

FILED '06 JUN 01 12:59 USDC-ORP

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOHN & GRACE HUMMASTI,

CIVIL NO. 06-251-ST

PLAINTIFFS,

VS.

PLAINTIFF'S REPLY TO

JOHN BUCKMASTER, MD., ET. AL.,

DEFENDANTS RESPONSE

DEFENDANTS.

REQUESTING SANCTIONS

Comes now, John & Grace Hummasti, and hereby submits this Reply to Defendant's Response to Plaintiff's Motion to Enjoin Defendants.

In Support of their Complaint and in Reply to Defendant's Response Plaintiff's aver the following:

This Court has jurisdiction pursuant to 28 USC § 1331, (Federal Question); 28 USC § 1332 (Actions in Diversity), 28 USC § 1343, (Civil Rights and Elective Franchise); 28 USC § 1350, (Alien Tort Statute); and, 28 USC § 1367, (Supplemental Jurisdiction Over State Law Claims); 18 USC § 1531 (Private Right of Action Under "Partial Birth Abortion Ban Act of 2003").

Plaintiff respectfully reminds this Honorable Court of the Memorandum of Law submitted to the Court on or about 3<sup>rd</sup> day of April, 2006; with respect to Plaintiff's claims and the nature of or subject matter of the instant action.

Relevant thereto, Defendants allege that Plaintiff's "cannot establish a likelihood of success on the merits" (Defendants' Response @1, 2).

While Defendant's attempt to make out a pleading "on the *ultimate* success on the merits of Plaintiff's case;" they have failed to adequately address the factual basis set

forth in Plaintiff's Motion.

Here Defendants have had an adequate opportunity to address Plaintiff's factual statements and controvert the documents submitted in Support of Plaintiff's Complaint and Motion; Defendants have not done so.

Since Defendants have remained silent as to the incontrovertible facts and relied upon the "reasons set forth in their Motion to Dismiss (Defendants Response, @ 2, ¶4), they have attempted to convert their Response into a supplemental pleading to support their Motion to Dismiss without specifically addressing the factual matters established by Plaintiffs.

In light of such pleading tactic, the Court should construe their Response as a Motion for Summary Judgment, and view the factual averments in a light most favorable to Plaintiffs (for arguendo sake, Plaintiffs are the non-moving party to the Motion to Dismiss). As established by the Ninth Circuit in Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd., 228 F.3d 1043, 1049 (9th Cir. 2000), all allegations of material fact are taken as true and viewed in the light most favorable to the non-movant.

#### **Failure to State a Viable Federal Claim**

In Defendants Reply in Support of Defendant ... Motion to Dismiss, Defendants claim the Court should dismiss "for failure to state a viable federal claim;" but it is unclear whether their pleading is based upon FRCP 12(b)(1), 12(b)(5) or pursuant to Federal Rule of Civil Procedure 12(b)(6). A Motion to Dismiss for failure to State a claim is reviewed under the standards annunciated in Libas Ltd. v. Carillo, 329 F.3d 1128, 1130 (9th Cir. 2003). However, "[c]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." Nat'l

Ass'n for the Advancement of Psychoanalysis v. Cal. Bd., 228 F.3d 1043, 1049 (9th Cir. 2000).

Relevant thereto, Defendants attempt to reference Estelle v. Gamble, 429 US 97, 106-07 (1976); and Wood v. Housewright, 900 F.2nd 1332, 1334 (9th Cir. 1990); et. seq., as authority for the proposition that this Court lacks jurisdiction because "Plaintiff's claim is one **SOLELY** based upon medical negligence<sup>1</sup> (Defendant Motion to Dismiss, @2, #2; Defendants Memorandum in Support, @2, ¶2)." (In Monell v. NY Dept. Social Services, 436 U.S. 658 (1978), the US Supreme Court in dictum relates that §1983's predecessor, (the Civil Rights Act of 1871) empowered Federal Courts to entertain negligence claims brought before them involving violations under the Color of State Law.

The Congressional Record clearly shows that Congress discussed negligence claims and Congress' authority to enact "appropriate legislation" under Section 5 of the Fourteenth Amendment relevant thereto. Monell, supra, at note 45!

Clearly, Plaintiff's claims are not based **SOLELY** on medical negligence.

### **Statutory Element of Deliberate Indifference**

A reasonable inference may be drawn from the facts that Buckmaster **was**, (contrary to Defendants assertions), **deliberately indifferent** to Plaintiff's *Substantive* right to informed consent when he:

- a) failed to inform Plaintiffs of the type of abortion he intended to perform;
- b) failed to inform Plaintiffs of the risks related to all kinds of abortions; and,
- c) failed to inform Plaintiffs that he was not going to perform the abortion Grace had

<sup>1</sup> Plaintiff's claim of negligence is related, not to informed consent ~~under the above~~ Oregon Revised Statutes per se, but to the requirements under 45 CFR §46.116 that informed consent be obtained after an "explanation in [a] language understandable to the patient." §46.116, *Id.* Additionally, the issue of negligence is relevant to the tissue discovered in Plaintiff's uterus following the abortion. See attached EMMS Hospital Discharge Letter - Diagnostic Curettage 23 Sept. 2004.

ORS 677.087, 097

consented to as required by ORS 677.097 and 677.087. (Substantive and Administrative "Procedural" Due Process under these statutes require a three stage *duty to inform*, and an *additional* duty to inform the patient *prior to surgery* that the physician *will not* be performing the "*agreed upon surgery.*") Wyant v. Meyers, S50490, S50493 OR. Supreme CT., Filed: Nov. 28, 2003).

Relevant thereto, ORS 677.188 describes "Fraud or misrepresentation [as,] the intentional misrepresentation or misstatement of a material fact, concealment of or failure to make known any material fact, or any other means by which misinformation or a false impression knowingly is given.;" and, ORS 677.190 (1)(B)(9) states that "Making statements that the licensee knows, ..., or should know, are false or misleading,...."

In the instant case, Defendant Buckmaster knew or should have known that his conduct was unprofessional and criminal when he failed to acquire informed consent from Plaintiffs under the circumstances set forth above.

Because Defendants have not addressed Plaintiffs claims regarding the applicable facts relevant to statutory and constitutional requirements, their silence constitutes an admission of the facts; and, all reasonable inferences that may be drawn from such facts must be taken as true.

Again, Silence constitutes a waiver where a Party has a duty to speak and fails to do so. Therefore, **ALL** of Plaintiff's statements, supporting documents and affidavits must be taken as true and thus viewed in light most favorable to the Plaintiff.

This is true because,

c) Defendants have not attempted to explain why Defendant Buckmaster preformed a Dilation and Extraction (**D& E**) abortion, (See Plaintiff's submitted

Supporting Document, Lovejoy Surgicenter Operative Record 7-2-04); without the consent of Plaintiffs leading to the injuries to Plaintiffs (Asherman's Syndrome, Blood Loss, Pain and Suffering as well as Loss of Consortium).

d) Defendants have not attempted to explain why Defendant Buckmaster stated to Plaintiffs that he was going to preform a suction (**D& C**) abortion, when in fact he **intended** (the *scienter* element of fraud or misrepresentation under ORS 677.190, et. seq.,) to perform a **D&E** abortion (See OHSU Patient Informed Consent Form, 6-30-04 and Plaintiff Grace Hummasti's Sworn Declaration, 26 December 2006 [Appended to Plaintiff's Motion in Opposition]).

#### **Criminal Element of D & E Abortions**

With respect thereto, a **misrepresentation** under ORS Chapter 677 is a *criminal offense*. ORS **677.990** Relevant thereto, the law only requires a single showing of one violation of ORS Chapter 677 for a physician to be guilty of a **crime**.

The circumstances of the instant case clearly show a single violation of ORS Chapter 677 and, under these circumstances, Defendant Buckmaster's material misrepresentation of the single fact, viz, that he **said** he was going to perform a D& C abortion when he really *intended* to preform a D & E abortion requires that Court order a Jury Trial to determine the *mens rea* of Defendant Buckmaster.

#### **Showing of Public Interest**

Relevant thereto, Plaintiffs made out a sufficient showing of a public interest warranting enjoining Defendants from soliciting informed consent from non-English speaking or limited English speaking patients by submitting as an attachment to their Memorandum of Law, such violations of informed consent as detailed their Motion to

Enjoin Defendants; the letter of 4 October 2002 to Dr. Peter Kohler, President of OHSU from Kristina C. Borrer, Ph.D., Division of Human Subject Protections (informed consent procedures at OHSU have been found by the US Department of Health and Human Services' Secretary, **Office for Human Research Protection** to be in **serious non-compliance** with 45 CFR 46.116; and in fact Defendants were acquiring informed consent for medical procedures that were not performed on patients when other procedures actually were that patients had not consented to.)<sup>2</sup>.

As to making out a showing of "ultimate success on the merits of their case," such that they would prevail at a jury trial; Plaintiffs aver that the above showing of *scienter* related to Buckmaster's misrepresentation or fraud is a sufficient showing of *probable* success on the merits and therefore, Dismissal is not warranted or justified.

This is especially true with respect to the criminal elements of a cause of action authorized by Congress pursuant to 18 USC §1531 since the ground for finding said statute, or a portion thereof, allegedly "unconstitutional" is the exact reason why Plaintiffs bring this action: "no statute, state or federal adequately protects the health and safety of a mother undergoing an abortion procedure" and Congress sought through this statute to penalize the criminal act of performing the type of **D&E** abortion Defendant Buckmaster criminally committed under the color of Oregon law; this Court should enforce the statute because the United States Supreme Court has not found the same to be unconstitutional.

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<sup>2</sup> Additionally, the issue of Federal Jurisdiction is relevant to the tissue discovered in Plaintiff's uterus following the abortion since OHSU and the State of Israel have Treaty Obligations and OHSU is the Recipient of grants related to genetic research under the Binational Science Foundation Grant Program. This is because Federal Jurisdiction is appropriate under Federal Foreign Policy Concerns, US Foreign Interests and the Federal Common Law involving the Courts protective power to make US law in relation to US Foreign Policy Interests. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); and see Jewish Virtual Library, page 4, <<http://www.jewishvirtuallibrary.org/jsource/states/OR.html>>.

### **Issue of Standing**

With respect to Defendants claim that Plaintiff John Hummasti cannot represent Grace Hummasti since the majority of the allegations Plaintiff claims are related to injuries Grace Hummasti sustained (Defendants Response @3 **Issue of Standing**); Plaintiffs aver that Plaintiff John Hummasti has a hand-drafted *Power of Attorney* as to authority to prosecute a civil action against Defendants by formal sworn declaration under the penalty of perjury from Grace Hummasti done in Nazareth, Israel on 6 January 2006 that Plaintiff is willing to submit as an offer of proof or as proof by Ex Parte submission under seal with the Court<sup>3</sup>.

As to the signature on the Supporting Document appended to the Motion in Opposition bearing Grace Hummasti's signature; as is clear from the OHSU Informed Consent document of 6-30-04 appended to the Plaintiffs Statement of Facts and Showing of Federal Jurisdiction filed with the Court on or about May 3, 2006. That simply is the way she signs her signature. She is in Israel as are other witnesses and therefore the Oregon State Court is a *Forum Non Conveniens*.

As to the claim by Defendants (Reply @3, n.2) that Plaintiffs are divorced; until Plaintiff receives a formal divorce decree from the State of Israel's "*Misrad Hapnim*" (Ministry of Interior), Plaintiffs are only divorced under Jewish (Rabbinical) Law, not government (secular) law, by virtue of a *get* sent to Grace Hummasti in March 2005 and by virtue of an additional sworn declaration as to a conditional *get* given to Grace Hummasti prior to John Hummasti's leaving Israel for Jordan on or about 3 January 2006.

### **Loss of Consortium**

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<sup>3</sup> Additionally, Plaintiff can submit Ex Parte letters falling under Attorney-Client confidentiality Privilege of Grace Hummasti's consultations with Jonathan Clarke, Attorney At Law; and Hala Gores, Attorney at Law; both of Portland, Oregon.

Because Plaintiff may make out a claim for loss of consortium under Oregon and Israeli law pursuant to the Court's Federal Supplemental Jurisdiction under 28 USC 28 USC § 1367, et. seq., Plaintiff need not address the Defendants claim that Plaintiff John Hummasti lacks standing.

For brevity of pleading and judicial economy in the efficient administration of justice, Plaintiffs incorporates by reference herein Plaintiff's initial pleading and averments relevant to Loss of Consortium set forth in their first Memorandum of Law. (See also Plaintiffs Memorandum of Law, @pp.8-9, filed with the Court on or about 12 May 2006; incorporated herein by reference.)

Oregon Courts have long recognized Loss of Consortium as a viable claim for which damages can be awarded. Oregon Law recognizes a Plaintiff has a right to redress of grievances for "loss of consortium" or "alienation of affection" caused by a third party. Elling v. Blake-McFall Co., 85 Or. 91, 94, 166 P. 57 (1917); Naber v. Thompson, 274 Or. 309, 546 P. 2d 467 (1976); Sheard v. Oregon Electric Ry. Co., 137 Or. 341, 2 P.2d 916 (1931); Bird v. Ellingsworth, 65 P.2d 674, 156 Or. 103 (1937) (Citing: Keen v. Keen, 49 Or. 362 ( ), and, Roberts v. Cohen, 104 Or. 177, 206 P.2d 93 ( ).)

Additionally, as shown by the inference that may be drawn from the attached EMMS Discharge Letter, 9-23-04, Plaintiff has standing to pursue the claim of Loss of Consortium because Jewish Law prohibits conjugal relations where there is an abnormal menstrual flow<sup>4</sup>.

### **Sanctions Warranted Against Defendants Counsel**

For the reason set forth herein, Sanctions are warranted against Defendants

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<sup>4</sup> See: <<http://en.wikipedia.org/wiki/Niddah>>



Counsel under FRCP Rule 11 (c).

Plaintiff should not have to reiterate the claims made relevant thereto in this Reply and sanctions are warranted against Defendants Counsel for making a frivolous pleading of "lack of standing." Clearly, a First Amendment right attaches to Plaintiff's Claim of Loss of Consortium since under Jewish law conjugal relations are governed by the dictates of Torah and Plaintiffs claims of injury due to loss of consortium arose in Israel with respect to said conjugal relations.

Moreover, Plaintiff avers that John Hummasti has standing as an heir or personal representative, individually, and jointly with Grace Hummasti of Ya'acov Hummasti's Estate under 28 USC 1332 (b)(2).

Because the Plaintiff's claim wrongful death, and Ya'acov Hummasti, the decedent never acquired residency or domicile in the State of Oregon, and Grace *and* John Hummasti had purchased non-refundable one way airline tickets back to Israel, a federal question is presented as to the issues, in and of themselves, of Diversity Jurisdiction and the Alien Tort Statute.

The issue of wrongful death of decedent as to citizenship of John Hummasti as his personal representative turns on a question of fact which is ultimately for the jury to decide and therefore, without Discovery or examination of witnesses, Defendants Motion for Dismissal is untimely and Sanctions are warranted due to the frivolous nature of Defendants pleadings.

Wherefore, for the foregoing reasons Plaintiffs respectfully request that this Honorable Court Enjoin Defendants from regulating ORS 677.097, et. seq. relevant to soliciting informed consent, from advising or performing any activities where abortions

**EMMS Hospital Nazareth**  
**Gynecology Department**  
**Department manager: Dr. M. Hakim**

Grace Farah Bassem 580227-7 Jan. 4, 1964 F  
Address:  
407/18 Box 2363 Nazareth 04-6562965  
FN: 138769 019458/2004 AD-DS Sep. 23, 2004 07:57  
3 Maccabi

To: Caring physician

**Admission / Discharge Letter – Diagnostic Curettage**

Primary diagnosis: Menorrhagia

Additional diagnoses: S/P DnC resolved

Surgical procedure: DnC

A 40 year old woman. Marital Status: Married. No. of children: 0. Obstetric: G1P0.

Admitted for diagnostic curettage due to: vaginal hemorrhaging for about 3 months after curettage due to rejected abortion.

Last menstruation: September 3, 2004 Irregular Menopause \_\_\_ years

Current illness: Three months ago underwent curettage due to rejected abortion. Since then, strongly and intermittently, has had [illegible] suspicion of a finding in part of the uterus, a remains and/or endometrial polyp.

History: Usually healthy. Underwent partial thyroidectomy two years ago due to [illegible].

Medications: does not take medications.

Sensitivity: Unknown. Habits:

**Physical examination:** General condition: Good. Blood pressure: 116/75. Heart rate: 56

Temperature:

Head and neck: Surgical scar after partial thyroidectomy. Breasts: No pathological findings

Heart: Regular heart sounds, without murmurs: Lungs: Alveolar respiration – clear lungs.

Abdomen: Soft, not tender Limbs: No pathological findings

Other findings:

PV: Vulva: Not possible to [illegible] – vaginismus Vagina: Cervix:

Uterus: [Illegible], and a lipoadenomas finding - irregular in uterine cavity, 12 mm diameter, [illegible]

Douglas, adnexa, perimetrium:

Other findings: Hemoglobin: Name of physician:

[stamp: Dr. Ibn Tabia Fazi, specialist in obstetrics and gynecology,

license no. 22034 specialist license no. 19804]

Course:

Time: Under general anesthesia Examination

Curettage of cervix: yes/no Material for histology harvested: yes/no

Length of cavity: 9 cm. Expansion from Hegar dilator 5 to Hegar dilator 11

Upon curettage of uterus: [illegible] matter removed [illegible] that can be consistent with remains.

Histology: Yes

Course after procedure: No complications

Recommendations at discharge:

1. Rest for 3 days.
2. Checkup by caring gynecologist after receiving histological answer – 6 [illegible]
- 3.
4. Two weeks at healthcare clinic – checkup by caring gynecologist [illegible]

Date: September 23, 2004

Regards,

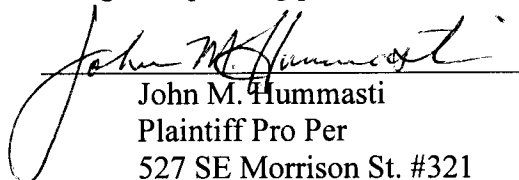
[stamp: Yasin Christina – Gynecologist – License no. [illegible]]

[stamp: EMMS Nazareth – the Nazareth Hospital]

WE CERTIFY THAT THE ABOVE  
IS AN ACCURATE TRANSLATION  
OF THE ORIGINAL  
TRANSLATORS' POOL LTD.

are concerned with regards to non-English or Limited English Speaking patients.

Dated this 1<sup>st</sup> day of June, 2006.

  
John M. Hummasti  
Plaintiff Pro Per  
527 SE Morrison St. #321  
Portland, OR. 97214-2364

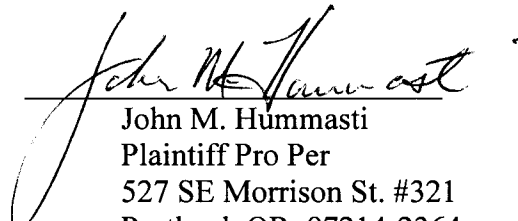
### CERTIFICATE OF SERVICE

I, John Mauritz Hummasti, hereby declare that I have served by Regular US Mail, a true copy of the attached Plaintiff's Memorandum of Law w/Supporting Documents on the Defendants by placing the Attached in an Addressed, Sealed Envelope with prepaid postage affixed thereon addressed to:

Kari A Furnanz -Attorney At Law  
HOFFMAN, HART AND WAGNER  
ATTORNEYS AT LAW  
Twentieth Floor  
1000 SW Broadway  
Portland, OR. 97205

and depositing the same in a US Postal Collection Box on this date.

Dated this 1<sup>st</sup> day of June 2006.

  
John M. Hummasti  
Plaintiff Pro Per  
527 SE Morrison St. #321  
Portland, OR. 97214-2364