

STATE OF INDIANA) ELKHART COUNTY SUPERIOR COURT 2
) SS:
COUNTY OF ELKHART) CAUSE NO. 20D02-1911-CT-243

LINDA GIEREK and STEPHEN GIEREK, on behalf of
themselves and all others similarly situated,

Plaintiffs,

Class Action

K.W., G.S., L.P., L.W., S.B., S.J. C.D., S.S. and E.M.,

Intervenor-Plaintiffs

v.

ANONYMOUS 1, ANONYMOUS 2, and ANONYMOUS 3,

Defendants,

STEPHEN W. ROBERTSON, Commissioner of the INDIANA
DEPARTMENT OF INSURANCE AS ADMINISTRATOR OF
THE INDIANA PATIENT'S COMPENSATION FUND,

Intervenor-Defendant.

STEPHEN W. ROBERTSON, Commissioner of the INDIANA
DEPARTMENT OF INSURANCE AS ADMINISTRATOR OF
THE INDIANA PATIENT'S COMPENSATION FUND,

Counter-Plaintiff/Cross-Plaintiff,

v.

LINDA GIEREK, and STEPHEN GIEREK on behalf of
themselves and all others similarly situated, K.W., G.S., L.P.,
L.W., S.B., S.J. C.D., S.S., E.M.,

Counter-Defendants,

ANONYMOUS 1, ANONYMOUS 2, and ANONYMOUS 3,

Cross-Defendants.

**LINDA GIEREK, STEPHEN GIEREK, AND PROPOSED CLASSES’
ANSWER TO COUNTERCLAIM OF STEPHEN W. ROBERTSON**

Linda Gieriek and Stephen Gieriek, on behalf of themselves and the Proposed Classes, by counsel, for their Answer and Affirmative Defenses to the Counterclaim of Stephen W. Robertson, Commissioner of the Indiana Department of Insurance as Administrator of the Indiana Patient’s Compensation Fund, state:

ANSWER

1. The PCF brings this Counterclaim and Cross-Claim for a declaratory judgment regarding its rights and obligations, if any, regarding all claims asserted by Plaintiffs and Intervenor-Plaintiffs against Defendants, Anonymous 1, Anonymous 2, and Anonymous 3 (“Healthcare Providers”), for and deriving out of an alleged failure to properly sterilize surgical instruments resulting in the potential exposure to infections, such as the hepatitis C virus, hepatitis B virus and human immunodeficiency virus (HIV).

Answer: This paragraph makes legal statements that do not require an answer. To the extent that an answer is required, Plaintiffs/Counterclaim-Defendants admit that the PCF purports to bring the declaratory judgment that is described in this paragraph.

2. An actual, immediate controversy exists among the parties regarding whether said negligence claims arise out of ordinary negligence under common law or professional medical malpractice subject to the Indiana Medical Malpractice Act, Ind. Code § 34-18-1-1 et seq (the “MMA”).

Answer: Plaintiffs/Counterclaim-Defendants admit that there may be a legal dispute among the parties to this action as to whether the claims brought by Plaintiffs/Counterclaim-Defendants sound in ordinary negligence or medical malpractice. To the extent this paragraph’s allegation that there is an “actual, immediate controversy” states a legal conclusion, no answer is required.

3. The PCF seeks a declaration that said claims arise out of ordinary negligence under common law, and therefore, the MMA does not apply to said

claims.

Answer: This paragraph makes legal statements that do not require an answer. To the extent that an answer is required, Plaintiffs/Counterclaim-Defendants admit that the PCF purports to seek a declaration that the claims arise out of ordinary negligence under common law.

Parties

4. Stephen W. Robertson is Commissioner of the Indiana Department of Insurance, and Administrator of the Indiana Patient's Compensation Fund.

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

5. Counterclaim-Defendant Ms. Gierek is and was an Indiana resident and citizen at all relevant times.

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

6. Counterclaim-Defendants in Proposed Class 1 ("Proposed Class 1"), represented by Ms. Gierek, are defined as:

"all patients of Healthcare Providers to whom Healthcare Providers sent a letter identical or substantially similar to the letter it sent to Linda Gierek or to whom Healthcare Providers did not send such a letter but who underwent surgery or other procedure that involved the use of surgical instruments, during the period of time when one or more employees of Healthcare Providers did not complete all steps in the surgical instrument sterilization process (approximately but not necessarily limited to April 1, 2019 to September 30, 2019)."

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

7. Counterclaim-Defendant Mr. Gierek is and was an Indiana resident and citizen at all relevant times.

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

8. Counterclaim-Defendants in Proposed Class 2 ("Proposed Class 2"), represented by Mr. Gierek, are defined as:

“all persons who are currently married to a member of Proposed Class 1 or who were married to a member of the Proposed Class 1 at any time after the corresponding member of Proposed Class 1 underwent surgery or other procedures that involved the use of surgical instruments, during the period of time when one or more employees of Healthcare Providers did not complete all steps in the surgical instrument sterilization process (approximately but not necessarily limited to April 1, 2019 to September 30, 2019).”

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

9. Counterclaim-Defendants, Intervening Plaintiffs², represented by the law firm of Pfeifer, Morgan and Stesiak, are residents of Indiana at all relevant times.

Answer: Plaintiffs/Counterclaim-Defendants are without knowledge or information sufficient to form a belief as to the truth of the factual allegations in this paragraph the allegations of this paragraph, and therefore deny the same.

10. Cross-Claim-Defendant Anonymous Healthcare Provider 1 is an Indiana non-profit corporation.

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

11. Cross-Claim-Defendant Anonymous Healthcare Provider 2 is an Indiana non-profit corporation.

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

12. Cross-Claim-Defendant Anonymous Healthcare Provider 3 is an Indiana limited liability com[pany.]

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

² On May 14, 2020, the PCF, by counsel, was informed that counsel for the Intervening Plaintiffs plan to file a Supplemental Motion to Intervene and, therefore the PCF will amend its Counterclaim and Crossclaim for Declaratory Judgment to include any new intervening parties on the Supplemental Motion once it is approved by the Court.

13. Anonymous Healthcare Providers are Healthcare Providers pursuant to the requirements of the Indiana MMA.

Answer: Plaintiffs/Counterclaim-Defendants are without knowledge or information sufficient to form a belief as to the truth of the factual allegations in this paragraph the allegations of this paragraph, and therefore deny the same.

Jurisdiction/Venue

14. This Court has jurisdiction over this matter pursuant to Ind. Code §34-14-1-1 and Indiana Rules of Trial Procedure 13 as a compulsory counterclaim and cross-claim. Venue is proper pursuant to Rule 75 of the Indiana Rules of Trial Procedure. Preferred venue lies in Elkhart County pursuant to 75(A)(4) and 75(A)(5) because Healthcare Providers' principal offices are in Elkhart County and the majority of the Counterclaim-Defendants reside in Elkhart County.

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

Factual Allegations

15. The Plaintiffs in this case allege that during November 2019, the Healthcare Providers sent a letter ("Letter") that informed potentially affected surgery patients that a technician had failed to adhere to the sterilization process for surgical equipment from April to September 2019 ("Incidents").

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

16. According to the Plaintiff, the Healthcare Providers notified its recipients that they might have been exposed to infections such as the hepatitis C virus, hepatitis B virus and human immunodeficiency virus (HIV).

Answer: Plaintiffs/Counterclaim-Defendants admit that they allege the Letter informed Plaintiffs/Counterclaim-Defendants and the members of the Proposed Classes that they "may have been exposed to countless infectious diseases, including without limitation Hepatitis B, Hepatitis C, and Human Immunodeficiency Virus ('HIV')."

LINDA AND FRANK GIEREK

17. In June 2019, Healthcare Providers allegedly performed medical

treatment on Ms. Gierek.

Answer: Plaintiffs/Counterclaim-Defendants admit that Healthcare Providers performed medical treatment on Linda Gierek in June 2019.

18. In November 2019, Healthcare Providers allegedly notified Ms. Gierek that one of their surgical instrument sterilization technicians did not complete a step in a multistep sterilization process.

Answer: Plaintiffs/Counterclaim-Defendants admit that Healthcare Providers sent a Letter to Linda Gierek and members of the Proposed Classes stating that one of the Healthcare Providers' surgical instrument sterilization technicians did not complete one step in a multistep sterilization process with certain surgical instruments.

19. On November 22, 2019, Ms. Gierek, on behalf of herself and all others similarly situated, filed a Class Action Complaint ("Ms. Gierek's Complaint") in Cause No. 20D02-1911- CT-000243 in Elkhart County Superior Court 2, against the Healthcare Providers.

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

20. On November 22, 2019, Ms. Gierek filed with the Indiana Department of Insurance a Proposed Complaint ("Ms. Gierek's Proposed Complaint"). Ms. Gierek's Proposed Complaint contains the same operative facts, circumstances, and allegations of negligence that Ms. Gierek asserted in her civil Complaint filed in Elkhart County.

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

21. On November 26, 2019, Ms. Gierek filed Plaintiff's Motion for Class Certification requesting the Court certify a class to include approximately 1,182 alleged surgical patients that received a Letter from Healthcare Providers.

Answer: Plaintiffs/Counterclaim-Defendants admit Linda Gierek filed Plaintiff's Motion for Class Certification, on November 26, 2019, requesting the Court certify the class that is defined as Proposed Class 1 in the First Amended Class Action Complaint.

22. On February 3, 2020, Ms. Gierek and Mr. Gierek filed with the Indiana Department of Insurance an Amended Proposed Complaint. Mr. and Ms. Gierek's Amended Proposed Complaint contains the same operative facts, circumstances, and allegations of negligence that the Gierek's assert in their civil Amended Complaint filed in Elkhart County.

Answer: Plaintiffs/Counterclaim-Defendants admit they filed their proposed First Amended Class Action Complaint with the Indiana Department of Insurance on February 3, 2020 and that the facts alleged on behalf of Linda Gierek and Proposed Class 1 are the same as the Ms. Gierek Complaint and the same facts were at the core of Stephen Gierek's claims and those of Proposed Class 2.

23. On February 7, 2020, Mr. Gierek, on behalf of himself and all others similarly situated, and Ms. Gierek, on behalf of herself and all others similarly situated, filed an Amended Class Action Complaint ("Amended Complaint") in Cause No. 20D02-1911-CT-000243 in Elkhart County Superior Court 2, against the Healthcare Providers.

Answer: Plaintiffs/Counterclaim-Defendants admit they filed their First Amended Class Action Complaint in the Elkhart County Superior Court 2 against the Healthcare Providers on February 7, 2020.

24. In the Amended Complaint, Ms. Gierek alleges that she suffered ongoing and future extreme emotional distress and trauma after learning of potential exposure to these diseases. Ms. Gierek also alleges that she will incur medical testing and other expenses for months or years to come. (Amended Complaint, ¶¶ 20-21).

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

25. In the Amended Complaint, Mr. Gierek alleges that he fears and feared for his spouse's wellbeing as well as his own wellbeing, upon learning that his spouse had undergone a surgery by Healthcare Providers in which the surgical instruments may not have been properly sterilized. (Amended Complaint, ¶ 23).

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

INTERVENING PLAINTIFFS

26. On February 18, 2020, Counterclaim Defendants, the Intervening Plaintiffs filed a Motion to Intervene (“Petition”) in Elkhart County Superior Court in Cause No. 20D02-1911-CT- 000243.

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

27. The Intervening Plaintiffs claim an interest relating to the Gierek Complaint. Specifically, the Intervening Plaintiffs allege to have undergone various surgical procedures by Healthcare Providers which may have exposed them to infections such as hepatitis C Virus, hepatitis B Virus and HIV. (Petition, ¶¶ 3-4).

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

Claim for Relief – Declaratory Judgment

28. Plaintiff is the Commissioner of the Indiana Department of Insurance, which is a state governmental entity doing business throughout the State of Indiana with its principal place of business in Marion County, Indiana.

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

29. The Commissioner is the statutorily appointed Administrator of the PCF.

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

30. The PCF is a dedicated fund responsible for the payment of excess damages in medical malpractice liability claims involving qualified health care providers, as more completely set out in the MMA.

Answer: Plaintiffs/Counterclaim-Defendants admit the allegations of this paragraph.

31. Recovery for damages against the PCF is not an available remedy in general liability negligence claims that fall outside the scope of the MMA.

Answer: Interpretation of the MMA is a question of law not necessitating an answer. To the extent an answer is necessary, Plaintiff/Counterclaim-Defendants deny the

allegations of this paragraph.

32. The Commissioner has the sole responsibility for administering the PCF, including the statutory right to protect the PCF against claims for excess damages. Ind. Code §34-18-6-2.

Answer: Interpretation of the MMA is a question of law not necessitating an answer. To the extent an answer is necessary, Plaintiff/Counterclaim-Defendants deny the allegations of this paragraph.

33. A legal dispute exists concerning whether the claims of Ms. Gierek and all others similarly situated, Mr. Gierek and all others similarly situated, and the Intervening Plaintiffs against Healthcare Providers sound in ordinary negligence under common law, or medical malpractice subject to the MMA.

Answer: This allegation makes a legal assertion that does not require any answer. To the extent an answer is necessary, Plaintiffs/Counterclaim-Defendants deny the allegations of this paragraph.

34. The question of whether Ms. Gierek and all others similarly situated, Mr. Gierek and all others similarly situated, and the Intervening Plaintiffs' claims falls within the provisions of the MMA is an important question of law that will dictate both the procedural and substantive remedies applicable to these claims.

Answer: This allegation makes a legal assertion that does not require any answer. To the extent an answer is necessary, Plaintiffs/Counterclaim-Defendants deny the allegations of this paragraph.

35. This issue should be decided at the outset of this litigation because the determination impacts both substantive and procedural law that governs the entire case.

Answer: This allegation makes a legal assertion that does not require any answer. To the extent an answer is necessary, Plaintiffs/Counterclaim-Defendants deny the allegations of this paragraph.

36. The applicability of the MMA to the circumstances alleged in Ms. Gierek and all others similarly situated, Mr. Gierek and all others similarly situated, and the Intervening Plaintiffs' claims is a question of law, whose early

resolution is necessary to avoid the delay and expense of proceeding under inapplicable procedural and substantive rules.

Answer: This allegation makes a legal assertion that does not require any answer. To the extent an answer is necessary, Plaintiffs/Counterclaim-Defendants deny the allegations of this paragraph.

37. If Ms. Gieriek and all others similarly situated, Mr. Gieriek and all others similarly situated, and the Intervening Plaintiffs' claims sound in medical malpractice, the determination of healthcare liability and damage caps will be controlled by provisions of the MMA. Conversely, if the claims are not covered under the MMA there are no statutory damage caps and the claim will be treated as a claim of ordinary negligence.

Answer: Interpretation of the MMA is a question of law not necessitating an answer. To the extent an answer is necessary, Plaintiffs/Counterclaim-Defendants deny the allegations of this paragraph.

38. A declaratory judgment by which a court of law determines the appropriate procedural and substantive remedy is necessary in order to resolve an existing dispute and to establish the rights and responsibilities of all parties to this action.

Answer: This allegation makes a legal assertion that does not require any answer. To the extent an answer is necessary, Plaintiffs/Counterclaim-Defendants deny the allegations of this paragraph.

39. Substantial differences exist, both procedurally and substantively, between the dispute resolution provisions and remedies of the MMA, and the common law.

Answer: This allegation makes a legal assertion that does not require any answer. To the extent an answer is necessary, Plaintiffs/Counterclaim-Defendants deny the allegations of this paragraph.

40. The parties will suffer substantial expense and will be severely prejudiced if this action is pursued under procedural and substantive rules that are later determined to be inapplicable.

Answer: Plaintiffs/Counterclaim-Defendants are without knowledge or information sufficient to form a belief as to the truth of the factual allegations in this paragraph the allegations of this paragraph.

GENERAL DENIAL

To the extent that an answer or response may be required which is not set forth herein, Plaintiffs/Counterclaim-Defendants generally deny any allegations contained within the Counterclaim of Stephen W. Robertson not expressly admitted.

AFFIRMATIVE DEFENSES

Plaintiffs/Counterclaim-Defendants, by counsel, for their Affirmative Defenses further assert and allege:

1. Counter-Plaintiff's claims are barred, in whole or in part, by one or more of the following equitable doctrines: waiver, estoppel, laches, and/or unclean hands.
2. Counter-Plaintiff's claims fail, in whole or in part, to state a cause of action against Plaintiffs/Counterclaim-Defendants upon which relief may be granted.
3. Counter-Plaintiff's claims are barred, in whole or in part, due to the non-occurrence of one or more conditions precedent.
4. Counter-Plaintiff lacks standing to seek the relief it requests.
5. Counter-Plaintiff's claims are barred because Counter-Plaintiff is not the real party at interest.

Discovery in this matter is ongoing. Accordingly, Plaintiffs/Counterclaim-Defendants reserve the right to add additional defenses as they are uncovered.

WHEREFORE, having fully answered the Counterclaim of Stephen W. Robertson, Plaintiffs/Counterclaim-Defendants respectfully request that the Court enter judgment in favor of Plaintiffs/Counterclaim-Defendants and against Counter-Plaintiff; that Counter-Plaintiff takes nothing by way of its Counterclaim; that costs be assessed against Counter-Plaintiff; and that Plaintiffs/Counterclaim-Defendants be awarded all other appropriate relief.

Respectfully submitted,

/s/ Eric S. Pavlack
Eric S. Pavlack
Colin E. Flora
PAVLACK LAW, LLC
50 E. 91st St., Ste. 317
Indianapolis, IN 46240
(317) 251-1100
(317) 252-0352 *fax*
Eric@PavlackLawFirm.com
Colin@PavlackLawFirm.com

Walter J. Alvarez
Brock Alvarado
Steven J. Alvarez
WALTER J. ALVAREZ, P.C.
1524 West 96th Ave.
Crown Point, Indiana 46307
(219) 662-6400
(219) 6626410 *fax*
**Attorneys for Plaintiffs and the
Proposed Classes**

CERTIFICATE OF SERVICE

I certify that on June 3, 2020, a copy of the foregoing was filed electronically with Efile.INCourts.Gov. On the same date the foregoing was served on the following parties by operation of the Court's electronic filing system pursuant to Ind. Trial Rule 86. Parties may access this filing through the Court's system:

Alyssa Stamatakos
James Hough
Stephen A. Tyler
Julia M. Kwait
Ryan T. Dahlquist
EICHHORN & EICHHORN, LLP
2929 Carlson Drive, Suite 100
Hammond, IN 46323
astamatakos@eichhorn-law.com
jhough@eichhorn-law.com
styler@eichhorn-law.com
jkwait@eichhorn-law.com
rdahlquist@eichhorn-law.com

Jack A. Kramer
Kenneth J. Allen
Kenneth J. Allen Law Group
1109 Glendale Blvd.
Valparaiso, IN
kja@allen.law
jkramer@allen.law

Jeffrey J. Stesiak
Daniel H. Pfeifer
PFEIFER MORGAN & STESIAK
53600 N. Ironwood Dr.
South Bend, Indiana 46635
dpfeifer@pilawyers.com
jstesiak@pilawyers.com

A. Richard M. Blaiklock
Wade D. Fulford
Matthew W. Conner
Taylor L. Fontan
LEWIS WAGNER, LLP
501 Indiana Avenue, Suite 200
Indianapolis, IN 46202
ablaiklock@lewiswagner.com
wfulford@lewiswagner.com
mconner@lewiswagner.com
tfontan@lewiswagner.com

/s/ Eric S. Pavlack
Eric S. Pavlack