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IN THE SUPREME COURT OF THE STATE OF UTAH

MOUNTAIN WEST SURGICAL CENTER, LLC and MOUNTAINWEST MEDICAL PROPERTIES, LLC, Plaintiffs and Appellants, v. HOSPITAL CORPORATION OF UTAH, dba LAKEVIEW HOSPITAL, Defendant and Appellee.	**APPELLANT'S REPLY BRIEF AND RESPONSE TO APPELLEE'S CROSS APPEAL** Appellate Case No. 20060243-SC

Appeal from the Second District Court, Davis County, Utah
Judge Thomas L. Kay Presiding

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ARGUMENT

I. THE JUDICIAL PROCEEDINGS PRIVILEGE CANNOT NOT BAR AN ABUSE OF PROCESS CLAIM.

By definition, the tort of abuse of process relies on a party's misuse of the legal process. It cannot exist, therefore, if the judicial proceedings privilege absolutely protects a party's use of the process. In light of the fact that abuse of process is a valid tort in Utah, it is not surprising that Utah courts have never applied the judicial proceeding privilege to bar an abuse of process claim.

There can be no reasonable dispute regarding the vitality of the tort of abuse of process in Utah. Within the last year, this Court has issued two separate opinions addressing abuse of process, Anderson *Dev. Co. v. Tobias*, 2005 UT 36, 116 P. 3d 323 and *Hatch v. Davis*, 2006 UT 44, 558 Utah Adv. Rep. 25. In both cases, this Court addressed the tort of abuse of process without providing any indication that it intended the judicial proceedings privilege to impact a party's ability to proceed with an abuse of process claim.

In *Anderson Development*, this Court reviewed a trial court's dismissal of an abuse of process claim. The claim was based on the filing of a lawsuit that Tobias alleged was a misuse of the process. This Court clarified the difference between the torts of abuse of process and wrongful use of civil proceedings, and provided a two-part test for abuse of process claims. Ultimately, the Court remanded the case to the trial court to apply that test. The judicial proceedings privilege never entered into the Court's analysis, however. This is particularly

interesting because the Court relied on the Noerr-Pennington Doctrine, a concept that is conceptually similar to the privilege, to bar one of Anderson Development's claims. See *Anderson Development* at ¶28.

In *Hatch*, the Court also reviewed a trial court's decision regarding an abuse of process claim. As with the claim in *Anderson Development*, the abuse of process claim was premised on the filing of a lawsuit. Again, the judicial proceedings privilege was never mentioned in the Court's analysis.

HCU cannot refer this Court to a holding from a single Utah case to support its position. Instead, HCU relies on dicta from unrelated Utah cases and holdings from other jurisdictions. In doing so, HCU effectively establishes that the law may differ from state to state, and that the privilege may be applied differently depending on the jurisdiction[1]. HCU cannot, however, establish that Utah law supports the trial court's decision.

II. THE TRIAL COURT ERRED WHEN IT RULED THAT MOUNTAIN WEST DID NOT SATISFY THE ELEMENTS OF AN ABUSE OF PROCESS CLAIM

Since the date of trial court's decisions, this Court has clarified the abuse of process tort. In the recent *Hatch* decision, this Court explained that the essence of an abuse of process claim is the perversion of the process to accomplish some improper purpose, and that the use of process "becomes actionable when it is used 'primarily to

[1] There are countless cases from other jurisdictions in which Courts have specifically held that the privilege does not apply to abuse of process claims. See *General Refractors Co. v. Firmeman's Fund Ins*, 337 F.3d 297 (3d Cir. 2003) (mere existence of abuse of process tort is evidence that judicial proceeding privilege does not apply); *Goldstein v. Mitchell*, 496 So.2d 412 (LA. Ct. App 1986) (holding that the judicial proceedings privilege does not apply to abuse of process claims.); *Vallombroso v. Brockett*, 1992 Conn. Supr. Lexis 1734, (holding privilege does not apply to abuse of process claims).

accomplish a purpose for which it was not designed." *Hatch v. Davis*, 2006 UT at ¶34. The Court also explained that to prevail on an abuse of process claim, a party must prove (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. *Id* at ¶36. Because there is no dispute regarding the general legal principles, the issue in this case is whether the trial court properly applied the law to the undisputed facts.

A. Ulterior Purpose

In *Hatch*, this Court explained that the ulterior purpose component goes to the "essence" of the tort, or in other words, the "tortfeasor's motive." *Id* at ¶36. Interestingly, courts have provided very little analysis regarding the ulterior purpose component. For instance, in *Hatch*, this Court touched on the ulterior purpose component, yet focused on the willful act component. Based on the Court's analysis, one is left with the impression that the ulterior purpose component is the more easily satisfied component, while the willful act component is the sticking point for most abuse of process claims.

In this case, there was ample evidence before the trial court regarding HCU's ulterior motive. It was undisputed that HCU's motive was to stop construction of the medical center. Without a claim in the lawsuit to title or right to possession, and without any legitimate interest to protect, HCU recorded the Lis Pendens. If the only proper motive for recording the Lis Pendens was not available to HCU, then its decision must have been born of an ulterior motive. This conclusion is supported by HCU's own statements. Time and again HCU has

admitted its motive: to stop construction of the project. (R at 468.). This motive was confirmed by the testimony of HCU's board member, Lynn Summerhays (R. at 385-386 and R. at 410.).

These were the only facts before the trial court on the issue of motive and HCU presented no evidence that its motive was pure. Consequently, the only reasonable conclusion the trial court could have reached was that HCU filed the Lawsuit and recorded the Lis Pendens with an ulterior motive.

On appeal, HCU now claims that its motive was pure, and that it filed the Lawsuit to protect its rights and recorded the Lis Pendens to give notice to prospective purchasers. See Appellee Br. at 17. There are two fatal problems with this argument. First, HCU was prohibited by Utah Code Ann. § 78-40-2 from providing notice of anything but claims that impacted title to the property or right to possession of the property. Second, HCU knew that SDCH was days away from deeding the property into the joint venture with Mountain West. There were no prospective purchasers, and HCU knew it.

HCU also makes the somewhat puzzling argument that its motive could not be ulterior, because it admits its motive. There is a key problem with this argument as well. The issue is not whether HCU concealed its true motive; it is whether HCU employed a legal process for a purpose ulterior to that for which it is designed. If this argument had any validity, a party could misuse the process and avoid liability by simply admitting they were abusing the process.

B. Willful Act

As explained by this Court in *Hatch*, the facts necessary to prove the ulterior motive and willful act components are closely related.

The 'willful act' requirement is consistent with the notion that an 'improper act may not be inferred from the motive.' *Hatch* at ¶40.

> The 'willful act' element can be understood as an obligation imposed on the complaining party to allege (or in this case prove) that the tortfeasor has confirmed through his conduct his improper ulterior motive for employing legal process .... In this respect, the 'wilful act' element exists to be in the service of the 'ulterior purpose' core that makes up the 'essence' of abuse of process.

Id. at ¶40. Consistent with this concept, this Court has required "conduct independent of legal process itself that corroborates the alleged improper purpose." *Id.* at ¶39.

In *Hatch*, this Court cites the facts in *Templeton Feed & Grain v. Ralston Purina Co.*, 446 P.2d 152 (Cal. 1968), as an example of a corroborating willful act. In *Templeton*, a defendant used legal process to seize turkeys at the height of the Thanksgiving season in order to force payment of a debt, and then made payment demands. The Court explained that while the payment demands "were not integral to the proceeding that resulted in the seizure of the turkeys...they collaborated the perverse character of the proceedings. *Id.* at 155. Therefore, the acts together satisfied the willful act component.

HCU's actions are analogous to the turkey example in *Templeton*. HCU filed its Complaint on January 10, 2000. While it had no legal right to do so, its admitted purpose was to stop construction of the medical center. Much like the

defendant in *Templeton*, HCU used the timing of the process to create undue pressure. HCU did not record the Lis Pendens at the time it filed its complaint, as is the custom when a party is truly concerned about notice to third parties. Rather, HCU waited until March 2, 2000, days before SDCH was scheduled to finalize its joint venture with Mountain West and Mountain West was scheduled to close on its construction financing. Following this tactical move, HCU's board members threatened Mountain West by telling it that this was just the beginning of what HCU was willing to do to stop construction. (R. at 385-386 and R. at 410).

In this light, the timing of the Lis Pendens and the statements of Lynn Summerhays satisfy the willful acts component outlined in Hatch. Futhermore, they confirm the fact that the Lis Pendens was a carefully timed tactical misuse of the process to disrupt Mountain West's joint venture with SDCH, disrupt Mountain West's financing and stop construction of the project.

C. Impact of the Lawsuit and Lis Pendens

Mountain West provided undisputed evidence that the lawsuit and Lis Pendens effectively stopped the project. SDCH pulled out of the joint venture, SDCH did not deed the property to Mountainwest Properties and Mountainwest Properties' lender withdrew its commitment for construction financing." (R. at 409) This testimony was confirmed by the testimony of George Bennett, president of SDCH. (R. at 416.) HCU did not dispute this testimony, and the trial court denied its motion to strike the testimony.

Based on the foregoing, there was competent, undisputed evidence that the Lawsuit and Lis Pendens disrupted Mountainwest's joint venture with SDCH and disrupted Mountainwest Property's construction financing. Any conclusion to the contrary is not supported by the record, and the trial court erred in its findings.

III. MOUNTAIN WEST'S TORTIOUS INTERFERENCE CLAIM IS NOT BARRED BY THE JUDICIAL PROCEEDING PRIVILEGE

A. The Lawsuit

Utah courts have consistently held that baseless and unfounded litigation can serve as the basis for an interference with economic relationships claim. Therefore, the trial court erred when it ruled as a matter of law that unfounded litigation is privileged and cannot serve as the basis for a tortuous interference claim.

Leigh Furniture v. Isom, 657 P.2d 293 (Utah 1982), is controlling. Much like this case, *Leigh Furniture* is a case based on the filing of groundless lawsuits. In that case, Isom brought a counterclaim against the Leigh Corporation for intentional interference with contractual relations based on, among other things, groundless lawsuits filed by the Leigh Corporation. While setting forth the elements of a tortious interference claim, this Court explained that "unfounded litigation" satisfies the improper means component of a tortious interference claim. *Id.* at 308-09. In the process, this Court specifically addressed the judicial proceedings privilege and first amendment concerns.

In *St. Benedict's Development Company v. St. Benedict's Hospital*, 811 P.2d 194 (Utah 1994), the Court confirmed that "unfounded litigation" can serve as the improper means element of an intentional interference claim. *Id* at 201. Since then, the Court has never indicated any intention to limit its holdings in *Leigh Furniture* and *St. Benedict's Development* in the manner advocated by HCU. Furthermore, the *Leigh Furniture* and *St. Benedict's Development* decisions are consistent with the great weight of authority on this issue.[2]

Apparently recognizing the futility of the arguments it made at the trial court level, HCU now focuses on the holdings in *Price v. Armour*, 949 P.2d 1251 (Utah 1997), and *Beezley v. Hansen*, 286 P.2d 1057 (Utah 1955) to support the argument that *Leigh Furniture* has been impliedly overturned. This argument does not withstand any serious scrutiny, however.

HCU relies on *Beezly* for the proposition that the filing of a lawsuit—however unfounded—cannot be the improper means necessary to support a tortuous interference claim. See Appellee Br.at 21. Reliance on *Beezley* is futile, since it was decided by this Court in 1955, twenty seven years before the *Leigh Furniture* decision. In *Leigh Furniture*, this Court expressly held that "unfounded litigation" satisfies the improper means component of a tortious interference

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[2] *See Silver v. Mendel*, 894 F.2d 598 (3d. Cir. 1990); *Trau-Med v. Allstate Ins.*, 71 S.W.3d 691 (Tenn. 2002); *Guard-Life v. S. Parker Hardware*, 406 N.E.2d 445 (N.Y. 1980); *Corning Inc. v. SRU Biosystems*, 292 F.Supp. 2d 583 (D. Del. 2003); *Cacique, Inc. v. Gonzalez*,WL 609278 (N.D. Ill. 2004); *Mantia v. Hanson*, 79 P.3d 404 (Or. Ct. App. 2003); *Matsushita Electronics Corp. v. Loral Co.*, 974 F.Supp. 345 (S.D. N.Y. 1997); *Universal City Studios, Inc. v. Nintendo Co.*, 797 F.2d 70 (2d. Cir. 1986).

claim. *Leigh Furniture* 697 P.2d at 308-09. Therefore, *Leigh Furniture* is controlling on this issue and *Beezley* is no longer good law.

Problems also exist with HCU's reliance on *Price v. Armour*. HCU suggests that *Price v. Armour* stands for the broad proposition that "the judicial proceedings privilege immunizes actions taken in a lawsuit from liability for tortuous interference. Appellee. Br., at 21. It does not. *Price v. Armour* addressed potential liability for defamatory statements made during the judicial process. The holding is limited to the privileged nature of defamatory statements, and does not even venture into the issue of unfounded litigation. The actual holding in *Price v. Armour* reads:

> It is essential that the privilege apply to all **claims arising from the same allegedly defamatory statements** in order to encourage full and free participation in judicial and administrative proceedings. We therefore hold that the judicial proceedings privilege protects against Price's claim for intentional interference with business relations.

(emphasis added) *Id.* at 1259. On its face, the holding in *Price v. Armour* dealt only with claims based on defamatory statements. It did not attempt to overturn this Court's holding in *Leigh Furniture*, and therefore did not do so.

B. The Lis Pendens

The Lis Pendens not privileged for three distinct reasons. First, the improper use of a lis pendens is not privileged. Second, the Lis Pendens is an excessive publication, and thus any privilege that may have existed was destroyed. And third, even if the Lis Pendens is privileged, the privilege is qualified.

1. The Improper Use of a Lis Pendens Is Not Privileged Under Utah Law

The judicial proceeding privilege does not apply where the statements at issue are made unlawfully, even if during or in the course of a judicial proceeding. As recently as August, the Court of Appeals held in *Sorenson v. Barbuto*, 2006 UT App 340, ¶22 (Utah Ct. App 2006). that the judicial proceeding privilege did not bar a claim against a physician for intentional infliction of emotional distress because the physician's "acts of communicating ex parte with defense counsel were not legally justified." *Id.* at ¶22.

The recent holding in *Sorenson* is consistent with this Court's holding in *Hanson v. Kohler*, 550 P.2d 186 (Utah 1976). In *Hanson*, this Court held that filing a lis pendens was privileged in the context of a slander of title action. To reach that conclusion, however, the Court had to distinguish the facts in *Hanson* from the facts of *Birch v. Fuller,* 9 Utah 2d 79, 337 P.2d 964 (Utah 1959), where the Court held that a lis pendens could serve as the basis for a slander of title action in part because the lis pendens was not in accordance with law. *Id.* at 190. In *Birch v. Fuller,* the Court upheld a judgment for slander of title where evidence supported findings that defendants filed a lis pendens in bad faith and had no equitable or legal title to the property. *Id* at 964,65. Other jurisdictions have similarly determined that an improperly filed lis pendens is not privileged and have allowed tort claims, such as slander of title, based on a lis pendens.[3]

[3] *See, e.g., Warren v. Atkinson v. Fundaro, 400 So. 2d 1324,1326* (Fla. App. 1981) ("the filing of the lis pendens was not privileged since it was neither a proper notice of lis pendens nor did it involve the property in litigation"); *Trotter v. Indiana Waste Systems, Inc.*, 632 N.E.2d 1159,1163 (Ind. App. 1994) ("a lis

HCU primarily relies on *Bower v. Stein Eriksen Lodge Owners Ass'n*, 201 F. Supp. 2d 1134 (D. Utah 2002) to support its position that even an improperly filed lis pendens is protected by the judicial proceeding privilege. See Appellee. Br. at 18. In *Bower*, just as Mountain West does, the plaintiff argued that *Hanson* supported their argument that an invalid lis pendens is not privileged. However, finding *Hanson* to be unclear, Judge Campbell elected to follow the Texas Supreme Court in *Prappas v. Meyerland Community Improvement Ass'n,* 795 S.W.2d 794, 797-98 (1990), and held that even an improperly filed lis pendens is privileged. *Bower*, 201 F.Supp.2d at 1138.

Judge Campbell's decision, however, is not consistent the recent decision in *Sorenson* or this Court's decision in *Hanson*. Mountain West submits that Judge Campbell should have turned to the authority that the *Hanson* Court found persuasive, *Albertson v. Raboff,* 46 Cal 2d 375 (1956), which held that a lis pendens is (generally) privileged under California law. However, an improperly filed lis pendens is *not* privileged under California law unless it identifies an action previously filed with a court of competent jurisdiction which effects title or possession of real property[4].

2. An Improperly Filed Lis Pendens Is Also an Excessive Publication and Constitutes Abuse of the Judicial Proceeding Privilege Under Utah Law.

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pendens notice is absolutely privileged ... if the party filing the notice had a sufficient 'interest' in real estate pursuant to the lis pendens statute that would justify the filing of the notice under that statute").

[4] See *Palmer v. Zaklama*, 109 Cal. App 4th 1367, 1380 (2003) (citing Cal Civ Code § 47(b)(4)).

Even if the Lis Pendens had been privileged, HCU destroyed the privilege through excessive publication. This Court has consistently held that "[s]tatements that are otherwise privileged lose their privilege if they are excessively published, that is, 'published to more persons than the scope of the privilege requires to effectuate its purpose.'" *Krouse v. Bower*, 2001 UT 28, ¶15, 20 P.3d 895; (quoting *Debry v. Godby*, 1999 UT 111, ¶21, 992 P.2d 979). "The excessive publication rule, in the context of judicial proceeding privilege cases, is to prevent abuse of the privilege by publication of defamatory statement to persons who have no connection to the proceeding." *Krouse v. Bower*, 2001 UT 28, ¶15, 20 P.3d 895, 900. Thus, Mountain West can show abuse of the judicial proceeding privilege where publication of the complaint "extended beyond those who had a legally justified reason for receiving it." *Debry v. Godby*, 1999 UT 111, ¶21, 992 P.2d 979, 985 (quoting *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991)).

As acknowledged by HCU, "[a] lis pendens is, in effect, a republication of the pleadings." Aplee. Br. at 17 (quoting *Hansen v. Kohler*, 550 P.2d 186, 190 (Utah 1976)). In cases where a party has claims that impact title or right to possession, Utah Code Ann. § 78-40-2 authorizes the filing and recordation of a lis pendens. HCU had no such right. Accordingly, the Lis Pendens was an excessive publication.

This case is clearly distinguishable from cases in which this Court held that publication was not excessive. In *Krouse*, this Court stated that a demand letter is excessively published if "published to more persons than necessary to resolve the

dispute or further the objectives of the proposed litigation...," and held that sending demand letters directly to various homeowners (in addition to their attorney) was not excessive publication since the homeowners "had a clear legal interest in the subject matter of the letter and threatened lawsuit." *Id.* at ¶¶15-17. Similarly, in *Debry*, this Court held that an attorney's publication of a letter to six people was not excessive where four of them had direct involvement in the case, one did not receive the letter, and one was the attorney's lawyer. *Id.* at ¶¶22-24, 985-86. However, by filing and recording the Lis Pendens, HCU published the Lawsuit to those with no connection to it, including Mountain West's construction lender, and thereby abused the judicial proceeding privilege through excessive publication.

3. If the Lis Pendens is Privileged, It Is Only Qualifiedly Privileged, and Does Not Bar Mountain West's Tortious Interference Claim Where HCU Knew It Lacked a Legally Protected Interest the Property and Improperly Filed a Lawsuit and Lis Pendens.

In *Westfield Development Company v. Rifle Investment Associates*, 786 P.2d 112 (Colo. 1990), the Supreme Court of Colorado was asked to decide as a matter of first impression "[w]hether there is a privilege to file a lis pendens which constitutes a defense to an action based on intentional interference with a contract." *Id.* at 116. Noting that the states are splits on the issue, the Court decided that "a party has only a qualified privilege to interfere with an existing contract by means of initiating litigation and filing pleadings and notice of lis pendens" because "the policy of encouraging free access to the courts which is the

basis of an absolute privilege is outweighed by the intentional and improper interference with contract by means of litigation." *Id.* at 1117-18 Accordingly, the privilege only applies when "(1) the interferer has, or honestly believes he has, a legally protected interest; (2) the interferer in good faith asserts or threatens to assert it; and (3) the assertion or threat is by proper means." *Id.* at 1118 (citing *McReynolds v. Short,* 115 Ariz. 166, 564 P.2d 389, 394 (Az. Ct. App. 1977)).

Colorado is not alone in refusing to afford an absolute privilege to the filing of a lis pendens.[5] Additionally, Mountain West submits that qualifying the judicial proceeding privilege so as to allow a claim for tortious interference for filing an invalid lis pendens is justified by the facts in this case. By qualifying the privilege so as to require the good faith assertion of an interest in real property before the privilege will attach to a lis pendens, this Court may prevent tortious interference by means of lis pendens while largely preserving the privilege.

IV AT A MINIMUM, THERE WERE ISSUES OF FACT THAT PREVENTED THE TRIAL COURT FROM DISMISSING MOUNTAINWEST'S CLAIM ON SUMMARY JUDGMENT

As is established above, groundless litigation satisfies the improper means component of an interference claim. See *Leigh Furniture* and *St. Benedict's*

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[5] *See, e.g., Belliveau Building Corp. v. O'Coin,* 763 A.2d 622, 639 (R.I. 2000) ("we believe that the recognition of a qualified privilege is also appropriate in [the lis pendens] context, one that a plaintiff may overcome only by a showing of 'actual malice'"); *Warren v. Bank of Marion,* 618 F. Supp. 317, 325 (W.D. Va. 1985) ("It is this court's position, however, that when all the interests involved are taken into consideration the filing of a notice of lis pendens is more appropriately characterized as a qualifiedly privileged occasion"); *Kensington Development Corp. v. Israel,* 419 N.W.2d 241, 244 (Wis. 1988)("the legislature has, in effect, modified this doctrine as it relates to the filing of a lis pendens and rendered it a conditional privilege").

Development. Therefore, to defeat summary judgment, Mountain West was only required to raise issues of fact regarding the validity of the underlying Lawsuit[6].

In the underlying Lawsuit, HCU sought relief based on four separate causes of action against SDCH; (1) Breach of Contract, (2) Breach of the Covenant of Good Faith and Fair Dealing; (3) Breach of Restrictive Covenant on the Use of Land, and (4) Declaratory Judgment (the "Lawsuit"). The first, second and fourth claims were dismissed in the underlying lawsuit by the trial court on summary judgment. The restrictive covenant claim survived based on perceived questions of fact.

In this case, Mountain West conclusively addressed those perceived issues of fact, and established that the restrictive covenant claim was groundless as well. HCU claimed a restrictive covenant prevented SDCH (and Mountainwest Properties) from constructing the Medical Center. By its terms, however, the restrictive covenant was limited to a

> prohibition on the establishment of a commercial ancillary facility. A commercial ancillary facility is defined as including, but not limited to, commercial laboratories or x-ray, radiological imaging, physical therapy, pulmonary or cardiology testing or out-patient medical facilities or birthing centers, any of which are offered on a commercial basis to third-party users. This prohibition shall not restrict physicians on the land from maintaining or performing ancillary services for their own patients. This prohibition shall be a covenant running with the land and enforceable so long as Hospital Corporation of Utah or any other subsidiary of Healthtrust, Inc.- the hospital company continues to operate an acute care hospital adjacent to the property.

[6] Without citing any authority, HCU now contends that litigation can only be groundless if the claims have been previously adjudicated and found groundless. There is no basis in Utah law for this position.

(R. at 385.)

Through the affidavit testimony of Richard Vincent and Gordon Bennett (the CEO of SDCH), Mountain West established that the planned Medical Center would not have been a "commercial ancillary facility" as defined by the restrictive covenant. (R. at 409-410.) Rather, the Medical Center was simply a 47,000 square foot medical office complex. Mountainwest Properties never intended to operate any facilities on the Medical Center. Instead, it intended to lease space to tenants. Likewise, the Surgical Center that Mountain West intended to open in leased space within the Medical Center would not have been a "commercial ancillary facility" as defined by the restrictive covenant. Mountain West Surgical did not intend to allow any of its member doctors to provide the prohibited services on a commercial basis to "third-party users." The member doctors could only perform services on their own patients. (R. at 409-410.)

These were the only facts before the trial court on summary judgment, and they were not disputed. At a bare minimum, Mountain West created issues of fact precluding summary judgment. Under no circumstances, however, did it fail to present evidence to support the elements of its interference claim.

V. THE TRIAL COURT PROPERLY DENIED HCU'S MOTION TO STRIKE

HCU claims that Mountain West utterly failed to respond to discovery. See Appellee Br. at 46. HCU's position, however, is contrary to the record. As Mountain West explained to the trial court, the discovery propounded by HCU

required Moutnain West to produce thousands of pages of documents. In an effort to respond to those requests, Mountain West worked for months to locate the requested information and to retrieve it from various locations throughout the country. The majority of the documents were in long-term storage in Kansas City, Missouri. Because many of the documents related to events that occurred several years ago, it took Mountain West months just to locate those documents. Mountainwest then spent a significant amount of time pouring through the documents and preparing them for production in this case. This was the sole reason for the delay in responding to HCU's discovery, and this fact was explained to HCU's counsel on numerous occasions. After a significant amount of effort, those documents were made available for defendants' inspection, copying and review. Mountain West also responded to the outstanding discovery requests. (R. at 452-459.)

After Mountain West had compiled the documents, Mountainwest's counsel and HCU's counsel even worked on a draft protective order. HCU never, however, made any effort to inspect or copy the information. (R. at 530.) Further, while HCU may have at one time drafted and filed a motion to compel, that motion was never submitted to the trial court for decision. Rather, HCU waited for summary judgment to complain about Mountain West's participation in the discovery process.

These facts were clearly explained to the trial court. Therefore, HCU's current claim that Mountainwest did not participate in discovery is absolutely false.

A. The trial court did not abuse its discretion.

HCU contends that trial court erred by not striking the affidavit of Richard Vincent pursuant to Rule 37 of the Utah Rules of Civil Procedure. Overturning that decision, however, would require this Court to determine that the trial court abused its discretion. In Utah, appellate courts

> [U]phold a trial court's denial or imposition of sanctions under rule 37 of the Utah Rules of Civil Procedure unless the court abuses its discretion. Rule 37 allows a trial court to order a party to cooperate in discovery, see Utah R. Civ. 37(a), permits a court to impose sanctions if a party fails to comply with its order see id. 37 (b), and in some instances allows a court to sanction an uncooperative party without having first issued an order, see ic. 37(d). However, sanctions under rule 37are not mandatory.

Pennington v. Allstate Ins. Co., 973 P.2d 932, 938 (Utah 1998). As is explained above, the trial court was aware of the facts regarding discovery and chose not to enter sanctions. Because there is no evidence that the trial court abused its discretion, there is no basis for this Court to overturn its decision regarding the affidavit of Richard Vincent.

B. The affidavit of Richard Vincent did not lack foundation

As an additional tactic, HCU claims that the trial court erred by not striking paragraphs 12 through 19 of the affidavit of Richard Vincent. This decision is also reviewed under an abuse of discretion standard. See *In re General Stream Adjudication*, 1999 UT 39, ¶25, 982 P.2d 65. As is outlined below, there is no

basis for HCU's position and the trial court certainly did not abuse its discretion when it denied HCU's motion to strike portions of the affidavit of Richard Vincent.

Paragraph 12

In paragraph 12, Richard Vincent explained, "The lis pendens was discovered by Mountainwest Properties when its lender pulled a final title report as it was preparing to fund Mountainwest Properties' construction financing".

HCU took issues with this statement claiming that Richard Vincent lacks foundation for the statements contained in paragraph 12. The fact is, as an officer of Mountainwest Properties, Richard Vincent was uniquely qualified to testify about how it discovered the lis pendens and how the lis pendens impacted Mountainwest Properties' construction financing. As a result, there was no basis to strike this testimony.

Paragraph 14

In paragraphs 14 and 15 Richard Vincent explained, "Through the lawsuit and subsequent lis pendens, HCU claimed that there was a restrictive covenant that prevented SDCH (and Mountainwest Properties) from constructing the Medical Center".

HCU argues that this paragraph should have been stricken because Mountainwest Properties and Mountain West Surgical were not parties to the lawsuit. The fact that HCU challenged this testimony is puzzling for a number of

reasons. First, the testimony accurately summarizes the claims in the Underlying Lawsuit, as admitted by HCU throughout this case and the appeal. Second, this information was only included in the affidavit to provide factual context. If it was stricken, it would not have in any way materially impact Richard Vincent's testimony.

Paragraph 15

In paragraph 15, Richard Vincent explained, that by its terms, the restrictive covenant was a:

> Prohibition on the establishment of a commercial ancillary facility. A commercial ancillary facility is defined as including but not limited to commercial laboratories or x-ray, radiological imaging, physical therapy, pulmonary or cardiology testing or out-patient Medical facilities or birthing centers, any of which are offered on a commercial basis to third-party users. This prohibition shall not restrict physicians on the land from maintaining or performing ancillary services for their own patients. This prohibition shall be a covenant running with the land and enforceable so long as Hospital Corporation of Utah or any other subsidiary of Healthtrust, Inc.- the hospital company continues to operate an acute care hospital adjacent to the property.

Paragraph 15 is simply a quote from the restrictive covenant. There was no claim that the covenant is not properly quoted and there was no rational basis for striking it from the affidavit.

Paragraph 17

In paragraph 17, Richard Vincent explained, "Mountainwest Properties did not intend to operate any facilities on the Medical Center. Instead, it intended to lease space to tenants"

As an officer of Mountainwest Properties, Richard Vincent is qualified to testify about the Mountainwest Properties' plans for the Medical Center.

Paragraph 18

In paragraph 18, Richard Vincent explained, "The Surgical Center that Mountain West Surgical intended to open in leased space within the Medical Center would not have been a "commercial ancillary facility" as defined by the restrictive covenant. Mountain West Surgical did not intend to allow any of its member doctors to provide the prohibited services on a commercial basis to "third-party users". The member doctors could only perform services on their own patients.

HCU claims the court erred because this statement contains a legal conclusion. It does not, and therefore, was not stricken. Richard Vincent merely explained the type of services Mountain West Surgical intended to perform. As an officer of Mountain West Surgical, he was clearly qualified to do so.

Paragraph 19

In paragraph 19, Richard Vincent explained,

> Following the filing of the lawsuit and recording of the lis pendens, it became clear that HCU would continue its efforts to interfere with the construction of the Medical Center. Following the filing of the lawsuit and recording of the lis pendens, I had a conversation with Lynn Summerhays, a member of Lakeview Hospital's board. Mr. Summerhays informed me that the lawsuit and lis pendens were just the first in a series of actions that HCU intended to take to stop construction of the Medical Center. He told

me that HCU would do whatever was necessary tie up the process and delay construction of the Medical Center at the SDCH location.

This statement is simply a recitation of Richard Vincent's conversation with Lynn Summerhays along with Richard Vincent's personal conclusions based on that conversation. He has personal knowledge of those conversations and is therefore free to testify about the conversation.

In short, the trial court was uniquely situated to make decisions regarding the admissibility of evidence. It chose not to strike the Affidavit of Richard Vincent. Because there is no evidence that it abuse its discretion, the trial court's decision must be upheld.

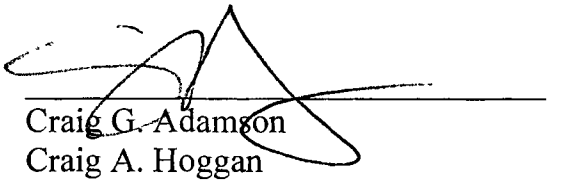
CONCLUSION

Based on the foregoing, Mountain West respectfully requests that this Court (1) reverse the trial court's decision that the Lis Pendens cannot form the basis of an abuse of process claim as a matter of law; (2) reverse the trial court's decision that testimony from a lender or title company was necessary to support Mountain West's abuse of process claim; (3) reverse the trial court's decision that Mountain West failed to establish the elements of an abuse of process claim and remand the case to the trial court with instructions to enter summary judgment in favor of Mountain West on its abuse of process claim; (4) reverse the trial court's decision that the Lawsuit and Lis Pendens are privileged as a matter of law, and therefore cannot form the basis of a tortuous interference claim; (5) reverse the trial court's decision that Mountain West failed to factually support the elements

of an interference claim as a matter of law and remand this case to the trial court for a trial on the merits; (6) reverse the trial court's decision to use Mountain West's failure to meet certain discovery deadlines as a basis for granting HCU's motion for summary judgment, and remand this case to the trial court for a trial on the merits, and; (7) uphold the trial court's decision to deny HCU's motion to strike the Affidavit of Richard Vincent.

DATED this 2nd day of October, 2006.

DART, ADAMSON & DONOVAN



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CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of October, 2006, I caused to be mailed via first-class, U.S. Mail, postage prepaid, two true and correct copies of APPELLANT'S BRIEF to the following:

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