

**CAUSE NO. D-1-GN-08-003432**

BRYN DUFFY, MD and	§	IN THE DISTRICT COURT
SUSANNE MATTSSON DUFFY	§	
	§	
Plaintiffs,	§	
	§	
v.	§	353 <sup>RD</sup> JUDICIAL DISTRICT OF
	§	
TEXAS MEDICAL LIABILITY TRUST	§	
	§	
Defendant.	§	TRAVIS COUNTY, TEXAS

**PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION**

TO THE HONORABLE COURT:

NOW COME Bryn Duffy, M.D., and Susanne Duffy [Plaintiffs’], complaining of Texas Medical Liability Trust [“TMLT” or “Defendant”], and for cause of action show the following:

**I.**

**DISCOVERY CONTROL PLAN LEVEL**

Discovery is intended to be conducted under Level 3 of *Texas Rule of Civil Procedure* 190. Plaintiffs request that the Court enter an appropriate scheduling order governing this matter.

**II.**

**JURISDICTION AND VENUE**

This case involves an amount in controversy that is within the jurisdictional limits of this Court. The Defendant has its principal office in Travis County, Texas, and one of more acts that form the basis of liability herein occurred in Travis County, Texas. Therefore, this Court has jurisdiction and venue is proper in Travis County, Texas.

### **III.**

#### **PARTIES**

Plaintiff Bryn Duffy is a physician. All Plaintiffs reside currently in Rochester, New York.

Defendant Texas Medical Liability Trust is an independent insurer in Texas providing medical liability insurance for more than 14,000 Texas physicians. Said Defendant has been served with process, has filed an answer herein, and is before the Court for all matters.

### **IV.**

#### **SUMMARY OF THIS LAWSUIT- CIVIL CONSPIRACY TO COMMIT TORTIOUS CONDUCT**

Bryn Duffy MD and his wife Suzanne bring this suit against TMLT for civil conspiracy to breach fiduciary duty, civil conspiracy to commit unlawful and wrongful conduct, and civil conspiracy based upon the specific intent of TMLT to cause harm to Plaintiffs. While Plaintiffs are not bringing civil causes of action expressly for *per se* violations of the Texas Penal Code, it is clear that TMLT crafted and controlled this conspiracy to commit misconduct that is illegal under the Texas Penal Code, the United States Code, and violates public policy for the purpose of unfairly and illegally depriving him of all or a substantial portion of his property rights; to wit, valid liability claims he possessed and pursued against TMLT-insured physicians. Specifically, suit was brought against two TMLT physicians. In response, TMLT and others secretly approached a key physician-witness in that case [who was also a TMLT insured] and ultimately obtained from him a signed letter that stated the exact opposite of that witness's original dictated medical report that had been unchanged in Duffy's medical chart for four years. The witness was then designated as a testifying witness on behalf of the Defendants. This tortious misconduct was for the purpose of allowing TMLT to claim that Duffy suffered no damages from the

substandard medical care and would either defeat Duffy's valid liability claims altogether - or at least force him to accept far less in compensation than his claims were worth.

## V.

### BACKGROUND

#### A. Hospital Admission Number 1, October 11, 2003:

Bryn Duffy MD was admitted to the Intensive Care Unit at Covenant Medical Center on October 11, 2003 and diagnosed with severe pneumonia. When Bryn was admitted on the 11<sup>th</sup>, his doctors were looking to see if he already had blood clots in his legs or in his lungs. They determined that he did not have them in either place.<sup>1</sup> For example, Bryn had no signs, symptoms, or findings of such.<sup>2</sup> The doctor's ordered an imaging study known as a spiral CT scan<sup>3</sup> to look specifically for blood clots in Bryn's lungs.<sup>4</sup> The CT scan was read by a radiologist named David Muff [a TMLT-insured physician] and he wrote "no evidence of pulmonary embolism".<sup>5</sup>

#### CT SCAN OF THE CHEST WITH CONTRAST:

Clinical history is hemoptysis.

Images were obtained during intravenous injection of 118 cc of Optiray 350. Great vessels are well opacified. Main pulmonary artery appears well opacified. Right and left pulmonary arterial branches demonstrate no evidence of intraluminal filling defect to suggest emboli. Images through

\* \* \*

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1 Blood clots in the legs are called "Deep Vein Thrombosis" or "DVT" for short. Blood clots in the lungs are known as "Pulmonary Embolus" in the singular or "Pulmonary Emboli" in the plural - "PE" for short.

2 Medical Records dated October 11, 2003, specifically Dr. Kadiyala's dictated H & P note, Kadiyala's handwritten progress notes, Dr. Duriex's consult note; Deposition Kadiyala at page 26

3 A spiral CT scan is considered the gold standard imaging study to detect blood clots in the lungs

5 Id.

NODES ARE NOTED. FINDINGS WERE CALLED TO DR. NARRA IN THE EMERGENCY ROOM AT THE COMPLETION OF THE EXAMINATION. NO EVIDENCE OF PULMONARY EMBOLI.

RAD/95042  
D: 10/11/2003 04:50:38  
T: 10/11/2003 09:07:55

David S. Muff, M.D.

Through these efforts, the doctors ruled out blood clots in Bryn's legs and lungs.<sup>6</sup>

Bryn remained hospitalized without any blood clot prophylaxis until October 17, 2003 when he was discharged to his home.

**B. Hospital Admission Number 2, October 19, 2003:**

After Bryn arrived home following discharge he began to suffer symptoms of blood clots in his lungs. Bryn returned to the hospital on October 19, 2003, and had documented signs, symptoms, and findings of blood clots in his legs and lungs at that time, including pain and swelling in his legs, weakness and shortness of breath. He underwent a second CT scan that showed he had blood clots in both his legs and his lungs. This obviously developed between the time he was admitted on the 11<sup>th</sup> and the second admission on the 19<sup>th</sup>.

**C. Lawsuit is Filed:**

Duffy filed suit against Drs. Kadiyala and Johnson [TMLT-insured physicians] among others for failing to use standard measures to prevent development of blood clots during the first hospital admission and for the permanent damage that resulted. Kadiyala and Johnson were TMLT insured and TMLT has admitted that it controlled the defense of the case. TMLT hired attorney Jim Hund to defend both Kadiyala and Johnson, later Hund withdrew from representing Kadiyala and proceeded with the defense of Dr. Johnson.

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<sup>6</sup> Deposition of Dr. Kadiyala at pages 26-27

**D. Mischief Ensues:**

In 2007, TMLT attorney Hund approached Dr. Muff both through an intermediary contact and then later met directly with Muff. TMLT hired attorney Ben Davidson to represent Muff even though Muff was not a defendant in the case and no claim had ever been threatened or asserted against him. At that time, Muff was Bryn Duffy's fiduciary and that relationship had never been changed, waived, or withdrawn. TMLT did not have permission from Duffy to breach the fiduciary relationship between Duffy and Muff. All dealings between Muff, Davidson, and TMLT, and much of the interaction between Hund and Muff, has been kept from Duffy by claims of attorney-client communications and attorney work-product privilege.

As a result of a number of meetings or other interactions between TMLT agents or representatives over several weeks or months Dr. Muff reluctantly signed a letter for TMLT that stated Duffy in fact had pulmonary embolus evident on his CT scan of October 11, 2003:

September 9, 2007

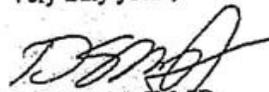
Mr. Jim Hund  
HUND & HARRIGER, L.L.P.  
P. O. Box 54390  
Lubbock, TX 79453

Re: Bryn Duffy

Dear Mr. Hund:

At your request I have compared Bryn Duffy's CT scan of October 20, 2003 with his CT scan of October 11, 2003. I was the radiologist who initially reviewed the October 11 scan and found extensive pulmonary infiltrates but no sign of pulmonary emboli. Comparing the two scans I have discovered that the pulmonary emboli appearing on the October 20 scan were also present on the October 11 scan. They are in the same locations. I was unable to identify them when interpreting only the October 11 scan because they were obscured by the infiltrates.

Very truly yours,

  
David S. Muff, M.D.

Muff would later testify that he signed the letter reluctantly, that TMLT/Hund told him if he signed it then it would reduce or eliminate the chance that he would be deposed, and that if he signed it would help his fellow physicians escape liability in the lawsuit. Moreover, Muff would testify that while he interpreted the CT scan originally for medical purposes only, he signed the letter at TMLT/Hund's request for litigation purposes only. He stated he would not have signed the letter but for TMLT/Hund's involvement and he added that he would interpret the CT scan as he originally did ["no evidence of pulmonary emboli"] if he were interpret the scan today.

TMLT used the Muff report to advance a theory that Duffy had pulmonary emboli when he arrived at the hospital and therefore, despite various acts or omissions of negligence, no harm came to Duffy as result of the negligence. TMLT used the Muff letter to pressure Duffy into accepting far less than the liability claim was worth.

## VI.

By virtue of the conduct described above, TMLT's conduct is unlawful and wrongful, proximately causing injury to Plaintiffs. As evidence of this unlawful nature of TMLT's conduct, one notes that both the Texas Penal Code and the United States Code prohibit such conduct. TMLT is liable to the Duffys for conspiracy to breach fiduciary duty that runs between David Muff, MD and Bryn Duffy, MD, conspiring to commit unlawful conduct that amounts to witness tampering and commercial bribery, and conspiracy based upon TMLT's specific intent to cause this harm to Plaintiffs.

When TMLT agents or representatives approached Dr. Muff secretly and without Duffy's permission and influenced him in such a way that he signed a letter when he would otherwise have not done so changing his medical report, it offered them a benefit to doing so. When this happened, a violation of Texas Penal Code §§ 32.43 and 36.05 occurred. These are felony

statutes. The misconduct also violates the sanctity of the justice system.

And, this is not the first time TMLT has done this. For example, in another case undersigned counsel pursued TMLT contacted Plaintiff's expert witness Gary Donovan, MD who was at the time TMLT insured. TMLT told Donovan that "we don't insure doctors who testify against other doctors," and forced Donovan to withdraw from the case as an expert witness. Here is the letter Donovan sent undersigned counsel as a result:

**Gary S. Donovan M.D.**

431 Omega Ste. 102  
Arlington, Texas 76014  
817-467-7474  
Fax 817-468-8643

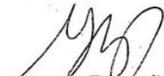
March 12, 2002 .

Mr. James Girards  
C/O The Girards Law Firm  
La Sierra Building  
5445 La Sierra, Suite 250, LB3  
Dallas, Texas 75231

Dear Jim,

I have discussed your request for times for deposition with my malpractice carrier. Unfortunately, I agreed in our last renewal to not do the expert work on the plaintiff side as a prerequisite to being insured. Although this case does not involve them, they are towing the line on this. Therefore, I will be unable to continue as an expert on your case, and regret any inconvenience that this may have caused you. I understand the timeframe that you are working on in short, but I did feel like I should consult the legal department at TMLT before making a decision which could adversely affect my malpractice policy.

Sincerely,



Gary S. Donovan, M.D.

TMLT is well known in the legal community for this type of misconduct and it is time that it stop. It seems that only an award of exemplary or punitive damages will do that and the Duffy family seeks exemplary or punitive damages in an amount the jury in this case deems sufficient to assure TMLT will from now on honor the sanctity of our justice system and stop conspiring to commit their unlawful and wrongful conduct, tampering with witnesses, or

otherwise coercing them to change or withdraw their testimony meritorious claims.

## VII.

### CAUSES OF ACTION

As a direct and proximate cause of the above wrongful acts on the part of Defendant TMLT detailed more fully above, Plaintiffs bring the numerous causes of action in the instant litigation. TMLT is not being sued for the medical negligence of its insureds in the underlying medical negligence lawsuit; but, is instead being sued for its own separate, intentional and unlawful conduct, specifically targeted at Plaintiffs:

Plaintiffs bring a cause of action against TMLT for conspiracy to breach the fiduciary duty that runs between Bryn Duffy MD and his physician, David Muff, MD. Bryn Duffy and his physician Dr. Muff had this well-recognized fiduciary relationship, yet TMLT, acting directly through its agents, caused Dr. Muff to breach his fiduciary duty to Bryn Duffy proximately causing damages to Plaintiffs. Dr. Muff's breach directly and proximately resulted in injury to Plaintiffs, by damaging the value of their lawsuit. Likewise, the breach directly and proximately resulted in benefit to both Dr. Muff, who was told that signing the September 9, 2007 letter would make it less likely he would be required to give a deposition, and TMLT, who now had caused the treating physician to support their allegations in the lawsuit – something that was intended to and in fact did sharply diminish the verdict potential and settlement value of the case.

Plaintiffs bring a cause of action against TMLT for conspiracy to commit unlawful and wrongful acts specifically targeted against Plaintiffs in the intention of causing Plaintiffs harm. In this case TMLT unlawful and wrongful acts amount to witness tampering and commercial bribery. Witness tampering occurs when someone intending to influence a witness, offers, confers, or agrees to confer any benefit on a witness or prospective witness in an official

proceeding and/or coerces a witness or prospective witness in an official proceeding to testify falsely, or when a witness or prospective witness in an official proceeding knowingly solicits, accepts, or agrees to accept any benefit on the representation or understanding that he will testify falsely. Plaintiffs are not alleging civil causes of action for *per se* violations of Texas Penal Code. However, these violations of the Texas Penal Code provision are evidence of the unlawful and wrongful nature of Defendants actions against Plaintiffs.

Dr. Muff has testified that he was promised by TMLT and/or Jim Hund that he would not be sued for doing this because of the expiration of the statute of limitations and that if he signed the 2007 report changing his opinion it would decrease the chances that he would have to give a deposition in the case and this would help Hund/TMLT insured doctor in their legal case against Bryn.

Plaintiffs further bring a cause of action against TMLT for conspiracy based upon Defendant's specific intent to cause harm to Plaintiffs and its taking steps to cause that harm. Plaintiffs allege that TMLT's specific intent to commit the above wrongful and tortious conduct, thereby proximately causing Plaintiffs damages, as noted hereinbelow.

## **VII.**

### **DAMAGES**

As a result of the offensive conduct committed by TMLT, Plaintiffs are entitled to and therefore seek damages within the jurisdictional limits of the Court that represent the difference between the settlement value of the case before the illegal conduct versus the settlement value of the case following the illegal conduct.

Plaintiffs also seek punitive or exemplary damages in an amount adequate to assure that TMLT will never commit similar misconduct again. In that regard, the reprehensibility of the

conduct is at issue – including whether such conduct is a state-law felony, the maximum potential harm that could result from such conduct is at issue, TMLT’s long-standing history of illegal witness tampering is at issue, and application of damages caps is at issue.

FOR THESE REASONS, Plaintiffs Bryn and Susanne Duffy respectfully pray that Defendant be cited to appear and answer herein, and that upon a final hearing of this cause, judgment be entered for Plaintiffs against Defendant for damages in an amount within the jurisdictional limits of this Court; exemplary damages, excluding interest, and as allowed by TEX. CIV. PRAC. & REM. CODE § 41.008, together with pre-judgment interest (from the date of injury through the date of judgment) at the maximum rate allowed by law; post-judgment interest at the legal rate, costs of court; and such other relief to which Plaintiffs are justly entitled.

Respectfully Submitted,

**THE GIRARDS LAW FIRM**



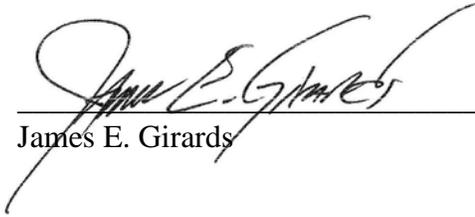
James E. Girards  
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10,000 N. Central Expressway  
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Dallas, Texas 75231  
214/346-9529 telephone  
214/346-9532 facsimile

**ATTORNEY FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

A true and complete copy of the foregoing document was faxed, mailed or served to all counsel of record on November 30, 2009.



James E. Girards