

**IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA**

<b>PATRICIA ANN AUSTIN, and</b>	)	CASE NO. _____
<b>DENNIS D. AUSTIN,</b>	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	COMPLAINT
	)	AND
<b>THE NEBRASKA METHODIST</b>	)	WAIVER OF PANEL REVIEW
<b>HOSPITAL, a Nebraska Corporation,</b>	)	
<b>d/b/a Methodist Home Health, also</b>	)	
<b>unofficially d/b/a Methodist Wound</b>	)	
<b>Center; NEBRASKA METHODIST</b>	)	
<b>HEALTH SYSTEM, INC., a Nebraska</b>	)	
<b>Corporation, d/b/a Methodist Health</b>	)	
<b>System, also d/b/a Nebraska Methodist</b>	)	
<b>Hospital; MARIE E. MONTAG, M.D.;</b>	)	
<b>and, AESTHETIC SURGICAL</b>	)	
<b>IMAGES, P.C., a Nebraska Prof. Corp.,</b>	)	
	)	
Defendants.	)	

Plaintiffs, for their cause of action against all Defendants, individually and collectively, state as follows:

**ALLEGATIONS COMMON TO ALL CLAIMS**

**Parties, Jurisdiction and Venue**

1. At all times relevant herein, Plaintiff, Patricia Ann Austin ("Mrs. Austin"), has been a resident of Omaha, Douglas County, Nebraska and is the wife of Dennis D. Austin.
2. At all times relevant herein, Plaintiff, Dennis D. Austin, ("Mr. Austin"), has been a resident of Omaha, Douglas County, Nebraska and is the husband of Patricia Ann Austin.
3. At all times relevant herein, Defendant, The Nebraska Methodist Hospital ("Methodist Hospital"), has been a Nebraska corporation engaged in the business of operating a hospital and providing healthcare goods and services on an inpatient and/or outpatient basis to members of the general public, including but not limited to Mrs. Austin. Defendant, Methodist Hospital, in-part provides home health care and/or hospice services and has operated under the trade name "Methodist Home Health" in its provision of such healthcare goods and/or services. Defendant, Methodist Hospital, in-part provides treatment and management of acute and chronic wounds and has operated under the unofficial or official trade name "Methodist Wound Center"

or “The Methodist Hospital Wound Center” in its provision of such wound treatment and/or management.

4. At all times relevant herein, Defendant, Nebraska Methodist Health System, Inc. (“NMHS”), is a corporation organized and existing under and by virtue of the laws of the State of Nebraska with its principal place of business in Omaha, Douglas County, Nebraska. At all times relevant herein, Nebraska Methodist Health System, Inc. owned and operated a hospital known as Nebraska Methodist Hospital in Omaha Douglas County Nebraska. Upon information and believe, Defendant, Nebraska Methodist Health System, Inc., is the holding company for the Methodist System and/or Methodist Health System. Defendant, NMHS, operates and/or continues to operate under various trade names, including, but not limited to, “Methodist Health System” and/or “Nebraska Methodist Hospital”.

5. At all times relevant herein, Defendants, Methodist Hospital and NMHS employed physicians, nurses, and/or other healthcare professionals (“Methodist Hospital Staff”) to provide healthcare goods and services to the general public, including but not limited to Mrs. Austin. The negligent acts and/or omissions of the Methodist Hospital staff are imputed to Methodist Hospital and NMHS as a matter of law, and Methodist Hospital and NMHS are, therefore, vicariously liable for all such negligent acts and/or omissions under the legal theories of Respondeat Superior and/or Agency.

6. At all times relevant herein, Defendant Marie E. Montag, M.D. (“Dr. Montag”), was a physician engaged in the practice of her profession in Omaha, Douglas County, Nebraska, and held herself out to be a skilled and competent physician.

7. At all times relevant herein, Defendant Aesthetic Surgical Images, P.C. (“ASI”), was a Nebraska corporation engaged in the business of providing surgical and other healthcare services to members of the general public, including but not limited to Plaintiff, Mrs. Austin.

8. At all times relevant herein, Dr. Montag was an officer, director, shareholder, agent, servant or employee of ASI, acting in the course and scope of her employment or other business relationship with ASI. The negligent acts and/or omissions of Dr. Montag and/or those negligent acts and/or omissions of other ASI officers, directors, shareholders, agents, servants or employees of ASI (together, hereinafter referred to as “ASI Staff”), acting in the course and scope of employment or other business relationship, are imputed to ASI as a matter of law, and

ASI is therefore vicariously liable for all such negligent acts and/or omissions under the legal theories of Respondeat Superior and/or Agency.

9. This Court has jurisdiction pursuant to Neb. Rev. St. §24-517, because this is a civil action in which the amount in controversy exceeds \$52,000.00.

10. Venue lies in this Court as the tortious acts and/or omissions complained of occurred in Omaha, Douglas County, Nebraska.

### **The Nebraska Hospital Medical Liability Act**

11. Defendants do not qualify for coverage under the Nebraska Hospital-Medical Liability Act, §44-2801 et. seq. R.R.S. 1943, as amended (“NHMLA”) and have failed to comply with the requirements of the Act. Plaintiffs therefore demand strict proof of any claim by any Defendant of coverage under or compliance with the NHMLA.

12. Notwithstanding any filing by the Defendants for the special benefits, privileges and protection of such act, Plaintiffs allege that the NHMLA is unconstitutional in whole or in part because it violates the Seventh and Fourteenth Amendments to the 14<sup>th</sup> Amendment of the Constitution of the United States, as well as the following provisions of the Constitution of the State of Nebraska: Article I, §§1,3,6,13,16,21,25,26; Article II, § 1; Article III, §18; Article V, § 2; Article VI, §1 and Article XII, § 10(c).

13. Plaintiffs hereby affirmatively waive their right for a medical review panel to review their claims herein against the Defendants as provided by the NHMLA and elect to file this action directly in the District Court of Douglas County, Nebraska.

14. A copy of this complaint is hereby served upon the director of the Nebraska Department of Insurance, together with a copy upon the Attorney General of the State of Nebraska.

### **Basic Facts**

15. On June 8, 2011, Mrs. Austin was admitted to Methodist Hospital and/or NMHS for the purpose of having an abdominal panniculectomy.

16. The abdominal panniculectomy was performed by Dr. Montag, and whether any other physicians or other ASI Staff assisted in the surgery is presently unknown to Plaintiffs.

17. Nurses as well as other members of the Methodist Hospital and/or NMHS staff were present in the operating room during all or part of the abdominal panniculectomy, and some

or all of them assisted in the surgery and or during all relevant time periods following the surgery.

18. During the course of the June 8, 2011 surgery, or during post-operative treatment, a piece of guaze/sponge (hereinafter “sponge”) was left inside of Mrs. Austin.

19. Plaintiff, Mrs. Austin, became ill and began showing signs of infection within two weeks of the date of the surgery. Her symptoms included, but were not limited to, “flu like” symptoms and severe diahrea. Three drains were placed in Mrs. Austin’s abdomen by one or more of the Defendants at the time of the panniculectomy. One drain was removed approximately 3.5 weeks following the surgery, the second was removed approximately 4.5 weeks post-op, and the third was removed about 5.5 weeks post-op. The very next week, Mrs. Austin began running a temperature of 100-103 degrees farenheit for most of every day for approximately four weeks. The incision broke open and was tunneling but did not open up on the right side until later.

20. A wound VAC was placed on Mrs. Austin’s right lower abdomen by one or more of the Defendants at or near the end of July 2011 and Methodist Home Health nurses were visiting the Plaintiff at her home for VAC changes three or more times per week. The VAC remained on Mrs. Austin’s lower abdomen until the first week of October 2011. At or around that time, Mrs. Austin was sent to the Methodist Wound Care Center for treatment three times per week—however, she was quickly transitioned to daily treatment due to the large amount of drainage. At or near the end of October 2011, Mrs. Austin underwent a CT scan of her abdomen and was placed on at least two different antibiotics to be administered for consecutive periods of time.

21. On or about November 2, 2011, interventional radiology placed two drain tubes on Mrs. Austin’s lower abdomen. Leading up to and including this date, Mrs. Austin was sick, extremely uncomfortable and, was experiencing recurring dry-mouth. It was only after Dr. Robert Penn and Infectious Disease Associates, P.C. became involved with Mrs. Austin’s treatment that anyone decided that an exploratory surgery was necessary. On or about December 27, 2011, after the installation of PICC lines in Mrs. Austin and after administering a large amount of IV antibiotics over a stretch of time, Dr. Penn contacted Dr. Montag and instructed that Mrs. Austin needed to undergo further surgery to determine the root cause of the infection. The lengthy infection, and/or the treatment of that infection with large doses of antibiotics and

other medicine, caused Mrs. Austin to suffer diminished and/or otherwise negatively changed, kidney function (hereinafter “diminished kidney function”). The negligence of one or more of the Defendants proximately caused Mrs. Austin’s diminished kidney function. Mrs. Austin continues to suffer from diminished kidney function as of the date of the filing of this Complaint. Her diminished kidney function is feared to be a permanent condition. Mrs. Austin’s many symptoms did not improve, and/or worsened, up through January 25, 2012—the date the 4x4 sponge was removed. During the entire relevant time period, Mrs. Austin was miserable. She experienced unnecessary pain, inconvenience, and constant uncomfortableness. Her life-style was needlessly, and drastically, altered during the entire time period up through her recovery from the January 25, 2012 surgery. During the entire relevant time period, Mrs. Austin and her husband, Plaintiff, Dennis Austin, were required to endure extreme worry and concern for Mrs. Austin’s health and well-being. Additionally, both Plaintiffs were subjected to the unavoidable, nearly continuous, awful, and embarrassing smell that seeped from Mrs. Austin’s festering wounds. None of this would have happened but for the negligence of one or more of the Defendants.

22. During the many months following the panniculectomy surgery, Mrs. Austin was treated by all of the Defendants and/or their respective assistants and/or staff. These Defendants, including their assistants and staff, exercised complete control over the treatment of Mrs. Austin and exercised complete control over the sponges used in her treatment throughout the entire relevant period of time—up through the surgical removal of the sponge on or about January 25, 2012.

### **COUNT I: NEGLIGENCE**

For their Count I claim against all Defendants, Plaintiffs allege:

23. Plaintiffs incorporate by this reference the allegations of Paragraphs 1 through 22 of the Allegations Common to all Claims found in this complaint.

#### ***METHODIST HOSPITAL AND NMHS***

24. As a result of the healthcare provider-patient relationship between and among Methodist Hospital, NMHS and Mrs. Austin, and between Methodist Hospital Staff and Mrs. Austin, Methodist Hospital, NMHS, and their staff, owed a duty to Mrs. Austin to possess and use the care, skill, and knowledge ordinarily possessed and used under like circumstances by

other members of their respective professions engaged in a similar practice in the same or similar localities.

25. Methodist Hospital, NMHS, and their staff breached their respective duties to Mrs. Austin to possess and use the care, skill, and knowledge ordinarily possessed and used under like circumstances by other members of their respective professions engaged in a similar practice in the same or similar localities, because Methodist Hospital, NMHS, and their staff, negligently:

- a. Failed to adequately monitor and manage the surgery and post-operative treatment being performed on Mrs. Austin-- on its premises, using its facilities, including but not limited to, ensuring adequate control over, and accounting for, sponges used during the course of surgery and/or during post-operative treatment including during the many months of treatment that followed the surgery;
- b. Failed to ensure that no sponge was left inside Mrs. Austin after completion of the surgery and failed to ensure that no sponge was left inside Mrs. Austin at any time during the post-operative treatment period; and,
- c. Failed to comply with appropriate protocols, policies, procedures and guidelines for situations such as that involving Mrs. Austin, and were otherwise negligent in a manner not presently known to Mrs. Austin.

*DR. MONTAG AND ASI*

26. As a result of the healthcare provider-patient relationship between and among Dr. Montag and ASI and Mrs. Austin, Dr. Montag and ASI owed a duty to Mrs. Austin to possess, provide and use the care, skill, and knowledge ordinarily possessed and used under like circumstances by other members of Dr. Montag's profession engaged in a similar practice in the same or similar localities.

27. Dr. Montag breached her duty to Mrs. Austin to possess and use the care, skill, and knowledge ordinarily possessed and used under like circumstances by other members of her profession engaged in a similar practice in the same or similar localities, because Dr. Montag negligently:

- a. Failed to adequately perform the surgery, including but not limited to ensuring that there was adequate control over, and accounting for, sponges used during the course of the surgery;

- b. Failed to adequately monitor and manage the nursing or other services being provided to, or for, Mrs. Austin during the surgery, including but not limited to ensuring adequate control over, and accounting for, sponges used during the course of the surgery;
- c. Failed to ensure that no sponge was left inside Mrs. Austin after completion of the surgery; and,
- d. Failed to comply with appropriate protocols, policies, procedures and guidelines for situations such as that involving Mrs. Austin, and was otherwise negligent in a manner not presently known to Mrs. Austin.

#### *CAUSATION AND DAMAGES*

28. As a direct and proximate result of the above described negligence of Methodist Hospital Staff (for which Methodist Hospital and NMHS are vicariously liable), and Dr. Montag (for which ASI is vicariously liable), Mrs. Austin suffered the following damages:

- a. Past and future physical pain and suffering;
- b. Past and future emotional distress;
- c. Past and future inconvenience;
- d. Past and future expenses for healthcare goods and services in an amount greater than she would otherwise have incurred, the nature and extent of which are not presently known, and other general damages, the nature and extent of which are not presently known.

**WHEREFORE**, Plaintiffs pray for judgment against Defendants The Nebraska Methodist Hospital, Nebraska Healthcare Systems, Inc., Marie E. Montag, M.D., and Aesthetic Surgical Images P.C. and each of them, for special and general damages in an amount to be determined by the jury that will be fair and adequate, but not excessive, plus interest, costs, attorney fees and expenses, and for such further relief as the Court may deem just and proper under the circumstances.

#### **COUNT II: RES IPSA LOQUITUR**

For Their Count II Claim against Defendants, the Plaintiffs allege:

29. Plaintiffs incorporate by this reference the allegations of Paragraphs 1 through 28 of the Allegations found in this complaint.

30. Mrs. Austin was unconscious when the abdominal panniculectomy was performed on her.

31. Leaving a sponge inside a patient undergoing surgery, or at any time during post-operative treatment, is not an occurrence which would, in the ordinary course of things, happen without negligence.

32. Methodist Hospital, NMHS, their staff, ASI, its staff, and Dr. Montag, individually and collectively, had control over the operating room, and the performance of the surgery and post-operative treatment, including but not limited to controlling the use of and accounting for all sponges used during the course of the surgery, and during all post-operative treatment.

33. There is no reasonable explanation for a sponge being left inside a patient such as Mrs. Austin-- other than negligence.

#### *CAUSATION AND DAMAGES*

34. As a direct and proximate result of the negligent failure to remove the sponge from inside Mrs. Austin before the completion of the surgery, and/or failure to remove the sponge up to late January of 2012, Mrs. Austin suffered the damages described herein and specified in Paragraph 28 of Count I.

**WHEREFORE**, Plaintiffs pray for judgment against Defendants, Methodist Hospital, NMHS, Marie E. Montag, M.D., and Aesthetic Surgical Images, P.C., joint and severally and each of them, for special and general damages in an amount to be determined by the jury that will be fair and adequate, but not excessive, plus interest, costs, attorney's fees and expenses, and for such further relief as the Court may deem just and proper under the circumstances.

#### **COUNT III: LOSS OF CONSORTIUM**

For their Count III claim against Defendants, Plaintiffs allege:

35. Plaintiffs incorporate by this reference the allegation of found in paragraphs 1- 34 of Counts I and II above.

36. At all times relevant herein, as the husband of Plaintiff, Patricia Austin, Dennis Austin suffered a loss or diminution of what is commonly known as his legal right of consortium, which was enjoyed by him previous to June 8, 2011.



37. As a direct and proximate result of the negligence of all Defendants, as described in Counts I through III, which caused the injuries to Mrs. Austin as described herein and specified in paragraph 28 of Count I, Mr. Austin has been deprived of the services of his wife, and has suffered a loss of past, present, and future loss, impairment or diminution in the services, society, affection, care, comfort, companionship, and conjugal rights of his wife – otherwise known as his legal right of consortium.

**WHEREFORE**, Plaintiffs, Patricia Ann Austin and Dennis D. Austin pray for judgment against Defendants The Nebraska Methodist Hospital, Nebraska Methodist Health Systems, Inc., Marie E. Montag, M.D., and Aesthetic Surgical Images, P.C., joint and severally and each of them, for special and general damages in an amount to be determined by the jury that will be fair and adequate, but not excessive, plus interest, costs, attorney's fees and expenses, and for such further relief as the Court may deem just and proper under the circumstances.

#### **REQUEST FOR JURY TRIAL**

Plaintiffs hereby request that a trial by jury for the foregoing action should be held in Omaha, Nebraska, and that the case be calendared accordingly.

**DATED** this 5<sup>th</sup> day of June, 2013.

PATRICIA ANN AUSTIN, and  
DENNIS D. AUSTIN, Plaintiffs

By: /s/ Sean P. Rensch

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