

**District Court of Lancaster County, Nebraska**

**Mr. and Mrs. Parent,**

**Plaintiffs,**

**v.**

**Doctor, Hospital, Physician Network,**

**Defendants.**

**Case No.** \_\_\_\_\_

**Judge** \_\_\_\_\_

**Complaint (Law) and Jury Demand**

Plaintiffs allege:

**Case Overview**

1. Mother Parent (“Mrs. Parent”), is a married woman of childbearing age who informed her family physician she and her husband wanted to begin a family. Mrs. Parent attended her annual examination, and told her doctor she experienced a recent history of interruption in her menstrual cycle (“amenorrhea”). Her doctor, Defendant, Doctor (“Defendant Doctor”), failed to take any steps to diagnose, or rule out, pregnancy as the medical explanation for Mrs. Parent’s condition. Instead, he prescribed estrogen therapy, and dismissed his patient without appropriate examination, testing, or instructions.

2. When Mrs. Parent was examined by Defendant Doctor he failed to attempt any diagnostic measures to identify or rule out pregnancy. At such time, Mrs. Parent was approximately twenty (20) weeks pregnant, but did not know it.

3. Mrs. Parent, and her husband, Plaintiff Parent (“Mr. Parent”), continued to be unaware of her pregnancy until cramping, and vaginal discharge suddenly occurred approximately 4 weeks after consultation with Defendant Doctor. Mrs. Parent’s circumstances became acute. She and her husband rushed to a Lincoln-area hospital where Mrs. Parent was immediately diagnosed as pregnant, fully dilated, and about to deliver a premature child. Mr. and Mrs. Parent were traumatized by this diagnosis; their fears were overwhelming.

4. Within 2 hours, the Parent's premature infant Baby Boy was delivered by Caesarean section. At birth, Baby Boy weighed 1 pound 10 ounces (737 grams), and measured 13 inches in length. Baby Boy was immediately in critical condition. Baby Boy was intubated in his 3<sup>rd</sup> minute of life. He was then rushed immediately to a neonatal intensive care unit. There, Baby Boy had no respiratory effort and a dangerously low heart rate.

5. The Parents were dramatically traumatized by the discovery of pregnancy, the premature delivery, and the medical measures initiated to save their Baby Boy's life, all done in their presence. Mr. and Mrs. Parent embarked upon a month-after-month long vigil at their infant Baby Boy's bedside, during which they experienced "Code Blue" upon "Code Blue" events and other life-threatening emergencies of their Baby Boy.

6. Defendants committed professional malpractice. The standard of care applicable to Defendant Doctor required – *as a first diagnostic step* – he consider and rule out pregnancy as the cause of Mrs. Parent's symptoms. His failure to do so proximately caused the emotional distress, premature birth experience, bystander injuries and dramatic medical care costs and expenses incurred by the Parents from the time of Baby Boy's birth and thereafter for at least as long as Baby Boy was a neonatal ICU patient. The Parent's sustained general and special damages. This action for medical malpractice seeks recovery for those general and special damages sustained by the Parents. Recovery is not yet sought for damages sustained by their Baby Boy because the nature, extent, and permanency of his injuries may not be known for years.

#### **Jurisdiction, Venue, Parties & Constitutional Issues**

7. The District Court has subject matter jurisdiction pursuant to *Neb Rev Stat* § 24-302 and the Nebraska Hospital Medical Liability Act *Neb Rev Stat* §§ 44-201 *et. seq* ("Act"), Plaintiffs attack the Act's constitutionality; they do not invoke its jurisdictional criteria on terms that estop their constitutional challenges.

8. Venue is proper in Lancaster County, Nebraska pursuant to *Neb Rev Stat* § 25-403.01 because Defendants reside here, as do Plaintiffs and the claim arose here.

9. The Director of the Nebraska Department of Insurance has been notified of this claim and was furnished a copy of this Complaint before suit was filed. The Nebraska Attorney General has been notified of this claim and of the Parent's (i) constitutional challenge to the Act as unconstitutional in general *Neb Rev Stat* §§ 44-2801 *et seq.*, as well as the unconstitutional damages limit within Section 44-2825, and (ii) their challenge to Nebraska statutes providing for health care provider liens, *Neb Rev Stat* §§ 52-401 and 52-402. Plaintiffs assert the Nebraska Lien of Physician, Nurse or Hospital Act, *Neb Rev Stat* § 52-401 ("Lien Act"), is unconstitutional and void because it: (a) unreasonably and arbitrarily classifies; (b) impairs the obligation or right of contract; (c) denies due process of law by failing to prioritize, or allocate, on any grounds other than the one specified in the statute, (d) deprives parties with competing or conflicting interests of a hearing, and is, therefore, constitutionally impermissible; and (e) rewards a tortfeasor for tortious conduct and is thereby repugnant to the Nebraska Constitution.

10. The Plaintiffs, Parents, are husband and wife. They reside in Lancaster County, Nebraska. The Defendants are (1) Doctor, Nebraska medical license # \_\_\_\_\_; (2) Physician Network, a corporation, engaged in a joint venture with its owner, and (3) Hospital, a corporation.

11. Doctor is a physician. Each joint venturer, and Doctor, have joint and separate liability. He is, and was at all relevant times, employed by Physician Network and practices in Lancaster County, Nebraska. Physician Network is a trade name and part of the Hospital. Network is an entity owned, controlled and operated by Hospital. The registered agent for Network and Hospital is \_\_\_\_\_ is sued as a Defendant; its registered agent is \_\_\_\_\_. All Defendants other than Doctor are referred to collectively as "\_\_\_\_\_"

## **General Allegations**

12. Mrs. Parent, a healthy, married, well-educated woman, and her husband, desired to allow nature to take its course and determine when, or if, she would become pregnant. As a patient of Defendant Doctor and Physician Network, Mrs. Parent discontinued oral contraception (birth control hormone therapy) with Defendant Doctor's knowledge and assistance. This occurred prior to December 2004.

13. Mrs. Parent saw Defendant Doctor professionally on June 14, 2004 for her annual Papanicolaou screening (PAP test) and pelvic examinations. Mrs. Parent expressed concern she (a) had not experienced a menstrual cycle since after December 2003, (b) had a negative pregnancy test in February, and (c) stopped birth control pills in October, but had periods in November and December. She reported a negative family history of amenorrhea, and said she suffered from no cramping, morning sickness, mood changes or other prodromal signs of early pregnancy.

14. Defendant Doctor conducted an examination of Mrs. Parent's head, ears, eyes, nose, and throat, and her body generally. He examined her cervix and noted it "appears normal." He identified "no abnormal masses palpable, nontender" in connection with his examination of Mrs. Parent. Defendant Doctor did not, however, conduct any tests or examinations to ascertain whether Mrs. Parent was pregnant.

15. Defendant Doctor's examination and care of Mrs. Parent on June 14, 2004, was negligent. He violated the standards of professional care to which he was held because:

- a. Contrary to the standards of care, pregnancy should have been first priority on his differential diagnostic list until ruled out. It was not, and testing to rule out pregnancy was not conducted by Defendant Doctor.
- b. Mrs. Parent was 20 weeks pregnant when she saw Defendant Doctor in June 2004, although she did not know it. At this stage, her fetus and her uterus comprised a palpable pelvic-abdominal mass reaching near the umbilicus with a

significant fundal height, but it was not observed upon examination by Defendant Doctor.

- c. Estrogen therapy was reinitiated by Defendant Doctor in June 2004, though it was contraindicated and should not have been used, when pregnancy is a suspected diagnosis, or until pregnancy has been ruled out in a patient like Mrs. Parent.
- d. Hormonal testing was considered by Defendant Doctor, but it was neither specified nor implemented, and its circumstances, terms or conditions were not identified.
- e. No urine test, blood test, or pregnancy test of any kind, or other differential diagnostic technique was used to rule out pregnancy as a cause of Mrs. Parent's amenorrhea.

16. If the standard of professional care were observed by Defendant Doctor, and if he had provided services that met the standard, pregnancy would have been diagnosed, necessary prenatal health care and follow-up measures would have been initiated. The patient, Mrs. Parent would have been informed, alerted and educated, and premature delivery would have been prevented. The resulting traumatic events would have been avoided.

17. Defendant Doctor was negligent when he committed the acts and omissions referred to above. As a direct, proximate result, Mrs. Parent did not know she was pregnant and did not know of the tell-tale signs which would alert her to seek immediate care. Had Defendant Doctor made the appropriate diagnosis and properly advised Mrs. Parent, her premature labor and delivery could have been suppressed with drug therapy and bedrest. Instead, she became ill, entered the second stage of labor, and her cervix dilated to such an extent it was impossible to avoid delivery.

18. On July 11, 2004, Mrs. Parent experienced such acute low abdominal cramping that she and her husband found it necessary to go urgently to the Hospital, Lincoln, Nebraska. At the hospital, Mrs. Parent was immediately diagnosed as pregnant, with a single live intra-uterine pregnancy with the fetus in a breech position at

the time. By ultrasound, her fetus' gestational age was ascertained at 25 weeks and 6 days, meaning her normal full-term pregnancy delivery date should have been October 18, 2004.

19. As a result of Mrs. Parent's status, she was assessed and taken to an appropriate hospital suite for emergency caesarean section. C-section delivery was recommended and performed due to the extreme prematurity and breech presentation (buttocks-first rather than head-first position of the baby in the birth canal).

20. Defendant Doctor's acts of professional negligence are attributed to Hospital under the doctrines of *respondeat superior* and joint venture. As a proximate result of their acts and omissions, Mrs. Parent suffered pain, premature delivery, caesarean section delivery, emotional distress, and mental anguish during and after delivery, continuing until the time of this filing. Her husband, Parent, and she both experienced the stress and trauma of negligently induced emotional pain, anxiety, tension, depression, and fear for the prospective loss of their fetus, and after his caesarean delivery, the recurrent fear, risk and threat he was too premature to survive, too weak to live, and wholly incapable of life outside a neonatal intensive care unit. The Parents both suffered bystander injuries on each occasion of trauma, tension, emergent cardiopulmonary resuscitation (CPR) in multiple "Code Blue" situations, and countless emergency neonatal ICU care administered to, and suffered by, Baby Boy. The Parents both suffered ongoing special damages for medical care for Baby Boy, and for Mrs. Parent.

21. Mrs. Parent was hospitalized four days. When she was discharged, her husband and she were unable to take their baby home with them. Instead, they were forced to endure long, difficult visitation with Baby Boy for more than four (4) months. During this time, they suffered the recurrent travail of emergency-upon-emergency. Each such episode was life-threatening to Baby Boy, and an emotional upheaval for each parent. Most or all these episodes occurred in the Parent's immediate presence, or in their absence under circumstances requiring they be notified and rushed to their baby's side.

22. The Parents were forced to suffer:
- a. Twenty-eight (28) or more episodes requiring emergency CPR procedures or “Code Blue” (or equivalent procedures) to treat Baby Boy.
  - b. Twenty-eight (28) or more episodes requiring Baby Boy be “bagged” (manually ventilated by hand) with emergency external oxygen administered in their presence.
  - c. High Frequency Oscillatory Ventilation (“HFOV”) on an emergency basis to supplement ventilatory support and supplemental oxygenation administered to Baby Boy in their presence.
  - d. Protective isolation and isolation therapies from moments after birth on July 11, 2004 until his discharge October 12, 2004; these were administered to Baby Boy in their presence. These artificial measures effectively prevented almost all forms of direct physical contact with Baby Boy – contacts essential to normal emotional bonding between parents and infant children.
  - e. Blood transfusions, continuous positive airway pressure (CPAP), and respiratory therapies, fluid volume intake issues, inability to eat normally, efforts to aid Baby Boy’s insufficient self-thermoregulations, and risk of delayed or limited growth and development.
  - f. Catheterization of Baby Boy’s arteries, veins, and urinary bladder, endotracheal intubation, transfusions and other dramatic therapies administered to Baby Boy in their presence.
  - g. Separation anxiety, sleeplessness, fear of their Baby Boy’s morbidity, fear of their Baby Boy’s appropriate development and maturation, financial fears and stress.

23. The Parent's lives, hopes, and dreams were dashed, and their fears and anxieties were exacerbated. Baby Boy grew and his condition stabilized so he could eventually be discharged. The Parents took their infant Baby Boy home to a life of continuing medical care, ongoing medical observation and substantial concern he cannot, and will not, mature fully or normally and will not, or cannot, live a normal life or experience normal development. Mr. and Mrs. Parent continue to live and cope with these tensions, anxieties, fears and substantial burdens. They also have mounting medical care costs.

### **Mrs. Parent**

#### **Physical Injuries**

24. Mrs. Parent sustained special damages for medical care and hospitalization for herself due to Defendants' negligence. She also sustained general damages for her physical injuries, including unexplained pain and suffering during her undiagnosed and then negligently-induced premature labor, emergency Caesarean section and emotional distress of the emergency delivery.

#### **Bystander Injuries**

25. Mrs. Parent was a bystander, with her husband, after their Baby Boy's birth, and throughout the 94-day course of his care in the neonatal intensive care unit. She was repeatedly present when emergency procedures were required, and disquieting, disturbing, but necessary medical therapies were used to transfuse, intubate, feed, support, and address the emergency circumstances in her premature infant Baby Boy's life. As a bystander, she suffered emotional distress because matters she was required to experience, all of which were due to her Baby Boy's avoidable premature birth, were shocking and should not be required to be endured by a person in her circumstances. Mrs. Parent (a) was located nearby her Baby Boy during his recurrent trauma, (b) was shocked, repeatedly, by the direct emotional impact from the sensory and contemporaneous observance of each episode, and (c) was closely related to Baby Boy as his mother, all as she was forced to cope with her infant Baby Boy's struggle to survive from the time of his birth, to the present, and for the foreseeable future. Among the

bystander injuries was impaired maternal bonding with Baby Boy. In addition, Mrs. Parent was forced to endure, as a bystander, the diagnosis of need for, and aftermath of, two surgical procedures on her infant Baby Boy: one (1) heart surgery, and one (1) laser eye surgery with anesthesia.

### **Substantial Burdens**

26. Mrs. Parent, like her husband, has been subjected to substantial financial burdens to provide necessities of life for Baby Boy. These include care costs exceeding One Half Million Dollars and mounting. These catastrophic financial losses mean the Parent's financial lives have been placed in turmoil, and their ability to acquire health insurance has been compromised because their baby's lifetime healthcare limit is in jeopardy, and likely to be exceeded long before he attains adulthood.

### **Emotional Distress from Malpractice**

25. Mrs. Parent also sustained general damages for emotional distress inflicted by Defendants' professional negligence. Like her husband, Mrs. Parent suffered and continues to suffer the uncertainty, fear, and anxiety regarding her Baby Boy's recurrent emergency circumstances while in the neonatal intensive care unit at Hospital in Lincoln, and his continuing care and care needs following his discharge from the Hospital. Like Mr. Parent, Mrs. Parent now suffers the emotional travail of her Baby Boy's uncertain future and unknown potential for normal development. These emotional distresses have caused and continue to cause general damages.

### **Negligently Inflicted Emotional Distress**

27. Defendants' professional negligence caused Mrs. Parent and her husband to suffer negligently inflicted emotional distress which was reasonably foreseeable, and avoidable, but proximately caused by Defendants' professional negligence. This distress is separate from her bystander injuries. This includes impaired parental bonding with her Baby Boy.

### **Mr. Parent**

### **Bystander Injuries**

28. Mr. Parent was a bystander, with his wife, at the time of their Baby Boy's birth, and throughout the 94-day course of his care in the neonatal intensive care unit. He was repeatedly present when emergency procedures were required, and disquieting, disturbing, but necessary medical therapies were used to transfuse, intubate, feed, support, and address the emergency circumstances in his premature infant Baby Boy's life. As a bystander, he suffered emotional distress because Mr. Parent (a) was located nearby his Baby Boy during his recurrent trauma, (b) was shocked repeatedly by the direct emotional impact from the sensory and contemporaneous observance of each episode, and (c) was closely related to Baby Boy as his father, all as he was forced to cope with his infant Baby Boy's struggle to survive from the time of his birth, to the present, and for the foreseeable future. Among the bystander injuries was impaired paternal bonding with Baby Boy. In addition, Mr. Parent was forced to endure, as a bystander, the diagnosis of need for, and aftermath of, two surgical procedures on his infant Baby Boy: one (1) heart surgery, and one (1) laser eye surgery with anesthesia

29. Mr. Parent sustained special damages by reason of his responsibility for the cost of medical care rendered to his wife, Mrs. Parent. He also sustained special and general damages, along with his wife, for the medical expenses incurred for the Parent's Baby Boy, and for ongoing medical expenses for his care, and the fear and emotional distress caused by these catastrophic and crushing expenses.

#### **Emotional Distress from Wife's Personal Injury**

30. Mr. Parent suffered emotional distress and loss of consortium because of his wife's undiagnosed pregnancy, emergency delivery, emergency Caesarean section, and post-surgical and post-partum suffering. All this caused general damages to Mr. Parent.

#### **Emotional Distress from Malpractice**

31. Mr. Parent also sustained general damages for emotional distress inflicted by Defendants' professional negligence. Like his wife, Mr. Parent suffered and continues to suffer the uncertainty, fear, and anxiety about his Baby Boy's recurrent

emergency circumstances while in the neonatal intensive care unit at Hospital, and his continuing care and care needs following his discharge from the Hospital. Like Mrs. Parent, Mr. Parent now suffers the emotional travail of his Baby Boy's uncertain future and unknown potential for normal development. These emotional distresses have caused and continue to cause general damages.

32. Defendants' professional negligence caused Mr. Parent and his wife to suffer negligently inflicted emotional distress which was reasonably foreseeable, and avoidable, but proximately caused by Defendants' professional malpractice. This distress is separate from his bystander injuries. This includes impaired bonding his Baby Boy.

### **Constitutional Issues**

33. *Neb Rev Stat* Section 44-2801 purports to provide a special procedure required to maintain an action for medical malpractice in Nebraska. Section 44-2825 purports to limit, or cap, recoverable damages in such actions. The Parents respectfully contend *Neb Rev Stat* § 44-2801 *et seq.*, and specifically § 44-2825 (collectively the Statutes), and any cap or limit on damages recoverable on this action for medical malpractice and any such action in Nebraska are unconstitutional and void for each and all the following reasons:

- a. *US Const Art. I* § 10, prohibiting States from granting letters of marque and reprisal, emitting bills of credit, passing bills of attainder, or impairing the obligations of contract.
- b. *US Const Amend V & XIV* because the Statutes deprive Mr. and Mrs. Parent of their life, liberty or property without due process of law, and because the statutory limit, which restricts a recovery even for out-of-pocket expenses, requires private property of the Parents be risked, and subjected to a taking to pay medical bills for the public use of Nebraska's Licensed Physicians, and does so without just compensation.
- c. *US Const Amend VIII & XIV* because the cap or limit constitutes an "unusual punishment inflicted" by the State of

Nebraska by imposing the limit on a select group of persons, i.e., victims of medical negligence.

- d. *US Const Amend XIV* because the Statutes abridge the privileges and immunities of the Parents as citizens of the United States, deprive them of life, liberty or property without due process of law, and deny them equal protection of law.
- e. *Neb Const Art I §§ 1 & 3* because the Statutes deprive Mr. and Mrs. Parent of life, liberty or property without due process of law, and deny them equal protection of law.
- f. *Neb Const Art I § 16* because the Statutes impair the obligation of contract, and constitute an irrevocable grant of a special privilege or immunity.
- g. *Neb Const Art XIII § I* because the Statutes violate this section, prohibiting the State from contracting debt for the reason the Statute, containing the limitation, purport to impose constraints upon the State that affect its credit as the party holding certain pooled funds.
- h. *Neb Const Art VIII § 3* for the reason the Statutes purporting to contain the cap or limitation requires the State, through a fund administered by it, be obligated to pay, and stand ready to lend its credit and pay obligations for professional negligence. This constitutes a pledge of the State's credit contrary to *Neb Const Art XIII § 3*.
- i. *Neb Const Art I § 13* because the Statutes constitute an effective limitation on the openness of the courts of this State which are required to be open to every person including the Parents, for any injury done, and to furnish a remedy by due course of law and justice.

34. Nebraska's hospital / health care provider lien statutes, found at *Neb Rev Stat* §§ 52-401 *et seq.*, (Lien Act) purport to provide a priority lien to Defendants upon and against any recovery upon the Parents or their Baby Boy might make against Defendants for professional negligence. The Lien Act purports to entitle Plaintiffs to recover expenses associated with providing care for their Baby Boy. However, the Lien Act is unconstitutional and void as applied to this case, and generally, for each and all of the following reasons:

- a. Hospital is a major provider of health care to the Parents. To permit the Hospital to recover payments or damages, or to have any lien against a recovery made in this case would defeat the purpose of Plaintiff's claim and effect a taking without just compensation contrary to *US Const Amend V*, *XIV*, and *Neb Const Art I § 21*. The Lien Act substantially deprives the Parents of their claims for medical malpractice by subordinating their claims, which are property under the Lien Act to the lien of the negligent Defendant Doctor's principal or his master, or joint venturer who are vicariously liable for his malpractice.
- b. The Lien Act unfairly and unjustly prioritizes parties with competing interests without notice or an opportunity to be heard and without due process of law, contrary to *Neb Const Art I §§ 1, 3 & 13*.
- c. This Lien Act unfairly, improperly, and arbitrarily classifies medical bills as having a legal priority and importance superior, for purposes of §§ 52-401 *et seq.*, to the value of family relationships, and the right to be made whole when family relationships, personal health, and personal emotional health are disrupted. This classification is unconstitutional

because it is arbitrary, denies equal protection of the law, and denies due process of the law. The Lien Act violates *US Const Amend XIV*, *US Const Art I § 10*, and *Neb Const Art I §§ 1, 3 & 13*. This classification in the Lien Act also impairs the right to freely contract for professional services, or with others.

The Lien Act, is, therefore, unconstitutional and void as applied to the Parents, and generally.

### **Request for Relief**

35. On the foregoing basis, Parents each request judgment for:
  - a. Special damages which continue to accrue;
  - b. General damages, which continue to accrue;
  - c. Declaratory judgment declaring *Neb Rev Stat §§ 44-2801 et seq.*, and particularly *Neb Rev Stat § 44-2825* and any provision of law purporting to cap or limit the recovery for damages for medical malpractice, unconstitutional and void;
  - d. Declaratory judgment declaring the Nebraska Doctor, Nurse & Hospital Lien Act, *Neb Rev Stat §§ 52-401 et seq.* unconstitutional and void as applied to the Parents;
  - e. Taxable costs, attorneys' fees to the extent permitted by law, and prejudgment interest to the extent permitted by law;
  - f. Judgment at law to disgorge any payments received by any defendant contrary to the declaratory judgment sought.

### **Jury Demand**

36. Plaintiffs respectfully demand trial by jury.

June \_\_\_\_\_, 2005

Parents, Plaintiffs,

By: \_\_\_\_\_

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