2006

Mountain West Surgical Center, L.L.C. and Mountainwest Medical Properties, L.L.C. v. Hospital Corporation of Utah dba Lakeview Hospital, a Utah corporation : Brief of Appellee

Utah Court of Appeals

IN THE UTAH SUPREME COURT

MOUNTAIN WEST SURGICAL CENTER, L.L.C. and MOUNTAINWEST MEDICAL PROPERTIES, L.L.C.,	:	
	:	Case No. 20060243-SC
Plaintiffs/Appellants,	:	
vs.	:	District Court Case No. 040600019
HOSPITAL CORPORATION OF UTAH, d/b/a LAKEVIEW HOSPITAL, a Utah corporation,	:	
Defendant/Appellee.	:	

BRIEF OF APPELLEE
(ORAL ARGUMENT REQUESTED)

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS COUNTY, STATE OF UTAH, HONORABLE THOMAS L. KAY

Craig G. Adamson
Craig A. Hoggan
Debra G. Griffiths
DART, ADAMSON & DONOVAN
370 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 521-6383

Counsel for Plaintiffs/Appellants

Andrew H. Stone (USB #4921)
Marci Rechtenbach (USB #8146)
Ryan M. Harris (USB #8192)
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Telephone: (801) 521-3200

Counsel for Defendant/Appellee

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170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Telephone: (801) 521-3200

Counsel for Defendant/Appellee

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal under Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented on appeal are as follows:

1. Did the district court correctly grant summary judgment in favor of HCU on Mountainwest's claim for tortious interference with economic relations?

A district court's decision to grant or deny summary judgment is reviewed for correctness. Harline v. Barker, 912 P.2d 433, 438 (Utah 1996). "Because entitlement to summary judgment is a question of law, [an appellate court is to] accord no deference to the trial court's resolution of the legal issues presented." Id. In conducting this *de novo* review, the appellate court should "apply the same standard as that applied by the trial court." Durham v. Margetts, 571 P.2d 1332, 1334 (Utah 1977). The standard applied by the trial court is set forth in Utah R. Civ. P. 56(c). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c).

These issues were preserved in the trial court by motion. See R. at 211 (HCU's motion); R. at 252 (opposition memorandum); R. at 344 (reply memorandum); R. at 518 (Minute Entry); Order (Order, attached as Exhibit A to Mountainwest's appellate brief).

2. Did the district court correctly grant summary judgment in favor of HCU on Mountainwest's claim for abuse of process?

A court's decision to grant or deny summary judgment is reviewed for correctness, according no deference to the trial court's resolution of the legal issues presented. Harline,

912 P.2d at 438. In conducting this *de novo* review, the appellate court should "apply the same standard as that applied by the trial court." Durham, 571 P.2d at 1334. The standard applied by the trial court is set forth in Utah R. Civ. P. 56(c), as noted above.

These issues were preserved in the trial court by motion. See R. at 211, 252, 344, 518.

3. Did the district court err in refusing to strike the affidavit of Richard Vincent?

This issue is reviewed for abuse of discretion. See In re General Stream Adjudication, 1999 UT 39, ¶25, 982 P.2d 65 (stating that "an affidavit is simply a method of placing evidence of a fact before the court" and that, at least in civil cases, "a trial court decision to admit evidence is reviewed under a broad grant of discretion").

These issues were preserved in the trial court by motion. See R. at 313 (HCU's Motion); R. at 452 (Mountainwest's opposition memorandum); R. at 488 (HCU's reply memorandum); R. at 518 (district court's minute entry); Order (trial court's Order, attached as Exhibit A to Mountainwest's appellate brief).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

There are no constitutional provisions, statutes, ordinances or regulations whose interpretation is determinative of or of central importance to this appeal.

STATEMENT OF FACTS

Up until 1973, South Davis Community Hospital, Inc. ("SDCH") operated a small (74-bed) general acute care hospital in Bountiful, Utah. By the mid-1960s, however, both SDCH and Davis County leaders had begun to recognize that the SDCH facility was neither large enough or modern enough to meet the growing demands of southern Davis County residents. See R. at 395, 419. Davis County leaders formulated a plan to build two entirely

new hospitals to serve the county's burgeoning population—one in the north end of the county, and one in Bountiful in the south end of the county. Id. at 395, 420. At the same time, however, it was generally understood that it would be impossible to sufficiently remodel or enlarge the existing SDCH facility, and that an entirely new facility would be needed. Id. SDCH determined that it did not have the resources to construct and operate a large new hospital, and accordingly Davis County began to search for other commercial entities willing and able to finance, construct and operate the new hospital facilities. Id.

After lengthy investigation and negotiation with Davis County and with SDCH, Hospital Corporation of America ("HCA") agreed to develop, finance, construct and operate a new and larger hospital—approximately 150 beds—on property adjoining the older and smaller SDCH facility in Bountiful. That larger hospital was eventually built and is now known as Lakeview Hospital. Id. at 395-96, 421.

The fruits of the negotiation between HCA, Davis County, and SDCH were a series of written agreements, entered into in November 1973, under which HCA agreed to develop, finance, construct, and operate Lakeview Hospital, and under which SDCH agreed to cease operating its older and smaller hospital next door. Pursuant to these agreements, SDCH ceased operating its older and smaller hospital (and turned the facility into a nursing home), and HCA built Lakeview Hospital next door. Id. at 421. Contemporaneously, HCA created an affiliate business entity known as Hospital Corporation of Utah ("HCU," the Defendant/Appellee herein) to own and operate Lakeview Hospital. Id. at 421-22.

Some years later, in 1989, in order to straighten out the borders between their adjoining properties, HCU deeded certain property to SDCH, but those grants contained

certain deed restrictions prohibiting SDCH from constructing certain types of medical facilities on those deeded properties. Id. at 395-96, 421-22. Specifically, SDCH was prohibited from establishing, on the properties, a "commercial ancillary facility," 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.

Id.

In 1999, Plaintiffs/Appellees Mountainwest Medical Properties, L.L.C. ("Mountain-west Properties") and Mountain West Surgical Center, L.L.C. ("Mountain West Surgical") (collectively, "Mountainwest"), together with SDCH, announced a joint venture in which they planned to build a 47,000 square foot medical complex on the SDCH property adjacent to Lakeview Hospital. Under the plan, SDCH was to contribute the property adjacent to Lakeview Hospital (the nursing-home site) to Mountainwest Properties, and was to receive in exchange a membership interest in Mountainwest Properties. R. at 214; Aplt. Br., at 4.

Fearing that this new medical complex would violate, *inter alia*, the terms of the 1989 conveyances, HCU made efforts to stop the construction of the new facility. For instance, HCU exercised its right to appear at certain planning and zoning meetings to express its opposition to the new medical facility. See R. at 466. Despite HCU's opposition, the local planning and zoning authorities approved the joint venture's plans for the new medical facility, and Mountainwest alleges that it then began to make plans to build the facility. Id. at 466-67. HCU, still believing that the facility would violate, *inter alia*, the terms of the 1989 conveyances, then filed a lawsuit against SDCH in Second District Court seeking to

prevent SDCH from contributing the property to Mountainwest for the proposed medical facility. That lawsuit was filed on January 10, 2000, and is herein referred to as "the First Lawsuit." See R. at 418-38. HCU sued only SDCH; neither Mountainwest Properties nor Mountain West Surgical were ever made parties to that action, nor did those entities ever seek leave to intervene in that action.

In the First Lawsuit, HCU stated three different substantive causes of action: (1) for breach of the 1973 written agreements; (2) for breach of the covenant of good faith and fair dealing implied by force of law into the 1973 written agreements; and (3) for breach of the 1989 conveyances. HCU sought damages from SDCH, as well as declaratory and injunctive relief halting further violations of the 1973 and 1989 written documents. Id. at 418-38. As set forth in the First Lawsuit, that action's express purpose was to halt what HCU perceived as a facility that violated the 1973 and/or the 1989 written documents.

In March 2000, a few weeks after filing the First Lawsuit, HCU filed a Lis Pendens ("the Lis Pendens"), and recorded that document with the Davis County Recorder. Id. at 504-08. The Lis Pendens, on its face, stated plainly that HCU was making no claim to title of the SDCH property; rather, the document simply gave notice of the pending lawsuit:

> Hospital Corporation of Utah, dba Lakeview Hospital, the above-named plaintiff, has a pending Complaint against the above-named defendant South Davis Community Hospital, Inc. in the above-entitled Court for injunctive relief against South Davis's ***proposed use*** of certain real property owned by South Davis.

Id. at 504 (emphasis added).

Mountainwest has alleged in this lawsuit that "the Lis Pendens effectively stopped the

project," because the project lender allegedly "withdrew its commitment for construction financing." See R. at 467. However, as discussed below, Mountainwest has never presented any admissible evidence supporting this contention.

At the time, however, SDCH did not take any action to strike or otherwise immediately remove the Lis Pendens. Rather, it filed a summary judgment motion seeking to dispose of HCU's claims in the First Lawsuit. After briefing and argument, the district court in the First Lawsuit determined that SDCH was entitled to summary judgment on HCU's claims related to the 1973 written agreements. See R. at 398-401. The district court also held that the Lis Pendens was a "wrongful lien" because in the First Lawsuit HCU made no claim to title of the property in question. Id. at 401-03. However, the district court also determined that genuine issues of material fact remained for trial with respect to HCU's claims related to breach of the 1989 property conveyances. The court noted as follows:

> There is . . . a factual issue as to whether the Medical Center will be used for commercial purposes to third party users, or if it will be used merely for physicians' existing patients. HCU contends that the Medical Center will provide acute medical treatment on a commercial basis to third party users. SDCH, on the other hand, contends the Medical Center will be used by physicians to treat their existing patients. It is unclear what constitutes an "existing patient" for the purposes of this restrictive covenant. This fact is also clearly material.

See R. at 398. Accordingly, on June 28, 2000—less than four months after the Lis Pendens had been filed and recorded—the district court issued a written ruling memorializing its determination that (a) part of HCU's claims in the First Lawsuit (those related to the 1973 agreements) were dismissed on summary judgment; (b) part of HCU's claims (specifically, those claims related to the 1989 conveyances) were supported by enough evidence to proceed

to trial; and (c) the March 2000 Lis Pendens was wrongfully filed. See id. at 394-405.

Following the issuance of the district court's written opinion in the First Lawsuit, SDCH still did not (until August 2001, more than 13 months following the ruling) seek immediate removal of the Lis Pendens, even after it had been determined to be wrongfully filed. Rather, SDCH and HCU entered into settlement negotiations, and finally in the summer of 2002 reached an accord and settled the case. As part of the settlement, HCU agreed to dismiss its lawsuit, release the Lis Pendens, and pay SDCH an undisclosed sum of money; for its part, SDCH agreed not to convey the property in question to Mountainwest.

The First Lawsuit was dismissed, and the Lis Pendens released, in July 2002. Also, Mountainwest ended up building its proposed medical facility at a different site.

STATEMENT OF THE CASE

On January 7, 2004, Mountainwest filed the instant lawsuit ("the Second Lawsuit") in Second District Court, naming HCU as the sole defendant. In the Second Lawsuit, Mountainwest alleged that HCU, by filing the First Lawsuit and the Lis Pendens, caused the proposed medical facility to be built in a different location at an elevated cost and after a long delay. Mountainwest alleges that these delays and additional costs resulted in damage to Mountainwest. See R. at 1-7. Mountainwest alleged three substantive causes of action against HCU: (1) for tortious interference with prospective economic relations; (2) for abuse of process; and (3) for violations of various anti-trust provisions. Id. Mountainwest eventually voluntarily dismissed its anti-trust claims, leaving only the tortious interference claim and the abuse of process claim for judicial determination. Id. at 450-51, 460-61.

Mountainwest served process on HCU on March 3, 2004. Id. at 9. Rather than

answer the complaint, HCU filed a motion to dismiss pursuant to Utah R. Civ. P. 12(b)(6), arguing that Mountainwest failed to state any claim upon which relief could be granted. See id. at 11-26. After full briefing, the motion to dismiss was orally argued on May 25, 2004. Id. at 125-74 (transcript). HCU argued that, even if one were to assume that the allegations in Mountainwest's complaint were true, Mountainwest could still not state a claim of abuse of process because Mountainwest had not even alleged that HCU had used the process of the First Lawsuit for a purpose other than the purposes stated on the face of the lawsuit. Id. at 125-36. And HCU argued that Mountainwest could not state a valid claim of tortious interference because the alleged improper means—the filing of the First Lawsuit and the Lis Pendens—were protected by the judicial proceedings privilege and therefore could not form the basis for liability. Id. at 136-39.

After hearing oral argument, the district court (after expressing some concern about being reversed on appeal if it granted the motion) denied the motion as to the abuse of process and tortious interference claims. Id. at 171-72. The district court entered an order memorializing its ruling on June 11, 2004. Id. at 54-55.

On June 29, 2004, HCU, believing strongly that Mountainwest's claims were subject to dismissal, asked this Court to entertain an interlocutory appeal of the district court's rulings on the motion to dismiss. Id. at 56. This Court referred the matter to the Utah Court of Appeals, which denied the petition and refused to hear the interlocutory appeal. Id. at 81.

Upon remand, HCU answered Mountainwest's complaint (which had been amended by this time), and the parties' respective counsel held an attorneys' planning meeting on October 27, 2004 to set the relevant schedules for litigation of the Second Lawsuit. At the

meeting, counsel for both sides agreed to exchange initial disclosures by November 15, 2004, to complete fact discovery by July 8, 2005, and to have the case ready for trial by March 2006. See id. at 207-09. In addition, Mountainwest's counsel agreed to identify all expert witnesses in the case by August 8, 2005. Id. at 208.

The first deadline—for submission of initial disclosures—came and went on November 15, 2004, and Mountainwest failed to submit initial disclosures as agreed to.

In December 2004, HCU sent a set of written discovery to Mountainwest. Id. at 226-37. Among other things, HCU asked Mountainwest to "[i]dentify each and every fact witness you may call to testify at the trial of this matter, and state the substance of their anticipated testimony." Id. at 229. Mountainwest's responses to that written discovery would have been due on or about January 17, 2005. Mountainwest's counsel telephoned HCU's counsel to ask for several extensions of time to respond to the discovery, which HCU's counsel courteously granted. After several extensions of time, however, Mountainwest still failed to provide any response to the written discovery, and on May 24, 2005—more than five months after the discovery would have originally been due—HCU filed a motion to compel, asking the district court to order Mountainwest to respond to the discovery. See id. at 246-48.

Mountainwest did not ever file a response to the motion to compel either. In the interim, the scheduling dates for the completion of fact discovery (July 8) and for the identification of Mountainwest's expert witnesses (August 8) came and went. During this time, Mountainwest not only failed to respond to HCU's written discovery and to its motion to compel, but Mountainwest also conducted no discovery, written or otherwise, of its own,

and did not designate or identify any expert witnesses.

Finally, in September 2005, HCU filed a motion for summary judgment on Mountainwest's claims, reasoning that because Mountainwest had not participated in any discovery, had refused to provide HCU with a list of witnesses it would use to support its claims, and had not designated any experts, that it had failed to come forward with any evidence to support its claims, and for these reasons (and for the reasons already advanced at the motion to dismiss stage) Mountainwest's claims were subject to dismissal. See id. at 211-25. As HCU put it in its opening brief on summary judgment,

> Plaintiffs have done nothing with this case. They have never filed Initial Disclosures, never promulgated any discovery, and failed to file any expert reports. The deadlines for those actions are now passed. [HCU] now renews its motion to dismiss as a motion for summary judgment.

Id. at 212.

The filing of this summary judgment motion spurred Mountainwest into action like nothing else theretofore had. Mountainwest filed a brief opposing the summary judgment motion, and for the first time submitted a document (an affidavit) bearing the name of a witness (Richard Vincent) that it planned to use to support its claims. Id. at 252-70. In addition, Mountainwest moved for summary judgment in its favor on its abuse of process claim (but not on its tortious interference claim). Id. at 381-92. Also, Mountainwest filed a motion seeking leave to amend the scheduling order to allow it to re-open discovery to atone for its previous failure to participate in discovery. Id. at 446-49.

For its part, HCU opposed Mountainwest's partial summary judgment motion. Id. at 462-82. In addition, HCU filed a motion to strike the affidavit of Richard Vincent on the

grounds that Mountainwest did not participate in discovery and did not identify Mr. Vincent as a potential fact witness and did not allow HCU the opportunity to depose Mr. Vincent during the discovery period, and on the additional ground that much of what Mr. Vincent had to say in his affidavit was without proper foundation. Id. at 313-20.

After full briefing, these motions came before the district court for oral argument on January 20, 2006. Id. at 530. The district court granted HCU's summary judgment motion, summarily dismissing Mountainwest's claims for abuse of process and tortious interference. With respect to the tortious interference claim, the district court made the following ruling:

> With respect to Plaintiffs' interference claim, the Court rules that as a matter of law neither the [First Lawsuit] or the Lis Pendens filed by [HCU] in connection with [the First Lawsuit] can form the basis for an interference action for the reasons stated in [HCU's] brief. Plaintiffs have failed to factually demonstrate the elements of an interference claim and the conduct alleged to constitute interference is privileged as a matter of law.

See Order (attached as Exhibit A to Mountainwest's brief), at 2. With respect to the abuse of process claim, the district court made the following ruling:

> [T]he Court concludes that Plaintiffs have failed to produce evidence of an ulterior motive on the part of [HCU] or a willful act not proper in the regular course [of] proceedings that caused Plaintiffs' harm. The Court rules that as a matter of law that the Lis Pendens filed by [HCU] herein in connection with [the First Lawsuit] cannot form the basis for an abuse of process claim for the reasons stated in Defendant's brief. In addition, Plaintiffs offer no testimony from any lender or title company that the Lis Pendens, as such, caused them to refuse to proceed with the sale of the underlying land.

Id. In sum, the district court concluded that "Plaintiffs have not come forth with evidence to create any disputed issue of fact and Defendant is entitled to summary judgment as a matter of law." Id. The district court also stated that

> [a]n additional basis for the Court's decision . . . is Plaintiff's failure to comply with the agreed schedule in the Attorneys' Planning Meeting Report filed herein. This includes the failure of the Plaintiffs to file Rule 26 Disclosures, to respond to discovery during the factual discovery period, and file expert reports on the appointed date.

Id. In keeping with this ruling, the district court granted HCU's motion on both the tortious interference and abuse of process claims, and denied Mountainwest's partial cross-motion on the abuse of process claim. Id. at 2-3.

In addition, the district court denied Mountainwest's motion to amend the scheduling order. Id. at 3.

Also, the district court denied HCU's motion to strike the affidavit of Richard Vincent, stating that "this Court has granted [HCU's summary judgment motion] notwithstanding such affidavit." Id. at 2. The district court's failure to grant this motion to strike is the subject of HCU's cross-appeal in this matter.

On appeal, Mountainwest appeals from the district court's grant of summary judgment in HCU's favor on its tortious interference and abuse of process claims. HCU cross-appeals from the district court's failure to grant its motion to strike the affidavit of Richard Vincent.

SUMMARY OF THE ARGUMENT

Mountainwest's complaint with HCU is that HCU initiated and filed an allegedly baseless lawsuit against SDCH, and then publicized that lawsuit by filing a Lis Pendens. The tort that is usually available to litigants who feel aggrieved by the initiation of "baseless" lawsuits is wrongful use of civil proceedings, not abuse of process or tortious interference. However, the wrongful use tort is unavailable to Mountainwest here, because (a) Mountainwest was not a party to the First Lawsuit, and wrongful use is a claim only available

to the party sued in the initial lawsuit; and (b) the First Lawsuit was never actually terminated in favor of SDCH because the parties eventually settled the lawsuit out of court.

Finding the tort that is intended to cover this situation unavailable to it, Mountainwest has tried mightily to shoehorn its grievance into other torts, such as abuse of process and tortious interference. But these other torts simply do not fit the situation.

Mountainwest's claim for tortious interference fails for the simple reason that all of the acts Mountainwest complaints of—the filing of the First Lawsuit and Lis Pendens—are protected by the judicial proceedings privilege, and under well-established Utah case law cannot form the basis for a tortious interference claim. Mountainwest claims that the First Lawsuit was "unfounded litigation" that constitutes "improper means" for the purposes of a tortious interference claim, but this argument runs directly counter to established Utah law discussing the judicial proceedings privilege. The bottom line for Mountainwest is that unless the First Lawsuit meets the elements of the "wrongful use of civil proceedings" tort, it cannot use the First Lawsuit as the basis for a tortious interference claim.

Mountainwest's claim for abuse of process also fails. This claim is infirm because it too is defeated by the judicial proceedings privilege—acts immunized for purposes of a tortious interference claim are also immunized for purposes of an abuse of process claim. Moreover, Mountainwest has completely failed during discovery to adduce facts supporting its abuse of process claim. Mountainwest must show that HCU had an ulterior purpose in filing the First Lawsuit and/or the Lis Pendens, and that HCU committed a wilful act in the First Lawsuit that was not proper in the regular course of the proceedings. Mountainwest has no admissible evidence in support of any of this.

Indeed, as the district court noted, Mountainwest completely ignored this case throughout the entire discovery period. Mountainwest did not provide initial disclosures, did not respond to HCU's written discovery, and did not respond to HCU's follow-up motion to compel. Moreover, Mountainwest did not propound any discovery of its own, and did not take a single deposition. At no point in the process—at least not until HCU filed its summary judgment motion *after* the discovery period had closed—did Mountainwest so much as disclose the identity of a single witness. At the end of the discovery period, Mountainwest had done absolutely nothing to prove up its claims, and had no evidence in support of them.

After the summary judgment motion was filed, Mountainwest submitted an affidavit from Richard Vincent that it asserted supported its claims. However, that affidavit was untimely and without foundation. Mountainwest does not even purport to have any other evidence in support of its claims.

Faced with this situation, the district court properly dismissed, on summary judgment, Mountainwest's claims for tortious interference and abuse of process. That portion of the court's decision should be affirmed. The district court erred, however, in refusing to strike the affidavit of Richard Vincent, and that portion of the court's decision should be reversed.

ARGUMENT

Mountainwest purported to state two causes of action against HCU: for tortious interference and abuse of process. Both causes of action arise out of the same allegations, namely, that HCU filed an allegedly baseless lawsuit against SDCH, and publicized that lawsuit through the filing of a Lis Pendens, allegedly causing damage to Mountainwest. The district court correctly recognized, however, that both of Mountainwest's causes of action

suffer from both legal and factual infirmities. The district court's decision to enter summary judgment on both of Mountainwest's causes of action was correct and should be affirmed.[1]

However, the district court erred when it refused to strike the untimely and inadmissible affidavit of Richard Vincent.

I. THE DISTRICT COURT CORRECTLY DISMISSED MOUNTAINWEST'S CLAIM FOR TORTIOUS INTERFERENCE, BECAUSE BOTH THE FILING OF THE FIRST LAWSUIT AND THE FILING OF THE LIS PENDENS ARE PROTECTED BY THE JUDICIAL PROCEEDINGS PRIVILEGE

The district court correctly dismissed Mountainwest's claim for tortious interference. In order to state such a claim, a plaintiff must show three elements: (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff. See Anderson Dev. Co. v. Tobias, 2005 UT 36, ¶20, 116 P.3d 323. With respect to the second element, Mountainwest does not assert that HCU acted with an improper purpose; rather, Mountainwest's tortious interference claim has always been based on an allegation that HCU acted with improper means. See R. at 4 (Complaint). Mountainwest's tortious interference claim fails because Mountainwest is simply unable to show that HCU acted with improper means: neither the filing of the First Lawsuit nor the filing of the Lis Pendens can qualify

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[1] As this Court has stated, an appellate court may only *reverse* a trial court on matters raised and adjudicated below, but an appellate court may *affirm* a trial court's decision "if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court." See Bailey v. Bayles, 2002 UT 58, ¶10, 52 P.3d 1158 (quoting Dipoma v. McPhie, 2001 UT 61, ¶18, 29 P.3d 1225).

as "improper means" for purposes of a tortious interference claim, because both actions are protected by the judicial proceedings privilege.

Under Utah law, "judges, jurors, witnesses, litigants, and counsel involved in a judicial proceeding have an *absolute privilege* against" nearly all tort suits. See Krouse v. Bower, 2001 UT 28, ¶8, 20 P.3d 895 (emphasis added); Bower v. Stein Eriksen Lodge Owners Ass'n, 201 F. Supp. 2d 1134, 1138 (D. Utah 2002) ("statements of attorneys, parties, judges, witnesses, and other participants in the judicial process enjoy an absolute privilege against liability for torts if the statements are made during or preliminary to a judicial proceeding"). "The policy behind such privilege is to encourage full and candid participation in judicial proceedings by shielding the participant from potential liability for defamation." Price v. Armour, 949 P.2d 1251, 1256 (Utah 1997).[2] The privilege "is premised on the assumption that the integrity of the judicial system requires that there be free and open expression by all participants and that this will only occur if they are not inhibited by the risk of subsequent" lawsuits. Id. (quoting Allen v. Ortez, 802 P.2d 1307, 1311 (Utah 1990)).

This Court has held that the privilege shields participants in judicial proceedings not only from defamation lawsuits, but also from lawsuits alleging other torts, such as intentional infliction of emotional distress and (notably for the purposes of this case) intentional interference with economic relations. See id. at 1258; DeBry v. Godbe, 1999 UT 111, ¶25,

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[2] This Court has also recently recognized similar privileges in other analogous contexts. See Anderson Dev. Co., 2005 UT 36, ¶26, 116 P.3d 323 (recognizing the Noerr-Pennington doctrine as immunizing actions constituting petitions to the government); Riddle v. Perry, 2002 UT 10, ¶10, 40 P.3d 1128 (recognizing a privilege immunizing statements and actions taken when addressing the state legislature).

992 P.2d 979. If a statement or action falls within the judicial proceedings privilege, liability under these torts cannot be based on that statement or action.

Utah courts have developed a three-part test for determining whether a statement or action falls within the judicial proceedings privilege:

> To establish the judicial proceeding privilege, the statements must be (1) made during or in the course of a judicial proceeding; (2) have some reference to the subject matter of the proceeding; and (3) be made by someone acting in the capacity of judge, juror, witness, litigant, or counsel.

DeBry, 1999 UT 111, ¶11, 992 P.2d 979. The privilege and its three elements are to be interpreted broadly, in order to further the privilege's purpose of encouraging full and candid participation in judicial proceedings. Krouse, 2001 UT 28, ¶10, 20 P.3d 895; DeBry, 1999 UT 111, ¶14, 992 P.2d 979.

A. The Lis Pendens

The filing of HCU's Lis Pendens is protected by the judicial proceedings privilege. This Court has stated that "[a] lis pendens is, in effect, a republication of the pleadings. Since the publication of the pleadings is absolutely privileged, the republication thereof by recording a notice of lis pendens is similarly privileged." See Hansen v. Kohler, 550 P.2d 186, 190 (Utah 1976). This Court summed up its holding by stating that the "recordation of a lis pendens was absolutely privileged and the action of [the cross-claimant] for slander of title cannot be sustained." Id. Utah's federal district court, applying Hansen, recently reached the same conclusion. See Bower, 201 F. Supp. 2d at 1138.[3]

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[3] This holding comports with the holdings of other state courts, which have held that statements made in lis pendens are protected from liability. See, e.g., Zamarello v. Yale, 514 (continued...)

In fact, in Bower, the court held that even an *improperly filed* lis pendens is protected by the privilege, and that therefore the counterclaimant could not maintain a tortious interference claim based on the filing of the lis pendens. In Bower, the counter-claimant was making the argument that the lis pendens filed in that case was improper because it allegedly did not have anything to do with title to the property in question, and argued by extension that this "improperly filed" lis pendens was not protected by the privilege. The court squarely rejected that argument, stating that "[n]oncompliance with filing requirements in no way abrogates the privilege which has long gone hand in hand with judicial proceedings; the remedy is removal of the noncomplying material." Bower, 201 F. Supp. 2d at 1139 (quoting Prappas v. Meyerland Comm. Improvement Ass'n, 795 S.W.2d 794, 797-98 (Tex. Ct. App. 1990)). In Prappas, the court made the point even clearer, stating that the proper remedy for a plaintiff harmed by an improperly filed lis pendens is not to file a tort suit against the filer, but, rather, to seek a judicial order removing the lis pendens. Prappas, 795 S.W.2d at 797. The court used examples from other contexts to illustrate its point:

> For example, irrelevant evidence is inadmissible in a trial. [Rule 402]. Such evidence, when offered, is therefore subject to an order to strike it from the record. Thus if a witness testifies, "Yes, the defendant is the man who shot me, and by the way, he has a loathsome disease," the court should sustain a timely objection, strike the slanderous remark, and instruct the jury to disregard it. ***Yet no one would suppose for a moment that the privilege evaporated simply because the comment was unauthorized.*** The same result

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[3] (...continued)
P.2d 228 (Alaska 1973); Albertson v. Raboff, 295 P.2d 405 (Cal. 1956); Procacci v. Zacco, 402 So. 2d 425 (Fla. Ct. App. 1981); Wendy's of South Jersey, Inc. v. Blanchard Mgmt. Corp. of New Jersey, 406 A.2d 1337 (N.J. Super. Ct. Chancery Div. 1979); Prappas v. Meyerland Comm. Improvement Ass'n, 795 S.W.2d 794 (Tex. Ct. App. 1990).

> would occur if an impropriety surfaced in another part of civil proceedings . . . , namely pleadings. For example, an amended pleading would be "unauthorized" if it were filed late and without leave of court, see Tex. R. Civ. P. 63, but one cannot conceive of such a defect making the slightest difference as far as absolute privilege is concerned. Rather, the remedy would be for the aggrieved party to ask the court to strike the offending papers. Although such a pleading, like irrelevant evidence, is not authorized in the sense in which appellants employ that term, ***no loss of privilege ensues.***

Id. (emphasis added).

Accordingly, there can be no liability for tortious interference associated with HCU's filing of the Lis Pendens.

B. The Filing of the First Lawsuit

Mountainwest next argues that the mere filing of the First Lawsuit constitutes "improper means" sufficient to support a tortious interference claim. Mountainwest's argument is that the First Lawsuit was "unfounded litigation" and therefore constitutes "improper means." See Aplt. Br., at 15-18. This argument fails on both legal and factual grounds.

1. Mountainwest has no evidence supporting its claim that the First Lawsuit was "unfounded."

As an initial matter, before discussing the legal infirmities inherent in Mountainwest's claim, it is worth noting that Mountainwest utterly failed to come forward with any evidence supporting its claim that the First Lawsuit was "unfounded." The first step down the path to showing that litigation may be "unfounded"—and an essential step used in the only Utah case cited by Mountainwest in which a plaintiff actually used "unfounded litigation" as the allegedly improper means—is to show, *inter alia*, that the earlier "unfounded" lawsuit was terminated on the merits against the plaintiff. See Leigh Furniture & Carpet Co. v. Isom, 657

P.2d 293, 299 (Utah 1982) (stating that both "previously initiated lawsuits" alleged to have been "unfounded" had in fact terminated on the merits against the party that brought the lawsuits). Here, Mountainwest cannot make even this initial showing, because the First Lawsuit was not terminated in favor of SDCH; rather, the case was resolved in an out-of-court settlement with one claim against SDCH still viable and very much alive. R. at 398.

Thus, in order to show that the First Lawsuit was "unfounded," Mountainwest proposes to do what no reported Utah decision has sanctioned: it proposes to litigate, in this lawsuit, the issue of whether the First Lawsuit was "unfounded," without the essential first step of having that earlier litigation already decided on the merits against the filer. Faced with this obstacle, one would have expected Mountainwest to diligently pursue discovery in an effort to make this unprecedented showing. However, Mountainwest *did absolutely nothing* during the discovery period—did not submit initial disclosures, did not respond to written discovery requests, did not respond to a motion to compel, did not propound any written discovery of its own, and did not take a single deposition.

In the end, Mountainwest has nothing (except the self-serving and untested affidavit of Richard Vincent, which is the subject of HCU's cross-appeal, discussed below) to support its claim that the First Lawsuit was "unfounded." And that affidavit is not admissible, because Mr. Vincent has no foundation to make the statements he makes, and because HCU was denied the opportunity to depose and cross-examine the affiant. Mr. Vincent is not a judge, or even a lawyer, and yet Mr. Vincent feels qualified to aver that the proposed medical facility would not have violated the 1989 conveyances. This is simply not proper evidence.

Thus, because Mountainwest's claim is completely unsupported by any admissible

evidence, its claim that the First Lawsuit was "unfounded litigation" fails.

2. The judicial proceedings privilege protects the filing of the First Lawsuit from a tortious interference claim, at least where the First Lawsuit did not terminate on the merits in favor of SDCH.

Factual infirmities aside, Mountainwest is barred on legal grounds from claiming that the First Lawsuit was "unfounded litigation." The judicial proceedings privilege, as discussed above, protects litigants from being sued for tortious interference for any statement or action taken during the course of litigation. See Price v. Armour, 949 P.2d at 1258. Because the filing of a lawsuit is the quintessential action taken during litigation, it necessarily follows that the filing of lawsuit is protected by the judicial proceedings privilege, see, e.g., Beezley v. Hansen, 286 P.2d 1057, 1058 (Utah 1955) (stating that the privilege protects "all pleadings and affidavits necessary to set the judicial machinery in motion"), and that the filing of a lawsuit—however "unfounded"—cannot be the "improper means" necessary to support a tortious interference claim.

Mountainwest, however, points toward this Court's pronouncement in Leigh Furniture that "unfounded litigation" can serve as "improper means." See Leigh Furniture, 657 P.2d at 308-09 (stating that "unfounded litigation" can constitute improper means, and holding that two lawsuits previously adjudicated on the merits against the filer were "unfounded"). However, Mountainwest overlooks the fact that Leigh Furniture is not necessarily inconsistent with this Court's later-decided judicial proceedings privilege cases.

This Court has not—until now—had the opportunity to confront the intersection between Leigh Furniture's statement about "unfounded litigation" and Price v. Armour's holding that the judicial proceedings privilege immunizes actions taken in a lawsuit from

liability for tortious interference. Examination of this intersection requires the examination of the origins of the "interference" tort in Utah, as well as the examination of other courts' treatment of this intersection.

Although some early Utah cases dealt with the issue of interference with contract, see, e.g., Bunnell v. Bills, 368 P.2d 597, 602 (Utah 1962), the contours and variants of the tort were more or less undefined in Utah prior to this Court's issuance of the Leigh Furniture opinion. In Leigh Furniture, this Court stated expressly for the first time that it recognized the tort, and proceeded to set forth the contours of the tort in Utah. In doing so, the Court noted that certain states and the First Restatement had adopted a "prima-facie tort approach"; that other states and the Second Restatement had adopted a factor-balancing approach; and that Oregon had outlined a "middle ground." See Leigh Furniture, 657 P.2d at 302-04. After analyzing the advantages and disadvantages of the three approaches, this Court rejected the approach taken by the First Restatement and the approach taken by the Second Restatement, and adopted the "middle ground" formulation of the tort that had been set forth by the courts of Oregon. Id. at 304. Specifically, this Court adopted the formulation of the tort set forth in Top Service Body Shop, Inc. v. Allstate Ins. Co., 582 P.2d 1365 (Or. 1978), and held that, in order to state a claim under the new "interference" tort, "a plaintiff must prove (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff." Id. In addition, this Court's determination that "improper means" could include "unfounded litigation" was taken directly from Top Service. See Leigh Furniture, 657 P.2d at 308.

Because Utah's version of tortious interference is taken from Oregon law rather than

from the Restatement, it is useful to examine the Oregon appellate courts' treatment of the interplay between "unfounded litigation" and the judicial proceedings privilege. The precise issue presented here was addressed by the Oregon Court of Appeals in Mantia v. Hanson, 79 P.3d 404 (Or. Ct. App. 2003), review denied, 90 P.3d 626 (Or. 2004), where a party was attempting to use "unfounded litigation" as the basis for a tortious interference claim. The court began its analysis by noting that the "absolute" judicial proceedings privilege was not actually absolute, because at least one tort—for wrongful use of civil proceedings—remained available to plaintiffs claiming to be aggrieved by the filing of a "baseless" lawsuit. Id. at 408. The court noted, at the outset, that

> this case implicates a fundamental tension between the law of "absolute privilege" . . . and the recognition that there are exceptions—most obviously the availability of "wrongful initiation" actions . . . —to the general principle that attorneys cannot be civilly liable for actions undertaken in representing a client.

Id. at 407. The court noted that some states had resolved this tension by adopting an "exclusive tort" approach under which the *only* tort available to parties aggrieved by the filing of a lawsuit was the tort of wrongful use of civil proceedings. Id. at 413.[4] The Oregon Court of Appeals stated that this "exclusive tort" approach was "appealing," but ultimately determined that it could not adopt that approach given the language already extant in its case law, including Top Service, that "unfounded litigation" could form the basis of a tortious interference claim. Id. at 413-14. In the end, however, the Oregon court adopted something

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[4] One notable state to adopt this "exclusive tort" approach is California. See Silberg v. Anderson, 786 P.2d 365 (Cal. 1990) (noting that "the only exception to application of [the privilege] to tort suits has been for malicious prosecution actions").

quite similar to the "exclusive tort" approach, holding that litigation was only "unfounded" for purposes of a tortious interference claim when all of the elements of the tort of wrongful use of civil proceedings were satisfied. Id. at 414. In such a situation, a plaintiff could potentially have *both* a wrongful use claim *and* a tortious interference claim on the same facts. However, under this approach, if the plaintiff has no wrongful use claim, then the plaintiff by the same token has no cognizable claim that the litigation is "unfounded," and therefore has no tortious interference claim related to the filing of the earlier lawsuit. Id.

The simplest solution to the apparent contradiction between Price v. Armour and Leigh Furniture would be for this Court to adopt the exclusive tort approach espoused by California and discussed by the Oregon Court of Appeals in Mantia. Under this approach, litigants aggrieved by the filing of an allegedly baseless lawsuit would have one and only one avenue open to them: the filing of a lawsuit for wrongful use of civil proceedings. Under this approach, "unfounded litigation" would no longer be considered a potential "improper means" for purposes of a tortious interference claim. This approach would require a partial overruling of Leigh Furniture.

If this Court is unwilling to expressly overrule Leigh Furniture's statement that "unfounded litigation" can serve as "improper means" for purposes of a tortious interference claim, then the approach that makes the most sense, when viewed against the backdrop of this Court's tortious interference and judicial proceedings privilege cases, is the approach taken by the Oregon appellate courts—the same courts from which this Court derived its original formulation of the interference tort. Like the Oregon courts, this Court also has case law stating, on the one hand, that actions or statements taken during the course of a judicial

proceeding are immune from tortious interference lawsuits, see Price, 949 P.2d at 1258, but on the other hand stating that "unfounded litigation" can constitute the "improper means" necessary to support a tortious interference claim, see Leigh Furniture, 657 P.2d at 308-09. The way to reconcile these two seemingly contradictory pronouncements is to follow Mantia and establish a rule that "unfounded litigation" for purposes of a tortious interference claim means litigation that is otherwise actionable under the tort of wrongful use of civil proceedings and that meets all of the elements of that tort. This approach is entirely consistent with Leigh Furniture, because in that case the elements of the wrongful use tort were apparently met. This approach also retains the viability of the judicial proceedings privilege, whose purposes are so vital to the efficient functioning of our court system.[5]

The other option—and the one implicitly urged upon this Court by Mountainwest—is to ignore or overrule Price v. Armour and the other judicial proceedings privilege cases, and allow litigants to sue parties and/or attorneys for tortious interference simply because they have filed a lawsuit that the plaintiff considers "baseless." See Aplt. Br., at 15-18. This approach would go far toward eroding the judicial proceedings privilege, and indeed entirely ignores the vital policies underlying the privilege: to encourage full and fair participation in

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[5] In addition, both the exclusive tort approach and the Mantia approach—for that matter, any approach that links "unfounded litigation" to the wrongful use tort—have the added advantage of preventing strangers to a lawsuit from re-opening that lawsuit in later litigation. If parties are to be adequately incentivized to settle cases, those parties need to have comfort that third parties who were not involved in a lawsuit cannot appear later and re-open the litigation by filing a follow-on suit. Taking an alternative approach, like that urged by Mountainwest, would chill settlement and would force parties to litigate—and, indeed, expand litigation by adding parties—rather than resolve cases out of court. Linking "unfounded litigation" to the elements of the wrongful use tort provides adequate protection against "baseless" litigation while at the same time preserving the settlement mechanism.

litigation by eliminating fear of tort suits arising from participation in litigation. See Price, 949 P.2d at 1256, 1258 (stating that "[p]articipation in a judicial proceeding will be inhibited unless all claims arising from the same statements are protected"). This approach would also create practical problems of proof: what is a "baseless" or "unfounded" lawsuit, if not one that meets all of the elements of wrongful use of civil proceedings?

Mountainwest claims that its argument is supported by the Restatement (Second) of Torts[6] and by some cited cases, but this is simply not the case. Mountainwest's quotation from the Restatement's commentary on tortious interference is misleading, because Mountainwest omits from that quotation one critical cross-reference. In discussing the nature of the actor's conduct that could lead to liability for tortious interference, the drafters of the Restatement mention "prosecution of civil suits," and state as follows:

> Litigation and the threat of litigation are powerful weapons. When ***wrongfully*** instituted, litigation entails harmful consequences to the public interest in judicial administration as well as to the actor's adversaries. The use of these weapons of inducement is ordinarily ***wrongful*** if the actor has no belief in the merit of the litigation or if, though having some belief in its merit, he nevertheless institutes or threatens to institute the litigation in bad faith, intending only to harass the third parties and not to bring his claim to definitive adjudication. ***(See §§ 674-681B).***

See Restatement (Second) of Torts, § 767, cmt. c (emphasis added). Mountainwest omitted the underscored portion of that quotation, which (notably) refers the reader directly to the Restatement's discussion of the wrongful use tort. When read in its entirety, the Restatement is saying the same thing as the Oregon Court of Appeals did in Mantia: that litigation only

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[6] It is worth remembering that this Court, in Leigh Furniture, expressly declined to adopt the Restatement (Second) of Torts' formulation of tortious interference, and adopted the Oregon version of the tort instead. See Leigh Furniture, 657 P.2d at 303-04.

rises to the level of improper conduct for purposes of a tortious interference claim when that same litigation would also be subject to a claim for wrongful use of civil proceedings.[7]

If this Court were to adopt the exclusive tort approach, there could be no cause of action for tortious interference based on the filing of a lawsuit. Under that approach, all that Mountainwest would have at its disposal would be a claim for wrongful use of civil proceedings. Even under the Mantia approach, Mountainwest will only have a tortious interference claim related to the filing of the First Lawsuit if it can make out the elements of

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[7] The case law cited by Mountainwest, where applicable at all, is to the same effect—that litigation is only improper for purposes of tortious interference where the elements of wrongful use are met. See, e.g., National Ass'n of Prof. Basketball Leagues, Inc. v. Very Minor Leagues, Inc., 223 F.3d 1143, 1150-51 (10th Cir. 2000) (applying Oklahoma law, and rejecting the tortious interference claim because the litigation did not meet the elements of the wrongful use tort); Silver v. Mendel, 894 F.2d 598, 603-04 (3d Cir.) (applying Pennsylvania law, which adopted the formulation of the tort set forth in the First Restatement, and stating that the judicial proceedings privilege would apply to bar tortious interference claims based on wrongful litigation, except where the substantive elements of the tort of wrongful use of civil proceedings are met), cert. denied, 496 U.S. 926 (1990); Matsushita Elec. Corp. v. Loral Corp., 974 F. Supp. 345, 354-55 (S.D.N.Y. 1997) (applying New York law, and stating that a lawsuit constitutes "improper means" only if the substantive elements of the wrongful use tort are met, and only if Noerr-Pennington immunity does not apply); Universal City Studios, Inc. v. Nintendo of America, Inc., 797 F.2d 70, 75 (2d Cir.) (applying New York law, and stating that a lawsuit constitutes improper means only if the substantive elements of the wrongful use tort are met), cert. denied, 479 U.S. 987 (1986).

The other cases cited by Mountainwest in its footnote are unhelpful. Some of them simply contain passing statements, akin to the one in Leigh Furniture, that litigation can constitute "improper means," without discussing the parameters of "unfounded litigation" and without even alluding to the potential application of the judicial proceedings privilege. See, e.g., Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 406 N.E.2d 445, 449 (N.Y. Ct. App. 1980); Corning, Inc. v. SRU Biosystems, LLC, 292 F. Supp. 2d 583, 585-86 (D. Del. 2003); Cacique, Inc. v. Gonzalez, 2004 WL 609278 (N.D. Ill. 2004). And the last case is directly contrary to Utah law as announced in Price v. Armour, in that the case announces a Tennessee rule that the judicial proceedings privilege does not apply to tortious interference claims. Trau-Med of America, Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 702 (Tenn. 2002).

wrongful use of civil proceedings. Put simply, under any approach that retains the integrity of the judicial proceedings privilege, Mountainwest will be required to prove that the First Lawsuit fits the criteria for wrongful use of civil proceedings.

And, to be clear, Mountainwest does not even claim to be able to prove the elements of wrongful use of civil proceedings. At first blush, this is curious, because wrongful use of civil proceedings appears on the surface to be the tort that best fits this situation, where Mountainwest's grievance against HCU is that HCU initiated an allegedly baseless lawsuit against SDCH. This Court has stated that "wrongful use of civil proceedings" is the "civil counterpart to malicious prosecution" and that the tort "consists in instituting and maintaining civil proceedings for an improper purpose and without a justifiable basis." See Gilbert v. Ince, 1999 UT 65, ¶18, 981 P.2d 841. The Ince Court went on to adopt the Restatement (Second) of Torts' formulation of the tort:

> One who takes an active part in the initiation, continuation, or procurement of civil proceedings against another is subject to liability ***to the other*** for wrongful civil proceedings if (a) he or she acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and (b) except when they are ex parte, ***the proceedings have terminated in favor of the person against whom they are brought.***

Id. at ¶19 (quoting Restatement (Second) of Torts, § 674) (emphasis added); see also Hatch v. Davis, 2004 UT App 378, ¶22, 102 P.3d 774 (quoting Ince and the Restatement), aff'd, 2006 UT 44, – P.3d —.

This tort is unavailable to Mountainwest in this case, for two independent reasons. First, a claim for wrongful use of civil proceedings can only be brought by the party against whom the allegedly wrongful lawsuit was brought. See Ince, 1999 UT 65 ¶18, 981 P.2d 841

(quoting the Restatement: that a person who files a wrongful lawsuit "against *another* is subject to liability *to the other*" (emphasis added)); Hatch, 2004 UT App 378, ¶22, 102 P.3d 774 (same). The party against whom the First Lawsuit was filed was SDCH, not Mountainwest. Indeed, Mountainwest was never a party to the First Lawsuit in any form, nor did it ever ask for leave to intervene in that lawsuit. For this reason, it is unable to maintain a cause of action against HCU for wrongful use of civil proceedings.

Moreover, an essential element of any wrongful use claim is that the proceedings in the earlier lawsuit have "terminated in favor of the person against whom they are brought." Ince, 1999 UT 65 ¶18, 981 P.2d 841. In the First Lawsuit, two of the three substantive claims were terminated in favor of SDCH, but the third claim—the one related to breach of the 1989 conveyances—survived summary judgment, and the parties later settled the First Lawsuit out of court to their mutual satisfaction. Under these facts, the First Lawsuit was never "terminated in favor of" SDCH. See Restatement (Second) of Torts, § 674, cmt. j (noting that civil proceedings may be terminated in favor of the person against whom they are brought in three ways, none of which involves a mutual out-of-court settlement).

For these two independent reasons, Mountainwest cannot satisfy the elements of the wrongful use tort. Indeed, Mountainwest has recognized this from the outset, and has been trying to shoehorn its lawsuit into other torts that do not quite fit the facts.

Faced with this exact factual scenario, the court in Mantia ruled that the plaintiff had no tortious interference claim based on the filing of the allegedly "baseless" litigation:

> [T]he Bailey firm's actions in prosecuting Mantia's claims against Hanson could not constitute actionable "improper means" for purposes of tortious interference unless and until the "first-party" proceedings were "terminated"

in Hanson's favor.

See Mantia, 79 P.3d at 414.

Under these facts, and using the Mantia approach, Leigh Furniture remains robust: the plaintiff in Leigh Furniture could properly use the earlier litigation as "improper means," because that litigation had actually terminated in favor of the person against whom it was brought. The judicial proceedings privilege retains viability, barring all tortious interference claims based on the initiation of a lawsuit unless the elements of wrongful use can be shown. And, most importantly for the purposes of this appeal, Mountainwest's tortious interference claim related to the filing of the First Lawsuit fails as a matter of law, as Mountainwest is unable to show that the First Lawsuit constituted wrongful use of civil proceedings, because that lawsuit did not ever terminate in favor of SDCH, the party against whom it was brought.

In the end, Mountainwest is simply unable to show that HCU acted with improper means. The filing of the Lis Pendens is protected by the judicial proceedings privilege, even if it was improperly filed. The filing of the First Lawsuit can constitute "improper means," if at all, only if that lawsuit satisfies the elements of the tort of wrongful use of civil proceedings, and the First Lawsuit does not meet those elements because it was never terminated in favor of SDCH. Finally, even aside from the legal infirmities of its claim, Mountainwest failed during discovery to come up with any admissible evidence supporting its tortious interference claim. For all of these reasons, the district court correctly entered summary judgment in favor of HCU on Mountainwest's tortious interference claim.

II. THE DISTRICT COURT CORRECTLY DISMISSED MOUNTAINWEST'S CLAIM FOR ABUSE OF PROCESS

The district court also correctly entered summary judgment in HCU's favor on Mountainwest's claim for abuse of process. "The essence of a cause of action for abuse of process is a perversion of the process to accomplish some improper purpose." See Bennett v. Jones Waldo Holbrook & McDonough, 2003 UT 9, ¶48, 70 P.3d 17. "If a legal process is used for its proper and intended purpose, the mere fact that it has some other collateral effect does not constitute abuse of process." Id. Indeed, "there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." Id. at ¶49. "[E]ven a pure spite motive is not sufficient to state a claim for abuse of process where process is used only to accomplish the result for which it was created." Id. (quoting Keller v. Ray, Quinney & Nebeker, 896 F. Supp. 1563, 1572 (D. Utah 1995), aff'd, 78 F.3d 597 (10th Cir. 1996)). "The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay ***a different debt*** or to take some other action or refrain from it." See Hatch, 2004 UT App 378, ¶33, 102 P.3d 774 (quoting Restatement (Second) of Torts, § 682 cmt. b) (emphasis added). A prime example of this is a situation, recently cited by this Court, where a litigant "used legal process to seize turkeys at the height of the Thanksgiving season in order to force payment of a debt." See Hatch v. Davis, 2006 UT 44, ¶39, – P.3d —. Another example of abuse of process gleaned from Utah case law is found in Keller, where Judge Winder stated that "an excessive execution on a judgment or attaching property in an excessive amount" would be an abuse

of process (although the court did not find an abuse of process on the facts presented there). See Keller, 896 F. Supp. at 1571. One final example of abuse of process raised during oral argument below is a case of a party maliciously serving process on an opponent on the opponent's wedding day, when service a few days later would have sufficed. See R. at 132. The facts of this case are much different from these examples.

In order to state a claim for abuse of process, Mountainwest has the burden of proving that (1) HCU had an ulterior purpose ***and*** (2) HCU committed a wilful act in the use of the process not proper in the regular conduct of the proceedings. See Hatch, 2006 UT 55, ¶36, – P.3d —; see also Anderson Dev. Co., 2005 UT 36, ¶65, 116 P.3d 323; Bennett, 2003 UT 9, ¶47, 70 P.3d 17 (stating that "[a] cause of action for abuse of process requires pleading and proof of two elements: (1) the use of legal process primarily to accomplish a purpose not within the scope of the proceeding for which it was designed; and (2) malice"). Both elements are required. With respect to both of its claims—related to the filing of the First Lawsuit and the Lis Pendens—Mountainwest has failed to carry its burden on either element.

A. The Filing of the First Lawsuit Does Not Constitute an Abuse of Process

The filing of the First Lawsuit was not an abuse of process, for two independent reasons. First, the judicial proceedings privilege operates to bar claims for abuse of process related to the filing of a lawsuit. Second, even if the judicial proceedings privilege for some reason did not apply, the tort of abuse of process does not provide a remedy for grievances related solely to the filing and maintenance of a lawsuit.

1. The judicial proceedings privilege.

As noted above, the judicial proceedings privilege applies to immunize from tort

liability (other than for the tort of wrongful use of civil proceedings) all statements or actions taken during or related to litigation. See, e.g., Beezley, 286 P.2d at 1058 (stating that the privilege protects "all pleadings and affidavits necessary to set the judicial machinery in motion"). Accordingly, the privilege also applies to bar abuse of process claims related to the filing of a lawsuit. See, e.g., Drasin v. Jacoby & Myers, 150 Cal. App. 3d 481, 485 (1984) (stating that "the filing of a complaint" is "privileged" under the judicial proceedings privilege for purposes of an abuse of process claim).

Although HCU is unaware of any Utah reported decision applying the judicial proceedings privilege to abuse of process claims, HCU submits that the privilege should apply to abuse of process claims just as squarely as it does to claims for defamation, tortious interference, or intentional infliction of emotional distress. After all, as this Court stated in Price v. Armour when extending the privilege to tortious interference claims:

> The whole purpose of the judicial proceedings privilege is to ensure free and open expression by all participants in judicial proceedings by alleviating any and all fear that participation will subject them to the risk of subsequent legal actions. There is no reason to distinguish statements that may defame a person from statements that may interfere with that person's business relations. The purpose of the judicial privilege remains the same. Holding that a defamatory statement made during a judicial proceeding is absolutely privileged but then holding that the privilege does not apply to the claim that the statement interfered with a business relation would defeat the very purpose of the privilege and would chill free and open expression in the judicial setting.

See Price, 949 P.2d at 1258. Following this reasoning, the United States District Court for the District of Idaho, applying Utah law, held that the judicial proceedings privilege applies to abuse of process claims. See Christonson v. U.S., 415 F. Supp. 2d 1186, 1195 (D. Idaho 2006). The United States District Court for the District of Utah apparently came to the same

decision under Utah law, in an unpublished decision referenced in a Tenth Circuit decision. See Stichting Mayflower Recreational Fonds v. Newpark Resources, Inc., 917 F.2d 1239, 1249 n.11 (10th Cir. 1990) (noting that the district court below "stated that the absolute privilege for testimony given in a judicial proceeding barred the abuse of process claim" but for procedural reasons not reaching the issue itself). Other states are in agreement.[8]

Accordingly, the judicial proceedings privilege, as a matter of law, bars any abuse of process claim Mountainwest might make related to the filing of the First Lawsuit. The only tort that is available to parties allegedly aggrieved by the filing of a lawsuit is wrongful use of civil proceedings. Outside of that, the judicial proceedings privilege operates to bar all other tort claims based on the filing of a lawsuit, including claims for abuse of process.

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[8] See, e.g., Pacific Gas & Elec. v. Bear Stearns & Co., 791 P.2d 587, 594-95 (Cal. 1990) (stating that "[t]he policy of encouraging free access to the courts is so important that the litigation privilege extends beyond claims of defamation to claims of abuse of process" and to "any action except one for malicious prosecution"); Florida Evergreen Foliage v. DuPont, 336 F. Supp. 2d 1239, 1269-70 (S.D. Fla. 2004) (holding that the privilege applied to an abuse of process claim); Miller v. Reinert, 839 N.E.2d 731 (Ind. Ct. App. 2005) (affirming dismissal of abuse of process claim based on the privilege); Baglini v. Lauletta, 768 A.2d 825, 833-34 (N.J. Super. App. Div.) (holding that the privilege applies to abuse of process claims, and stating that "the one tort excepted from the reach of the litigation privilege" is wrongful use of civil proceedings), cert. denied, 782 A.2d 425 (N.J. 2001); Klapper v. Guria, 582 N.Y.S.2d 892, 896 (App. Div. 1992) (holding that the privilege applied to an abuse of process claim); Barefield v. DPIC Companies, Inc., 600 S.E.2d 256, 560 (W.Va. 2004) (stating that the privilege applied to an abuse of process claim); but see Havoco of America v. Hollobow, 702 F.2d 643, 647 (7th Cir. 1983) (applying Illinois law and stating that "the only cause of action recognized for the wrongful filing of a lawsuit is one for malicious prosecution or abuse of process"); Giles v. Hill Lewis Marce, 988 P.2d 143, 146 (Ariz. Ct. App. 1999) (holding that the privilege did not insulate *attorneys* from abuse of process claims due in part to attorneys' high ethical responsibilities).

2. The tort of abuse of process does not provide a remedy for grievances related to the filing of a lawsuit.

More substantively, and as the district court recognized, the tort of abuse of process—as distinguished from the tort of wrongful use of civil proceedings—is simply not designed to address grievances arising out of the initiation of a lawsuit.[9] Indeed, "an action challenging the initiation of a lawsuit is an action for malicious prosecution or for wrongful bringing of civil proceedings, and not for abuse of process," because the "gist of the tort" of abuse of process "is not commencing an action or causing process to issue without justification, but misusing, or misapplying, process justified in itself for an end other than that which it was designed to accomplish." See Keller, 896 F. Supp. at 1570 (quoting *Prosser & Keeton on the Law of Torts*); see also Brown's Shoe Fit Co. v. Olch, 953 P.2d 357, 367 (Utah Ct. App. 1998) (quoting Keller); Restatement (Second) of Torts, § 682, cmt. a (stating that "[t]he gravamen of the misconduct for which liability under [abuse of process] is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings"). In fact, Utah's appellate courts have made clear that, for purposes of an abuse of process claim, "it is immaterial whether [the] proceeding was baseless or not," Hatch, 2004 UT App 378, ¶33, 102 P.3d 774, and that "there is no abuse of process when the action is filed to intimidate and embarrass the defendant knowing there is no entitlement to recover the full amount of damages sought," id. at ¶14 (quoting Lyons

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[9] It is also worth noting that this Court has previously stated its intention to construe all of the "abusive litigation" torts narrowly, because "these torts have the potential to impose an undue chilling effect on the ordinary citizen's willingness to bring a civil dispute to court and, as a consequence, the torts have traditionally been regarded as *disfavored causes of action*." Anderson Dev. Co., 2005 UT 36, ¶59, 116 P.3d 323 (emphasis added).

v. Midwest, 235 F. Supp. 2d 1030, 1042 (N.D. Iowa 2002)). Even more recently, in Hatch, this Court declared that an abuse of process claim will fail if "the acts alleged as the irregular acts were no more than the filing of a 'groundless' lawsuit." See Hatch, 2006 UT 44, ¶39, – P.3d —. This Court explained that the filing of an allegedly "groundless" lawsuit does not, in and of itself, amount to an abuse of process, for the following reason:

> The focus of the "essence" of abuse of process is on the tortfeasor's motive. But motive is not enough. The tortfeasor must also have undertaken a "wilful act." It is easy to slip into the conceptual trap of simply defining the "wilful act" as the legal process that the tortfeasor pursues according to his ulterior motive. Such a definition would, however, render the "wilful act" requirement superfluous. Under it, a party would only be required to link a bad motive to an event having the hallmarks of legal process to state a claim.

Id. at ¶37. This Court went on to state that, "[t]o satisfy the 'wilful act' requirement, a party must point to conduct *independent* of legal process itself that corroborates the alleged improper purpose." Id. at ¶39 (emphasis added).

Mountainwest has fallen into the "conceptual trap" that this Court warned about. Under Utah law, even if Mountainwest were to allege that HCU filed the First Lawsuit out of spite, knowing that it had no entitlement to the damages sought, there would be no claim for abuse of process as a matter of law related to the actual initiation of the suit. Accordingly, Mountainwest simply cannot state a cause of action for abuse of process stemming from the filing of the First Lawsuit.

B. Mountainwest Has Provided No Evidence that the Filing of the Lis Pendens Constituted an Abuse of Process

Similarly, Mountainwest cannot prove a cause of action for abuse of process related to the filing of the Lis Pendens either. Mountainwest's claim for abuse of process related to

the Lis Pendens suffers from both legal and factual infirmities.

1. Legal infirmities: The judicial proceedings privilege

As noted above, the filing of a lis pendens—even an improperly filed one—is protected from liability by the judicial proceedings privilege. See Hansen, 550 P.2d at 190; Bower, 201 F. Supp. 2d at 1138-39. Although Utah's appellate courts have not had the opportunity to consider this issue in the context of an abuse of process claim, the same result should obtain. In Hansen, this Court held that a party allegedly aggrieved by the filing of a lis pendens could not state a claim for slander of title resulting from that lis pendens. See Hansen, 550 P.2d at 190. And in Bower, Utah's federal district court held that a party allegedly aggrieved by the filing of a lis pendens—even assuming that the lis pendens was improperly filed—could not state a claim for tortious interference. See Bower, 201 F. Supp. 2d at 1138-39. The same policies that counsel in favor of barring claims for slander of title and tortious interference also counsel in favor of barring abuse of process claims—participation in judicial proceedings will be no less inhibited by allowing abuse of process claims based on the filing of a lis pendens than it will be by allowing tortious interference or slander of title claims on the same basis. For these reasons, and for the reasons stated above in part II.A.1, the judicial proceedings privilege applies to abuse of process claims related to the filing of a lis pendens.

Mountainwest cites two cases from other jurisdictions, and argues that other states do allow a lis pendens to form the basis for an abuse of process cause of action. See Aplt. Br., at 12 (citing Salstrom v. Starke, 670 P.2d 809 (Colo. Ct. App. 1983), and Broadmoor Apts. v. Horwitz, 413 S.E.2d 9 (S.C. 1992)). These cases are unhelpful, however, because they

contain absolutely no discussion of the application of the judicial proceedings privilege, and therefore do not even address the relevant question, which is whether the judicial proceedings privilege immunizes the filing of a lis pendens from an abuse of process claim. Indeed, a later-decided Colorado case highlights the unhelpfulness of the Salstrom case—in Westfield Dev. Co. v. Rifle Investment Assocs., 786 P.2d 1112 (Colo. 1990), the Colorado Supreme Court considered it an open question in Colorado "whether the filing of the notice of a lis pendens may ever constitute abuse of process" in light of the privilege. Id. at 1116 n.2.

Other states, however, have reached the precise question at issue here, and have determined that the filing of a lis pendens is immunized by the judicial proceedings privilege from abuse of process claims. See, e.g., City of Angoon v. Hodel, 836 F.2d 1245, 1247 (9th Cir. 1987) (applying Alaska law); Woodcourt II Ltd. v. McDonald Co., 119 Cal. App. 3d 245, 249-51 (1981) (applying California law); Kopp v. Franks, 792 S.W.2d 413, 424-25 (Mo. Ct. App. 1990) (applying Missouri law). In Hodel, the Ninth Circuit examined Alaska law, and noted that the Alaska Supreme Court, in an earlier case, had already determined that "notice of lis pendens does not give rise to a cause of action for slander or disparagement of title" because of the judicial proceedings privilege. Hodel, 836 F.2d at 1247 (citing Zamarello v. Yale, 514 P.2d 228, 230 (Alaska 1973)). Based on this historical treatment of the issue by the Alaska Supreme Court, the Ninth Circuit concluded as follows:

> To grant notice of lis pendens a privileged status, which insulates it from slander or disparagement of title actions, would serve no purpose if lis pendens could be the basis for an abuse of process claim. Factual situations that would support a cause of action for slander of title could also support a cause of action for abuse of process. To prevent emasculation of the privilege, we conclude that Alaska would extend the privilege to an abuse of process claim.

Id.

This Court's historical treatment of the issue is substantively identical to the Alaska Supreme Court's treatment of the issue prior to Hodel. This Court has stated, in Hansen, 550 P.2d at 190, that the filing of a lis pendens is protected from liability by the judicial proceedings privilege. Indeed, in Hansen, this Court cited with approval to the Alaska Supreme Court's treatment of the issue in Zamarello v. Yale. See Hansen, 550 P.2d at 190 n.7. Against this backdrop, the Hodel case is directly on point.

Accordingly, the judicial proceedings privilege operates to immunize the filing of a lis pendens—even an unauthorized one—from liability for abuse of process.

2. Factual infirmities.

Finally, even if Mountainwest could overcome the judicial proceedings privilege, it has nevertheless failed to point to evidence sufficient to satisfy the elements of a claim for abuse of process related to the filing of the Lis Pendens.

a. *HCU had no ulterior purpose in filing the Lis Pendens.*

The first element of an abuse of process claim is demonstrating that the defendant had an ulterior purpose. See Anderson Dev. Co., 2005 UT 36, ¶65, 116 P.3d 323. Mountainwest failed to produce any evidence that HCU had an ulterior purpose in filing the Lis Pendens.

HCU had but one purpose in filing the Lis Pendens: to give notice to prospective purchasers of its pending lawsuit against SDCH. The lawsuit of which the Lis Pendens gave notice was one that expressly sought an injunction preventing SDCH from using the property for purposes not allowed by the agreements. See R. at 418-38. The express purpose of the First Lawsuit was to restrict the use of the property to purposes permitted by the agreements;

the express purpose of the Lis Pendens was to notify prospective purchasers that there was a lawsuit pending in which HCU sought to restrict the use of the property in question to purposes permitted by the agreements. This was the only purpose of the First Lawsuit and the Lis Pendens, and Mountainwest does not even argue that there was any other purpose.

In many cases, including the ones cited by Mountainwest, the filers of a lis pendens ***do*** have an ulterior purpose. In both cases cited by Mountainwest, the "ulterior" purpose of the filing of the lis pendens was to extort or pressure the seller of a parcel of property to sell the property to the filer at a reduced price. See Salstrom, 670 P.2d at 811 (stating that "the jury could infer" that "the purpose to be served by filing [the lis pendens] was to prevent a sale to any other party and to coerce [the seller] to consider Salstrom's previous offers" to purchase the property); Broadmoor, 413 S.E.2d at 12 (stating that the filer had an "ulterior purpose of preventing a sale to third parties in hopes of obtaining financial backing with which to purchase the property at an advantageous price"). In this case, by contrast, HCU had no such "ulterior" purpose in filing the Lis Pendens—HCU had no interest in purchasing the property from SDCH at a lower price, and was not trying to use the Lis Pendens as leverage to force such a sale. Rather, HCU was simply trying to stop SDCH from putting the property to uses that HCU felt violated the 1989 conveyances. There was only one purpose; there was no "ulterior" purpose.

Unable even to postulate about any ulterior purposes, Mountainwest argues that HCU's primary purpose must have been "ulterior" because the Lis Pendens was illegitimately filed. See Aplt. Br., at 11-12 (stating that "[i]f the only proper motive for recording the Lis Pendens was not available to HCU, then its decision to record the Lis

Pendens must have been born of an ulterior motive"). This semantic argument cannot withstand scrutiny. The word "ulterior" means that which is "beyond what is manifest, seen, or avowed" and is something "intentionally kept concealed." See Black's Law Dictionary, 6th ed., at 1522. HCU did not conceal its purpose; indeed, HCU's purpose was expressly stated from the outset of the filing of the First Lawsuit, and also was expressly stated right on the face of the Lis Pendens itself:

> [HCU], the above-named plaintiff, has a pending Complaint against the above-named defendant [SDCH] in the above-entitled Court for injunctive relief against [SDCH's] proposed use of certain real property owned by [SDCH].

See Lis Pendens (R. at 242).

In the end, HCU had only one purpose, and that purpose was expressly broadcast for all to see in the bright light of day. HCU had no "ulterior" purpose in filing the Lis Pendens, and for this reason Mountainwest's claim for abuse of process fails for lack of evidence.

b. *The filing of the Lis Pendens did not constitute a wilful act that was not proper in the regular course of the proceedings.*

The second element of an abuse of process claim is demonstrating that HCU committed a wilful act in the use of the process not proper in the regular prosecution of the proceedings. See Hatch, 2006 UT 44, ¶36, – P.3d —. Mountainwest has not produced any evidence in support of this element either.

Mountainwest argues that the filing of the Lis Pendens was an act not proper in the regular course of the proceedings for purposes of an abuse of process claim, because the Lis Pendens did not implicate title, or right of possession of, the property in question. See Aplt. Br., at 9-10. But Mountainwest overlooks the fact that "the filing of a notice of lis pendens

does not constitute process for the purpose of an abuse of process claim." See Hodel, 836 F.2d at 1247 (citing Woodcourt II, 119 Cal. App. 3d at 249, 251). The California Court of Appeal stated as follows in reaching its conclusion in Woodcourt II:

> [R]ecording notice of pending action does not constitute process in the sense that "abuse of process" is used. Process is a means whereby a court compels a compliance with its demands. Thus, the essence of the tort "abuse of process" lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice. Since defendant took no action pursuant to authority of court, directly or by ancillary proceedings, no judicial process was abused.

See Woodcourt II, 119 Cal. App. 3d at 251-52. The filing of a lis pendens is not a summons or a subpoena whereunder the filer/user is drawing on the processes of the court to compel a third party to perform a certain action. The filing of a lis pendens is simply a notice that restates the fact of the pending lawsuit, and is not "process." Several other states have followed California's approach. See, e.g., Podolsky v. Alma Energy Corp., 143 F.3d 364, 372 (7th Cir. 1998) (applying Illinois law, and stating that "the lis pendens filing in this case did not involve the misuse of the process of the court," and affirming dismissal of an abuse of process claim); Hodel, 836 F.2d at 1247-48; Gray v. Kohlhase, 502 P.2d 169 (Ariz. Ct. App. 1972) (holding that the filing of a lis pendens does not constitute a "process" for the purpose of an abuse of process claim); Bonnie Braes Farms, Inc. v. Robinson, 598 S.W.2d 765 (Ky. Ct. App. 1980) (stating that "[t]he lis pendens is merely a notice required by statute to protect the interests of any subsequent purchasers" and "[i]t is filed without intervention of the judicial authority and brings neither the property nor any parties before the court," and holding that "[s]ince there is no process, there can be no abuse of process").

Even if HCU's Lis Pendens can be considered process, Mountainwest has still not

shown that the Lis Pendens was a wilful act not proper in the proceedings. As this Court has stated, in order to meet the "wilful act" requirement there must be something in Mountainwest's allegations "that distinguish[es] [HCU's] conduct from process that is merely accompanied by spite, ill-will, or any of the other less agreeable human emotions that frequently attach themselves to court papers." Hatch, 2006 UT 44, ¶38, – P.3d —. The filing of a lis pendens, even if motivated by spite, is by itself not enough to amount to an abuse of process.

Moreover, the Lis Pendens was completely truthful and straightforward. As noted above, the Lis Pendens, on its face, made no claim to title. All it said was that there was a pending lawsuit "for injunctive relief against [SDCH's] ***proposed use*** of certain real property owned by [SDCH]." See R. at 242 (emphasis added). As such, the Lis Pendens was completely truthful, and contained an entirely accurate description of the pending lawsuit. Stated another way, the Lis Pendens did not even purport to affect title to the property in question. A completely truthful and accurate document cannot by definition be improper.

Mountainwest claims, however, that this accurate Lis Pendens "effectively stopped everything" and torpedoed the medical facility project. See Aplt. Br., at 8. But this conclusion does not necessarily follow from the filing of the Lis Pendens. A lis pendens that does not even purport to affect title should not affect title. A reasonable title company reviewing HCU's Lis Pendens ought not be bothered by it, because it did not even purport to affect title. Mountainwest bears the burden of actually proving its claim that the Lis Pendens "effectively stopped everything," and it has not carried that burden. As noted above, Mountainwest sat idle during the discovery period in this case, and as a result the only evidence it can point to is the belated and untimely affidavit of Richard Vincent, which for

several reasons is insufficient to allow Mountainwest to survive summary judgment.

As an initial matter, and as discussed below in Part III, the Vincent affidavit is inadmissible, because it lacks foundation and because it was untimely submitted. For these reasons alone, the Vincent affidavit should have been stricken, and cannot be used to support Mountainwest's claims.

More specifically, however, Mr. Vincent has no foundation to make claims that "[t]he notice of lis pendens effectively stopped the project." See R. at 409. Mountainwest needs admissible testimony from someone at the lender or at the title company to prove this point. Only those individuals can truly say why the medical facility was "effectively stopped." Anything Mr. Vincent has to say on the issue is hearsay and/or without foundation. Were there other reasons that the financing did not go through? Did a title company refuse to insure title to the property based solely on the Lis Pendens, or was something else going on? Because Mountainwest completely ignored this case during the discovery phase, these facts were never elicited, and Mountainwest has no evidence from anyone competent to testify thereto that the Lis Pendens had anything to do with stopping the project.

Moreover, the Lis Pendens was only robust for 3½ months. It was filed in early March 2000, and by the end of June 2000 SDCH had procured a ruling from Judge Allphin that the Lis Pendens was a "wrongful lien." See R. at 401-03. Surely Mountainwest cannot maintain that a lis pendens that has been adjudicated as a wrongful lien will prevent a title company from insuring title. And Mr. Vincent's affidavit contains no testimony as to the timing of any of this—he does not say whether the lender and title company allegedly made their decision during this 3½-month window or during some other time. Mr. Vincent also

does not even discuss the reasons why the project could not have been resuscitated after the June 2000 ruling from Judge Allphin.[10]

All of this nicely points out one important fact that Mountainwest conveniently overlooks: that there exist a myriad of remedies, apart from an abuse of process claim, available to a party allegedly aggrieved by the filing of a lis pendens. First and foremost, there is the remedy that SDCH used in the First Lawsuit—the remedies available under Utah's wrongful lien statute, Utah Code Ann. § 38-9-1(6). This statute provides an avenue for parties allegedly harmed by a lis pendens or other lien to remove the lien and even recover damages if appropriate. Id. SDCH used this statute to obtain a ruling from Judge Allphin that the Lis Pendens was a wrongful lien.

Second, and relatedly, a party can simply file a motion seeking removal of the lien or lis pendens. The litigants in the Bower case sought (and obtained) removal of the allegedly offending lis pendens, see Bower v. Stein Eriksen Lodge Owners' Ass'n, 16 Fed. Appx. 985 (10th Cir. 2001), and SDCH eventually filed a motion in the First Lawsuit, following Judge Allphin's "wrongful lien" ruling, asking that the Lis Pendens be removed. This method is simple and effective for getting rid of offending liens and lis pendens.

Alternatively, if the elements are met a party can file a claim for wrongful use of civil

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[10] Mountainwest also attached to its filings below an affidavit from SDCH's Gordon Bennett that had been submitted in the First Lawsuit. In that affidavit, Mr. Bennett avers that Mountainwest "had a commitment for financing which has been suspended by reason of the filing of the Lis Pendens." See R. at 416. It should go without saying that this affidavit is rank hearsay; Mr. Bennett was not affiliated with the lender or title company, and his speculative musings on the issue of why the financing apparently fell through are inadmissible, and the trial court recognized this. Id. at 530, p. 43-44.

proceedings, in cases where the lis pendens gives notice of a "baseless" or "frivolous" lawsuit. See Woodcourt II, 119 Cal. App. 3d at 251 (discussing remedies available to a party who feels aggrieved by a lis pendens, and stating that "a lis pendens may be an element of an action for malicious prosecution in a proper case").

Despite the availability of these other remedies, Mountainwest did not avail itself of any of them. Rather, Mountainwest, several years later, filed this lawsuit alleging abuse of process and tortious interference. The facts of this case simply do not fit these causes of action, and in any event Mountainwest has done nothing to prove the causes of action. For all of these reasons, the district court was correct to dismiss both of Mountainwest's causes of action, and the district court's decision in this regard should be affirmed.

III. THE DISTRICT COURT ERRED BY REFUSING TO STRIKE THE AFFIDAVIT OF RICHARD VINCENT

With respect to its treatment of the affidavit of Richard Vincent, however, the district court erred and its determination *not* to strike that affidavit should be reversed.[11] The affidavit is inadmissible for two independent reasons.

A. The Affidavit Is Untimely in Light of Mountainwest's Utter Failure to Respond to Discovery

As noted above, Mountainwest completely failed to provide HCU with initial disclosures listing relevant witnesses, and completely failed to respond to written discovery requests specifically asking for the identity of relevant witnesses. As a result, HCU had no opportunity to depose any of Mountainwest's witnesses, including Richard Vincent. It was

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[11] The Court only need reach this issue if it determines that the Vincent affidavit raises a genuine issue of material fact. Depending upon this Court's resolution of this and other issues pending in this appeal, HCU's cross-appeal could be mooted.

not until discovery had closed and a summary judgment motion was pending against it that Mountainwest for the first time produced the affidavit of Mr. Vincent. Mountainwest's failure to participate in discovery should bar it from presenting witnesses in this case.

Under such circumstances, the rules plainly contemplate that the noncompliant party may be barred from presenting witnesses. Rule 37(d) states that where a party fails

> to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories . . . 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 Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule.

Subdivision(b)(2) allows district courts to impose any of the sanctions on noncompliant parties in the form of an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence. See Utah R. Civ. P. 37(b)(2) & (d). Applied to this case, it would not be "just" to allow Mountainwest to put forth witnesses when it completely failed to respond to HCU's discovery. On the contrary, the only just result is to strike the Affidavit of Richard Vincent.

Moreover, Rule 37(f) provides additional support. That paragraph provides that where a party fails to disclose a witness, that party "shall not be allowed to use the witness . . . unless the failure to disclose is harmless or the party shows good cause for the failure to disclose." See Utah R. Civ. P. 37(f). Here, there can be question that Mountainwest's failure to respond to HCU's discovery or to identify a single witness was not "harmless." It deprived HCU of any meaningful opportunity to prepare its defense to Mountainwest's allegations. Further, there was no good cause for Mountainwest's failure to respond to discovery during the eight months when discovery was open and HCU's requests were

pending, or for its complete failure to engage in the discovery process.

B. The Affidavit Lacks Proper Foundation

An independent reason (aside from Mountainwest's failure to comply with its discovery obligations) exists for striking the operative paragraphs of the Mr. Vincent's affidavit. Though Mr. Vincent recites his position as Secretary/Treasurer of the Mountain West Surgical Center LLC and Mountainwest Medical Properties, LLC, in paragraphs 12-19 he proceeds to testify about the actions and motivations of other entities. Accordingly, these statements lack foundation. Utah appellate courts have made clear on several occasions that affidavits submitted in connection with summary judgment motions must be based on the affiant's personal knowledge, must have proper foundation, and cannot be conclusory. See Utah R. Civ. P. 56(e) (stating that affidavits submitted in connection with summary judgment motions "shall be made on personal knowledge" and "shall show affirmatively that the affiant is competent to testify to the matters stated therein"); see also In re General Stream Adjudication, 1999 UT 39, ¶¶26-27, 982 P.2d 65 (affirming a ruling striking affidavits "not based on personal knowledge, lack[ing] foundation, and contain[ing] hearsay").[12]

Mr. Vincent is not qualified to testify about what Mountainwest's lender discovered in paragraph 12. He is not the lender, nor does he explain how he has first-hand knowledge of this. In paragraph 13, Mr. Vincent is not qualified to testify regarding the reasons for SDCH's failing to deed the properties to his LLCs or why Mountainwest's lender withdrew

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[12] See also Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985) (holding that an affidavit based on unsubstantiated belief is insufficient); Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983) (holding that conclusory affidavits are invalid); GNS Partnership v. Fullmer, 873 P.2d 1157, 1164-65 (Utah Ct. App. 1994) (holding that affidavits not based on personal knowledge were properly stricken).

its commitment for construction financing. He is not a representative of either SDCH's or Mountainwest's lender.

Similarly, Mr. Vincent is not qualified to discuss or characterize, in paragraphs 14 and 15, HCU's claims in a lawsuit to which his company was not a party. As a non-lawyer and someone who has no interest in the properties in question, he is not qualified to testify regarding "restrictive covenants" or opine as to what restrictions were intended to be placed upon property neither he nor any company he worked with ever owned. The restrictive covenant and agreements regarding the use of the property apply to properties owned by SDCH, and not any entity represented by Mr. Vincent.

In paragraphs 17 and 18, Mr. Vincent, as "Secretary/Treasurer" of Mountainwest Properties, characterizes what Mountain West Surgical intended to do and makes legal conclusions regarding how those compare with an agreement to which he was not a party. His interpretation of the agreements between SDCH and HCU is without foundation, either as factual testimony or, more accurately, expert opinion disguised in affidavit form.

Finally, paragraph 19 is not only wholly irrelevant, but the conclusion that "it became clear that HCU would continue its efforts to interfere with the construction of the medical center," both assumes facts and is made without proper foundation.

Accordingly, though the entire Affidavit should be stricken for Plaintiffs' failure to disclose Mr. Vincent as a witness or to produce any documents which might support the statements in his Affidavit, the operative paragraphs (paragraphs 12-19) should be stricken independently for lack of foundation.

For these reasons, the district court erred by not striking the affidavit of Richard Vincent, and the district court's decision in this regard should be reversed.

CONCLUSION

For all of the foregoing reasons, the district court's order dismissing both of Mountainwest's claims should be affirmed, the district court's order refusing to strike the affidavit of Richard Vincent should be reversed, and all of Mountainwest's claims against HCU should be dismissed, with prejudice and on the merits.

DATED this 29th day of August, 2006.

JONES, WALDO, HOLBROOK & McDONOUGH

By: _____

Andrew H. Stone
Marci Rechtenbach
Ryan M. Harris
Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of August, 2006, I caused to be sent, via first-class U.S. Mail, postage prepaid, two (2) true and correct copies of the foregoing **BRIEF OF APPELLEE** to the following:

Craig G. Adamson
Craig A. Hoggan
Debra G. Griffiths
DART, ADAMSON & DONOVAN
370 East South Temple, Suite 400
Salt Lake City, Utah 84111