

2006

Mountain West Surgical Center, LLC and  
Mountain West Medical Properties, LLC v.  
Hospital Corporation of Utah, dba Lakeview  
Hospital : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

MOUNTAIN WEST SURGICAL  
CENTER, LLC and  
MOUNTAINWEST MEDICAL  
PROPERTIES, LLC.

Plaintiffs and Appellants.

v.

HOSPITAL CORPORATION OF  
UTAH, dba LAKEVIEW HOSPITAL,

Defendant and Appellee.

**APPELLANT'S BRIEF**

Appellate Case No. 20060243-SC

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

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FILED  
UTAH APPELLATE COURTS  
JUL 28 2006

**IN THE SUPREME COURT OF THE STATE OF UTAH**

<p>MOUNTAIN WEST SURGICAL CENTER, LLC and MOUNTAINWEST MEDICAL PROPERTIES, LLC,</p> <p style="text-align: center;">Plaintiffs and Appellants,</p> <p style="text-align: center;">v.</p> <p>HOSPITAL CORPORATION OF UTAH, dba LAKEVIEW HOSPITAL,</p> <p style="text-align: center;">Defendant and Appellee.</p>	<p><b>APPELLANT’S BRIEF</b></p> <p>Appellate Case No. 20060243-SC</p>
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## JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. §78-2- 2(3)(j).

### STATEMENT OF ISSUES

1. Whether the trial court incorrectly concluded appellants' that the lis pendens filed by defendant cannot form the basis of an abuse of process claim as a matter of law. (Issue preserved at R. at 439-440, R. at 384-392, and R. at 252-270.) The trial court's conclusion is reviewed for correctness since it was reached on cross motions for summary judgment. *Arnold Indus., Inc., v. Love*, 2002 UT 133, ¶11, 63 P.3d 721.

2. Was the trial court wrong in concluding that the affidavit testimony of Richard Vincent failed to establish an ulterior motive or a willful act not proper in the regular course of proceedings? (Issue preserved at R. at 439-440, R. at 384-392, and R. at 252-270.) The trial court's factual findings are reviewed under the "clearly erroneous" standard. Utah Rule of Civil Procedure 52(a).

3. Did the trial court err in concluding that testimony from a lender or title company on the impact of the lis pendens was necessary to appellant's abuse of process claim? (Issue preserved R. at 439-440, R. at 384-392, and R. at 252-270.) The trial court's summary judgment rulings are reviewed for correctness. *Arnold Indus., Inc., v. Love*, 2002 UT 133, ¶11, 63 P.3d 721.

4. Did the trial court incorrectly conclude that the underlying lawsuit and lis pendens cannot form the basis of a tortious interference claim because both are privileged as a matter of law? (Issue preserved at R. at 439-440, R. at 384-392, and R. at 252-270.)

The trial court's summary judgment rulings are reviewed for correctness. *Arnold Indus., Inc. v. Love*, 2002 UT 133, ¶11, 63 P.3d 721.

5. Was the trial court wrong in concluding the facts appellant offered in support of its interference claim are insufficient as a matter of law. (Issue preserved R. at 439-440, R. at 384-392, and R. at 252-270.) The trial court's conclusions that the facts failed to meet the legal standard is reviewed for correctness. *Drake v. Industrial Commission of Utah*, 939 P.2d 177 (UT 1997).

6. Did the trial court err when it used Mountain West's failure to meet discovery deadlines as a basis for granting HCU's summary judgment motion? (Issue preserved R. at 439-440, R. at 384-392, and R. at 252-270.) The trial court's summary judgment rulings are reviewed for correctness. *Arnold Indus., Inc. v. Love*, 2002 UT 133, ¶11, 63 P.3d 721.

## **STATEMENT OF THE CASE**

### **I. Nature of the Case**

This is an appeal from an order granting appellee's Motion for Summary Judgment and denying the Motion for Summary Judgment of plaintiffs and appellants Mountain West Surgical Center LLC and Mountainwest Medical Properties LLC.

### **II. Course of Proceedings and Disposition Below**

On January 7, 2004, Mountain West Surgical Center and Mountainwest Medical Properties, LLC, (sometimes collectively referred to as "Mountain West" and other times individually referred to as "Mountain West Surgical" and "Mountainwest Properties") filed this lawsuit against Hospital Corporation of Utah, dba Lakeview Hospital ("HCU").

(R. at 1-7.) HCU responded by filing a Motion to Dismiss on March 24, 2004. (R. at 11-13.) The trial court denied the Motion to Dismiss by order dated June 11, 2004 (R. 54-55.) HCU then filed a Petition for Permission to Appeal Interlocutory Order with this Court. (R. at 56-174.) By order dated July 19, 2004, the Utah Court of Appeals denied the petition (R. at 182-184.) After Mountain West filed an Amended Complaint on August 3, 2004, HCU filed an answer to the Amended Complaint on August 20, 2004. (R. at 185-194 and 195-205.)

HCU filed a motion for summary judgment on Mountain West's abuse of process, anti-trust<sup>1</sup> and intentional interference with economic relations claims (R. at 249-251.) Mountain West opposed that motion and filed its own motion for partial summary judgment, seeking partial summary judgment on the abuse of process claim (R. at 252-308, 439-440.) Mountain West's motion was supported in part by the affidavits of Richard Vincent and George Bennett. (R. at 407-438 and 413-416.) HCU opposed Mountain West's Motion for Partial Summary Judgment, moved to strike the Affidavit of Richard Vincent (R. at 462-482, 488-493) and filed a motion for Rule 56(f) relief. (R. at 479-480.) In conjunction with these motions, Mountain West also moved to amend the scheduling order to allow additional time to conduct limited discovery. (R. at 444-445.)

Following a hearing, the trial court granted HCU's Motion for Summary Judgment, denied Mountain West's Motion for Partial Summary Judgment, denied Mountain West's Motion to Amend Scheduling Order and denied HCU's Motion to

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<sup>1</sup> Mountain West voluntarily dismissed their anti-trust claim. (R. at 450-451 and 460-461.)



Strike the Affidavit of Richard Vincent. (R. at 338-339.) A copy of the Court's Order is included in the Addendum as Tab A<sup>2</sup>. Mountain West timely filed a notice of appeal. (R. at 519-520.)

### **III. Statement of Facts**

In 1999, Mountainwest Properties organized a joint venture with Mountain West Surgical and South Davis Community Hospital ("SDCH") for the construction and operation of a 47,000 square foot medical office building ("the Medical Center") on property owned by SDCH adjacent to Lakeview Hospital. (R. at 408.) The parties planned to lease 6,000 of the planned 47,000 square feet to Mountain West Surgical for a surgical center (the "Surgical Center"). (R. at 408.) The remaining space in the Medical Center was to be leased as office space to doctors who were members of Mountainwest Properties. (R. at 408.)

Under the planned joint venture, SDCH was to contribute a portion of its property to Mountainwest Properties in exchange for a membership interest in the company. (R. at 383 and 408.) SDCH did not have, and was never going to have, a membership interest in Mountain West Surgical. (R. at 383 and R. at 408.)

Throughout 1999, Mountainwest Properties worked towards the construction of the Medical Center. (R. at 383 and R. at 408.) It obtained building approval from Bountiful City to construct the Medical Center, paid architects and engineers hundreds of

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<sup>2</sup> The trial court's record transferred to the Supreme Court did not include a copy of the final Order. Through separate motion, the parties are jointly moving the Court to supplement the Record to include the Order. A copy of the order is attached in the Addendum as Tab A.

thousands of dollars to prepare final plans and specifications, and received commitments for construction financing and long term financing for the Medical Center. (R. at 383 and R. at 409.) At the same time, HCU actively opposed construction of the Medical Center. (R. at 383 and R. at 409.) For example, it openly opposed Mountainwest Properties' efforts to obtain development approval from Bountiful City. (R. at 383 and R. at 409.)

When Mountainwest Properties obtained development approvals despite HCU's administrative efforts, HCU turned to the courts and filed a complaint against SDCH on January 10, 2000 (the "Lawsuit"). (R. at 384.) HCU alleged four separate causes of action against SDCH: (1) Breach of Contract; (2) Breach of the Covenant of Good Faith and Fair Dealing; (3) Breach of Restrictive Covenant on the Use of Land; and (4) Declaratory Judgment. (R. at 384.) None of HCU's claims related to the type of structure that could be built on SDCH's property. (R. at 384.) In addition, none of the claims related to title or right to possession of the property. Rather, all claims related in one way or another to an alleged restriction on the activities that could take place in that structure. (R. at 384.)

By March of 2000, Mountainwest Properties had obtained a final commitment from its construction lender, and intended to begin construction on the Medical Center during the first week of March. (R. at 384 and R. at 409.) SDCH was prepared to convey the property into Mountainwest Properties and construction was about to begin on the Medical Center when HCU filed a document entitled "Notice of Lis Pendens" in the office of the Davis County Recorder on March 2, 2000 (the "Lis Pendens"). (R. at 504-508) (A copy of the Lis Pendens is included in the Addendum as Tab B.) The Lis

Pendens was recorded in spite of the fact that HCU had no claims impacting title or right to possession of the property. The Lis Pendens was discovered by Mountainwest Properties when its lender pulled a final title report as it was preparing to fund Mountainwest Properties' construction financing. (R. at 384 and R. at 409.)

It soon became clear that HCU would continue its efforts to interfere with construction of the Medical Center. Following the filing of the Lawsuit and recording of the Lis Pendens, Richard Vincent, a board member of Mountainwest Medical and Mountain West Surgical had a conversation with Lynn Summerhays, a member of Lakeview Hospital's board. (R. at 385-386 and R. at 410.) Mr. Summerhays informed Mr. Vincent that the Lawsuit and Lis Pendens were just the first in a series of actions that HCU intended to take to stop construction of the Medical Center. He told Mr. Vincent that HCU would do whatever was necessary tie up the process and delay construction of the Medical Center at the SDCH location. (R. at 385-386 and R. at 410.) A copy of the Affidavit of Richard Vincent is included in the Addendum as Tab C.

On June 28, 2001, the Court in the underlying Lawsuit dismissed three of HCU's four claims on summary judgment. (R. at 386.) It also ruled that the Lis Pendens was a wrongful lien pursuant to Utah Code Annotated §38-9-1(6). Specifically, the Court found that the Lis Pendens was a wrongful lien because it was not authorized by statute.

The plain wording of Utah Code Annotated §§78-40-1 and 2 requires that the action has to affect title to and /or the right to possession of land. HCU has not alleged any right to title to any of the parcels described in their lis pendens. Neither has HCU alleged any right to possession of these said parcels.

(R. at 394-404.) A copy of Judge Allphin's Ruling is included in the Addendum as Tab D?  
X After the joint venture deteriorated, HCU settled the remaining claim in the lawsuit by paying SDCH an undisclosed sum.

The Lawsuit and notice of Lis Pendens served their purpose, and effectively stopped the project. The lender withdrew its commitment for construction financing and SDCH withdrew from the joint venture and did not convey the property to Mountainwest Properties. (R. at 384 and R. at 409.) Mountainwest Properties ultimately built the Medical Center at an alternate location after substantial delays and after incurring significant additional costs.

## **SUMMARY OF ARGUMENT**

### **ARGUMENT**

#### **I. THE TRIAL COURT INCORRECTLY CONCLUDED THAT THE LIS PENDENS FILED BY HCU CANNOT FORM THE BASIS FOR AN ABUSE OF PROCESS CLAIM AS A MATTER OF LAW.**

The parties filed cross motions for summary judgment regarding Mountain West's abuse of process claim. Mountain West argued that HCU's filing of the lis pendens was an abuse of process of as a matter of law. HCU argued that Mountain West could not factually prove the elements of an abuse process claim. After oral argument, the trial court concluded that the Lis Pendens cannot form the basis of an abuse of process claim, granted HCU's motion and denied Mountain West's motion.

### **A. Factual Basis for Mountain West's Abuse of Process Claim**

The material facts before the trial court were largely undisputed. Two months after HCU filed the Lawsuit, Mountainwest Properties had obtained a final commitment from its construction lender, SDCH was prepared to convey its property to the joint venture and Mountainwest Properties and was prepared to begin construction. Then HCU filed a Lis Pendens that it admits was not supported by a claim to title or possession. The Lis Pendens effectively stopped everything. The lender discovered the Lis Pendens and withdrew its commitment for construction financing and SDCH withdrew its commitment to convey the property.

Any remaining hope was killed when Lynn Summerhays, a member of Lakeview Hospital's board told Richard Vincent that the Lawsuit and Lis Pendens were just the first in a series of actions that HCU intended to take to stop construction of the Medical Center. Mr. Summerhays stated that HCU would do whatever was necessary tie up the process and delay construction of the Medical Center at the SDCH location.

### **B. Argument**

In *Anderson Development Co. v. Tobias*, 2005 UT 36, 116 P. 3d 323, this Court explained that to establish a claim for abuse of process,

a claimant must demonstrate first, an ulterior motive [and] second, an act in the use of the process not proper in the regular prosecution of the proceedings. Unlike a plaintiff asserting a claim for wrongful use of civil proceedings, a plaintiff in an abuse of process claim is not required to establish that the prior proceeding terminated in his favor or that the proceeding lacked probable cause.

*Id.* at ¶37 (emphasis added).

In other words, abuse of process “is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish.” *Restatement (Second) of Torts*, § 682 cmt. a.

Based on the undisputed facts in the record, this Court must conclude that the recording of the Lis Pendens violated the two part test found in *Anderson Development*.

### 1. Improper Use of Process

In *Hatch v. Davis*, 24 Ut. App. 378, 102 P.3d 744 the Utah Court of Appeals explained that to establish an improper use of the process, a litigant must establish:

[s]ome act or threat directed to an immediate objective not legitimate in the use of the process; *In re Terracor*, No. 81-00599, 1982 Bankr.LEXIS 3251, at 19 (Bankr.N.D. Utah Sept. 27, 1982)(noting that the test for abuse of process is “that there must be ‘a willful act in the use of the process not proper in the regular conduct of the proceeding’ or ‘**some definite act not authorized by the process**’”) (quoting William Prosser, *Law of Torts*, § 121, at 857-858).

*Id.* at ¶14. (emphasis added)

It is undisputed that HCU’s use of the Lis Pendens was not proper in the regular prosecution of a proceeding, and that the Lis Pendens was not authorized by the process in the underlying Lawsuit. This conclusion is supported by the plain language of Utah Code Ann. § 78-40-2, Utah case law, the language of the Lis Pendens itself, and Judge Allphin’s ruling.

Utah law is clear that the filing of a lis pendens is a legal process that is only proper in certain circumstances. Utah Code Ann. § 78-40-2 provides:

In any action affecting the title to, or the right to possession of real property, the plaintiff at the time of filing the complaint or thereafter, and

the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action...

Simply put, a party may only encumber another's property with a lis pendens if it has filed claims in a lawsuit that impact title to, or right to possession of, real property. In fact, the Utah Court of Appeals has held that if an attorney records a lis pendens, when the underlying claims do not impact title or right to possession, that lis pendens is groundless as a matter of law. *Winters v. Schulman*, 977 P.2d 1218, 1224 (Utah Ct. App 1999).

HCU's claims in the Lawsuit had no bearing on the title to, or possession of, SDCH's property. Rather, all of HCU's claims related to alleged restrictions on the type of business that could be conducted within the Medical Center. Under those circumstances, HCU violated section 78-40-2 when it recorded the Lis Pendens.

The text of the Lis Pendens confirms that HCU intended to misuse the process. Obviously aware of the requirements of section 78-40-2, HCU did not even claim a right to title or possession. Instead, it filed a Lis Pendens that read:

To whom it may concern, please take notice: Hospital Corporation of Utah, dba Lakeview Hospital ("Lakeview"), the above-named plaintiff, has a pending Complaint against the above-named defendant South Davis Community Hospital, Inc. ("South Davis") in the above-entitled Court for injunctive relief against South Davis' proposed **use** of certain real property owned by South Davis...

(R. at 504-507.)

On its face, the Lis Pendens is not even an attempt to comply with section

78-40-2. Therefore, there can be no reasonable argument that the Lis Pendens was filed for its proper purpose: to notify third parties that a claim existed affecting title to or possession of the property. By statute, any other purpose is improper.

Finally, the conclusion that the Lis Pendens was a misuse of the process is confirmed by Judge Allphin's Ruling. As he explained, "[t]he plain wording of Utah Code Annotated §§78-40-1 and 2 requires that the action has to affect title to and/or the right to possession of land. HCU has not alleged any right to title to any of the parcels described in their lis pendens. Neither has HCU alleged any right to possession of these said parcels." Furthermore, "even if HCU had a legitimate property interest, it failed to adequately describe in its Complaint both this interest and the particular parcels for which it had such an interest. Therefore, the Court finds that HCU's Notice of Lis Pendens was improperly filed and thus is a wrongful lien." (R. at 403.)

## 2. Ulterior Motive

There can be no reasonable dispute regarding HCU's motive in filing the Lis Pendens. This Court has consistently held that "the **sole purpose** of recording a lis pendens is to give constructive notice of the pendency of proceedings which may be derogatory to an owner's title or right to possession." *Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1244, 1248 (Utah 1979) (emphasis added).

It was undisputed that HCU had no claim to title or right to possession. Therefore, it had no legitimate interest to protect by recording the Lis Pendens. If 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. Time and again HCU has admitted that motive: to stop construction of the project. (R at 468.)

The timing of the Lis Pendens helps illustrate HCU's ulterior motive. HCU filed its Complaint on January 10, 2000. It did not, however, immediately record the Lis Pendens. Rather, it waited until March 2, 2000, days before SDCH was to convey the property to Mountainwest Properties and Mountainwest Properties was scheduled to close on its construction financing. Combined with the statements of HCU board member Lynn Summerhays, it is clear that the Lis Pendens was a tactical attempt to use the process to disrupt Mountainwest Properties' financing and stop construction.

While Utah courts have not directly addressed the misuse of a lis pendens as the basis for an abuse of process claim, this issue has been addressed by courts in other jurisdictions. For example, in *Saltsrom v. Starke*, 670 P.2d 809, (Co. Ct. App. 1983) the court held that a lis pendens filed to prevent a sale to a third party, when the filing party knew it did not have a valid purchase contract, could serve as the basis for an abuse of process claim. *Id* at 811. Similarly, the South Carolina Supreme Court in *Broadmoor Apartments of Charleston v. Horwitz*, 413 S.E.2d 9, (S.C. 1992) held that by filing an improper lis pendens, there was "ample evidence from which a jury could infer that...Horwitz willfully abused the process, with the 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."

Based on the foregoing, Mountain West established the ulterior motive component.

## **II. THE TRIAL ERRED IN CONCLUDING THAT THE UNDISPUTED EVIDENCE IN FAILED TO ESTABLISH AN ULTERIOR MOTIVE OR A WILLFUL ACT.**

The evidence before the trial court regarding HCU's ulterior motive was undisputed. HCU admitted that it had no claim that impacted title or right to possession, and that it recorded a Lis Pendens anyway. (R at 466.) HCU admitted that its motive was to stop construction of the project, a goal it could not accomplish through its claims in the lawsuit. HCU's board member, Lynn Summerhays, stated that the Lawsuit and Lis Pendens were just the first in a series of actions that HCU intended to take to stop construction of the project. (R at 410.)

On the other hand, HCU presented no evidence of any kind regarding its motive. Consequently, the only conclusion the trial court could reach was that HCU had an ulterior motive. This is particularly true, in light of the fact that when reviewing a trial court's grant of a motion for summary judgment, the Court views the facts and "all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Hale v. Beckstead*, 2005 UT, 24, ¶2, 116 P.3d 263.

Similar problems exist with the trial court's finding that Mountain West failed to produce evidence of a willful act not proper in the regular course of proceedings. It is undisputed that HCU had no claims impacting title or right to possession. This fact was confirmed by the court in the underlying Lawsuit when it deemed the Lis Pendens a wrongful lien. (R at 403.) There has never been an argument regarding the willfulness of HCU's actions. Consequently, the only competent evidence before the trial court was

that HCU willfully recorded a lis pendens that was not proper in the regular course of a proceeding.

### **III. THE TRIAL COURT ERRED IN CONCLUDING THAT TESTIMONY FROM A LENDER OR TITLE COMPANY ON THE IMPACT OF THE LIS PENDENS WAS NECESSARY.**

On a related issue the trial court found that “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.” (*See* Addendum, Tab A.) This finding is troubling for three reasons. First, it misstates the nature of the transaction; second, it implies that testimony from a lender or title company is necessary to support Mountain West’s claims; third, it ignores the undisputed testimony from Richard Vincent and George Bennet that confirmed this fact.

Mountain West established through the affidavit of Richard Vincent that “the lis pendens was discovered by Mountainwest Properties when its lender pulled a final title report as it was preparing to fund Mountainwest Properties’ construction financing. The notice of lis pendens effectively stopped the project. SDCH did not deed the property to Mountainwest Properties and Mountainwest Properties’ lender withdrew its commitment for construction financing.” (R. at 409) This testimony was confirmed by the testimony of George Bennett, president of SDCH. (R. at 416.) HCU did not dispute this testimony, and the trial court denied its motion to strike the testimony.

Based on the foregoing, there was competent, undisputed evidence that the lis pendens disrupted Mountainwest Property’s construction financing. Any conclusion to the contrary is not supported by the record, and the trial court erred in its findings.

**IV. THE TRIAL COURT INCORRECTLY CONCLUDED THAT THE UNDERLYING LAWSUIT AND LIS PENDENS CANNOT FORM THE BASIS OF A TORTIOUS INTERFERENCE CLAIM AS A MATTER OF LAW BECAUSE BOTH ARE PROTECTED BY THE JUDICIAL PROCEEDING PRIVILEGE.**

The trial court concluded that the filing of the Lawsuit and Lis Pendens were privileged as a matter of law and therefore could not form the basis of a tortious interference claim. (*See* Order attached in the Addendum as Tab A.) HCU first made this argument in a motion to dismiss that was denied by the trial court. HCU then petitioned this Court for permission to file an interlocutory appeal on this issue. That petition was denied. (R. at 182-184.) HCU's motion for summary judgment was its third attempt to argue this issue. (R. at 249-251.) Its rationale for revisiting this issue a third time was its claim that the law in Utah been clarified by the Court's decision in *Anderson Development Co. v. Tobias*, 2005 UT 36, 116 P. 3d 323.

The claim is wrong. Utah courts have consistently held that baseless and unfounded litigation can serve as the basis for an interference with economic relationships claim.

The seminal Utah case addressing the tort of interference with economic relations is *Leigh Furniture v. Isom*, 657 P.2d 293 (Utah 1982). Much like this case, *Leigh Furniture* is a case based on the filing of groundless lawsuits. In that case, Isom brought a counterclaim against the Leigh Corporation for intentional interference with contractual relations based on, among other things, groundless lawsuits filed by the Leigh Corporation. While setting forth the elements of a tortious interference claim, this Court explained that "unfounded litigation" satisfies the improper means component of a

tortious interference claim. *Id.* at 308-09. In the process, the Supreme Court specifically addressed the judicial proceedings privilege and first amendment concerns.

In *St. Benedict's Development Company v. St. Benedict's Hospital*, 811 P.2d 194 (Utah 1994), the Court confirmed that “unfounded litigation” can serve as improper means. *Id.* at 201. Since then, the Court has never indicated any intention to limit its holdings in *Leigh Furniture* and *St. Benedict's Development* in the manner advocated by HCU.

Furthermore, the *Leigh Furniture* and *St. Benedict's Development* decisions are consistent with the great weight of authority on this issue. The Restatement (Second) of Torts § 767 comment c, for example, states:

Litigation and the threat of litigation are powerful weapons. When wrongfully instituted, litigation entails harmful consequences to... the actor's adversaries. The use of these weapons...is ordinarily wrongful if the actor has no belief in the merit of the litigation or if, though having some belief in its merits, he nevertheless institutes or threatens to institute the action in bad faith, intending only to harass the third parties and not to bring his claim to definitive adjudication.

Applying § 767, the court in *National Assoc. Professional Basketball Leagues v. Very Minor Leagues*, 223 F.3d 1143 (10<sup>th</sup> Cir. 2000), explained that wrongful litigation can serve as the basis for a tortious interference claim. Authority from other jurisdictions is in accord.<sup>3</sup>

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

In the face of well settled Utah law, HCU relied on the decision in *Anderson Development* to support its argument that the underlying Lawsuit and Lis Pendens cannot form the basis for a tortious interference claim, and are privileged as a matter of law. While the trial court agreed with HCU's position, a careful review of the holding in *Anderson Development* establishes that it is not controlling on this case.

Unlike the claims in this case, the tort claims in *Anderson Development* were not based on the filing of a lawsuit. Instead, they were based on statements made by Tobias during a public hearing in which he opposed Anderson Development's zoning application. In addressing whether those statements could satisfy the improper means component of an interference claim, the Court acknowledged, as it did in *Leigh Furniture*, that certain speech is protected by the First Amendment. Relying on *Searle v. Johnson*, the Court explained that the First Amendment protects "political activity against tort claims as well as antitrust claims". *Anderson Development* at 332, citing *Searle v. Johnson*, 646 P.2d 682 (Utah 1982). The Court found that because petitioning the city constituted political activity, Tobias's statements were protected by the First Amendment. Nowhere in the opinion, however, does the Court indicate that its holding impacts the numerous tort claims, including tortious interference, abuse of process and wrongful use of civil proceedings, that can be based on the filing of lawsuits. Furthermore, nowhere in the opinion does the Court indicate that it intends to overturn or limit *Leigh Furniture* and *St. Benedict Development*.<sup>4</sup>

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<sup>4</sup> In fact, the Court's opinion in *Anderson Development* relies on the holding in *Searle v. Johnson*. The rationale in *Searle v. Johnson* cannot be read to overturn *Leigh Furniture*

In addition to its reliance on *Anderson Development*, HCU relied on language from *Bennett v Jones Waldo*, 70 P.3d 17 (Utah 2003), to support its argument that the Court has somehow created a blanket privilege for “use of the legal process itself.” The Court did nothing of the sort, and did not even attempt to address the long-standing Utah law established by the Supreme Court in *Leigh Furniture*. Instead, the Bennett Court simply held that statements made during prior bar order litigation could not serve as the basis for subsequent intentional infliction of emotional distress and deceit claims. This is consistent with the Court’s previous application of the privilege to defamation claims based on statements made in demand letters or statements made during the litigation process.

**V. THE TRIAL COURT WAS WRONG IN CONCLUDING THE FACT APPELANTS OFFERED IN SUPPORT OF ITS INTERFERENCE CLAIM ARE INSUFFICIENT AS A MATTER OF LAW.**

Mountain West contends that the Lawsuit and Lis Pendens satisfy the improper means component of a tortious interference claim. Mountain West supported its claims with proof that the Lawsuit and Lis Pendens were groundless. Despite the fact that Mountain West’s evidence was undisputed, the trial court ruled that Mountain West “failed to factually demonstrate the elements of an interference claim.” (*See* Order included in Tab A of the Addendum.)

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since the opinion in *Searl v Johnson* actually predates *Leigh Furniture*. The Noerr-Pennington doctrine and the Court’s ruling in *Leigh Furniture* have existed in harmony since 1986.

The law in Utah is well established that to prevail on a claim for tortious interference, a plaintiff must demonstrate, “(1)...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 plaintiffs.” *Anderson Development*, citing *Leigh Furniture & Carpet v. Isom*, 657 P.2d 293, 304 (Utah 1982). There was no real dispute before the trial court regarding the first and third elements of the interference claim. It was undisputed that HCU interfered with Mountain West’s economic relations and it was undisputed that Mountain West was injured. The only issue before the trial court was whether HCU interfered for an improper purpose or by an improper means.

As is established above, groundless litigation satisfies the improper means component of an interference claim. See *Leigh Furniture v. Isom* and *St. Benedict’s Development*. Therefore, to defeat summary judgment, Mountain West was only required to raise issues of fact regarding the validity of the underlying Lawsuit.

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

In this case, Mountain West conclusively addressed those perceived issues of fact, and established that the restrictive covenant claim was groundless as well. HCU claimed



a restrictive covenant prevented SDCH (and Mountainwest Properties) from constructing the Medical Center. By its terms, however, the restrictive covenant was limited to a

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

(R. at 385.)

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

These were the only facts before the trial court on summary judgment, and they were not disputed. At a bare minimum, Mountain West created issues of fact precluding

summary judgment. Under no circumstances, however, did it fail to present evidence to support the elements of its interference claim.

**VI. THE TRIAL COURT ERRED WHEN IT USED MOUNTAIN WEST'S FAILURE TO MEET DISCOVERY DEADLINES AS A BASIS FOR GRANTING HCU'S SUMMARY JUDGMENT MOTION.**

In addition to summary judgment motions, there were several other issues before the trial court at the January 20, 2006 hearing. The Court also considered Mountain West's Motion to Amend the Scheduling Order (R. at 444-445), HCU's Motion to Strike the Affidavit of Richard Vincent (R. at 338) and HCU's Rule 56(f) motion (R. at 479-480). The heart of these motions was HCU's contention that Mountain West failed to comply with the scheduling order. Through Mountain West's motion to amend, and HCU's Rule 56(f) motion, the parties both asked the trial court for addition time to conduct limited discovery. As an alternative, HCU asked the trial court to punish Mountain West for alleged violation of the scheduling order by striking the Affidavit of Richard Vincent. HCU did not ask the Court, however, to use the discovery dispute as a basis to grant or deny summary judgment.

The trial court denied Mountain West's motion to amend and denied HCU's motion to strike the affidavit of Richard Vincent. It did not rule on HCU's rule 56(f) motion, which was essentially rendered moot by its decision on HCU's motion for summary judgment. (*See* Order included in Tab A of the Addendum.) It did not strike any of the pleadings.

On its own initiative, the trial court used the scheduling dispute as a basis to decide the summary judgment motions. Despite the fact that HCU never asked it to do

so, the trial court ruled that, “As an additional basis for the Court’s decision on Defendant’s Motion is Plaintiff’s failure to comply with the agreed schedule on the Attorney’s Planning Meeting Report filed herein.” (*See* Addendum, Tab A.) The trial court did not identify which of defendant’s motions it was referring to, and did not identify the rationale for its decision.

Assuming the trial court was referring to defendant’s Motion for Summary Judgment, there are two glaring problems with the trial court’s ruling. First, any perceived violations of the scheduling order did not impact the facts or issues before the trial court on summary judgment. Second, even if the Mountain West failed to comply with the discovery order, Utah law does not allow the trial court to use that failure as a basis to grant HCU’s Motion for Summary Judgment.

**A. Discovery issues had no bearing on the facts or issues before the court.**

The trial court found that Mountain West failed to file Rule 26 disclosures, failed to timely respond to discovery and did not file expert reports. (*See* Order included in Tab A of the Addendum.) Even if the trial court was correct, none of these acts had any bearing on the issues before the trial court. Mountain West ultimately responded to written discovery, and included all of the information typically contained in Rule 26 disclosures. While the discovery responses were admittedly late, the trial court never granted a motion to compel or had to address any issues relating to discovery in this case.

The trial court’s reference to expert reports is also troubling. Mountain West’s abuse of process and tortious interference claims do not rely on expert testimony.

Consequently, it is irrelevant whether Mountain West designated expert witnesses by the deadline contained in the scheduling order.

Simply put, the alleged violation of the scheduling order should have had no bearing on the legal or factual issues before the trial court.

**B. There is no legal basis for the trial court's decision.**

There was no pattern of discovery abuse in this case. The trial court never considered a motion to compel, and prior to its final order, never entered any ruling regarding discovery. Those facts highlight the egregious nature of the trial court's decision.

There is also no precedent for the trial court's decision. While this Court has upheld a trial court's decision to strike pleadings when a party repeatedly violates orders compelling discovery, Mountain West is not aware of single case where a Utah Appellate court has upheld (or even addressed) a trial court's decision to grant summary judgment based on alleged failures to timely comply with a scheduling order. This fact was readily acknowledged by the trial court at the hearing. (R. at 530, page 57 lines 4-14.) Because it lacked any legal basis for its actions, the trial court's decision must be overturned.

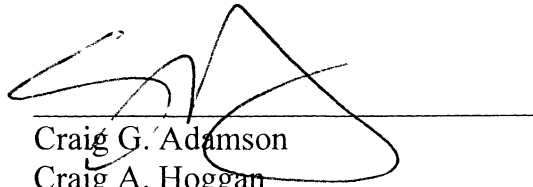
**CONCLUSION**

Based on the foregoing, Mountain West respectfully requests that this Court (1) vacate the trial court's decisions on summary judgment, enter summary judgment for Mountain West on its abuse of process claim and remand the case to the trial court for a determination regarding the amount of damages suffered by Mountain West; or in the

alternative, Mountain West requests that the Court vacate the trial court's summary judgment ruling on the abuse of process claim and remand the case to the trial court for a trial on the merits; and (2) Mountain West requests that the Court vacate the trial court's summary judgment ruling on the tortious interference claim and remand the case to the trial court for a trial on the merits .

DATED this 28<sup>th</sup> day of July, 2006.

DART, ADAMSON & DONOVAN

A handwritten signature in black ink, appearing to be 'Craig G. Adamson', is written over a horizontal line. The signature is stylized with a large loop and a long horizontal stroke extending to the right.

Craig G. Adamson  
Craig A. Hoggan  
Debra G. Griffiths  
Attorneys for Appellants

### **CERTIFICATE OF MAILING**

I hereby certify that on the 28<sup>th</sup> day of July, 2006, I caused to be mailed via first-class, U.S. Mail, postage prepaid, two true and correct copies of APPELLANT'S BRIEF to the following:

Andrew H. Stone  
Marci B. Rechtenbach  
JONES WALDO HOLBROOK & McDONOUGH  
170 South Main Street, Suite 1500  
Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to read "Marci B. Rechtenbach", is written over a horizontal line.

## **ADDENDUM**

- A. Order on Motion for Summary Judgment
- B. Lis Pendens
- C. Affidavit of Richard Vincent
- D. Judge Allphin's Ruling

Tab A



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

Attorneys for Defendant

*copy* **FILED**  
FEB - 8 2006  
Layton District Court

**IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY**

**STATE OF UTAH**

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MOUNTAIN WEST SURGICAL CENTER,	:	<b>ORDER</b>
L.L.C. and MOUNTAINWEST MEDICAL	:	
PROPERTIES, L.L.C.,	:	
	:	
Plaintiffs,	:	
<b>vs.</b>	:	
	:	
HOSPITAL CORPORATION OF UTAH, dba	:	Civil No. 040600019 MI
LAKEVIEW HOSPITAL, a Utah Corporation,	:	
	:	Judge Thomas L. Kay
Defendant.	:	

---

This case come on before the Court on January 20, 2006 on *Defendant's Motion for Summary Judgment, Plaintiffs' Motion for Partial Summary Judgment, Defendant's Motion to Strike Affidavit of Richard Vincent and Plaintiffs' Motion to Amend Scheduling Order*. The Court, have reviewed the memoranda and affidavits filed by the parties, and having considered the arguments of counsel, makes the following ruling:

1. The Court **HEREBY GRANTS** *Defendant's Motion for Summary Judgment* on all counts;

2. With respect to Plaintiffs' interference claim, the Court rules that as a matter of law neither the underlying lawsuit in the matter of *Hospital Corporation of Utah v. South Davis*

*Community Hospital*, Case 000700012 (2<sup>nd</sup> D. Court, Judge Allphin) or the *lis pendens* filed by Defendant herein in connection with that other action can form the basis for an interference action for the reasons stated in Defendant's brief. Plaintiffs have failed to factually demonstrate the elements of an interference claim and the conduct alleged to constitute an interference is privileged as a matter of law;

3. On Plaintiffs' claim for abuse of process, the Court concludes that Plaintiffs have failed to produce evidence of an ulterior motive on the part of Defendant or a willful act not proper in the regular course proceedings that caused Plaintiffs' harm. The Court rules that as a matter of law that the *lis pendens* filed by Defendant herein in connection with that other action 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;

4. In short, 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;

5. An additional basis for the Court's decision on Defendant's Motion is Plaintiff's failure to comply with the agreed schedule on 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;

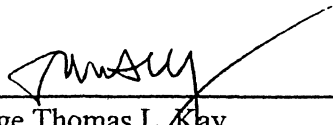
6. As to *Defendants' Motion to Strike the Affidavit of Richard Vincent*, the Court **DENIES** this motion and this Court has granted *Defendant's Motion for Summary Judgment* notwithstanding such affidavit;

7. As to *Plaintiffs' Motion for Partial Summary Judgment*, the Court **DENIES** that motion for the reasons stated above for the Court's granting *Defendant's Motion for Summary Judgment*. The Court rules that as a matter of law that the *lis pendens* filed by Defendant herein in connection with that other action cannot form the basis for an abuse of process claim for the reasons stated in Defendant's brief; and

8. As to the *Plaintiffs' Motion to Amend Scheduling Order*, the Court **DENIES** that motion as set forth above on its ruling for *Defendant's Motion for Summary Judgment*.

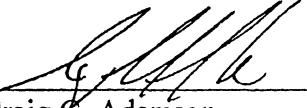
DATED this 8<sup>th</sup> day of February, 2006.

BY THE COURT

  
\_\_\_\_\_  
Judge Thomas L. Kay  
Second District Court Judge

**APPROVED AS TO FORM:**

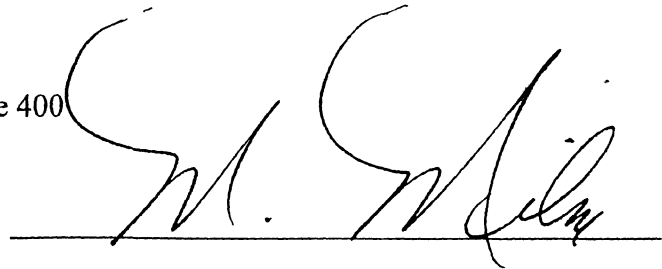
DART, ADAMSON & DONOVAN

By:   
\_\_\_\_\_  
Craig G. Adamson  
Craig A. Hoggan  
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on 3<sup>rd</sup> day of February, 2006, I caused one true and correct copy of the foregoing to be mailed, postage prepaid, to the following:

Craig G. Adamson  
Craig A. Hoggan  
Dart, Adamson & Donovan  
370 East South Temple, Suite 400  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "M. S. Hoggan", is written over a horizontal line.

Tab B

07-057 01,0096,0005,0007

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NW 27

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REC'D FOR JONES WALDO HOLBROOK

WHEN RECORDED PLEASE MAIL TO:

James S. Lowrie (USB #2007)  
Lewis M. Francis (USB #6545)  
JONES, WALDO, HOLBROOK & McDONOUGH  
Attorneys for Plaintiff  
Wells Fargo Plaza  
170 South Main Street, Ste. 1500  
Salt Lake City, Utah 84101

FILED IN CLERK'S OFFICE  
DAVIS COUNTY, UTAH  
Mar 3 4 54 PM '00  
CLERK OF COURT

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY,  
STATE OF UTAH, FARMINGTON DEPARTMENT

---

HOSPITAL CORPORATION OF UTAH, dba :	:	
LAKEVIEW HOSPITAL, a Utah corporation, :	:	
	:	NOTICE OF <i>LIS PENDENS</i>
Plaintiff,	:	
	:	
vs.	:	Civil No. 000700012
	:	
SOUTH DAVIS COMMUNITY HOSPITAL, :	:	Judge Allphin
INC., a Utah Corporation,	:	
	:	
Defendant.	:	
	:	
	:	

---

TO WHOM IT MAY CONCERN, PLEASE TAKE NOTICE:

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

Bountiful, Utah, and is more particularly described as the following described tracts of land in Davis County, State of Utah:

PARCEL 1:

Beginning on the North line of Section 29 and a Westerly deed segment of the Hospital Corporation at point North  $89^{\circ}38'33''$  East 302.48 feet along the section line from the Northwest corner of Section 29, Township 2 North, Range 1 East, Salt Lake Base and Meridian, Bountiful, Utah; and running thence North  $0^{\circ}12'10''$  West 170.00 feet, thence North  $89^{\circ}38'33''$  East 2.28 feet to a point in a Southerly fence line in connection with the Barton Creek drainage channel, and a point on a 75 foot radius curve to the right (radius bears South  $17^{\circ}17'50''$  West); thence Southeasterly along said curve and fence line 29.06 feet (central angle =  $22^{\circ}12'08''$  and next point is non-tangent); thence South  $52^{\circ}36'$  East 8.87 feet to a point on a 98 foot radius curve to the right (radius bears South  $38^{\circ}01'40''$  West); thence Southeasterly along said curve for an arc distance of 19.70 feet (central angle =  $11^{\circ}31'08''$  and next point is non-tangent), thence South  $42^{\circ}54'13''$  East 19.87 feet, thence South  $53^{\circ}31'02''$  East 8.44 feet, thence South  $49^{\circ}42'$  East 17.47 feet, thence South  $54^{\circ}33'48''$  East 17.75 feet; thence South  $52^{\circ}06'24''$  East 56.36 feet, thence North  $41^{\circ}21'30''$  East 5.05 feet, thence South  $55^{\circ}44'56''$  East 15.77 feet to a point on a 66.6 foot radius curve to the right (radius bears South  $31^{\circ}34'13''$  West) thence Southeasterly along said curve for an arc distance of 37.51 feet (central angle =  $32^{\circ}15'54''$  and next point is non-tangent), thence South  $20^{\circ}19'46''$  East 4.44 feet; thence North  $89^{\circ}40'49''$  West 51.47 feet, thence South  $10^{\circ}15'50''$  West 24.69 feet to said section line, thence South  $89^{\circ}38'33''$  West 127.82 feet along the section line to point of beginning.

Parcel #04-003-0129: *034*

PARCEL 2:

Beginning on North line of 5<sup>th</sup> South Street 258.92 feet East line of 4<sup>th</sup> East Street at a point 359.88 feet East and 483.86 feet South  $0^{\circ}07'$  West of relocated NW corner of Section 29, Township 2 North, Range 1 East Salt Lake Meridian; thence North  $0^{\circ}07'$  East 236.5 feet; thence East 110 feet; thence South  $0^{\circ}7'$

West 236.5 feet to North line of 5<sup>th</sup> South Street; thence West 100 feet to the point of beginning. Cont. 0.595 acres.

Parcel #04-069-0004.

PARCEL 3:

Beginning on North side of 5<sup>th</sup> South Street 368.92 feet East of East line of 4<sup>th</sup> East Street, which point is 469.88 feet East and 438.86 feet South 0°07' West of relocated monument at NW corner Section 29 Township 2 North, Range 1 East; Salt Lake Meridian; North 0°07' East 236.5 feet East 84.5 feet South 0°07' West 236.5 feet to North line side of 5<sup>th</sup> South Street, thence West along side of North line 84.5 feet to beginning. Cont. 0.46 acres.

<sup>04</sup>  
Parcel #05-069-0005.

PARCEL 4:

Beginning at a point on the North line of 500 South Street (a 66 foot wide road) which point is North 89°38'33" East 100.96 feet along the Section line and South 0°11'23" East 483.76 feet along the East line of 400 East Street (a 66 foot wide road) and North 89°44'04" East 258.92 feet along said North line of 500 South Street from the Northwest corner of Section 29, Township 2 North, Range 1 East, Salt Lake Base and Meridian, said point of beginning being also North 89°44'04" East 291.92 feet along the centerline of said 500 South Street and North 0°11'23" West 33.00 feet from an existing brass monument at the centerline intersection of said 400 East Street and said 500 South Street and running thence North 0°11'23" West 236.50 feet along an existing fence line; thence North 89°44'04" East 26.08 feet; thence North 0°11'23" West 117.47 feet along a line which is 10 feet east of an existing hospital building; thence North 89°38'33" East 135.02 feet; thence along an existing fence on the West boundary of the Barton Creek Canal in the following two courses: Southeasterly 56.49 feet along the arc of a 330.00 foot radius curve to the left through a central angle of 9°48'31" (chord bears South 20°30'00" East 67.43 feet), South 20°30'00" East 67.43 feet; thence South 89°44'04" West 89.49 feet; thence South 0°11'23" East 236.50 feet; thence South 89°44'04" West 110.00 feet along said North line of 500 South Street to the point of beginning.



DATED this 2nd day of March 2000.

JONES, WALDO, HOLBROOK  
& McDONOUGH

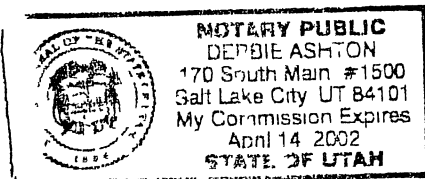
Lewis M. Francis  
James S. Lowrie  
Lewis M. Francis  
Attorneys for Plaintiff

STATE OF UTAH  
COUNTY OF SALT LAKE

)  
: ss.  
)

On the 2nd day of March, 2000, personally appeared before me Lewis M. Francis,  
the signer of the foregoing instrument, who duly acknowledged to me that he executed the  
same.

Debbie Ashton  
NOTARY PUBLIC



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2<sup>nd</sup> day of March, 2000, I caused a true and correct copy of the foregoing Notice of Lis Pendens, to be mailed, postage prepaid, to the following:

George K. Fadel  
Attorney for Defendant  
170 West 400 South  
Bountiful, Utah 84010

John M. Francis

Craig G. Adamson (0024)  
Craig A. Hoggan (8202)  
DART, ADAMSON & DONOVAN  
370 East South Temple, Suite 400  
Salt Lake City, Utah 84111  
Telephone: (801) 521-6383  
Facsimile: (801) 355-2513

Attorneys for Plaintiffs

IN THE SECOND JUDICIAL DISTRICT COURT  
IN AND FOR DAVIS COUNTY, STATE OF UTAH

---0000000---

MOUNTAIN WEST SURGICAL  
CENTER, L.L.C. and  
MOUNTAINWEST MEDICAL  
PROPERTIES, L.L.C.,

Plaintiffs,

vs.

HOSPITAL CORPORATION OF UTAH,  
dba LAKEVIEW HOSPITAL, a Utah  
Corporation,

Defendant.

**AFFIDAVIT OF RICHARD  
VINCENT**

Case No.: 040700012

Judge Thomas L. Kay

--0000000---

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

Richard Vincent , being first duly sworn under oath, deposes and states as follows:

1. I am an individual over the age of eighteen and I make the following Affidavit based on my personal knowledge, and would so testify if called upon to do so.

2. In 1999 and 2000, I was the Secretary/Treasurer of Mountain West Surgical Center L.L.C. ( Mountain West Surgical”) and the Secretary/Treasurer of Mountainwest Medical Properties L.L.C. (“Mountainwest Properties”).

3. In 1999, Mountainwest Properties organized a joint venture for the construction and operation of a 47,000 square foot medical office building to be constructed on the property of South Davis Community Hospital which is adjacent to Lakeview Hospital (“the Medical Center”).

4. 16,000 of the 47,000 square feet was to be leased to Mountain West Surgical for the operation of a surgical center (the “Surgical Center”). The remaining space in the Medical Center was to be leased as office space to doctors who were members of Mountainwest Properties.

5. Mountainwest Properties planned to construct the Medical Center on property that was owned by South Davis Community Hospital (“SDCH”).

6. SDCH was to contribute a portion of its property to Mountainwest Properties in exchange for a membership interest in Mountain West Properties.

7. SDCH did not have, and was never going to have, a membership interest in Mountain West Surgical.

8. Throughout 1999, Mountainwest Properties had worked towards the construction of the Medical Center. It had obtained approval from Bountiful City to construct the Medical Center, it had paid architects and engineers hundreds of thousands of dollars to prepare final plans and specifications for the construction of the Medical Center and had made arrangements and received commitments for construction financing and long term financing for the Medical Center.

Tab C

9. HCU had actively opposed the construction of the Medical Center. For example, it openly opposed Mountainwest Properties efforts to obtain development approval for the Medical Center from Bountiful City.

10. By March of 2000, Mountainwest Properties had obtained a final commitment from its construction lender, and intended to begin construction on the Medical Center during the first week of March.

11. Days before SDCH was to deed the property into Mountainwest Properties, and construction could begin on the Medical Center, HCU filed a notice of lis pendens in the office of the Davis County Recorder on March 2, 2000.

12. The lis pendens was discovered by Mountainwest Properties when its lender pulled a final title report as it was preparing to fund Mountainwest Properties' construction financing.

13. The notice of lis pendens effectively stopped the project. SDCH did not deed the property to Mountainwest Properties and Mountainwest Properties' lender withdrew its commitment for construction financing.

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

15. By its terms, the restrictive covenant was a:

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

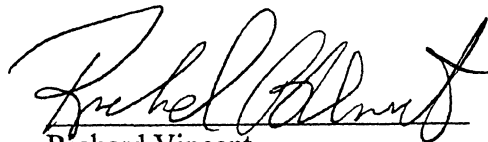
16. The planned Medical Center would not have been a “commercial ancillary facility” as defined by the restrictive covenant. Rather, the Medical Center was simply a 47,000 square foot medical office complex.

17. Mountainwest Properties did not intend to operate any facilities on the Medical Center. Instead, it intended to lease space to tenants.

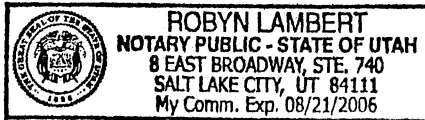
18. The Surgical Center that Mountain West Surgical intended to open in leased space within the Medical Center would not have been a “commercial ancillary facility” as defined by the restrictive covenant. Mountain West Surgical did not intend to allow any of its member doctors to provide the prohibited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

19. Following the filing of the lawsuit and recording of the lis pendens, it became clear that the HCU would continue its efforts to interfere with the construction of the Medical Center. Following the filing of the lawsuit and recording of the lis pendens, I had a conversation with Lynn Summerhays, a member of Lakeview Hospital’s board. Mr. Summerhays informed me that the lawsuit and lis pendens were just the first in a series of actions that HCU intended to take to stop construction of the Medical Center. He told me that HCU would do whatever was necessary tie up the process and delay construction of the Medical Center at the SDCH location.

DATED this 4<sup>th</sup> day of October, 2005.

  
Richard Vincent

SUBSCRIBED and SWORN TO before me this 14<sup>th</sup> day of October, 2005.



  
Notary Public

**CERTIFICATE OF MAILING**

I hereby certify that on the 14<sup>th</sup> day of October, 2005, I caused to be mailed a true and correct copy of the foregoing to the following:

Andrew H. Stone  
Marci B. Rechtenbach  
JONES WALDO HOLBROOK & McDONOUGH  
170 South Main Street, Suite 1500  
Salt Lake City, UT 84101





Tab D

SECOND DISTRICT COURT

MSE

2000 JUN 28 P 1:26

**IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY  
STATE OF UTAH, FARMINGTON DEPARTMENT**

HOSPITAL CORPORATION OF UTAH,  
dba LAKEVIEW HOSPITAL, a Utah  
Corporation,

Plaintiff,

VS.

SOUTH DAVIS COMMUNITY  
HOSPITAL, INC., a Utah Corporation,

Defendant.

**RULING ON DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT  
DISMISSING THE COMPLAINT AND  
FOR LEAVE TO FILE AN AMENDED  
ANSWER AND COUNTERCLAIM**

Case No. 000700012

Judge Michael G. Allphin

**INTRODUCTION**

South Davis Community Hospital, Inc. ("SDCH"), defendant, has filed this Motion for Summary Judgment, with a memorandum in support of the motion. However, SDCH failed to comply with the requirements of Rule 56 of the Utah Rules of Civil Procedure and Rule 4-501 of the Utah Code of Judicial Administration. These rules require a statement of undisputed facts in "separate numbered sentences which specifically refer to those portions of the record upon which the movant relies."

The Plaintiff, Hospital Corporation of Utah, Inc. ("HCU"), submitted a reply memorandum. In that memorandum HCU, unlike SDCH, included a separate statement of undisputed facts in separate numbered sentences specifically referring to those portions of the record upon which it relied.

As a result of having only one party follow the Utah Rules of Civil Procedure and Rule 4-501 of the Utah Code of Judicial Administration, the Court made its own determination as to what facts are in dispute and which of these facts are material for the purpose of this motion. In so doing, the Court compared HCU's numbered statement of undisputed facts with both the unformatted facts listed in SDCH's brief, as well as SDCH's Answer. Based on this comparison, the Court concludes the following:

### **UNDISPUTED FACTS**

1. Up until approximately 1973, SDCH operated a small 74 bed general acute care hospital at the site of its current nursing home facility in Bountiful, Utah.
2. By the mid-1960's, both Davis County and SDCH recognized that its hospital facility was neither large enough nor modern enough to meet the growing demands of southern Davis County residents. Davis County determined that it needed two new hospitals to serve its growing population, with one hospital in the north end of the county, and another in the south.
3. SDCH recognized that it could not remodel or enlarge the SDCH facility sufficiently to meet the growing needs of southern Davis County, and that it did not have the resources to construct and operate a new hospital.
4. Davis County eventually sought commercial entities to develop, finance, construct and operate the new Davis County hospitals. After lengthy investigation and extended negotiations with Davis County and SDCH, Hospital Corporation of America ("HCA") agreed to develop, finance, construct and operate a new and larger hospital, now known as Lakeview Hospital, on

the property adjoining the old SDCH hospital. As a result, on or about November 20, 1973, SDCH and HCA entered into a written agreement ("Agreement").

5. Pursuant to the Agreement, HCA agreed to finance, develop, construct, and operate the Lakeview Hospital, through Hospital Corporation of Utah ("HCU"), a subsidiary of HCA. HCU promised to keep prices at or below the average prices for substantially similar items sold by Holy Cross and Latter-Day Saint hospitals for a period of four years.

6. SDCH agreed to cease operating its present neighboring 74-bed general acute care hospital at the time HCA became ready and able to commence its operation of a new, modern, 149 (approximately) bed general acute care hospital.

7. The Agreement did not impose any other restrictions on SDCH with regards to competing with HCU.

8. Both HCU and SDCH complied with the Agreement. Since 1973, Lakeview Hospital and SDCH have not provided overlapping services. Lakeview Hospital has continued to operate as a general acute care hospital, and SDCH has continued operating its neighboring facility as a nursing home.

9. In 1989 Lakeview transferred deeds to SDCH in order to straighten the borders between their adjoining properties. Contained in those deeds were certain covenants prohibiting the establishment of a competing commercial ancillary facility. The pertinent covenant defined a commercial ancillary facility as:

including but not limited to commercial laboratories or x-ray, radiological imaging, physical therapy, pulmonary or cardiology testing or out-patient Medical facilities or birthing centers, any of which are offered on a commercial basis to third party users. This prohibition shall not restrict physicians on the land from maintaining or performing ancillary services for their own patients.

10. SDCH is now developing, with other partners, a 47,000 square foot medical facility on the property adjoining Lakeview Hospital, including a 16,000 square foot out-patient surgical center (the “Medical Center”).

11. The Medical Center will perform functions currently being performed by Lakeview Hospital, including those traditionally performed by general acute care hospitals, such as Lakeview. SDCH is providing the land for the Medical Center, will be a tenant, and will share in the profits from it.

12. On March 2, 2000, HCU filed a Notice of Lis Pendens, which was recorded in the office of the Davis County Recorder.

It is unclear from either party which parcels of land contain restrictive covenants. In addition, it is also unclear which parcels of land HCU named in its Notice of Lis Pendens. Finally, the exact location of the proposed development on the various parcels has not been provided to the Court.

#### **STANDARD OF REVIEW**

Summary judgment is appropriate “only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.” Doit, Inc. v. Touche, Ross & Co., 926 P.2d 835, 841 (Utah 1996); see also Beynon v. St. George-Dixie Lodge #1743, 854 P.2d 513, 514-515 (Utah 1993); and Alf v. State Farm Fire and Cas. Co., 850 P.2d 1272, 1274 (Utah 1993).

In considering a motion for summary judgment, the Court must examine the evidence in “a light most favorable to the party opposing summary judgment.” Hunt v. Hunt, 785 P.2d 414, 415

(Utah 1990). However, summary judgment is appropriate even on factual issues where the evidence is such that reasonable persons could not disagree. Harline v. Barker, 912 P.2d 433, 439 (Utah 1996).

Allegations or denials in the pleadings are not a sufficient basis for opposing summary judgment. See Hall v. Fitzgerald, 671 P.2d 224 (Utah 1983). When a motion for summary judgment is filed and supported by an affidavit or affidavits (or other material allowed as evidence in such cases), the party opposing the motion has an affirmative duty to respond with affidavits or other materials allowed by Rule 56(e) of the Utah Rules of Civil Procedure. See D&L Supply v. Saurini, 775 P.2d 420 (Utah 1989); Thayne v. Beneficial Utah Inc., 874 P.2d 120 (Utah 1994).

#### **DISPUTED MATERIAL FACTS**

It is first disputed whether SDCH will need to use one or more of the properties containing a non-competition covenant as parking for the Medical Center. HCU contends that SDCH will need to use, either directly or indirectly, one or more of the restricted properties in such a manner. SDCH claims that none of the parcels containing restrictive covenants will be used in a manner inconsistent with the restrictive covenant. The use of the said parcels containing the restrictive covenants is clearly a material issue of fact, which precludes summary judgment. This is true because the Utah Supreme Court has opined that the effective duration of a restrictive covenant, when a duration is not expressed, is a reasonable time. To determine what a reasonable time is in a given case, the Court must consider the circumstances surrounding the inclusion of the restrictive covenant in the deed, as well as the purpose of its imposition. Metropolitan Inv. Co. v. Sine, 376 P.2d 940, 945 (Utah 1962). This is a factually sensitive analysis that must be

undertaken at trial. Thus, if the proposed treatment facility or any of its appurtenant parking lots is located on one of the restricted deeds, it is possible that the restrictive covenant is still valid and binding. This cannot be determined on the facts presently before the Court.

There is also 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. If SDCH intends to use the facility for physicians' existing patients, as opposed to newly acquired patients, then SDCH is not in violation of the restrictive covenant, even if the treatment facility or its appurtenant parking lots will be located on the restricted parcels.

Given the fact that there are at least two genuine issues of material fact, the Court finds that summary judgment is inappropriate at this time. However, the Court finds that partial summary judgment may be appropriate on certain issues, to be discussed below.

### **CONCLUSIONS OF LAW**

As a matter of law, this Court concludes the Agreement between HCA and SDCH did not impose an obligation on SDCH to refrain from competing with HCA for an indefinite period of time. The plain wording of the Agreement places only one restriction on SDCH with respect to not competing with HCU: to cease operating its present 74-bed general acute care hospital. It is undisputed that SDCH met this obligation. The unambiguous wording of the contract imposes no

other restrictions on SDCH. Thus, this Court finds that SDCH has fulfilled its obligation under the Agreement, and the SDCH is entitled to partial summary judgment on the issue of an express contractual right pursuant to the Agreement.

The Court next addresses the issue of whether there was an implied covenant for SDCH not to compete with HCA for an indefinite period of time with respect to operating an general acute medical facility. In Dixon v. Pro Image, Inc., 1999 UT 89, 987 P.2d 48 (1999), the Utah Supreme Court held that it is improper for a court to look beyond the face of the contract unless it is unclear or ambiguous. If a contract is ambiguous or unclear on its face, extrinsic evidence is appropriate to determine the intentions of the parties. Thus, the Court must first determine whether the contract was unclear or ambiguous.

This Court finds that the Agreement is clear and unambiguous on its face. The Agreement binds SDCH to only one relevant obligation: to cease its *present* general acute care hospital. The Agreement is silent with respect to any other non-competition restrictions. Silence, however, is not ambiguity. It is presumed that contracts drafted by attorneys for the benefit of a client fully encompass the client's intentions. In addition, the Court will construe any contract against the party who drafted it. In the present case, HCU drafted the Agreement and had the opportunity to enumerate additional conditions and obligations. It did not do so. Thus, because the Agreement is clear on its face, it is inappropriate for the Court to speculate as to what the parties' intentions were by entertaining extrinsic evidence. SDCH is entitled to summary judgment as to the existence of any implied contractual right.



Furthermore, even if extrinsic evidence were allowed and the Court found there was an implied covenant restricting SDCH from constructing and operating a general acute facility, this Court finds that such a restrictive covenant would be overly broad. The four requirements for a valid restrictive covenant are that: (1) the covenant not to compete must be supported by consideration; (2) no bad faith may be shown in the negotiation of the contract; (3) the covenant must be necessary to protect the goodwill of the business; and (4) the covenant must be reasonable in its restrictions in terms of time and geographic area. Allen v. Rose Park Pharmacy, 120 Utah 2d 608, 619, 237 P.2d 823, 828 (1951).

In the present case, there is ample evidence SDCH and HCA mutually exchanged promises and obligations, thus satisfying the consideration element. There are no allegations that either HCA or SDCH had bad faith in negotiating their Agreement, so the Court will presume good faith. Since HCA explicitly required SDCH to shut down its current facility, the Court further infers that HCA sought the goodwill created by SDCH. In addition, since neither party has raised the issue of geographic area, the only remaining issue is whether this implied covenant is reasonable with respect to its duration.

In Allen, supra., the Court held, “restrictive covenants are generally upheld by the courts where they are necessary for the protection of the business for the benefit of which the covenant was made and no greater restraint is imposed than is reasonably necessary to secure such protection. See also 9 A.L.R. 1456, 20 A.L.R. 861, 67 A.L.R. 1002, 98 A.L.R. 963, and 155 A.L.R. 652 This is consistent with Restatement of Contracts, Second § 188d:

The extent of the restraint is a critical factor in determining its reasonableness... If the promise proscribes types of activity more extensive than necessary to protect

those engaged in by the promisee, it goes beyond what is necessary to protect his legitimate interests and is unreasonable.

In the present case, HCU had an interest in requiring SDCH shut down its present general acute facility, as enumerated in the Agreement. The Court presumes HCU's purpose in so doing was to avoid having to compete with the predominant general acute care facility in the south Davis County area. In return, HCU obliged itself to keep its prices in check for four years. The Court presumes HCU's obligation was to ensure the community that the hospital would not unduly burden it with rapidly increasing rates to cover its costs of the new Lakeview Hospital it was to construct. The Court is convinced that HCU would not have imposed on it a restriction to not raise its prices for four years if it did not think this was a reasonable amount of time. While it may be true that a covenant not to compete for four years may be necessary to protect HCU's interest in establishing itself as SDCH's *replacement*, the Court finds that a 27 year restriction is overly broad, and thus is invalid as a matter of law.

#### LIS PENDENS AS AN UNLAWFUL LIEN

The Court now addresses whether HCU unlawfully placed a wrongful lien on SDCH's property when it filed a Notice of Lis Pendens with the office of the Davis County Recorder. It is clearly established that a *Lis Pendens* creates a lien on the owner's interest in real property. A lien discourages potential purchasers since the land is used as collateral to pay the judgment in the event the court renders an unfavorable judgment against the landowner.

SDCH contends that HCU filed a wrongful lien against it in filing its Notice of Lis Pendens. Utah Code Annotated § 38-9-1(6) defines "wrongful lien" as:

Any document that purports to create a lien or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not: (a)

~~expressly authorized by this chapter or another state or federal statute; (b)~~  
authorized by or contained in an order or judgment of a court of competent  
jurisdiction in the state; or (c) signed by or authorized pursuant to a document  
signed by the owner of the real property.

The applicable section at issue is subsection (a), which requires that the *Lis Pendens* has to be authorized by statute. The only pertinent statute dealing with the *Lis Pendens* is Utah Code Annotated §§ 78-40-1 and 2. These sections authorize the filing of a *Lis Pendens* “in actions that affect title to and/or the right to possession of land.” Thus, the party that files the *Lis Pendens* must have a legal property interest in the parcels listed in the Notice.

HCU contends that the current Utah Wrongful Lien statute specifically excludes the filing of a *Lis Pendens* from its coverage. This presupposes that the *Lis Pendens* was properly filed. As support for its proposition that its filing a Notice of Lis Pendens was properly filed, and thus not wrongful, HCU cites Hansen v. Kohler, 550 P.2d 186 (Ut. 1976). HCU asserts Hansen establishes the proposition that filing a Notice of Lis Pendens is not wrongful when the underlying lawsuit affects the *use* of, as opposed to affecting the title to or possession of, certain land.

Although Hansen indeed addresses when a Notice of Lis Pendens is improper, this Court finds that HCU’s asserted proposition is nowhere in the body of the opinion. The plain wording of Utah Code Annotated §§ 78-40-1 and 2 requires that the action has to affect title to and/or the right to possession of land. HCU has not alleged any right to title to any of the parcels described in the Notice of Lis Pendens. Neither has HCU alleged any right to possession of these said parcels.

Even if HCU had a legitimate property interest in one of the parcels listed in the Notice, HCU failed to specifically state in its Complaint any property interest or right to any of the said parcels. In Winters v. Schulman, 1999 Utah App. 119, 977 P.2d 1218 (Utah Ct. App. 1999), the Utah Court of Appeals held that the *Lis Pendens* was invalid because the Complaint and Decree failed to address title to or possession of the property as required under § 78-40-2. (See comment 8, paragraph 2). The United States Supreme Court has also held that the opening pleadings of a party who intends to rely on operation of the doctrine of *Lis Pendens* with respect to property involved in litigation should include an adequate description of the property through information displayed in the pleadings. See Miller v. Sherry, 69 U.S. 237, 17 L.Ed. 827 (1864). Thus, even if HCU had a legitimate property interest, it failed to adequately describe in its Complaint both this interest and the particular parcels for which it had such an interest. Therefore, the Court finds that HCU's Notice of Lis Pendens was improperly filed, and thus is a wrongful lien.

#### AMENDED ANSWER AND COUNTERCLAIM

SDCH has moved the Court for leave to file an amended answer and counterclaim. SDCH cannot file the amended answer and counterclaim without leave of the court. However, Rule 15(a) of the Utah Rules of Civil Procedure provides that "leave shall be freely given when justice so requires." In this case SDCH filed its answer on January 14, 2000. HCU filed the *Lis Pendens* discussed above on March 2, 2000, approximately 1 1/2 months after SDCH filed its answer. The *Lis Pendens* is one of the main items brought up in SDCH's proposed amended answer and counterclaim. The Court concludes that the interests of justice will best be served by allowing SDCH to file the amended answer and counterclaim, and leave is hereby granted.

**RULING**

Based on the foregoing, the Court rules that SDCH's Motion for Summary Judgment is hereby DENIED in part and GRANTED in part. Furthermore, SDCH is given leave to file its amended answer and counterclaim. Counsel for SDCH is directed to prepare an order in accordance with Rule 4-504 of the Rules of Judicial Administration.

Dated June 28<sup>th</sup>, 2000.

BY THE COURT

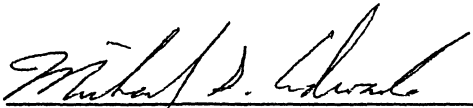
  
DISTRICT JUDGE

**CERTIFICATE OF MAILING**

I certify that I mailed a true and correct copy of the foregoing Ruling on June 28<sup>th</sup>, 2000, postage prepaid, to the following:

George K. Fadel #1021  
170 West 400 South  
Bountiful, UT 84010

James S. Lowrie (USB #2007)  
Lewis M. Francis (USB #6545)  
JONES, WALDO, HOLBROOK &  
McDONOUGH  
Wells Fargo Plaza  
170 South Main St., Ste. 1500  
Salt Lake City, UT 84101

A handwritten signature in cursive script, appearing to read "Michael S. Edwards", is written over a horizontal line.

Michael S. Edwards  
Law Clerk to the  
Honorable Michael G. Allphin