

ESTATE OF JOHNNY FISHER, DEC'D,
Plaintiff

VS.

J P MORGAN CHASE BANK, ROBERT M.
LANSFORD, CPA, GLENN MILTON, JAY
SANDLIN, LUCY NORRIS, RN,
and NANCY ARGO,
Defendants

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IN THE DISTRICT COURT

413TH JUDICIAL DISTRICT

JOHNSON COUNTY, TEXAS

FILED
JOHNSON COUNTY
2009 OCT -1 PM 4:25
DAVID M. FLOYD
CLERK

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION AND CLAIM OF ESTATE

TO THE HONORABLE COURT:

This claim is brought by the Estate of Johnny Fisher, Deceased, (hereafter, at times, "The Estate" or "Plaintiff") pursuant to TEX. PROBATE CODE ANN. SEC. 233A (Vernon) and as defined in TEX. PROBATE CODE ANN. SEC. 3 (C) (Vernon).

This claim is brought against J.P. MORGAN CHASE BANK (hereafter, at times "Chase Bank") for breach of fiduciary duty and against GLENN MILTON, JAY SANDLIN, LUCY NORRIS, RN and NANCY ARGO, RN for civil conspiracy to breach a fiduciary duty.

In support of this claim, Plaintiff shows unto the court and the jury, as follows:

Discovery Level

1. Plaintiff requests that discovery proceed in this case under **Level 3**, and that an appropriate scheduling order be entered.

First Amended Original Petition

ORIGINAL

Jurisdiction and Venue

2. **Jurisdiction and Venue Provided by Texas Probate Code.** This claim is a “matter appertaining to an estate or incident to an estate”. SEC. 5, TEX. PROB. CODE The administration of the estate bringing this claim is pending in Johnson County, Texas. This is a claim in tort brought by The Estate based upon various causes of action, hereafter set forth. Section 233A, TEXAS PROBATE CODE This claim was transferred from the Johnson County Probate Court on October 6, 2008, by Order of Transfer, pursuant to the statutory authority granted to the Probate Court and according to the provisions of Sections 5, 5A AND 5B, and Section 233A, TEXAS PROBATE CODE.

This District Court has jurisdiction over this claim because the Probate Court, in which it was filed, has jurisdiction and transferred the case to the 413th District Court, Johnson County, Texas. Sec. 5B, TEX. PROB. CODE; *Jackson v. Thompson*, 610 S.W.2d 519, 522 (Tex. Civ. App. - Houston [1st Dist.] 1980, no writ) (District Court given statutory jurisdiction in contested probate matter transferred to it).

3. **Additional Basis for Jurisdiction and Venue Provided by Texas Civil Practice & Remedies Code.** A “substantial part of the events or omissions giving rise to the claim occurred” in Johnson County, Texas. The medical malpractice claim, upon which a judgment owned by The Estate was ultimately obtained, was tried wholly in the 413th District Court, Johnson County, Texas. Concealment of improper conduct is a significant element of this case.

False documents concealing the improper conduct committed by the Defendants were filed with the 413th District Court, Johnson County, Texas. This concealment forms the basis, in whole or in part, of the claims set forth in this lawsuit. These false documents were published and filed in the 413th District Court, Johnson County, Texas. Numerous pleadings, known by Defendants to be false, were filed in the underlying lawsuit in Johnson County, Texas. This claim involves, in part, the conspiracy to conceal the falsity of these pleadings and the breach of fiduciary duty and civil conspiracy to breach a fiduciary duty and the concealing from Plaintiff, from the 413th District Court, Johnson County, Texas, and from others, the misappropriation of large sums of money from a trust established to resolve and satisfy claims of medical malpractice victims, including Plaintiff's claim. Therefore, a "substantial part of the events or omissions giving rise to the claim occurred" in Johnson County, Texas.. TEX. CIV. PRAC. & REM. CODE ANN, SEC. 15.002, et seq

4. The amount in controversy exceeds the minimum jurisdictional limits of the District Courts of Texas.

5. **Case Remanded by Federal Courts To State Court.** Shortly after this case was filed in this court, Defendant, Chase Bank improvidently attempted to remove the case to the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division. The Notice of Removal filed by Chase Bank with the Federal Courts was not filed with any state court, as represented by Chase Bank. The affidavits of both the Clerk of the Probate Court of Johnson

County, Texas and the Clerk of the District Courts of Johnson County, Texas are filed with the papers in this cause.

6. The Bankruptcy Court abstained from hearing the case, as herein after discussed, and the Federal District Court for the Northern District of Texas, Dallas Division, Hon. Jane Boyle Presiding, determined that the case should be remanded to the state court from which removal was attempted. The Orders of the Federal Courts are filed with the papers in this cause and in the Probate Court files.

7. For all the reasons herein above stated, this court has jurisdiction and venue over this cause of action to enforce a claim of The Estate, pursuant to TEX. PROBATE CODE ANN. Sec. 233A (Vernon) and as defined in TEX. PROBATE CODE ANN. Sec. 3 (C) (Vernon) and pursuant to TEX. CIV. PAC. & REM. CODE Sec. 15.002, et seq (Vernon).

Parties

8. Plaintiff:

- a. **The Estate of Johnny Fisher, Deceased**, the administration of which is pending in the Probate Court of Johnson County, Texas Plaintiff is herein referred to, at times, as "The Estate".¹

9. Defendants:

- a. **JP Morgan Chase Bank, N.A.** Chase Bank is a corporation authorized to transact business in Texas. Chase Bank's registered agent for service of process is

¹ The Administrator of the Estate of Johnny Fisher, Dec'd, Jackie Fisher, is, now, deceased. A substitute representative has not been appointed, at this time.

CT Corporation Systems, 350 St. Paul St., Dallas, TX 75201.

- b. **Glenn Milton**, whose present address is 612 Merrill Drive, Bedford, TX 76022-7130;
- c. **Jay Sandlin**, whose present address is 4708 Innisbrook Lane, Fort Worth, Texas 76179;
- d. **Nancy C. Argo, RN**, whose present address is 1190 Whispering Oaks Dr., DeSoto, TX 75115-7407; and
- e. **Lucy Norris, RN**, whose present address is 2101 Count Fleet Drive, Unit 514, Arlington, Texas 76011-2123;

Plaintiff requests that citation be issued and served upon each defendant, as required by law.

Nature of Claim

10. The Estate owns a judgment (“The Judgment”) against Fort Worth Osteopathic Hospital, Inc. (hereafter, at times, “FWOH” or “The Hospital”) based upon a medical malpractice claim The Estate asserted against The Hospital and filed in Johnson County, Texas.

11. The Hospital is bankrupt.

12. The Hospital’s bankruptcy is pending in the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, Case No. 05-41513-DML, Hon. D. Michael Lynn, presiding.

13. The Hospital established a self-insured trust fund in lieu of liability insurance, in 1987, to resolve and satisfy claims of victims of hospital malpractice. (Exhibit “1”) The subject trust is referred to, at times, as “the subject trust” or “The Trust” or “The Trust Agreement” or “The

Trust Fund”.

14. Defendant, Chase Bank is the trustee of the subject trust at all relevant times to the claims herein asserted.

15. The individual Defendants, Milton, Sandlin, Norris and Argo were employees and officers of The Hospital and possessed unique knowledge of the operation of the subject trust because of their positions with The Hospital.

16. This is a claim against Chase Bank for breach of fiduciary duty as trustee of the subject trust, and against the individual Defendants, Milton, Sandlin, Norris and Argo for participating in, aiding, encouraging and conspiring with Chase Bank to misappropriate large amounts of trust funds and to breach its fiduciary duties to Plaintiff, either as a beneficiary of the subject trust and/or as one to whom a fiduciary duty is owed by Chase Bank as a result of its peculiar relationship with Plaintiff.²

17. Plaintiff seeks compensatory damages, exemplary damages, attorney fees and any and all other damages allowed by law against Defendants, jointly and severally.

Factual Background

18. The Estate is a judgment creditor of The Hospital. (Exhibit “2”)

19. The Estate owns The Judgment as a result of a medical malpractice claim and lawsuit

² *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex.565, 160 S.W.2d 509, 512 (1942);
Paschal v. Great Western Drilling, 215 S.W.3d 437 (Tex. App. - Eastland 2006, no writ)

filed against FWOH in 2001 for damages from injuries sustained by Johnny Fisher, a FWOH patient, resulting in his death on October 1, 1999.

20. On numerous occasions, after the medical malpractice lawsuit was filed by The Estate, the individual Defendants represented to the 413th District Court in Johnson County, Texas in documents filed with the Court, in documents provided to Plaintiff and to others and by representations made to Plaintiff that The Hospital had \$4,000,000.00 in the subject trust and, also, had excess liability insurance coverage with upper limits of \$25,000,000.00 specifically established to satisfy any judgment Plaintiff might obtain in the lawsuit. (Exhibit "3")

21. The Judgment was signed and entered in the medical malpractice lawsuit on June 7, 2007 by Hon. William Bosworth, District Judge, 413th District Court, Johnson County, Texas, against FWOH, awarding Plaintiff damages in the amount of \$975,000.00. (Exhibit "2")

22. Following entry of The Judgment, demand was made for payment to satisfy The Judgment.

23. Trustee Brown advised Plaintiff that he did not have funds available from The Trust to pay The Judgment. Chase Bank refused to respond to the demand.

24. In its efforts to determine why the subject trust did not have \$4,000,000.00, as represented to satisfy The Judgment, Plaintiff discovered the following:

a. Plaintiff was advised by Trustee Brown that he had taken control of The Trust Fund and that there was only a few thousand dollars in The Trust Fund when he seized it.

b. The risk management committee of The Hospital, which included and/or was under the oversight of one or more of the individual Defendants had assigned \$900,000.00 to be reserved for the payment of Plaintiff's medical malpractice claim.

c. Plaintiff obtained a copy of The Trust Agreement (Exhibit "1") which provides:

- i. The Trust is a separate entity, with the trustee having legal title to its assets and its fund.
- ii. The Trust is established for a specific purpose and for specific beneficiaries.
- iii. The purpose of The Trust is to self-insure against the initial levels of malpractice liability.
- iv. The Trust is established for the benefit of victims of hospital malpractice.
- v. The Trust is established for the sole purpose of paying medical malpractice claims filed against The Hospital and related expenses of medical malpractice claims and lawsuits.
- vi. The beneficiaries of The Trust are those having medical malpractice claims against FWOH.
- vii. It is specifically provided in the trust document that "Payment shall be made from the trust property only for malpractice losses of The Hospital".
- viii. The Trust requires that payment from The Trust Fund shall be made only on written authorization from designated hospital representatives, certifying that the payment is related to the Plan and for one or more of the purposes specified in the Trust Agreement.
- ix. The Trust requires that the trustee shall make payment solely upon the direction of an Administrative Committee [of The Hospital].
- x. Payment shall be made from The Trust only for malpractice losses of The

Hospital, for expenses for administering the claims management program, expenses of establishing the Trust and trust fund, legal expenses, actuarial expenses, costs relating to the acquisition for The Hospital of excess insurance coverage, expenses involved in the maintenance of The Trust and cost of administering any risk management program of The Hospital.

- xi. No withdrawal or appropriation from The Trust, not enumerated in The Trust, is authorized.
- xii. The trustee is required to keep accurate and detailed accounts of all receipts, investments and disbursements with respect to The Trust property.
- xiii. The trustee is required to deliver a financial statement to The Hospital at the close of each twelve (12) month period, ending on September 30, of each year.
- xiv. In the event The Trust is terminated, funds must be maintained to resolve pending claims at the time of termination.
- xv. Nothing in The Trust agreement allows its trustee to refuse to pay any judgment obtained by a victim of hospital malpractice, after that victim's claim is reduced to judgment.
- xvi. The Trust provisions do not relieve its trustee of the duty to act prudently and/or in good faith or to exercise independent judgment authority, when appropriate.

25. After Plaintiff was advised by Trustee Brown that there were not sufficient funds in The Trust to satisfy Plaintiff's judgment, Plaintiff then, through discovery and additional investigation, also determined that The Trust was established in accordance with and to satisfy certain Medicare regulations³, to wit:

³ Medicare Provider Reimbursement Manual (CMS Pub. 15-1, "PRM")

- a. The Hospital must either maintain primary liability insurance to protect The Hospital in connection with medical malpractice claims, or if the hospital elected to establish a self-insured trust fund, in lieu of malpractice insurance, that The Trust Fund be established on specific terms required by and approved by Medicare.
- b. The subject trust was established because The Hospital elected to not obtain and carry primary liability insurance to cover medical malpractice claims asserted against The Hospital.
- c. The Hospital must continually maintain funds in The Trust sufficient to resolve all pending malpractice claims against The Hospital, even in the event of termination of The Trust.
- d. The Hospital was required to maintain excess liability insurance coverage.
- e. The Trust required that sufficient funds be maintained to resolve pending medical malpractice claims, in the event the hospital chose to terminate The Trust and revert to standard, liability insurance coverage.
- f. Legal title to The Trust must be in a separate entity from The Hospital.
- g. A hospital electing to establish a self-insured trust fund is referred to as the "provider" in the manual.
- h. Loans to the provider [the hospital] from The Trust are prohibited.
- i. Withdrawals from the established trust are only allowed for malpractice claims and related expenses.
- j. An adequate risk management program, similar to those programs provided and operated by insurance companies, must be utilized.
- k. An on-going claims process and risk management program was required to be in place.
- l. Programs must be in place at the hospital to minimize malpractice claims.

- m. Adequate excess liability insurance must be maintained, as appropriate.
 - n. Failure to comply with the provisions of the provider manual could result in severe penalties imposed on the hospital, including denial of Medicare benefits.
26. The Trust was, initially, funded in 1987 with \$1,000,000.00.
27. Chase Bank produced few records regarding activities of The Trust during the twenty (20) years of its operation.
28. The Hospital purchased what is generally described as “excess coverage” insurance, which liability insurance coverage provided liability insurance for any claims against The Hospital in excess of the self-insured fund maintenance level of \$4,000,000.00.
29. The “excess” liability insurance policy in place when Plaintiff’s claim was asserted against The Hospital required that The Hospital maintain \$4,000,000.00 in the self-insured fund.
30. Failure to maintain the represented level in The Trust could result in cancellation of the excess liability insurance coverage policies, which, in turn, would be a violation of Medicare requirements.
31. Medicare payments were a significant source of hospital income.
32. If The Trust Fund were not maintained, as required, The Hospital could be closed because Medicare payments were a significant source of hospital income.
33. If Medicare officials discovered that false reports regarding the status of The Trust Fund were filed with Medicare, The Hospital could be denied Medicare benefits.
34. At least one (1) transactions was discovered that involved depositing a large sum of

money into The Trust bank account at Chase Bank, then almost immediately withdrawing those funds and using them for non-trust purposes.

35. There were sufficient funds in The Trust Fund to satisfy the assigned value of Plaintiff's claims, and the resulting judgment prior to the alleged misappropriations

Representations

36. During the course of the litigation in the underlying medical malpractice lawsuit, numerous, relevant and significant representations were made to Plaintiff that there were sufficient funds to satisfy any judgment Plaintiff might obtain in the underlying malpractice lawsuit.

37. The Hospital represented to the 413th Judicial District Court of Johnson County, Texas, to Medicare, to excess liability insurance carriers and to other creditors of The Hospital, including Plaintiff, that the self-insured trust fund did, in fact, maintain a balance of \$4,000,000.00 to resolve Plaintiff's medical malpractice claim.

38. These representations regarding the status of The Trust were false.

39. Chase Bank now represents that it does not have records of the activities of the subject trust that had been in operation for more than twenty (20) years, other than a few bank statements.

40. When Plaintiff discovered that the individual Defendants knew that trust funds had been withdrawn from The Trust and used for purposes not authorized by The Trust, Defendants

claimed that The Trust was really “the hospital’s money”, then, later, revised that claim and claimed that The Hospital was the “sole beneficiary” of the subject trust. Both of these claims were rejected by The Bankruptcy Court overseeing the bankruptcy of The Hospital.

Claims

41. In support of the claims herein asserted, Plaintiff incorporates paragraphs 1. through 40., herein above, the same as if set forth herein, again, verbatim.

42. Plaintiff seeks to recover damages, compensatory and exemplary, from the named Defendants for improper and illegal management of The Trust, for misappropriation of trust funds established for the benefit of victims of hospital malpractice, for breach of fiduciary duty by Chase Bank and for civil conspiracy of the individual Defendants in aiding, encouraging and approving the improper management of The Trust and the misappropriation of large sums of trust funds by Chase Bank.

Breach of Fiduciary Duty

43. In support of this claim, Plaintiff incorporates paragraphs 1. through 42., herein above, the same as if set forth herein, again, verbatim

44. Chase Bank was the trustee of The Trust.

45. Chase Bank’s duties to Plaintiff under The Trust Agreement are clear.

46. Chase Bank, as trustee, had a duty to comply with the terms and provisions of The Trust Agreement.

Plaintiff is Beneficiary of The Trust

47. Based upon the following, Plaintiff is a “person” to whom Chase Bank owed a fiduciary duty to maintain funds in The Trust sufficient to satisfy Plaintiff’s claim and judgment:

- a. The subject trust was established to pay claims of victims of hospital malpractice.
- b. Johnny Fisher was a victim of hospital malpractice.
- c. The Estate “stands in the shoes” of Johnny Fisher and is, therefore a “person” for whose benefit The Trust was established.⁴
- d. Plaintiff is “a person for whose benefit property is held in trust, regardless of the nature of Plaintiff’s interest [in The Trust]”.
- e. The Trust refers to the beneficiary of The Trust as a “person”.
- f. The Hospital never was a person.
- g. The Hospital has represented in papers filed with the trial court in the underlying medical malpractice lawsuit that Plaintiff is a beneficiary of The Trust.
- h. The Trust was structured to be in compliance with the provisions of the Medicare Provider Reimbursement Manual.
- i. The Medicare Provider Reimbursement Manual defines the hospital as the “provider” and not the “beneficiary” of The Trust.
- j. Provisions of the Medicare Provider Reimbursement Manual define the victims of hospital malpractice as the beneficiaries of this, and similar self-insured retention funds or trusts.
- k. The Medicare Provider Reimbursement Manual defines Plaintiff as being in the class of persons who are the intended beneficiaries of The Trust.

⁴ § 71.021, TEX. CIV. PRAC. & REM. CODE ANN. (VERNON) “Survival of Cause of Action”

- l. Chase Bank has represented in pleadings filed in The Hospital's bankruptcy case that Plaintiff is a beneficiary of The Trust.⁵
- m. The Hospital has represented that Plaintiff is a beneficiary of The Trust.
- n. The Hospital has specifically represented that The Trust fund was available to pay Plaintiff's claim and judgment.
- o. To conclude that anyone, who is not a victim of hospital malpractice, is the beneficiary of this trust would render The Trust provisions regarding its purpose meaningless.
- p. To conclude that a victim of hospital malpractice is not a beneficiary of this trust would, likewise, render The Trust provisions regarding its purpose meaningless.
- q. The Trust provides that payments from The Trust shall be made "only for malpractice losses of the hospital".
- r. Plaintiff, as a victim of hospital malpractice is "sufficiently identified" in The Trust, as a beneficiary of The Trust, as required by state law.
- s. Victims of hospital malpractice are the "persons" who are benefitted "directly" by The Trust and not merely "incidentally" by The Trust.
- t. The Trust is a contract and its beneficiary can enforce its provisions.
- u. A reading of The Trust and the Medicare Provider Reimbursement Manual evidences that the beneficiary of The Trust can enforce the terms and provisions of The Trust.
- v. The issue of whether Plaintiff is a beneficiary of the subject trust has been

⁵ During the course of proceedings before the Bankruptcy Court in The Hospital's bankruptcy case, Chase Bank asserted that Plaintiff, as a victim of hospital malpractice, was a beneficiary of the subject trust. The Bankruptcy Court agreed and ordered that Trustee Brown could not pursue or settle any claims on behalf of beneficiaries of The Trust, including Plaintiff's claim. (Exhibit "4")

resolved by The Bankruptcy Court.⁶

48. For the reasons herein above stated, the issue of whether Plaintiff is a beneficiary of the subject trust is clear.

49. Plaintiff is sufficiently identified as a beneficiary of The Trust, as a matter of law..

50. Alternatively, Plaintiff is one that The Trust was intended to benefit.

51. Alternatively, Plaintiff is one with whom Chase Bank had a “position of peculiar confidence”.⁷

52. Chase Bank breached its fiduciary duty to Plaintiff in one or more of the following particulars:

- a. Failure to pay from The Trust only those expenditures allowed by the provisions of The Trust agreement;
- b. Failure to make disbursements from The Trust only for malpractice related claims and expenses;

⁶ When Plaintiff discovered Chase Bank’s misappropriation of trust funds, following Plaintiff attempting to collect its judgment, Chase Bank filed pleadings in the Hospital’s Bankruptcy Proceedings, claiming that its actions were lawful and proper, because The Hospital was the “sole beneficiary” of The Trust and that only Trustee Brown could assert the claims now being asserted by Plaintiff. Chase Bank attempted to remove this lawsuit from state court to the Bankruptcy Court where The Hospital’s bankruptcy was pending, asserting, again, the same argument. The Bankruptcy Court, presiding over the bankruptcy of The Hospital, ruled that The Hospital is not the sole beneficiary of The Trust and that the trustee in bankruptcy appointed by the Bankruptcy Court, Trustee Brown, did not have the authority to either pursue or settle the claims here asserted against Chase Bank.

⁷ *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex.565, 160 S.W.2d 509, 512 (1942); *Paschal v. Great Western Drilling*, 215 S.W.3d at 451

- c. Failure to make disbursements from The Trust only on written authorization from designated hospital representatives, certifying that the payment is for one or more of the purposes specified in the Trust Agreement;
- d. Failure to make disbursements from The Trust solely upon the direction of an Administrative Committee [of The Hospital] for designated purposes;
- e. Failure to make disbursements from The Trust only for the following: malpractice losses of The Hospital: malpractice claims, expenses for administering the claims management program, expenses of establishing the Trust and trust fund, legal expenses, actuarial expenses, costs relating to the acquisition for The Hospital of excess insurance coverage, expenses involved in the maintenance of The Trust and cost of administering any risk management program of The Hospital;
- f. Failure to prepare and maintain accurate and detailed accounts of all receipts, investments and disbursements with respect to the trust property;
- g. Failure to deliver a financial statement of The Trust to The Hospital at the close of each twelve (12) month period, ending on September 30, of each year;
- h. Failure to maintain adequate funds in The Trust on termination of The Trust to satisfy pending malpractice claims;
- i. Failure to maintain at least \$900,000.00 in The Trust Fund to satisfy Plaintiff's claim; and,
- j. Failure to manage The Trust in good faith and to exercise independent judgment authority, as and when appropriate.

Civil Conspiracy

53. In support of this claim, Plaintiff incorporates paragraphs 1. through 52., herein above, the same as if set forth herein, again, verbatim

54. Defendants, Milton, Sandlin, Norris and Argo, each and all, were in positions where they could encourage and assist Chase Bank in the misappropriation of Trust Funds and conceal those

misappropriations, to wit:

- a. each knew the restrictions placed upon the use to be made of trust funds.
- b. each was acquainted with the officers of Chase Bank to whom the management of The Trust was assigned.
- c. each, being officers and/or directors of The Hospital, knew the importance of The Trust being managed properly and in accordance with the trust agreement's terms and provisions.
- d. each knew that improper management of The Trust could jeopardize The Hospital's relationship with Medicare and its excess liability insurance coverage.
- e. each had access to the risk management documents of The Hospital and knew how malpractice claims asserted against The Hospital were received, reviewed, evaluated, and processed.
- f. each knew the Medicare requirements applicable to The Trust.
- g. each knew the excess liability insurance policy requirements applicable to a self-insured trust or retention fund.
- h. each knew the possible consequences if The Trust Fund was not used for its intended purposes and not managed according to the mandatory requirements set forth in The Trust.
- i. each was in a position where he or she could aid and participate in the misappropriation of trust funds and could conceal those misappropriations from liability insurance carriers and from Medicare officials and, even, from other directors and officers of The Hospital.
- j. each was in a position where he or she could also conceal misappropriations of Trust Funds from Plaintiff and from the 413th District Court, Johnson County, Texas.
- k. each was in a position where he or she could direct hospital funds to be deposited into The Trust Fund, then, to almost immediately be withdrawn from the subject

trust by Chase Bank and used for purposes not authorized by The Trust.

1. each knew the amount assigned to Plaintiff's medical malpractice claim and that said amount was required to be maintained in The Trust to satisfy that claim, but allowed those trust funds to be depleted, anyway.

55. As a result of the misappropriation of funds by Chase Bank from The Trust with the assistance of Milton, Sandlin, Norris and Argo, each and all, Chase Bank managed to misappropriate several million dollars from The Trust.

56. As a result of the misappropriation of large withdrawals of trust funds by Chase Bank with the active assistance and encouragement of Milton, Sandlin, Norris and Argo, each and all The Trust had less than \$20,000.00 to satisfy Plaintiff's judgment, when The Judgment was obtained..

57. For the reasons herein stated, Defendants, Milton, Sandlin, Norris and Argo, each and all, knowingly and actively participated in the concealing of the misappropriation of funds from The Trust, from Medicare officials, from hospital directors, from hospital liability insurance carriers, from the courts and from Plaintiff.

58. For the reasons herein stated, Defendants, Milton, Sandlin, Norris and Argo, each and all, aided Chase Bank in the breach of its fiduciary duties to Plaintiff.

Proximate Cause of Damages

59. Plaintiff alleges and will show that, at all times material to the claims made by Plaintiff in the underlying malpractice lawsuit, FWOH had funds sufficient to fund and maintain The Trust

and satisfy Plaintiff's claims. Therefore, had The Trust been properly managed by Chase Bank and the funds paid to The Trust been retained and used as they were required to be used, there would have been funds in this self-insured fund, in lieu of liability insurance, to satisfy The Judgment. As a direct result of Chase Bank's breach of fiduciary duty and misappropriation of large sums of trust funds and the civil conspiracy of the individual defendants participating in those misappropriations, as herein above enumerated, there are not sufficient funds in The Trust to satisfy The Judgment.

60. Defendants' wrongful conduct herein above detailed is a direct and proximate cause of Plaintiff's damages, herein enumerated and sought.⁸

Damages

61. Plaintiff states that its damages are not determined, at this time. Plaintiff seeks all actual and compensatory damages, all statutory damages, all punitive damages, and any and all attorney fees to which it is entitled.

Pre-Judgment Interest

62. Plaintiff seeks pre-judgment interest, as allowed by law.

Prayer

PREMISES CONSIDERED, Plaintiff prays that citation be issued and served upon each of the named Defendants, as allowed and provided for by law, that this matter be set for trial, and

⁸ *Whitfield v. Lindemann*, 853 F. 2d 1298, 1304 (5th Cir. 1988); *Florida Dept. of Ins. v. Chase Bank of Texas, N.A.*, 274 F. 3d 924 (5th Cir. 2001)

upon trial, Plaintiff recover from each and all of the Defendants, jointly and severally, as herein requested, and for any other relief to which Plaintiff shows itself justly entitled, at law or in equity.

Respectfully submitted,
LAW OFFICE OF E.L. ATKINS AND ASSOCIATES

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By: 

E. L. Atkins
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Exhibit “1”

First Amended Original Petition

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**FirstAmendedOriginalPetitionFishervChase 2 .wpd
C:\Documents and Settings\admin\My Documents\User Files off Desktop & Notebook\Desktop\ATKINS
LIBRARY\CLIENT FILES\Med-Mal\Fisher\Fisher v Chase\Pleadings\FirstAmendedOriginalPetitionFishervChase 2
.wpd**

FORT WORTH OSTEOPATHIC HOSPITAL, INC. D/B/A
FORT WORTH OSTEOPATHIC MEDICAL CENTER
SELF-INSURANCE PLAN TRUST AGREEMENT

THIS TRUST AGREEMENT, dated the 15th day of September, 1987 by and between FORT WORTH OSTEOPATHIC HOSPITAL, INC., a non-profit corporation organized and existing under the laws of the State of Texas, having its principal place of business in Fort Worth, Tarrant County, Texas ("Hospital") and TEXAS AMERICAN BANK, of Fort Worth, Texas, a national banking corporation organized and existing under the laws of the United States ("Trustee").

WITNESSETH:

This trust agreement is to evidence the agreement between the Hospital and the Trustee with respect to the administration of a self-insurance plan fund created by the Hospital pursuant to the Medical Provider Reimbursement Manual promulgated by the United States Department of Health and Human Services, Social Security Administration.

RECITALS

- (a) The Hospital owns and operates a 265 hundred bed Hospital and related facilities in Fort Worth, Tarrant County, Texas.
- (b) Despite the excellent claims and loss history of the Hospital, the annual cost and availability of professional liability insurance has become a matter of increasing uncertainty and concern in recent years.
- (c) Because of this concern, the Hospital caused an extensive study and review to be made of the various alternatives available to provide economical and dependable protection to the Hospital against malpractice liability claims.
- (d) After analysis of all the data arising from such study and review, the Hospital has determined that it is most reasonable and prudent to maintain a total self-insurance program with the establishment of a reserve fund and the self-assumption of the risk loss resulting from malpractice and general patient liability because of the non-availability or exorbitant

EX. 1

cost of commercial insurance, the Hospital concluded that it would be in the best interest of the Hospital and community which it serves to establish a self-funded plan, on an actuarially sound basis, designed to enable the Hospital to "self insure" against the initial levels of malpractice liability incurred at the Hospital and secure, if required, commercial insurance coverage from the liability in excess of self-insured limits.

(e) The Hospital desires that such self-funding plan be implemented through a trust designed in such manner as to enable payments thereto to qualify for Medicare reimbursement, and designed so as to exempt such trust from tax pursuant to the applicable provisions of the Internal Revenue Code.

NOW, THEREFORE, the Hospital and Trustee do mutually covenant and agree as follows:

ARTICLE 1 - DEFINITION OF TERMS

As used herein, unless otherwise defined or required by the context, the following words and phrases shall have the meaning indicated:

1.01 Actuary - shall mean an actuary, insurance company or broker experienced in the field of medical malpractice and general liability insurance, independent of any direct or indirect financial ownership or control by the Hospital and employed to render service with respect to the plan and the fund.

1.02 Board - shall mean the Board of Directors of the Hospital.

1.03 Committee - shall mean the committee which shall administer the plan as provided in Article 3.

1.04 Contributions - shall mean payments by the Hospital to the Trustee for the fund.

1.05 Fund - shall mean the trust fund created in accordance with the Plan.

1.06 Hospital - shall mean Fort Worth Osteopathic Hospital, Inc. d/b/a Fort Worth Osteopathic Medical Center, Fort Worth, Tarrant County, Texas.

1.07 Medicare Manual - shall mean the Medicare Provider Reimbursement Manual promulgated by the Social Security Administration

of the Department of Health and Human Services.

1.08 Plan - shall mean the Hospital's self-insurance plan with respect to malpractice liability claims.

1.09 Plan Year - shall mean September 16, 1987 through September 30, 1988 as the first Plan Year and beginning October 1, 1988 a Plan Year shall mean a 12-month period thereafter.

1.10 Trust - shall mean this trust agreement between the Hospital and the Trustee and all amendments thereto.

1.11 Trustee - shall mean Texas American Bank Fort Worth.

or any substitute or successor Trustee or Trustees.

ARTICLE 2 - CONTRIBUTIONS

The Hospital hereby conveys and delivers to Trustee, in trust, to be held and administered in accordance with the terms of this agreement the sum of money set forth on Exhibit A attached hereto (the receipt of which is acknowledged by the Trustee), which sum of money together with such additional money or property as may from time to time be delivered by the Hospital to the Trustee, including the income and earnings therefrom, shall constitute the trust property. Said sum has been determined by Marsh & McLellan of Chicago, Illinois to be reasonably required as a actuarially adequate or sound fund reserve for such liability losses incurred and accrued against the Hospital for the year commencing September 16, 1987 and expiring September 30, 1988. The Trustee shall have legal title to the trust property and shall be responsible for the proper administration and control thereof as hereinafter set forth.

ARTICLE 3 - ADMINISTRATIVE COMMITTEE

3.01 Appointment and Term of Office - The Committee shall consist of three (3) to five (5) individuals as shall be named by the Board from time to time. The Board shall have the right to remove any member of the Committee at any time. A member may resign at any time by written resignation to the Committee and Board. If a vacancy in the Committee should occur, a successor shall be

appointed by the Board.

The Hospital shall, by written notice, keep the Trustee notified of current membership of the Committee, its officers and agents, and shall furnish the Trustee a certified signature card for the members of the Committee. For all purposes hereunder, the Trustee shall be conclusively entitled to rely upon such certified signatures.

3.02 Organization of Administrative Committee. The Committee shall elect a chairman and secretary from among its members. It may appoint agents it deems necessary for the effective performance of its duties and may delegate to such appointees or to one or more members of the Committee such powers and duties, whether administrative or discretionary, as the Committee may deem expedient and appropriate. The Committee shall act by majority vote. Its members shall serve without compensation.

3.03 Powers of Administrative Committee. The Committee shall be governed by the Board with respect to the control of the administration of the Plan who shall provide it with all powers and instructions necessary to enable it to properly carry out its duties in that respect, and all powers conferred upon it by the Plan. Not in limitation, but in amplification of the foregoing, the Committee shall have the power to construe the Plan, to review periodically the adequacy of funding and of investment performance and communicate its findings to the Hospital and the Trustee, and to take steps it deems necessary to remedy any administrative error and to determine all questions that shall arise under the Plan. Subject to any limitations imposed on the Committee by the Board, it shall decide all questions relating to the determination of payments from the Fund, provided such payment shall be exclusively for the purposes of the Plan as hereinafter provided. All disbursements

by the Trustee shall be made upon and in accordance with the written notice of the Committee or its designated agent. The decision of the Committee upon all matters within the scope of its authority shall be final and binding upon all parties to this instrument. The Committee shall have the power but not the obligation to employ investment counsel on behalf of the Trust. Any such investment counsel shall be empowered to direct the Trustee with respect to permitted investments.

3.04 Records of Administrative Committee. The secretary of the Committee shall record or cause to be recorded all acts and determinations of the Committee and all such records, together with such other documents as may be necessary for the administration of the Plan and shall be preserved in the custody of such secretary.

3.05 Indemnification of Administrative Committee. The Hospital shall indemnify and save each member of the Committee harmless from the effects and consequences of the acts, omissions and conduct of each member in his official capacity, except to the extent that such effects and consequences shall result from the acts or omissions of such member in bad faith.

3.06 Miscellaneous. The Committee shall advise the Trustee and issue to the Trustee such instructions as the Trustee may require to administer the Trust.

The Committee and the Hospital shall be entitled to rely upon all tables, valuations, certificates, and reports furnished by an actuary or by an accountant, physician, or attorney selected or approved by the Hospital or the Committee. The Committee, the Hospital, its officers, and the Trustee shall not be deemed imprudent or subject to liability by reason of taking or refraining from any action in reliance upon the advice or opinion of any such actuary, accountant, physician, or attorney.

ARTICLE 4 - TRUST PLAN

4.01. The Hospital, after making a full and complete investigation

and analysis of its circumstances, organization and operation, has determined that it is reasonable and prudent for it to adopt and implement a plan of self-insurance against malpractice losses. The trust property shall constitute the Fund through which the purposes of the Plan are carried out. The Hospital represents to the Trustee that as part of the Plan it intends to maintain or cause to be maintained an ongoing claims processing and risk management activity to determine whether malpractice liability exists, and the cause and cost thereof, and to minimize the frequency and severity thereof. The Hospital intends that the Plan be established and maintained in accordance with the rules and regulations adopted or implemented from time to time by the United States Department of Health, Education and Welfare, Social Security Administration, or any agent thereof or successor thereto, governing reimbursement to the Hospital for payments made in connection with the Plan. The Hospital assumes full and sole responsibility for compliance with the Medicare regulations. All representations and recitals herein with respect to the Plan shall be deemed to be those of the Hospital.

ARTICLE 5 - TRUST FUND AND TRUSTEE

5.01 Trust Fund. The Trustee shall hold, manage, administer, and after paying all reasonable costs and expenses of the administration of said Trust or reserving a fund for the payment thereof, the Trustee shall invest and reinvest the trust funds in income-producing securities, assets and properties as may be authorized by the statutes and laws of the United States applicable to national banks exercising trust powers and regulations issued thereunder, and any amendments thereto. All requirements respecting investments by fiduciaries now or hereinafter required by the laws of the State of Texas, except that any loans to or investments and obligations, securities or properties of Hospital shall be prohibited. All income or revenue realized from said investments, including but not limited to, rebates, interest, dividends, etc. shall be retained and

held by the Trustee and become a part of the trust fund. Such retained income shall be considered and used for the purposes of determining and establishing adequate fund levels by Hospital's insurance actuary. The Trustee shall be under no duty to determine whether the amount of any contribution to the trust property from time to time made by the Hospital is in accordance with the Plan or the Medicare regulations or to enforce or to collect payment of any contributions.

5.02 Termination for Medicare. Upon termination of the Plan from the Medicare program, the Hospital shall obtain from the actuary a determination of the adequacy of the balance of the Fund as of the date of such termination in order to determine the amount, if any, to be offset against the Hospital's allowable cost to be reimbursed by Medicare if the Fund is excessive, as defined in the Medicare Manual.

5.03 Payment from the Trust Property.

(a) The Trustee from time to time, upon receipt of written direction from the individual or individuals designated by the Committee or Hospital to so act, shall make payment from the income or corpus of the trust property to such persons and in such manner and in such amounts as the Committee or an agent thereof in such writing shall direct. Each such written direction shall certify that the payment is related to the Plan, and is for one or more of the purposes specified below. The Trustee shall make payment solely upon the direction of the Committee and shall not be required to inquire into the purpose or nor be liable for the propriety of any such payment. Payment shall be made from the trust property only for malpractice losses of the Hospital whether such losses occur from incidents or claims arising after September 15, 1987, providing same are not covered under the terms of any previously held commercial liability insurance policy and may be made for the following expenses to the extent that such are related to the self-insurance plan of the Hospital:

- (1) Expenses for administering the claims management program;
- (2) Expenses of establishing this Trust and the Trust Fund;
- (3) Legal expenses;
- (4) Actuarial expenses;
- (5) Costs relating to the acquisition for the Hospital of excess insurance coverage, if purchased by the Trustee;
- (6) Expenses involved with the maintenance of this Trust and the trust property by the Trustee;
- (7) Cost of administering any risk management program of the Hospital, if risk management is performed by the Trustee; provided, however, that this subparagraph shall not be construed to impose upon the Trustee any duty or obligation to administer any risk management program of the Hospital.

(b) Payment for any of the foregoing purposes shall be deemed proper payment to be paid from the trust property. It is intended that all payments from the trust property shall be in accordance with the Medicare regulations, but the Trustee shall not be liable in any way for the Hospital's failure to comply therewith.

5.04 Accounts. The Trustee shall keep accurate and detailed accounts of all receipts, investments and disbursements with respect to the trust property. Such person or persons as the Hospital shall from time to time designate, including such persons as may be required by the Medicare regulations, shall be allowed to review, inspect and audit the books of account relating to the trust property upon request at any reasonable time during business hours of the Trustee.

Within 60 days after the close of each 12-month period ending on September 30 of each year, the Trustee shall deliver a financial statement and accounting containing such information as the Hospital shall from time to time reasonably request, including but not

limited to, the following information:

- (a) The balance of the trust property at the beginning of that Plan Year;
- (b) Current period contributions;
- (c) The amount and nature of final payments, including a separate accounting for claims management, legal expenses, claims paid, and other similar items; and
- (d) The trust property balance at the end of the Plan Year.

Notwithstanding any obligation to report within 60 days after the close of each 12-month period, Trustee shall render such reports regarding the trust fund and containing such information as Hospital shall reasonably request from time to time.

If this agreement shall be terminated for any reason during a Plan Year, or if the Trustee shall resign or be removed, the Trustee shall, within 45 days of such termination, resignation or removal date, submit its final statement and account for the period from the last previous accounting to the date of such termination, resignation or removal.

5.05 Resignation of Trustee. The Trustee may resign from this trust at any time by giving 60 days' written notice to the Board. Upon such resignation becoming effective, the Trustee shall render to the Hospital an account of its administration of the Fund during the period following that covered by its last annual accounting and shall perform all acts necessary to transfer and deliver the assets of the Fund to its successor Trustee.

5.06 Removal of Trustee. The Board may remove the Trustee at any time upon the delivery of 60 days' written notice to the Trustee. In the event of such removal, the Trustee shall be under the same duty to account and transfer and deliver the assets of the Fund to its successor as provided in the case of the Trustee's resignation.

5.07 Original and Successor Trustee. Trustee herein named has been selected by the Board on the basis that Trustee is the best qualified and readily available financial institution whose

service to the Hospital in the past has proved beneficial. It is contemplated that Trustee and Hospital will continue this agreement indefinitely. However, in the event of a vacancy in the trusteeship of this Trust occurring at any time, the Board shall designate and appoint a qualified successor Trustee of this Trust. Any such successor Trustee shall have all the rights and powers herein conferred upon the original Trustee.

5.08 Liability. Neither any member of the Committee, the Board, the Hospital, the actuary nor the Trustee shall be liable for any breach of responsibility on the part of persons other than itself, but shall be liable for its own acts, omissions in bad faith or for which it is grossly negligent.

ARTICLE 6 - POWERS OF TRUSTEE

6.01 Enumerated Powers. The Trustee or any successor Trustee shall have the authority without order of or report to any court or officer to exercise the following powers in such reasonable manner as may be fair and equitable under the circumstances and is hereby given and granted said powers, authorities, privileges and immunities as provided in the laws of the United States and State of Texas for banks exercising trust functions and the regulations issued thereunder. The powers shall include, but not be limited to, the following, to wit:

(1) To retain, sell, invest or reinvest in any stocks, bonds, securities, options or other property, including common trust funds established by the Trustee, and stock in the Trustee, which is deemed proper, necessary or expedient without responsibility for the exercise of this discretion, except that of using ordinary care; provided, however, that no loans may be made from the trust property to the Hospital or to any person related to the Hospital within the meaning of the Medicare regulations.

(2) To sell, exchange, or otherwise dispose of any property at any time held or required hereunder at public or private sale, for cash or on terms, without the necessity of court approval

or advertisement.

(3) To register any stock, bond or other security in the name of a nominee, with or without disclosure of any fiduciary relationship, but accurate records shall be maintained showing that such property is a trust asset.

(4) To invest in certificates of deposit and accounts issued by Trustee.

(5) to vote in person or by proxy all stocks or other securities, to grant proxies, general or limited, and to agree or take any other action in regard to any reorganization, merger, consolidation, bankruptcy or other procedure or proceedings affecting any property of the Trust.

(6) To serve without making and filing inventory and appraisal, without filing any annual or other return to any court and without giving bond; but the Trustee shall furnish to the Hospital such financial statements as are otherwise required by this agreement.

(7) Trustee is relieved from any responsibility of diversifying investments of said trust fund. However, it is contemplated that Trustee agrees to seek the highest rate of return commensurate with a sound investment policy.

6.02 Compensation. The Hospital is authorized to pay the Trustee reasonable compensation for its services rendered. Said compensation shall be based on what is reasonably and customarily charged for services of a similar type or nature in the community and shall include an evaluation of the services rendered by the Trustee together with the experience of payments or disbursements under this Trust Agreement.

ARTICLE 7 - AMENDMENT AND TERMINATION

7.01. The Hospital, through its Board, shall have the right and power at any time and from time to time by instrument in writing delivered to the Trustee to amend, in whole or in part, any or all of the provisions of the Plan and trust agreement; provided, however,

that the duties, powers and liabilities of the Trustee hereunder shall not be substantially increased or decreased without its consent.

7.02. Termination. The Hospital expects this Plan to be continued indefinitely, but of necessity, it reserves the right to terminate the Plan at any time by action of the Board communicated in writing to the Trustee. If the Hospital revokes this agreement or terminates the Plan, then upon receipt of written notice thereof, the Trustee shall either:

(1) Retain and administer in accordance with this agreement such portion of the trust property as the Hospital shall certify to the Trustee has been determined by an actuary as required by the Medicare regulations as a necessary reserve fund for future payment of the Plan until such time as the Hospital shall certify to the Trustee that an independent actuary has determined that such payment has been met or reserves are no longer necessary, whereupon the Trustee shall deliver the balance of the trust property to the Hospital; or

(2) Upon certification to the Trustee by the Hospital that such payment is consistent with the Medicare regulations, the Trustee shall deliver the balance of the trust property to the Hospital.

ARTICLE 8 - MISCELLANEOUS

8.01. Headings. The headings and sub-headings in this agreement have been inserted for convenience of reference only and are to be ignored in any construction of the provisions hereof.

8.02. Construction. This agreement shall be construed in accordance with the laws of the State of Texas. In the construction of this agreement, the masculine shall include the female and the singular the plural in all cases where such meanings would be appropriate.

8.03. Severability. Should any provision of this agreement be deemed in violation of any law, such provision shall be deemed void

to the extent required by law and all provisions of this agreement other than that held void shall remain in force and effect.

8.04 Counterparts. This agreement may be executed in multiple counterparts, each of which shall be regarded for all purposes as an original; and such counterparts shall constitute but one and the same instrument.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed by their duly authorized officers, to be effective on the date first above written.

FORT WORTH OSTEOPATHIC HOSPITAL, INC.
D/B/A FORT WORTH OSTEOPATHIC MEDICAL
CENTER

By: Jay Sandelin
Jay Sandelin
Chairman of the Board of Directors

ACCEPTED:

TEXAS AMERICAN BANK

By: Robert M. Lansford
Robert M. Lansford
Senior Vice President and Trust Officer

EXECUTED IN MULTIPLE COPIES, EACH COPY OF WHICH SHALL BE DEEMED TO BE AN ORIGINAL.

EXHIBIT A

Contemporaneously with the execution and delivery of the foregoing Trust Agreement, the Hospital conveys and delivers to the Trustee pursuant to Section 2 hereof, the sum of One Million Dollars (\$1,000,000.00).

Exhibit "2"

First Amended Original Petition

Page No. 23

FirstAmendedOriginalPetitionFishervChase 2 .wpd
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MILDRED FISHER

IN THE DISTRICT COURT

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JOHNSON COUNTY, TEXAS

VS.

JOHN B. PAYNE, D.O., OSTEOPATHIC
MEDICAL CENTER OF TEXAS, et al.
Defendants.

413th JUDICIAL DISTRICT

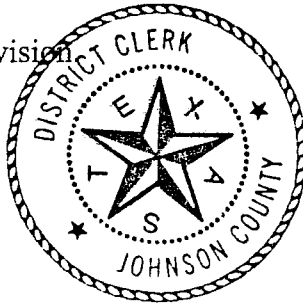
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DAVID R. LLOYD
DISTRICT CLERK
JOHNSON COUNTY, TEXAS
2007 JUN 7 AM 9:31
DEPUTY

AGREED JUDGMENT

On the 7 day of June ~~April~~, 2007, this cause came on to be heard. It was announced to the Court that an agreement had been reached between the parties. ACCORDINGLY, the Court finds that the following judgment is appropriate and should be made and entered:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Intervenors, Jackie Fisher, Individually and as Administratrix and Representative of the Estate of Johnny Fisher, Deceased, Houston Fisher and Johnny Fisher recover from the Defendant, Fort Worth Osteopathic Hospital, Inc., d/b/a Osteopathic Medical Center of Texas the sum of Nine Hundred Seventy-Five Thousand and no/100 Dollars (\$975,000.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this judgment may be enforced only in accordance with bankruptcy law, in Cause No. 05-41513-DML-7, styled "In Re: Fort Worth Osteopathic Hospital, Inc., Debtor", In the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division.



A CERTIFIED COPY 5 PGS
DISTRICT COURT
ATTEST: 6-7-2007
DATES
DAVID R. LLOYD
District Clerk Johnson
County Texas
By AA

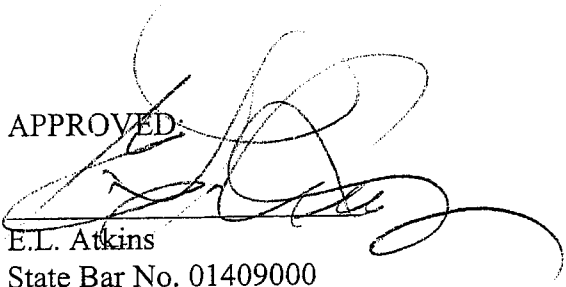
JUDGMENT

EX. 2

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of the Court are taxed against the party incurring same.

SIGNED this 7 day of June, 2007.

APPROVED:


E.L. Atkins
State Bar No. 01409000
Atkins Law Firm
325 South Mesquite Street
P.O. Box 157
Arlington, TX 76010
Telephone: 817-261-3346
Telecopier: 817-261-3347
Attorney for Intervenors, Jackie Fisher, Individually
and as Administratrix and Representative
of the Estate of Johnny Fisher, Deceased,
Houston Fisher and Johnny Fisher


JUDGE PRESIDING

Wayne Clawater
State Bar No.04328500
Cruse, Scott, Henderson & Allen, L.L.P.
Attorneys at Law
2777 Allen Parkway, 7th Floor
Houston, Texas 77019-2133
Attorney for Defendants, John Laurence, Sue Samuel, R.N.,
Sharon Orr, R.N., and Karen Cox, R.N.,

JUDGMENT

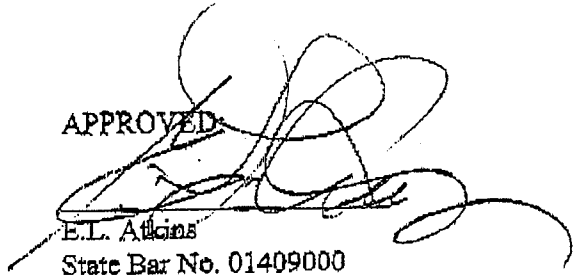
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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of the Court are taxed against the party incurring same.

SIGNED this _____ day of _____, 2007.

JUDGE PRESIDING

APPROVED:



E.L. Atkins
State Bar No. 01409000
Atkins Law Firm
325 South Mesquite Street
P.O. Box 157
Arlington, TX 76010
Telephone: 817-261-3346
Telecopier: 817-261-3347
Attorney for Intervenor, Jackie Fisher, Individually
and as Administratrix and Representative
of the Estate of Johnny Fisher, Deceased,
Houston Fisher and Johnny Fisher



Wayne Clawwater
State Bar No. 04328500
Cruse, Scott, Henderson & Allen, L.L.P.
Attorneys at Law
2777 Allen Parkway, 7th Floor
Houston, Texas 77019-2133
Attorney for Defendants, John Laurence, Sue Samuel, R.N.,
Sharon Orr, R.N., and Karen Cox, R.N.,

JUDGMENT

Exhibit “3”

First Amended Original Petition

Page No. 24

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MILDRED FISHER, ET AL	§	IN THE DISTRICT COURT OF
	§	
VS.	§	JOHNSON COUNTY, TEXAS
	§	
JOHN B. PAYNE, D.O., OSTEOPATHIC	§	
MEDICAL CENTER OF TEXAS,	§	
N. P. CASH, R.N., SUE SAMUEL, R.N.,	§	
V. PATE, CRT, and SUZANNE SHENK, D.O.	§	249 TH JUDICIAL DISTRICT

DEFENDANT OSTEOPATHIC MEDICAL CENTER OF TEXAS' SECOND
 SUPPLEMENTAL RESPONSE TO INTERVENORS' JACKIE FISHER, INDIVIDUALLY AND AS
 ADMINISTRATRIX OF THE ESTATE OF JOHNNY FISHER, DEC'D.,
JOHNNY FISHER AND HOUSTON FISHER'S REQUEST FOR DISCLOSURE

TO: Intervenor, by and through their attorney of record, E. L. Atkins, 325 S. Mesquite Street, Arlington, Texas 76010.

COMES NOW Osteopathic Medical Center of Texas, one of the Defendants herein, and files its Second Supplemental Response to Jackie Fisher, Individually and as Administratrix of the Estate of Johnny Fisher, Dec'd., Johnny Fisher and Houston Fisher's Request for Disclosure.

REQUEST FOR DISCLOSURE A: The correct names of the parties to the lawsuit.

RESPONSE: Defendant has no record of any registered nurse in its employ by the name of "N. P. Cash." Otherwise, the parties have been correctly named to Defendant's knowledge.

REQUEST FOR DISCLOSURE B: The name, address, and telephone number of any potential parties.

RESPONSE: None.

REQUEST FOR DISCLOSURE C: The legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial).

RESPONSE: Defendant contends that neither it, nor any of its employees, breached the applicable standard of care with respect to their medical treatment of the Decedent, and that no act or omission on the part of Defendant, or any of its employees, was a proximate cause of the death of Decedent or any resulting damages to Plaintiffs.


REQUEST FOR DISCLOSURE D: The amount and any method of calculating economic damages.

RESPONSE: Not applicable.

EX. 3

Respectfully submitted,

GOODMAN, ODOM, LACY, FLOYD & BERRY, L.L.P.
301 Commerce Street, Suite 3131
Fort Worth, Texas 76107
817/338-9400
817/338-9494 (fax)

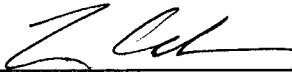
By: 

Lane Odom
Texas Bar No. 15202600

ATTORNEYS FOR DEFENDANT OSTEOPATHIC MEDICAL
CENTER OF TEXAS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served upon Intervenor's counsel by certified mail, return receipt requested, and upon all other counsel of record by regular U. S. Mail, on the 1st day of March, 2002.



- (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
- (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:
 - (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
 - (B) the expert's current resume and bibliography.

RESPONSE: No experts have been retained at this time.

REQUEST FOR DISCLOSURE G: Any indemnity and insuring agreements described in Rule 192.3(f).

RESPONSE: Defendant maintains a self-insured trust with limits of \$2,000,000.00 per occurrence, \$4,000,000.00 aggregate. Excess coverage is provided through Mutual Assurance with limits of \$20,000,000.00. A copy of this self-insured trust agreement and declarations page of the excess insurance policy are attached to this Response to Request for Disclosure.

REQUEST FOR DISCLOSURE H: Any settlement agreements described in Rule 192.3(g).

RESPONSE: None.

REQUEST FOR DISCLOSURE I: Any witness statements described in Rule 192.3(h).

RESPONSE: None, other than the patient's medical records may contain such "statements."

REQUEST FOR DISCLOSURE J: In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills.

RESPONSE: Not applicable.

REQUEST FOR DISCLOSURE K: In a suit alleging physical and mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party.

RESPONSE: Defendant assumes that Plaintiffs are in possession of the Osteopathic Medical Center of Texas chart relating to the incident in question. If not, Defendant will make this hospital chart available for inspection and copying at a mutually agreeable time. As for other medical records that may be obtained by virtue of an authorization, this request will be supplemented, assuming that Defendant obtains any responsive information.

Exhibit "4"

First Amended Original Petition

Page No. 25

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
501 WEST TENTH STREET, ROOM 128
FORT WORTH, TX 76102-3643

CHAMBERS OF
DENNIS MICHAEL LYNN
U.S. BANKRUPTCY JUDGE

Telephone: (817) 333-6020
Facsimile: (817) 333-6002

May 31, 2007

Shawn K Brown
1401 Elm Street Suite 4750
Dallas, TX 75202

Gregory H. Bevel/Kerry Ann Miller
ROCHELLE HUTCHESON & McCULLOUGH, LLP
325 N. St. Paul St., Ste 4500
Dallas, TX 75201

Matthew M. Julius
JPMorgan Chase Bank
P.O. Box 655415
Dallas, TX 75265-5414

Re: *Shawn K. Brown, Ch. 7 Trustee for Fort Worth Osteopathic Hospital, Inc. v. JPMorgan Chase Bank, N.A.; Adversary No. 07-04016*

Dear Counsel:

I have now carefully reviewed the complaint, Defendant's Motion to Dismiss (the "Motion") and supporting brief and Plaintiff's response. As I understand the complaint, Plaintiff's claims are of two types. First, Plaintiff asserts that Defendant breached its duties as trustee under the Fort Worth Osteopathic Medical Center, Inc, d/b/a Fort Worth Osteopathic Medical Center Self-Insurance Trust Agreement (the "Agreement") to the detriment of its intended beneficiaries. Second, Defendant's breaches of its duties were part of a course of conduct undertaken by Debtor's officers and directors which course of conduct harmed Debtor's creditors.

With respect to the first type of claim, I concur with Defendant that Plaintiff lacks the standing to assert for the estate's benefit harm to the beneficiaries of the trust created by the Agreement. Had Defendant properly performed its duties,¹ the corpus of the trust could only have been used to satisfy malpractice claims; the funds would not have been available to Plaintiff for distribution to all of Debtor's creditors.²

¹ I do not reach here the question of whether, in fact, Defendant breached its duties. For purposes of the Motion I must assume it did. See 15 *Moore's Federal Practice*, § 101.30 (Matthew Bender 3d ed); *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 938, No. 06-486, 2007 U.S. LEXIS 5901 (U.S. May 21, 2007); *Neitzke v. Williams*, 490 U.S. 319 (U.S. 1989).

² I note that Defendant turned over to Plaintiff monies held at the petition date. I do not at this time know

Brown v. JPMorgan Chase Bank, N.A.
May 31, 2007
Page 2 of 3

Nevertheless, Plaintiff may be able to cause replenishment of the trust by exercising rights retained under the Agreement. For example, in addition to authority to direct distribution to satisfy claims covered cited in the complaint, Debtor, through its board of directors, has considerable power to control the trust under Agreement § 3.03 and may even change the trustee (Agreement § 5.06). Debtor controls the administrative committee, which may "take steps it deems necessary to remedy any administrative error." (Agreement § 3.03). Additionally, the hospital retained the right to inspect and audit the trust account. (Agreement § 5.04). This provision, for example, might give standing to bring an accounting action. See *National Bank of Detroit v Sheldon*, 730 F.2d 421 (6th Cir. 1984); *Sanders v Citizen Nat'l Bank*, 585 So.2d 1064 (Fla. 5th DCA 1991). Because Plaintiff can exercise Debtor's rights (11 U.S.C. § 323), Plaintiff may be able to achieve reimbursement of the trust through exercise of the rights retained by the hospital.

Alternatively, Plaintiff steps into Debtor's shoes as settlor of the trust created by the Agreement. See *West v. Parker (In re Watson)*, 325 B.R. 380, 386 (Bankr. S.D. Tex. 2005) and *Gray v. Exec. Risk Idem., Inc. (In re Molten Metal Tech., Inc.)*, 271 B.R. 711, 721 (Bankr. D. Mass. 2002). Under Texas law³, it may be that the settlor has standing to sue the trustee for improper administration of the trust. See Tex. Prop. Code § 113.151(b) (1992); *Sanders v. Citizen Nat'l Bank*, 585 So.2d 1064 (Fla. 5th DCA 1991) (discussing exceptions to the no-settlor enforcement rule).

Furthermore, if the extent of the retained rights qualifies Debtor as a co-trustee of the trust, Debtor has standing to sue for trustee's breaches. Tex. Prop. Code §§ 111.004(7) and 113.151(b) (1992). Because Plaintiff steps into Debtor's shoes, if Debtor has standing as a co-trustee, Plaintiff would have standing. 325 B.R. 380; 271 B.R. 711.

Should a claim under one of these theories be viable, Plaintiff has stated sufficient facts to support an action in contract or as settlor. If Plaintiff repleads to assert an action under such a theory,⁴ I will allow such an action to proceed. Should Plaintiff fail to replead by June 21, 2007, I will enter an order granting the Motion to the extent of the first type of claim asserted in the complaint.

under what theory Plaintiff received those monies. It may be that, if Plaintiff is successful in asserting the claims referred to below that, upon replenishment of the trust, some theory could be put forward for their transfer to Debtor's estate. Alternatively, the payment of remaining funds to Plaintiff may have been improper.

³ The agreement provides that Texas law applies. (Agreement §8.02)

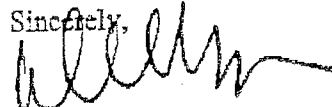
⁴ I note that such an action would effect replenishment of the trust created by the Agreement, not direct enhancement of Debtor's estate. See, e.g., *Fla. Dep't of Ins v Chase Bank of Tex. N.A.*, 274 F.3d 924 (5th Cir. 2001); *In re Brunswick Hosp. Ctr., Inc.*, 156 B.R. 896 (D.N.Y. 1993).

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As to the second kind of claim, I do not believe it is as presently alleged properly articulated. I do conclude, though, that sufficient facts are pleaded to support a claim that Defendant participated with Debtor's officers and directors in a course of conduct harmful to Debtor's creditors. I believe this claim is sufficiently set out to allow discovery to go forward. Once Plaintiff has had an opportunity to flesh out the facts, I would expect a clearer statement of the nature of the cause of action. Should Plaintiff be unable to provide such a delineation of his claim, summary disposition may be appropriate. Therefore, as to the second type of claim asserted in the complaint, the Motion will be denied without prejudice.

Counsel to Plaintiff is directed to prepare and submit⁵ an order consistent with the foregoing. Should Plaintiff not replead by June 21, 2007, Defendant's counsel may submit an appropriate order to the court granting the Motion in part.

Sincerely,



D. Michael Lynn

DML:bt

⁵ Such order shall be provided to Defendant's counsel three business days prior to presentation to the court.