privileged. Utah R. Civ. P. 26(b)(1). The Court has determined that any incident reports that may exist are privileged. Therefore, the discovery of any existing incident reports is not allowed under Rule 26.

Furthermore, requests for discovery of information related to incident reports, such as the deposition of individuals who have either seen the incident reports or have been involved in the care review process are not permitted under Rule 26 because such requests are not reasonably calculated to lead to the discovery of admissible, nonprivileged information. *See* Utah R. Civ. P. 26(b)(1) (limiting discovery to information that is reasonably calculated to lead to the discovery of admissible evidence).

Case law from other jurisdictions supports Salt Lake Regional's position on this issue. The Georgia Supreme Court has held that even basic information such as whether a medical review committee was held and who attended that meeting is privileged information. *Hollowell v. Jove*, 279 S.E.2d 430, 434 (Ga. 1981). Similarly, a Florida District Court of Appeal cited and quoted with approval another Florida Court decision for the following statement of law: "While the names of

the committee members are not specifically protected by the statute, the release of the names would neither be relevant nor lead to the discovery of admissible evidence.” *Mount Sinai Med. Ctr. of Greater Miami, Inc. v. Bernstein*, 645 So. 2d 530, 532 (Fla. Dist. Ct. App. 1994).

Yet another court has reviewed various rulings on the issue and concluded, “The teachings of these cases is that committee proceedings—in all respects—are inviolate and nondiscoverable.” *Doe v. Unum Life Ins. Co. of Am.*, 891 F. Supp. 607, 610 (N.D. Ga. 1995). That court analogized the peer review process to a black hole and concluded that what goes into the peer review committee does not come out. *Id.* While the court recognized that the identities of health care providers who are fact witnesses can be discovered and that those individuals could be deposed about their personal involvement in treating the patient, the peer review privilege prohibited any discovery aimed at determining who may have attended or given testimony at any peer review meeting. *Id.* at 611; *see also Eubanks v. Ferrier*, 267 S.E.2d 230, 233 (Ga. 1980) (holding that while a physician could be deposed about his treatment of the patient, he could not be deposed about any matter arising out of his service on the hospital’s medical review committee); *Munroe Reg’l Med. Ctr. v. Bountree*, 721 So. 2d 1220, 1223 (Fla. Dist. Ct. App. 1998) (allowing a fact witness to be deposed as to what he or she saw or heard during surgery but refusing to allow questions as to what that person told the hospital’s peer review committee).

Here, plaintiffs served notice of deposition of Salt Lake Regional’s Risk Manager, Linda Wright. Plaintiffs have clearly indicated that the only reason they want to depose Ms. Wright is for the purpose of questioning her about the hospital’s care review process and any existing incident reports. *See* Pls.’ Reply Mem. in Supp. of Mot. to Compel Disc. of Hosp.’s Incident Report, p. 5;

Pls.' Mot. to Compel Disc. and for Sanctions, p. 5. Plaintiffs have also served notice of their intent to depose (1) each person who has knowledge or information as to the identity of each person who has seen any existing incident report concerning Mr. Cannon's fall; and (2) each and every person who has seen any existing incident report concerning Mr. Cannon's fall. Plaintiffs' intent with regard to these proposed depositions is evident on the face of the notice of depositions.

As pointed out in the cases cited above, the matters sought to be discovered during the depositions at issue are privileged. While plaintiffs certainly have the right to depose Mr. Cannon's health care providers about the treatment and care they rendered to Mr. Cannon while he was a patient at Salt Lake Regional, they have not yet bothered to do so. *See Bernstein*, 645 So. 2d at 532 (noting that plaintiffs failed to pose any interrogatories about nonprivileged matters involving the treatment and care provided to the patient).

In fact, plaintiffs have not taken a single deposition despite the passage of over 15 months since this case was commenced and having knowledge of the names of at least some of the health care providers involved in this case. Far from being unjustified, Salt Lake Regional's refusal to provide witnesses for questioning about privileged matters is supported by case law and was made in reasonable reliance on this Court's Minute Entry. For these reasons, plaintiffs' motion to compel should be denied.

II. SALT LAKE REGIONAL HAS NO IMPROPER MOTIVE FOR REFUSING TO PRODUCE WITNESSES FOR DEPOSITION QUESTIONING ABOUT PRIVILEGED MATTERS

Plaintiffs presume to ascribe improper motive for Salt Lake Regional's refusal to allow its employees to be questioned about privileged matters. Plaintiffs specifically argue that Salt Lake

Regional is somehow trying to preclude plaintiffs from including evidence in the record on appeal. Plaintiffs' accusation fails for several reasons. First, plaintiffs' argument fails to acknowledge that the actions of counsel for Salt Lake Regional demonstrate an absence of improper motive. A signed minute entry may be considered a final order for purposes of appeal "in appropriate circumstances." *Swensen Assoc. Architects, P.C. v. State*, 889 P.2d 415, 417 (Utah 1994). Specifically, a signed minute entry is not considered a final appealable order when further action, such as the preparation and signing of an order, are contemplated by the express language of the minute entry. *See id*; *State v. Leatherbury*, 2003 UT 2, ¶ 9, 65 P.3d 1180.

Regardless of whether or not the Court's signed Minute Entry constitutes a final appealable order, counsel for Salt Lake Regional proceeded to prepare a written order for approval and signature. Plaintiffs' counsel did not approve the order as to form and instead filed an objection to the order on the Court's Minute Entry. If, in fact, an order reflecting the Court's ruling in its Minute Entry must be signed and entered by the Court, the 20-day time period for filing a petition for interlocutory appeal would not begin to run until the final, appealable order has been entered. In any event, Salt Lake Regional's preparation of a proposed order is inconsistent with plaintiffs' charge that Salt Lake Regional is trying to run out the clock on plaintiffs' efforts to supplement the record on appeal with new evidence.

Finally, plaintiffs' argument fails because it presumes that Utah's appellate courts would consider new evidence on appeal that was not previously considered by this Court. Plaintiffs' argument seems to be that they intend to support an appeal of the Court's Minute Entry with new evidence that was not considered by this Court when it issued the Minute Entry. Utah's appellate

courts have consistently refused to consider new evidence on appeal. *See Low v. Bonacci*, 788 P.2d 512, 513 (Utah 1990); *Finlayson v. Finlayson*, 874 P.2d 843, 847 (Utah Ct. App. 1994). If plaintiffs want to appeal this Court's Minute Entry, they must do so on the same evidence that was presented to this Court prior to the issuance of its Minute Entry. Therefore, Salt Lake Regional's refusal to permit deposition questioning about privileged matters has not unfairly limited the record on appeal.

In conclusion, Salt Lake Regional's sole motive in refusing to allow deposition questioning about the incident reports and care review process is to preserve the privileged nature of such information. Plaintiffs' allegation that Salt Lake Regional has some improper motive for refusing to agree to the proposed depositions at issue is both unfounded and unfair.

III. SANCTIONS AGAINST SALT LAKE REGIONAL WOULD BE UNJUST

Plaintiffs request for sanctions against Salt Lake Regional is not warranted. Rule 37 of the Utah Rules of Civil Procedure provides that sanctions are not proper if the actions of the party opposing the motion to compel were substantially justified. Utah R. Civ. P. 37(a)(4). In addition, sanctions are not proper if "other circumstances make an award of expenses unjust." *Id.*

Here, Salt Lake Regional's refusal to allow the noticed depositions was substantially justified by the Court's Minute Entry. Because the Court denied plaintiffs' motion to compel production of incident reports without oral argument, the Minute Entry and the Court's actions serve as the parties' only guide to the Court's intent. Despite plaintiffs' argument that the deposition of Linda Wright may be necessary to establish that the care review privilege applies in this case, the Court ruled that any existing incident reports are privileged. The Court's actions imply that further discovery was neither necessary for a decision on the matter nor invited. Salt Lake Regional Hospital reasonably

relied on the Court's Minute Entry and its actions in denying plaintiffs' requests for depositions of persons with knowledge of the hospital's care review process or any incident report that may exist. Because Salt Lake Regional's actions were substantially justified by the Court's Minute Entry and actions, sanctions would not be appropriate.

Plaintiffs' own actions in this case also make their request for sanctions against Salt Lake Regional unjust and unreasonable. Plaintiffs do not come to the Court with clean hands in the discovery process of this case. Although plaintiffs are required to serve their initial disclosures within 14 days of the Rule 26(f) attorney planning conference, plaintiffs did not serve their initial disclosures until almost eleven months after the Court signed the initial stipulated scheduling order.

Plaintiffs have also been inexcusably late in providing responses to Salt Lake Regional's discovery requests. Counsel for Salt Lake Regional sent plaintiff's counsel two letters inquiring as to plaintiffs' overdue responses to Salt Lake Regional's first set of interrogatories and requests for production of documents. Plaintiffs finally served their responses to those discovery requests over two and a half months late. As of this date, plaintiffs have failed to serve responses to Salt Lake Regional's third request for production of documents despite the passage of four months and two letters from counsel for Salt Lake Regional inquiring as to when Salt Lake Regional can expect to receive the overdue responses.

Finally, plaintiffs' have been less than diligent in fulfilling their duty to prosecute this case. *See Charlie Brown Constr. Co. v. Leisure Sports Inc.*, 740 P.2d 1368, 1370 (Utah Ct. App. 1987) ("Plaintiffs are required 'to prosecute their claims with due diligence, or accept the penalty of

dismissal.’” (citation omitted)). Plaintiffs have failed to take a single deposition despite the passage of over 15 months since this case was commenced. In contrast, Salt Lake Regional has taken five depositions. Simply put, plaintiffs’ conduct not only makes their request for sanctions against Salt Lake Regional unjust, but it begs the question of whether sanctions should be imposed against plaintiffs.

CONCLUSION

The Court’s Minute Entry and actions, in conjunction with case law on the issue, provide Salt Lake Regional with solid bases for denying plaintiffs’ requests for depositions regarding privileged information. Salt Lake Regional’s sole motive in denying plaintiffs’ requests for the depositions at issue to protect privileged care review information. Because Salt Lake Regional reasonably relied on the Court’s actions and Minute Entry in denying plaintiffs’ requests for the depositions at issue, sanctions against Salt Lake Regional would not be appropriate. Finally, plaintiffs’ own conduct throughout the course of this case makes sanctions against Salt Lake Regional unjust.

DATED this 31st day of March, 2004.

SNOW, CHRISTENSEN & MARTINEAU

By Bradley R. Blackham
David W. Slagle
Elizabeth L. Willey
Bradley R. Blackham
Attorneys for Defendant
Salt Lake Regional Medical Center, Inc.

CERTIFICATE OF SERVICE

I certify that I am employed by the law offices of Snow, Christensen & Martineau, attorneys for Defendant, Salt Lake Regional Medical Center; that I had hand delivered the attached **DEFENDANT SALT LAKE MEDICAL CENTER, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY AND FOR SANCTIONS** (Case Number 020914614, Third District Court, Salt Lake County, State of Utah) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Douglas G. Mortensen
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
Attorneys for Plaintiff

and causing the same to be hand delivered, on the 31st day of March, 2004.

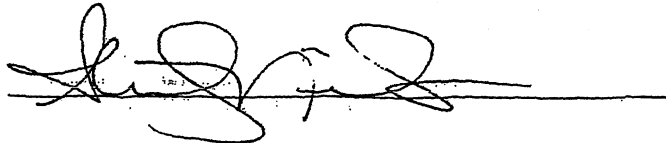
A handwritten signature in black ink, appearing to read 'Douglas G. Mortensen', is written over a horizontal line.

EXHIBIT “A”

LAW OFFICES
SNOW, CHRISTENSEN & MARTINEAU

A PROFESSIONAL CORPORATION
10 EXCHANGE PLACE, ELEVENTH FLOOR
POST OFFICE BOX 45000
SALT LAKE CITY, UTAH 84145-5000
TELEPHONE (801) 521-9000
FACSIMILE (801) 363-0400
HTTP://WWW.SCMLAW.COM

ELIZABETH L. WILLEY

TO CONTACT WRITER:
(801) 322-9278
ewilley@scmlaw.com

March 17, 2003

Douglas G. Mortensen
Matheson, Mortensen, Olsen & Jeppson
648 East First South
Salt Lake City, Utah 84102

Re: Gary R. Cannon v. Salt Lake Regional Medical Center

Dear Doug:

Thank you for responding to defendant's Second Set of Requests for Production of Documents. I also note, that your clients' responses to defendant's First Set of Interrogatories and Requests for Production of Documents are overdue. Please let know when I should expect to receive those responses. Thank you for your help and cooperation in this matter.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU



Elizabeth L. Willey

ELW:sn

NA2044051\CORRES\Mortensen-030317-discovery requests.wpd

EXHIBIT “B”

LAW OFFICES
SNOW, CHRISTENSEN & MARTINEAU

A PROFESSIONAL CORPORATION
10 EXCHANGE PLACE, ELEVENTH FLOOR
POST OFFICE BOX 45000
SALT LAKE CITY, UTAH 84145-5000
TELEPHONE (801) 521-9000
FACSIMILE (801) 363-0400
HTTP://WWW.SCMLAW.COM

ELIZABETH L. WILLEY

TO CONTACT WRITER:
(801) 322-9278
ewilley@scmlaw.com

May 1, 2003

Douglas G. Mortensen
Matheson, Mortensen, Olsen & Jeppson
648 East First South
Salt Lake City, Utah 84102

Re: Gary R. Cannon v. Salt Lake Regional Medical Center

Dear Doug:

My records indicate that your responses to defendant's First Set of Interrogatories and Requests for Production of Documents are now two months overdue. Please let me know when I should expect to receive those responses.

Thank you for your help and cooperation in this matter.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU



Elizabeth L. Willey

ELW:sn

NA20440\51\CORRES\Mortensen-030501-First Set of Discovery Requests.wpd

EXHIBIT “C”

LAW OFFICES
SNOW, CHRISTENSEN & MARTINEAU

A PROFESSIONAL CORPORATION
10 EXCHANGE PLACE, ELEVENTH FLOOR
POST OFFICE BOX 45000
SALT LAKE CITY, UTAH 84145-5000
TELEPHONE (801) 521-9000
FACSIMILE (801) 363-0400
HTTP://WWW.SCMLAW.COM

ELIZABETH L. WILLEY

TO CONTACT WRITER:
(801) 322-9278
ewilley@scmlaw.com

January 12, 2004

Douglas G. Mortensen
Matheson, Mortensen, Olsen & Jeppson
648 East First South
Salt Lake City, Utah 84102

Re: Gary R. Cannon v. Salt Lake Regional Medical Center

Dear Doug:

In reviewing the above file, it appears that plaintiffs' Responses to defendant Salt Lake Regional Medical Center's Third Set of Request for Production of Documents is overdue. Please let me know when I should expect to receive those responses.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU



Elizabeth L. Willey

ELW:sn

\\Scm-prolaw\Documents\020440-0051\SN\40602.wpd

EXHIBIT “D”

Recd. 3/29/04
ELL

FILED DISTRICT COURT
Third Judicial District

MAR - 4 2004

SALT LAKE COUNTY

By Matthew D. ...
Deputy Clerk

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

KATHERYN CANNON, as surviving	:	MINUTE ENTRY
spouse of GARY R. CANNON,	:	
deceased, LANE CANNON and	:	CASE NO. 020914614
ROLAND CANNON, as surviving	:	
children and legal heirs of	:	
GARY R. CANNON, deceased,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
SALT LAKE REGIONAL MEDICAL	:	
CENTER, INC., JOHN AND JANE	:	
DOES 1 THROUGH X, and DOE	:	
BUSINESS ENTITIES 1 THROUGH V,	:	
	:	
Defendants.	:	

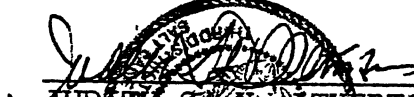

This matter is before the Court on plaintiffs' Motion to Compel, dated October 24, 2003. This Court has reviewed arguments of counsel and hereby denies plaintiffs' Motion.

Pursuant to Benson, ex rel. Benson v. IHC Hospitals, Inc., 866 P.2d 537 (Utah 1993), the Supreme Court equates the peer review privilege with the care review privilege. Accordingly, reports are privileged if they are "prepared specifically to be submitted for review purposes." Id. The only evidence presented in this case is the Affidavit of Linda Wright. Ms. Wright asserts that the "Incident reports are created specifically for submission to the [care review department]," and that "Incident reports are not

created or used for any purpose other than for evaluating and improving the health care rendered to patients at Salt Lake Regional Medical Center.... Incident reports are not included as part of the patient's medical records."

In the absence of any evidence to the contrary, this Court finds that the reports are privileged.

Dated this 4 day of March, 2004.

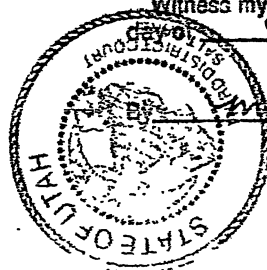

JUDITH A. MATHERTON
DISTRICT COURT JUDGE


STATE OF UTAH)
County of Salt Lake) ss.

I, the undersigned, Clerk of the District Court, State of Utah, Salt Lake County, Salt Lake Department do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office as such clerk.

Witness my hand and seal of said Court This 24th
March 2004

CLERK OF COURT



Matthew Blair
Deputy

CANNON V. SALT LAKE
REGIONAL MEDICAL CENTER

PAGE 3

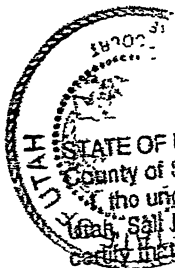
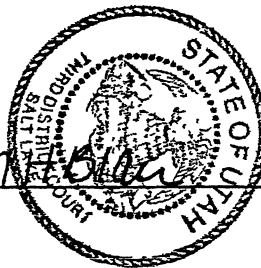
MINUTE ENTRY

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 4th day of March, 2004:

Douglas G. Mortensen
Attorney for Plaintiffs
648 East 100 South
Salt Lake City, Utah 84102

David W. Slagle
Elizabeth L. Willey
Bradley R. Blackham
Attorneys for Defendant
Salt Lake Regional Medical Center
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145



STATE OF UTAH) ss.
County of Salt Lake)
I, the undersigned, Clerk of the District Court, State of Utah, Salt Lake County, Salt Lake Department do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office as such clerk.

Witness my hand and seal of said Court This 24th
day of March 2004

CLERK OF COURT

By _____

M. B. B.
Deputy

EXHIBIT 'E'

LAW OFFICES
SNOW, CHRISTENSEN & MARTINEAU
A PROFESSIONAL CORPORATION
10 EXCHANGE PLACE, ELEVENTH FLOOR
POST OFFICE BOX 45000
SALT LAKE CITY, UTAH 84145-5000
TELEPHONE (801) 521-9000
FACSIMILE (801) 363-0400
HTTP://WWW.SCMLAW.COM

Elizabeth Willey

to contact writer:
(801) 322-9278
ewilley@scmlaw.com

March 12, 2004

Douglas G. Mortensen
Matheson, Mortensen, Olsen & Jeppson
648 East 100 South
Salt Lake City, UT 84102

Re: *Gary R. Cannon v. Salt Lake Regional Medical Ctr.*

Dear Douglas:

Enclosed please find the original Proposed Order as to the Minute Entry made by Judge Atherton. If it meets with your approval, please execute it and return it to me for filing with the court. Should you have any questions, please feel free to contact me.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU



Elizabeth Willey

ELW:sn
Enclosure
020440-0051\SN\44591.wpd

DAVID W. SLAGLE (2975)
ELIZABETH L. WILLEY (5639)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Salt Lake Regional Medical Center, Inc.
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

KATHRYN CANNON, as surviving spouse **ORDER**
of GARY R. CANNON, deceased, LANE
CANNON and ROLAND CANNON, as
surviving children and legal heirs of GARY
R. CANNON, deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X AND DOE BUSINESS
ENTITIES 1 THROUGH V,

Case No. 020914614
Judge Judith S.H. Atherton

Defendants.

The above entitled matter having come before the Court on Plaintiffs' First Motion to Compel Discovery and the Court having reviewed the Motion and Defendant's Opposition thereto, the Court is fully advised in the premises and for good cause therefore appearing,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion to
Compel Discovery is DENIED.

SO ORDERED this _____ day of _____, 2004.

BY THE COURT

Honorable Judge Judith S. H. Atherton
THIRD DISTRICT COURT

APPROVED AS TO FORM:

Douglas S. Mortensen
Attorneys for Plaintiff

EXHIBIT ‘F’

LAW OFFICES
SNOW, CHRISTENSEN & MARTINEAU
A PROFESSIONAL CORPORATION
10 EXCHANGE PLACE, ELEVENTH FLOOR
POST OFFICE BOX 45000
SALT LAKE CITY, UTAH 84145-5000
TELEPHONE (801) 521-9000
FACSIMILE (801) 363-0400
HTTP://WWW.SCMLAW.COM

to contact writer:
(801) 322-9278
ewilley@scmlaw.com

Elizabeth Willey

March 17, 2004

Douglas G. Mortensen
Matheson, Mortensen, Olsen & Jeppson
648 East 100 South
Salt Lake City, UT 84102

Re: *Gary R. Cannon v. Salt Lake Regional Medical Ctr.*

Dear Douglas:

This letter is in response to your letter dated March 11, 2004, regarding our letter to you indicating that we were going to subpoena the records of Dr. Ronald Ward pertaining to plaintiff Katheryn Cannon. It is my understanding that Ms. Cannon has placed her physical condition at issue in this case. Therefore, I believe I have the right to obtain medical records from her treating physicians. To that effect, I am enclosing a Release for Dr. Ronald Ward, that I request that plaintiff Katheryn Cannon sign. Please let me know if you refuse to have Ms. Cannon sign this Release. If I do not receive the executed Release by March 31, 2004, I will go forward in filing a Motion to Compel.

Additionally, my records indicate that you have not responded to defendant's Third Set of Requests for Production of Documents. If you intend to drop the claims for psychological damage and expense for plaintiffs Lane Cannon and Roland Cannon, I do not need them to sign the Release forms. However, if they plan on placing their mental health at issue in this matter, I have the right to review those providers that they sought care from, and whose billing statements are part of their special damage claim. Those requests for documents were due on December 24, 2003. Please let me know within the next week your intent in producing the requested documents.

March 17, 2004
Page 2

Thank you for your help and cooperation in this matter.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU

A handwritten signature in black ink, appearing to read 'E. Willey', with a stylized, flowing script.

Elizabeth Willey

ELW:sn
Enclosure
020440-0051\SN\44841.wpd

EXHIBIT ‘G’

LAW OFFICES
SNOW, CHRISTENSEN & MARTINEAU
A PROFESSIONAL CORPORATION
10 EXCHANGE PLACE, ELEVENTH FLOOR
POST OFFICE BOX 45000
SALT LAKE CITY, UTAH 84145-5000
TELEPHONE (801) 521-9000
FACSIMILE (801) 363-0400
HTTP://WWW.SCMLAW.COM

to contact writer:
(801) 322-9278
ewilley@scmlaw.com

Elizabeth Willey

March 19, 2004

Douglas G. Mortensen
Matheson, Mortensen, Olsen & Jeppson
648 East 100 South
Salt Lake City, UT 84102

Re: *Gary R. Cannon v. Salt Lake Regional Medical Ctr.*

Dear Douglas:

I am in receipt today of the following:

1. Rule 30 (b)(6) Notice of Deposition of Salt Lake Regional Medical Center Representative(s); and
2. Notice of Deposition of Linda Wright

These depositions have been scheduled for March 31, 2004. The 30 (b)(6) Notice specifically asks to depose "each and every individual who has at any time seen the incident reports Salt Lake Regional Medical Center has refused to produce in this action..." The Notice of Linda Wright gives no specific purpose for her deposition. Since Linda Wright, is the Risk Manager at Salt Lake Regional Medical Center, and was not a care giver for decedent, it is assumed that the purpose of her deposition is to question her also about the subject incident report. Please inform me if you intend to depose Linda Wright for any other purpose.

As you will recall, Judge Atherton denied your Motion to Compel Discovery and issued a Minute Entry in this matter wherein she held that the subject incident report was


March 19, 2004

Page 2

privileged and therefore not discoverable. Based on Judge Atherton's ruling, please be advised that defendant will not be producing Rule 30 (b)(6) deponents or Linda Wright for deposition on March 31, 2004, unless ordered to do so by Judge Atherton.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU

A handwritten signature in cursive script, appearing to read "Elizabeth", followed by a long horizontal flourish.

Elizabeth Willey

Exhibit J

Douglas G. Mortensen, USB #2329
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
(801) 363-2244

Attorneys for Plaintiff

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

KATHERYN CANNON, as surviving
spouse of GARY R. CANNON,
deceased, LANE CANNON and
ROLAND CANNON, as surviving children
and legal heirs of GARY R. CANNON,
deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X and DOE BUSINESS
ENTITIES 1 THROUGH V,

Defendants.

**PLAINTIFFS' REPLY
MEMORANDUM
SUPPORTING THEIR
MOTION TO COMPEL
DISCOVERY AND FOR
SANCTIONS**

Civil No.: 020914614

Judge Judith S. Atherton

Plaintiffs Kathryn, Lane and Roland Cannon submit this reply memorandum
supporting their motion to compel discovery and for sanctions.

IRRELEVANCE OF DEFENDANT'S "MATERIAL FACTS"

Of the defendant's 33 enumerated "material facts" only those assertions numbered 25, 27, 28, 30 and 31 are remotely germane to the pending motion. All of the other assertions are immaterial and irrelevant and should be disregarded.

In addition, plaintiffs contest the accuracy of defendant's Fact No. 21 which asserts:

21. In their reply memorandum, plaintiffs argued that the deposition of Linda Wright may be necessary to determine whether or not any existing incident reports are protected under Utah's care review privilege.

Plaintiff's reply memorandum contains no such argument. It does, however, contain argument, supported by ample case authority that any affidavit asserting a privilege must be accompanied by copies of the documents allegedly subject to the privilege, for the Court's in-camera review. The plaintiffs further pointed out:

In the case cited by the Hospital, the affidavit was accompanied not only by the documents sought to be protected by discovery but also by the Hospital's bylaws, rules and regulations. (952 SW.2d at 930). Here, Ms. Wright's affidavit is not accompanied by the incident reports claimed to be privileged nor by the Hospital's bylaws, rules or protocols. Without such documentation, there is no corroboration for the risk manager's naked assertion that incident reports are created specifically and solely for care review purposes.

An accompanying footnote states simply: "Even with such documents, examination of Linda Wright under oath may necessary."

The root issue before this Court is simply whether the hospital can prevent the plaintiffs from conducting discovery aimed at ascertaining the truth of Linda Wright's affidavit assertions. It is plaintiffs' position that if a privilege can be conclusively established and rendered unassailable by a simple, conclusory worded affidavit the pursuit for truth is in serious jeopardy.

ARGUMENT

THIS COURT'S MINUTE ENTRY PROVIDES NO BASIS FOR THE HOSPITAL'S REFUSAL TO COOPERATE IN DISCOVERY CONCERNING THE DISSEMINATION AND USE OF THE INCIDENT REPORTS.

This Court's minute entry indicates it relied entirely on the affidavit of Linda Wright as the factual basis for its finding that the incident reports are privileged. This Court stated after referring to statements in that affidavit:

In the absence of any evidence to the contrary, this Court finds that the reports are privileged.

There is absolutely no statement or implication in the minute entry suggesting the plaintiffs may not try to gather contrary evidence.

This Court had ample opportunity in its minute entry to foreclose any discovery into the accuracy of Linda Wright's affidavit assertions. It chose not to close the door on such discovery. On the contrary, the minute entry seems to invite discovery. To

preclude discovery would be contrary to the compelling case authority cited in plaintiffs' reply memorandum last December. The training videotape the Hospital uses to train its personnel in the prevention of patient falls specifically dictates that **"all circumstances and findings [concerning a fall] should be documented in the patient's chart and on the incident report form."** In this instance, it is precisely because the facts and circumstances surrounding Mr. Cannon's fall are not documented in the patient's chart that plaintiffs seek production of the incident reports. They should at the least be allowed to interrogate Linda Wright as to the Hospital's apparent violation of its own standard concerning documentation of circumstances surrounding patient falls. They should also be allowed to discover the identity of all persons who have seen the incident reports.

As the plaintiffs pointed out in their reply memorandum last December, Linda Wright's affidavit

. . . was crafted in a way to conceal whether the Hospital's own counsel has had access to the incident reports. If so, denying access to plaintiffs' counsel would be grossly unfair. At the very least, the incident reports should have been produced for the Court's in-camera review. So too should the Hospital's bylaws, and all rules and protocols pertaining to patient rights, patient records and the use of information contained in incident reports.


The Hospital should not be allowed to benefit from a practice of labeling as privileged information which its own training film unequivocally states should be a part

of the patient's medical records.

CONCLUSION

This Court has not precluded discovery into the dissemination and use of the Hospital's incident reports. There is no basis in this Court's minute entry for the Hospital's conclusion that it has. The Hospital had no right on its own to refuse to produce Linda Wright and other witnesses possessing information responsive to plaintiffs' Rule 30(b)(6) deposition notice. The Hospital has filed no motion for a protective order. It has simply taken upon itself the role of deciding what can and cannot be discovered. In doing so, it has violated the rules of discovery and should be sanctioned.

DATED this 2 day of April, 2004.



Douglas G. Mortensen
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 2004, I caused a true and correct copy of the foregoing to be delivered to the following via the means indicated:

Elizabeth L. Willey
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Federal Express

Ann Berumen

Pldg Reply mem supporting mtn to compel.0402

Exhibit K

Douglas G. Mortensen, USB #2329
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
(801) 363-2244

Attorneys for Plaintiff

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

KATHERYN CANNON, as surviving
spouse of GARY R. CANNON,
deceased, LANE CANNON and
ROLAND CANNON, as surviving children
and legal heirs of GARY R. CANNON,
deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X and DOE BUSINESS
ENTITIES 1 THROUGH V,

Defendants.

**AFFIDAVIT AS TO COSTS
AND ATTORNEYS FEES**

Civil No.: 020914614

Judge Judith S. Atherton

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

Douglas G. Mortensen, being first duly sworn, deposes and says:

1. I am and at all times material hereto have been counsel for the plaintiffs in
this action. I hold and continuously since 1991 have held an "A V" rating from

Martindale Hubbell. I have been practicing law in Utah for 26 years. I have personal knowledge of the information contained in this affidavit.

2. I am familiar with the rates customarily charged by attorneys of my experience. My hourly rate is \$200. That rate is reasonable.

3. Through the date of the signing of this affidavit, I have spent 3.5 hours in connection with the motion to compel discovery concerning the assertions of privilege set forth in Linda Wright's affidavit. My office has to date incurred copying and mailing costs in connection with that motion of \$3.50. **The reasonable costs and fees incurred to date in connection with the motion to compel discovery total \$703.50.**


4. To the date of the signing of this affidavit, I have spent some 6.75 hours in work necessitated by the Hospital's motion for summary judgment. Such work has included reviewing correspondence and e-mails, consulting the Rules of Procedure, conducting research, drafting an affidavit pertaining to communications surrounding the extension of discovery deadlines and drafting and editing a memorandum opposing summary judgment. My office has to date incurred copying and mailing costs in connection with that motion of \$7.60. **The reasonable costs and fees incurred in connection with opposing the Hospital's summary judgment motion total \$1,357.60.**

DATED this 24 day of March, 2004.



Douglas G. Mortensen
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
Attorneys for Plaintiffs

Subscribed and sworn to before me this 24 day of March, 2004.



Notary Public



CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2004, I caused a true and correct copy of the foregoing to be delivered to the following via the means indicated:

Elizabeth L. Willey
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Facsimile
<input checked="" type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Federal Express

