

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

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JEAN M. HERMAN FEHR, as SPECIAL  
ADMINISTRATOR of the ESTATE OF  
JAMES A. HERMAN, Deceased,

CASE NO. CI: \_\_\_\_\_

Plaintiff,

**COMPLAINT**

vs.

NEBRASKA METHODIST HEALTH  
SYSTEM, INC., a Nebraska non-profit  
domestic corporation; THE NEBRASKA  
METHODIST HOSPITAL, a Nebraska  
non-profit domestic corporation d/b/a  
METHODIST WOUND CENTER;  
PHYSICIANS CLINIC, INC., a non-profit  
domestic corporation formerly d/b/a  
OMAHA VEIN SPECIALISTS; EUGENE  
A. WALTKE, M.D.; JANIS K. COLE,  
APRN; and, KATHRYN J. BRAND,  
APRN,

Defendants.

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NEBRASKA HOSPITAL-MEDICAL LIABILITY ACT

1. This is a medical malpractice claim brought pursuant to the Nebraska Hospital-Medical Liability Act (NHMLA).

EXCLUSIVE REMEDY

2. NHMLA is the exclusive remedy for patients alleging professional negligence against qualified healthcare providers.
  - A. Each Defendant was NHMLA qualified during the dates of the occurrences.
  - B. Occurrences are events that proximately cause damages for which patients or representatives may claim reimbursement.

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C. The Plaintiff is bound by NHMLA because Plaintiff did not:

1. Elect to opt out of NHMLA;
2. File notice with the Director of Insurance in advance of any treatment with a qualified healthcare provider of the election to opt out of NHMLA; and,
3. Notify the healthcare provider of the election to opt out of NHMLA.

WAIVER OF MEDICAL REVIEW PANEL

3. No claim against a qualified healthcare provider may be filed in Court without it first being submitted to a medical review panel.
4. A claimant may affirmatively waive that right, and then may proceed to file an action directly in Court.
5. Plaintiff waives the right to a panel review.

COMMENCING AN ACTION

6. Filing a Complaint in a court of law having requisite jurisdiction is the proper way to commence an action under NHMLA.
7. This Complaint is timely filed within two years of the date of the occurrences as there was a period of continuous negligent treatment from December 3, 2012, through January 4, 2013.

JURISDICTION AND VENUE

8. Being a court of general jurisdiction, the District Court for Douglas County has requisite jurisdiction to hear NHMLA cases.
9. The occurrences took place in Omaha, Douglas County, Nebraska so venue is proper in the District Court of Douglas County.

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PARTIES

10. Plaintiff Jean M. Herman Fehr is:

- A. Qualified as a representative of the patient;
- B. A resident of Omaha, Douglas County, Nebraska; and,
- C. The daughter of the Decedent James A. Herman.

1. The County Court for Douglas County, Nebraska, appointed her as  
Special Administrator on January 2, 2015, at PR 13-1642.

11. Defendant Nebraska Methodist Health System, Inc.:

- A. is qualified as a health system under the NHMLA;
- B. is a non-profit domestic corporation licensed as a holding company for the  
Methodist System in Nebraska;
- C. operates Nebraska Methodist Hospital and Methodist Wound Center in  
Omaha, Douglas County, Nebraska; and,
- D. established policies and protocols for employees of The Nebraska  
Methodist Hospital and Methodist Wound Center.

12. Defendant The Nebraska Methodist Hospital d/b/a Methodist Wound Center:

- A. is qualified as a health system under the NHMLA;
- B. is a non-profit domestic corporation licensed to operate as a hospital in  
Nebraska;
- C. operates the Methodist Wound Center in Omaha, Douglas County,  
Nebraska; and,
- D. employed health care providers who treated Plaintiff's Decedent  
continuously on the dates of occurrences from December 24, 2012,  
through January 4, 2013.

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13. Defendant Physicians Clinic, Inc.:

- A. is qualified as a health system under the NHMLA;
- B. is a non-profit domestic corporation licensed to operate a medical clinic in Nebraska;
- C. operated the clinic formerly known as Omaha Vein Specialists in Omaha, Douglas County, Nebraska, now known as Methodist Physicians Clinic Vascular & Vein and,
- D. employed health care providers who treated Plaintiff's Decedent continuously on the dates of occurrences from December 3, 2012, through January 3, 2013.

14. Defendant Eugene A. Waltke, M.D.:

- A. is qualified as a health care provider as defined by the NHMLA;
- B. is a physician licensed to practice medicine in Nebraska;
- C. is employed by Physicians Clinic, Inc., which operates Methodist Physicians Clinic Vascular & Vein formerly known as Omaha Vein Specialists in Omaha, Douglas County, Nebraska; and,
- D. Provided continuous care to the Plaintiff's Decedent from December 3, 2012, through January 3, 2013, the dates of the occurrences.

15. Defendant Janis K. Cole, APRN:

- A. Is a nurse practitioner authorized to practice medicine in Nebraska;
- B. is employed by The Nebraska Methodist Hospital which operates the Methodist Wound Center in Omaha, Douglas County, Nebraska; and,
- C. Provided continuous care to the Plaintiff's Decedent from December 24, 2012, through January 4, 2013, the dates of the occurrences.

16. Defendant Kathryn J. Brand, APRN:

- A. Is a nurse practitioner authorized to practice medicine in Nebraska;
- B. is employed by The Nebraska Methodist Hospital which operates the Methodist Wound Center in Omaha, Douglas County, Nebraska; and,
- C. Provided care to the Plaintiff's Decedent on January 3, 2013, the date of one of the occurrences.

OCCURRENCES

- 17. On October 10, 2012, an angiogram to evaluate Plaintiff's Decedent's known peripheral vascular disease was performed which findings included left proximal tibial occlusion with posterior branch above the ankle providing blood flow to the plantar arch.
- 18. On November 27, 2012, the surgeon, Eugene Waltke, MD, performed a left popliteal to plantar artery bypass using reversed right saphenous vein as the conduit for treatment of peripheral vascular disease to save the left leg.
- 19. On December 3, 2012, Dr. Waltke evaluated Plaintiff's Decedent after surgery and noted a little drainage from the donor site wounds, but otherwise determined the wounds were healing. An Unna boot used to control postoperative edema was deemed successful.
- 20. On December 6, 2012, Dr. Waltke noted that Plaintiff's Decedent's wounds were healing, drainage was improving, and there was no reported foot pain from the popliteal tibial bypass surgical procedure. The Unna boot was discontinued, "edema wear" was initiated, and Plaintiff's Decedent was encouraged to recline more often with his leg elevated.

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21. On December 13, 2012, Plaintiff's Decedent's wounds were healing. His left foot ulcer was healed, pain was resolved, and he had a palpable graft pulse. An unidentified wound was not completely healed, and Plaintiff's Decedent was asked to return in one week for suture removal.
22. On December 17, 2012, laboratory results revealed improved, but ongoing anemia, elevated non-fasting blood glucose, elevated potassium, elevated BUN, and elevated creatinine indicative of a disease process possibly related to vascular insufficiency or hypertension.
23. On December 17, 2012, Plaintiff's Decedent's primary care physician, Clayton Schroeder, MD, evaluated Plaintiff's Decedent, and described a left ulcer that "has not healed up well." Oozing in the region of the left heel was noted on the outer aspect of the left lower extremity dressing, and the treatment plan included follow up with the vascular surgeon, Dr. Waltke.
24. Also during the same appointment on December 17, 2012, the Unna boot was removed by Nurse Practitioner Cole and the wound was visualized and measured. The incision in the lower inner calf region just above the medial malleolus measured 10.0 x 0.5 x depth of 0.3 with continuing 80% slough. The periwound was clean, the edema was slightly less from the previous week, and there was pulsatile flow in the lower one-third of the wound. The wound was gently cleaned with Vashe, dried, and Santyl was placed into the wound bed for enzymatic debridement.
25. On December 24, 2012, Plaintiff's Decedent presented to Nurse Practitioner Cole at the Methodist Wound Center in the morning, via Dr. Waltke's referral as a new consult. She removed Plaintiff's Decedent's sutures from the prior week and noted

left inner calf wound dehiscence. Plaintiff's Decedent reported quite a bit of drainage coming through the boot and now required wound evaluation and Unna boot change. Nurse Practitioner Cole agreed that he had quite a bit of drainage on the outside of the Unna boot.

26. Nurse Practitioner Cole believed drainage was a positive development and concluded that it showed the treatment was working. Dressings and Coban at 25% compression (Unna boot) were applied.

27. Nurse Practitioner Cole planned weekly treatment with goals of decreasing slough by 10% to 15% with each dressing change, no infection, and edema control. Plaintiff's Decedent was instructed to notify the clinic of increased drainage or edema.

28. On December 28, 2012, Plaintiff's Decedent again presented to Nurse Practitioner Cole with ongoing strike-through drainage with a slight green hue. The Unna boot and other dressing materials were removed and an open wound measuring 10.5 x 0.5 x 0.3 in depth remained at the lower incision line. The wound was 90% to 95% covered with slough, welling of clear serous fluid was seen from the inferior portion of the wound, and had a slight *Pseudomonas* odor.

29. On December 28, 2012, Dr. Waltke did examine the wound, expressing concern that it was not healing, and the wound continued to have a lymph leak. Treatment options were discussed with Plaintiff's Decedent and his wife with an understanding reached to continue Santyl for another week with re-evaluation. If no improvement was seen then Dr. Waltke planned surgical debridement and possible wound VAC placement.

30. On December 28, 2012, Nurse Practitioner Cole also provided wound care, that consisted of cleaning with Vashe, Dakin's soaked 4 x 4s for five to seven minutes, saline rinse, debridement with curette resulting in removal of 20% to 25% of the slough, saline irrigation, adaptic dressing over the wound, application of Santyl, bulky dressings, and Unna boot reapplication. Plaintiff's Decedent was instructed to return for dressing changes on December 31, 2012, January 3, 2013, and follow up with Dr. Waltke on January 4, 2013. Concern over possible infection was noted due to greenish hue of the wound drainage with a treatment plan to "watch this closely."

31. On December 31, 2012, Plaintiff's Decedent presented to Nurse Practitioner Cole on for wound follow up. Plaintiff's Decedent was soaking through his dressings within ten to twelve hours of clinic wound care. He was padding the external portion as instructed, and the drainage continued to have a Pseudomonas-like quality. Nurse Practitioner Cole described quite a bit of yellow-green drainage on the outer wrap of the Unna boot that smelled suspiciously like Pseudomonas. The wound had grown in size to 11 x 1.0 x 0.3 in depth, lymph leak was noted in the lower third of the wound with this region 100% covered in slough. The upper portion of the wound was 80% to 90% granulation tissue.

32. On December 31, 2012, Nurse Practitioner Cole performed wound care as she had done previously with few exceptions. A dangling suture was removed from the wound and a liberal layer of Santyl was applied before the adaptic. Due to excessive drainage Nurse Practitioner Cole determined to stop the use of the Unna boot. Plaintiff's Decedent and his wife observed the dressing change and were given

supplies to perform this at home the next day. They were also instructed to change the outer wrap as soon as drainage was seen.

33. On December 31, 2012, Nurse Practitioner Cole documented Plaintiff's Decedent's need for skilled wound care due to dehiscence, persistent lymph leak, and slough. The plan for the week was to keep the outer dressing as dry as possible and keep the appointment with Dr. Waltke. Nurse Practitioner Cole believed Plaintiff's Decedent would "more than likely end up having surgical debridement and wound VAC placement." Wound treatment was nickel-thickness Santyl and Unna boot application with appropriate ankle flexion ensured.

34. On January 2, 2013, Plaintiff's Decedent returned to Nurse Practitioner Cole at the Methodist Wound Center, for an Unna boot change to help him control drainage from his right lower extremity." Plaintiff's Decedent reported seeing external drainage within eight to ten hours and soaks through the outer wraps despite compression. The drainage remained greenish in color.

35. On January 2, 2013, Plaintiff's Decedent remained afebrile and without medication change since beginning wound care therapy. The wound was 10.2 x 0.8 x 0.3 in depth with no improvement in densely adhered slough, but less Pseudomonas odor. Some suture ends were seen, but Nurse Practitioner Cole was unable to grasp the ends to remove them. Wound treatment continued with nickel-thickness Santyl and Unna boot application with appropriate ankle flexion ensured.

36. On January 2, 2013, the soak with Dakin's solution and the dressing change were omitted.

37. On January 3, 2013, Plaintiff's Decedent and his wife performed the dressing change.

38. On January 3, 2013, Plaintiff's Decedent returned to the Methodist Wound Center and reported no change in his wound drainage. Nurse Practitioner Brand and Dr. Waltke examined the wound with no change in the findings. Dr. Waltke was concerned the incision was not healing, pulling together, and closing. Nurse Practitioner Brand was instructed to make every effort to pull the edges together when performing wound care and for the dressing to remain intact until it was changed in the clinic on January 4, 2013. Dr. Waltke also instructed Plaintiff's Decedent to stay on bedrest for a few days. Dr. Waltke planned to make the decision for surgical intervention on January 7, 2013.
39. On January 3, 2013, Nurse Practitioner Brand provided identical wound care as did Nurse Practitioner Cole, including nickel-thickness Santyl and also omitted the Dakin's solution soak. A medical assistant helped Nurse Practitioner Brand pull the Unna boot gel cast material tight followed by Coban wrap at 40% strong compression. Nurse Practitioner Brand noted Plaintiff's Decedent required advanced wound care products and possible surgical debridement with VAC to control lymph drainage.
40. On January 4, 2013, Plaintiff's Decedent returned to Nurse Practitioner Cole at the Methodist Wound Center, with some strike-through drainage. There was drainage at the medial malleolus area measuring a 50-cent piece coin in size, intact sutures were again seen, and the slough was lessened slightly with more granulation buds noted. Treatment with Santyl, bulky dressing and Unna boot with 40% compression was performed. Plaintiff's Decedent was given some chux pads for weekend drainage use. He agreed to remain on bedrest with his leg elevated until Dr. Waltke reevaluated the wound on January 7, 2013.

41. At 7:05 a.m. on January 7, 2013, an ambulance responded to a call at the home of Plaintiff's Decedent. When they arrived, Plaintiff's Decedent was unconscious and unresponsive on his bathroom floor. He was taken to The Nebraska Methodist Hospital where he was pronounced dead at 7:45 am. Of note was blood on Plaintiff's Decedent's left lower extremity dressing and EMS report of two (2) quarts of blood on the bathroom floor. The Amended Certificate of Death lists cause of death as bleeding surgical wound.

#### STANDARD OF CARE

42. All physicians and nurse practitioners holding a license to practice medicine in Nebraska are required to meet the generally accepted medical standard of care applicable to their specialty or profession in Nebraska in effect at the time of the service provided to the patient.

43. Malpractice or professional negligence shall mean that, in rendering professional services, a health care provider has failed to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice in his or in similar localities.

44. Reasonable and ordinary care, skill, and diligence on the part of a health care provider in a particular community, shall mean the care which health care providers, in the same community or in similar communities and engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients under like circumstances.

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45. Failure to meet reasonable and ordinary care, skill, and diligence is professional negligence or malpractice.

46. In this case, the generally accepted medical standard of care in effect from December 3, 2012, through January 3, 2013, was, and still is:

- A. What physicians using reasonable and ordinary care, skill, and diligence:
1. In Omaha, Nebraska, or similar metropolitan areas in the United States,
  2. Who perform lower extremity bypass surgery,

- B. Would ordinarily:
1. Know how to timely intervene on a non-healing, draining bypass surgical wound, and,
  2. Know how to actually treat the underlying cause of excessive drainage and bacterial infection in a surgical wound.

47. In this case, the generally accepted medical standard of care in effect from December 24, 2012, through January 4, 2013, was, and still is:

- A. What nurse practitioners using reasonable and ordinary care, skill, and diligence:
1. In Omaha, Nebraska, or similar metropolitan areas in the United States,
  2. Who provide care to patients suffering from excessive drainage and bacterial infection in a surgical wound,

- B. Would ordinarily:
1. Know not to use Santyl in Plaintiff's Decedent's surgical wound; and,

2. Actually not use Santyl in Plaintiff's Decedent's surgical wound.

#### PROFESSIONAL NEGLIGENCE

48. Defendant Eugene A. Waltke, M.D. was negligent and careless when he scheduled the wound care session too far apart; failed to culture for bacterial growth the green hued wound drainage with a strong odor consistent with *Pseudomonas*; inappropriately allowed the use of the debriding agent Santyl too close proximity to the suture lines by the nurse practitioners, and inappropriately postponed his decision about a second surgery to manage the ongoing lymph leak and non-healing surgical wound until January 7, 2013.

49. Defendants Janis K. Cole, APRN, and Kathryn J. Brand, APRN, were negligent and careless when each of them failed to realize that strike-through drainage occurring eight to ten hours after dressing change was not a positive sign of effective treatment, failed to advocate to culture the drainage for bacterial growth, and inappropriately used Santyl contrary to its instructed use.

#### CAUSATION

50. That as direct and proximate cause of the failure of the Defendants, and each of them, to carefully treat and manage a surgical incision which was not healing; failing to timely identify a bacterial infection; and failing to timely perform a second surgery due to the excessive drainage, the surgical site dehiscence with associated profuse, uncontrollable bleeding resulting in the death of James A. Herman from exsanguination on January 7, 2013.

#### FIRST CAUSE OF ACTION

51. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 50 of this Complaint in this first cause of action.

52. As a direct and proximate result of the joint and several negligence of the Defendants, and each of them, as set forth above, the survivors and next-of-kin of James A. Herman have sustained monetary losses, which include:

- A. Past and future loss of contributions and financial support;
- B. Past and future loss of society and comfort;
- C. Past and future loss of companionship;
- D. Past and future loss of counseling and advice; and,
- E. Past and future loss or consortium.

#### SECOND CAUSE OF ACTION

53. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 50 of this Complaint in this second cause of action.

54. That as a direct result of the joint and several negligence of the Defendants, and each of them, James A. Herman experienced conscious prefatal-injury fear and apprehension of his impending death.

#### THIRD CAUSE OF ACTION

55. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 50 of this Complaint in this third cause of action.

56. That as a direct result of the joint and several negligence of the Defendants, and each of them, Plaintiff's Decedent's wife experienced extreme emotional distress by reason of the seriousness of her husband's injuries, his deteriorating condition, and being in attendance to her husband during his continuous treatment. She has assigned to the Special Administrator of the Estate of James A. Herman and the Plaintiff herein, her causes of action arising by reason of her separate injuries for inclusion in this third cause of action.

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AGENCY

57. During the occurrences, Eugene A. Waltke, M.D., was:

- A. An employee of Physicians Clinic, Inc.; and,
- B. Acting in the scope of such authority when treating Plaintiff's Decedent.

58. During the occurrences, Janis K. Cole, APRN, was:

- A. An employee of The Nebraska Methodist Hospital d/b/a Methodist Wound Center; and,
- B. Acting in the scope of such authority when treating Plaintiff's Decedent.

59. During the occurrences, Kathryn J. Brand, APRN, was:

- A. An employee of The Nebraska Methodist Hospital d/b/a Methodist Wound Center; and,
- B. Acting in the scope of such authority when treating Plaintiff's Decedent.

WAIVER OF PANEL REVIEW AND UNCONSTITUTIONALITY OF THE NEBRASKA  
HOSPITAL MEDICAL LIABILITY ACT

60. Plaintiff alleges that Defendants did not qualify for coverage under the Nebraska Hospital Medical Liability Act, (NHMLA) Neb. Rev. Stat. §44-2801 et seq., as amended, and has failed to comply with the requirements of the Act.

61. Even though some of the Defendants may have filed with Nebraska Department of Insurance claims for special benefits, privileges, and other protections under the act, Plaintiff alleges the NMHLA is unconstitutional in whole or in part because it violates the Seventh and Fourteenth Amendments to the Constitution of the United States, as well as the following provisions of the Constitution of the State of Nebraska: Article 1 §§ 1, 3, 6, 13, 16, 21, 25, and 26; Article II, § 1; Article III, §18; Article V, §2; Article VI, §1, and Article XII, §10(c).

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62. Plaintiff, through the act of filing her Complaint affirmatively waives her right for a medical review panel to review her claims against any of the Defendants as provided by the NHMLA and elects to file this action directly in the District Court of Douglas County, Nebraska.

63. A copy of this Complaint was mailed to the Director of the Department of Insurance, and a copy was also mailed to the Attorney General of the State of Nebraska.

WHEREFORE, pursuant to the NHMLA, Plaintiff prays for judgment against Defendants, and each of them, on each of her causes of action as are reasonable in the premises.

Dated this 2<sup>nd</sup> day of January, 2015.

JEAN M. HERMAN FEHR, as SPECIAL  
ADMINISTRATOR OF THE ESTATE  
OF JAMES A. HERMAN, Deceased,  
Plaintiff,

By: /s/ John F. Carroll  
John F. Carroll, #23811  
Steven M. Watson, #16075  
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ATTORNEYS FOR THE PLAINTIFF

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CERTIFICATE OF SERVICE

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On January 2, 2015, a copy of the above and foregoing was sent via certified mail to:

Bruce Ränge, Director  
Nebraska Department of Insurance  
941 "O" Street, #400  
Lincoln, NE 68508

Jon Bruning  
Attorney General  
2115 State Capitol Building  
Lincoln, NE 68509

/s/ Jean M. Herman Fehr