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Of Attorneys for Defendant
Oregon Health Science University

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN and GRACE HUMMASTI,

Plaintiffs,

No. 06-251-ST

v.

JOHN BUCKMASTER, M.D., OSHU,
LOVEJOY SURGI-CENTER,

Defendants.

MEMORANDUM IN SUPPORT
OF DEFENDANT OREGON HEALTH
& SCIENCE UNIVERSITY'S MOTION
TO DISMISS PURSUANT TO FRCP
12(b)(1), 12(b)(5)

Defendant Oregon & Health Science University ("OHSU") moves to dismiss the claims against it.

I. LACK OF SERVICE OF PROCESS

Pursuant to FRCP 12(b)(5), defendant OHSU moves to dismiss for insufficiency of service of process. As of this date, the only documents that plaintiff has presented to OHSU are documents labeled "Civil Action for Damages and a Judicial Decree" and "Plaintiff's Memordanum [sic] of Law." Furnanz Aff., ¶ 3. According to the court's file, none of these

documents are the actual original Complaint or Amended Complaint that have been filed with the court in this case. Accordingly, proper service has not been effected.

II. LACK OF VIABLE FEDERAL CLAIM

According to the court's electronic file, Magistrate Judge Janice Stewart issued a Findings and Recommendation to Dismiss recommending that the claims brought under 42 USC § 1983 be dismissed, and that the case be remanded to state court for lack of subject matter jurisdiction. Although an Amended Complaint has been filed, it fails to correct the deficiencies noted in the Findings and Recommendation to Dismiss. Accordingly, for the reasons set forth in the Findings and Recommendation, defendant OHSU requests that this matter be dismissed. In particular, alleged medical negligence is not sufficient grounds for a claim under 42 USC § 1983. *See, e.g., Daniels v. Williams*, 474 US 327, 330 (1986) (negligent conduct not sufficient to state a claim under 42 USCS 1983 for a due process violation); *Jackson v. McIntosh*, 90 F 3d 330, 332 (9th Cir 1996) (A difference of medical opinion as to the need to pursue one course of treatment over another is insufficient, as a matter of law, to establish deliberative indifference under 42 USC § 1983).

Accordingly, this action should be dismissed.

DATED this 24th day of April, 2006.

HOFFMAN, HART & WAGNER, LLP

By: /s/ Kari A. Furnanz
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