

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

LINDA FICKEN and WILLIAM FICKEN, her
husband,

Plaintiffs,

vs.

UPMC PRESBYTERIAN SHADYSIDE;

MAXIM STAFFING SOLUTIONS, INC. d/b/a
MAXIM STAFFING SOLUTIONS; and

MEDICAL SOLUTIONS L.L.C. d/b/a
MEDICAL SOLUTIONS

Defendants.

CIVIL DIVISION

No.: _____

Code: 007 – Medical / Hospital
Liability

COMPLAINT IN CIVIL ACTION

Filed on behalf of Plaintiffs: Linda
Ficken and William Ficken

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JURY TRIAL DEMANDED

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NOTICE TO DEFEND

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER. IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

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AND NOW, come the Plaintiffs, Linda Ficken and William Ficken, by and through their attorneys, and file the following Complaint in Civil Action whereof the following is a statement:

PARTIES

1. Plaintiffs Linda Ficken and William Ficken, wife and husband respectively, are adult individuals residing at 420 Farmer Avenue, Andover, Kansas, 67002.

2. Defendant UPMC Presbyterian Shadyside (“UPMC”) is a medical facility duly incorporated and existing under the law of the Commonwealth of Pennsylvania with its principal place of business located at 200 Lothrop Street, Pittsburgh, Pennsylvania 15213.

3. Defendant Maxim Staffing Solutions, Inc. d/b/a Maxim Staffing Solutions (“Maxim”) is an agency that specializes in placing temporary and permanent personnel in healthcare jobs. Defendant Maxim is a Maryland corporation regularly doing business in the Commonwealth of Pennsylvania. To wit, defendant Maxim regularly solicits business from and provides staffing to healthcare providers in the Commonwealth of Pennsylvania. Defendant

Maxim's principal place of business is located at 7227 Lee Deforest Dr., Columbia, Maryland 21046.

4. Defendant Medical Solutions, L.L.C. d/b/a Medical Solutions ("Medical Solutions") is an agency that specializes in placing temporary and permanent personnel in healthcare jobs. Defendant Medical Solutions is incorporated in Delaware and has a principal place of business at 9101 Western Avenue, Suite 101, Omaha, Nebraska 68114. Defendant Medical Solutions has a registered agent, Koley Jessen P.C., L.L.O., located at 1125 S. 103rd St., Suite 800, Omaha, Nebraska 68124. Defendant Medical Solutions regularly conducts business in the Commonwealth of Pennsylvania. To wit, defendant Medical Solutions regularly solicits business from and provides staffing to healthcare providers in the Commonwealth of Pennsylvania.

5. At all times relevant hereto, the defendant corporations acted through their agents and employees, and are vicariously liable for all conduct, acts, commissions, and/or omissions occurring during the course and scope of said agents' and employees' agency or employment with the defendant corporations.

JURISDICTION

6. This Court has subject matter jurisdiction over this action pursuant to 42 Pa.C.S.A. § 931.

7. This Court has personal jurisdiction over defendant UPMC pursuant to 42 Pa.C.S.A. § 5301, as, *inter alia*, defendant UPMC carries on a continuous and systematic part of its general business within this Commonwealth.

8. This Court has personal jurisdiction over defendant Maxim pursuant to 42 Pa.C.S.A. § 5322, as, *inter alia*, defendant Maxim transacts business in this Commonwealth,

contracts to supply services in this Commonwealth, and caused harm or tortious injury by an act or omission in this Commonwealth.

9. This Court has personal jurisdiction over defendant Medical Solutions pursuant to 42 Pa.C.S.A. § 5322, as, *inter alia*, defendant Medical Solutions transacts business in this Commonwealth and contracts to supply services in this Commonwealth.

10. Venue is proper in this County pursuant to Pa. R. Civ. Pro. § 2179, as, *inter alia*, the defendants regularly conduct business in this County.

FACTUAL ALLEGATIONS

11. From approximately March of 2008 to May of 2008, David Kwiatkowski (“Kwiatkowski”) worked at UPMC Presbyterian Shadyside’s Presbyterian Campus as a radiologic technician.

12. At that time, Kwiatkowski’s employer was defendant Maxim, a staffing agency that placed Kwiatkowski at UPMC; in the alternative, Kwiatkowski was employed by defendant UPMC, which had and exercised the ability to control and direct Kwiatkowski’s job performance.

13. On or about May 7, 2008, a UPMC hospital employee observed Kwiatkowski enter an operating room, lift his shirt, put a syringe in his pants, and exit the room. UPMC determined that a syringe containing fentanyl, a Schedule II narcotic, was missing, having been replaced by a syringe containing a different liquid.

14. UPMC personnel confronted Kwiatkowski and found three empty syringes with fentanyl labels on him. An empty morphine syringe was found in his locker. Fentanyl and opiates were found in Kwiatkowski’s urine.

15. Beginning on or around May 7, 2008, as a result of the above-described incident, defendant UPMC no longer allowed Kwiatkowski to work at UPMC.

16. Defendant UMPC did not report Kwiatkowski's theft, use, and/or diversion of controlled substances to any state, federal, or other governmental agency, or to any law enforcement entity.

17. Defendant Maxim did not report Kwiatkowski's theft, use, and/or diversion of controlled substances to any state, federal, or other governmental agency, or to any law enforcement entity.

18. Based on information and belief, between 2008 and 2010, following Kwiatkowski's departure from UPMC, he worked as a radiologic technician at the following institutions:

- a. Baltimore Veterans Affairs Medical Center in Baltimore, Maryland, from approximately May of 2008 to November of 2008;
- b. Southern Maryland Hospital in Clinton, Maryland, from approximately December of 2008 to February of 2009;
- c. Maryvale Hospital in Phoenix, Arizona, from approximately March 9, 2009, to June 27, 2009;
- d. Johns Hopkins Hospital in Baltimore, Maryland, from approximately July of 2009 to January of 2010;
- e. Maryland General Hospital in Baltimore, Maryland, from approximately January of 2010 to March of 2010;
- f. Arizona Heart Hospital in Phoenix, Arizona, from approximately March 22, 2010, to April 1, 2010; and

g. Temple University Hospital in Philadelphia, Pennsylvania, from approximately April 7, 2010, to April 30, 2010.

19. On or about May 24, 2010, Kwiatkowski began working at Hays Medical Center in Hays, Kansas.

20. At that time, Kwiatkowski's employer was defendant Medical Solutions, a staffing agency that placed Kwiatkowski at Hays Medical Center.

21. Upon information and belief, Kwiatkowski tested positive for hepatitis C in June of 2010 in Kansas.

22. Between approximately May and September of 2010, plaintiff Linda Ficken was a patient at the Hays Medical Center cardiac catheterization laboratory. Kwiatkowski was working at Hays Medical Center at that time.

23. Plaintiff Linda Ficken has tested positive for hepatitis C on July 31, 2012, and August 1, 2012.

24. Based on information and belief, dozens of cardiac catheterization patients at hospitals where Kwiatkowski worked around the country have been infected with the same strain of hepatitis C as Kwiatkowski. For example, as of July 13, 2012, the New Hampshire Department of Health and Human Services announced that more than 30 people associated with the Exeter Hospital cardiac catheterization laboratory (where Kwiatkowski worked after his time at Hays Medical Center) have been infected with the same strain of hepatitis C as Mr. Kwiatkowski.

25. Based upon information and belief, thousands of cardiac catheterization patients at hospitals where Kwiatkowski worked around the country are being tested for hepatitis C.

26. On July 19, 2012, the United States District Court for the District of New Hampshire issued a warrant for Kwiatkowski's arrest. The warrant lists the following offenses:

- a. violation of 21 U.S.C. 843(a)(3), acquiring a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge; and
- b. violation of 18 U.S.C. 1365(a)(3), tampering with a consumer product and the container for such product that affected interstate and foreign commerce with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, resulting in serious bodily injury to another individual.

27. The plaintiffs did not know and could not have known by due diligence of the cause of Linda Ficken's disease process until approximately July 19, 2012, at which time the above-referenced allegations were publically known.

NEGLIGENCE AND NEGLIGENCE PER SE
DEFENDANT UPMC

28. Plaintiffs allege and incorporate by reference the allegations contained in all of the above paragraphs, as fully as though the same were set forth herein at length.

29. Defendant UPMC is vicariously liable for the negligent acts, commissions, or omissions of its employees and/or agents who were was at all times relevant hereto acting on behalf of defendant UPMC and within the scope of their employment with defendant UPMC, under the doctrines of respondeat superior and ostensible agency.

30. At all relevant times, defendant UPMC had a duty to act in accordance with the standard of care required of hospitals and hospital administrators and to act as a reasonable corporation would under the same or similar circumstances.

31. This duty required defendant UPMC to guard against theft and diversion of controlled substances. This duty further required defendant UPMC, upon discovery of theft or diversion of controlled substances, to take adequate steps to ensure that such conduct was prevented in the future.

32. Defendant UPMC failed to guard against theft and diversion of controlled substances, failed to report Kwiatkowski's theft, use, and/or diversion of controlled substances to any state, federal, or other governmental agency or to any law enforcement entity, and failed to take steps to ensure that Kwiatkowski would not, in the future, be able to steal, use, or divert controlled substances; defendant UPMC breached its duty and was negligent.

33. Furthermore, in failing to guard against theft and diversion of controlled substances, and in failing to report Kwiatkowski's theft, use, and/or diversion of controlled substances to any state, federal, or other governmental agency or to any law enforcement entity, defendant UPMC violated multiple state and federal statutes and regulations and was negligent per se. At a minimum, these statutes and regulations include 21 U.S.C. § 801 *et seq.*, 21 C.F.R. § 1301 *et seq.*, and 28 Pa. Code § 25 *et seq.*

34. Defendant UPMC is a "registrant" and/or distributor of controlled substances such that its conduct is governed by the above-referenced state and federal statutes and regulations.

35. The purpose of the above-listed statutes and regulations is, at least in part, to protect the interest of a group of individuals, namely healthcare patients who may be injured as a result of tampering with, theft of, and/or diversion of controlled substances.

36. The above-listed statutes and regulations clearly apply to the conduct of defendant UPMC, as defendant UPMC is a registered distributor of controlled substances.

37. Defendant UPMC's violation of the above-listed statutes and regulations was a legal cause of plaintiff Linda Ficken's injuries.

38. Had defendant UPMC complied with the above-listed statutes and regulations, Kwiatkowski would not have been able to infect plaintiff Linda Ficken at Hays Medical Center in 2010.

39. As a result of the injury sustained by Plaintiffs due to defendant UPMC's negligence and/or negligence per se, Plaintiffs have suffered and/or will continue to suffer the following damages:

- a. Past and future costs for medical treatment and care;
- b. Loss of past and future earnings and earning capacity;
- c. Loss of enjoyment of life;
- d. Past and future pain and suffering, inconvenience and emotional distress.

40. Defendant UPMC's conduct was malicious, wanton, willful, oppressive, and/or exhibited a reckless indifference to the rights and safety of others such that an award of punitive damages is warranted. To wit, defendant UPMC directly observed Kwiatkowski's diversion of controlled substances and failed to take steps to prevent conduct that posed a dire and foreseeable risk to future patients. Defendant UPMC knew that Kwiatkowski was a travelling radiologic technician and knew or should have foreseen that thousands of patients around the country would be endangered if UPMC failed to take steps to prevent Kwiatkowski from continuing his illicit conduct. Defendant UPMC knew or should have foreseen that failure to prevent future instances of such conduct would result in injury to potentially thousands of patients around the country.

WHEREFORE, Plaintiffs demand judgment against defendant UPMC in an amount in excess of the jurisdiction of the Compulsory Board of Arbitrators of this County, exclusive of interests and costs.

NEGLIGENCE
DEFENDANT MAXIM

41. Plaintiffs allege and incorporate by reference the allegations contained in all of the above paragraphs, as fully as though the same were set forth herein at length.

42. At all relevant times, defendant Maxim had a duty to act in accordance with the standard of care required of healthcare staffing agencies and to act as a reasonable corporation would under the same or similar circumstances.

43. Defendant Maxim breached its duty and was negligent by failing to report Kwiatkowski's theft, use, and/or diversion of controlled substances to any state, federal, or other governmental agency and/or by failing to take adequate steps to ensure that Kwiatkowski would not, in the future, be able to steal, use, or divert controlled substances.

44. Plaintiffs' injuries were the direct, legal and proximate result of defendant Maxim's negligence.

45. As a result of the injury sustained by Plaintiffs due to defendant Maxim's negligence, Plaintiffs have suffered and/or will continue to suffer the following damages:

- a. Past and future costs for medical treatment and care;
- b. Loss of past and future earnings and earning capacity;
- c. Loss of enjoyment of life;
- d. Past and future pain and suffering, inconvenience and emotional distress.

WHEREFORE, Plaintiffs demand judgment against defendant Maxim in an amount in excess of the jurisdiction of the Compulsory Board of Arbitrators of this County, exclusive of interests and costs.

VICARIOUS LIABILITY AND DIRECT NEGLIGENCE
DEFENDANT MEDICAL SOLUTIONS

46. Plaintiffs allege and incorporate by reference the allegations contained in all of the above paragraphs, as fully as though the same were set forth herein at length.

47. Defendant Medical Solutions is vicariously liable for the negligent acts, commissions, or omissions of its employee and/or agent, David Kwiatkowski, who was at all times relevant hereto acting on behalf of defendant Medical Solutions and within the scope of his employment with defendant Medical Solutions, under the doctrines of respondeat superior and ostensible agency.

48. At all relevant times, David Kwiatkowski had a duty to act in accordance with the standards of care required of radiologic technicians and to act as a reasonable person would under the same or similar circumstances.

49. This duty required Kwiatkowski to ensure that his conduct did not endanger patients or expose them to the risk of infection.

50. While in the employ of defendant Medical Solutions and while acting within the course and scope of that employment, Kwiatkowski breached his duty and was negligent, by:

- a. Endangering plaintiff Linda Ficken by contaminating syringes at Hays Medical Center; and/or
- b. Causing plaintiff Linda Ficken to become infected with hepatitis C; and/or
- c. In such other ways as may be proven by the evidence.

51. Defendant Medical Solutions is vicariously liable for said negligence.

52. At all relevant times, defendant Medical Solutions had a duty to act in accordance with the standard of care required of healthcare staffing agencies and to act as a reasonable corporation would under the same or similar circumstances.

53. Defendant Medical Solutions breached its duty and was negligent, by:

- a. Failing to properly train, test, supervise and monitor the acts of David Kwiatkowski; and/or
- b. Failing to review on a continuous basis the competence and/or qualifications of David Kwiatkowski, to oversee David Kwiatkowski, and to determine his compliance with the community standards and his history of alleged noncompliance; and/or
- c. Failing to use due care in the selection of physicians, employees, agents, and/or servants; and/or
- d. Increasing the risk of harm to Plaintiffs by the negligent acts and/or omissions stated in subparagraphs a through c; and/or
- e. In such other ways as may be proven by the evidence.

54. Plaintiffs' injuries were the direct, legal and proximate result of defendant Medical Solutions' vicarious and/or direct negligence.

55. As a result of the injury sustained by Plaintiffs due to defendant Medical Solutions' vicarious and/or direct negligence, Plaintiffs have suffered and/or will continue to suffer the following damages:

- a. Past and future costs for medical treatment and care;
- b. Loss of past and future earnings and earning capacity;
- c. Loss of enjoyment of life;

d. Past and future pain and suffering, inconvenience and emotional distress.

WHEREFORE, Plaintiffs demand judgment against defendant Medical Solutions in an amount in excess of the jurisdiction of the Compulsory Board of Arbitrators of this County, exclusive of interests and costs.

CONSORTIUM

56. Plaintiffs allege and incorporate by reference the allegations contained in all of the above paragraphs, as fully as though the same were set forth herein at length.

57. As a result of the injuries sustained by plaintiff Linda Ficken due to Defendants' negligence, plaintiff William Ficken has suffered and will continue to suffer all such damages as are allowable as a result of loss of consortium and society as provided by Pennsylvania law.

58. The sole and proximate cause of the injuries and damages sustained by Plaintiffs were the negligent acts, omissions, and/or conduct of Defendants, as set forth above.

WHEREFORE, Plaintiffs request damages from Defendants in an amount in excess of the jurisdiction of the Compulsory Board of Arbitrators of this County, exclusive of interests and costs.

JURY TRIAL DEMANDED.

Respectfully Submitted,

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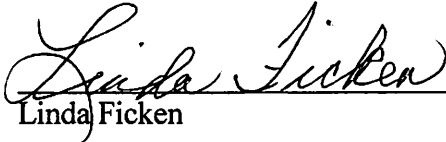
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Counsel for Plaintiffs

VERIFICATION

The undersigned, Linda Ficken and William Ficken, herein aver this 30 day of August, 2012, that the statements of fact contained in the attached COMPLAINT IN CIVIL ACTION are true and correct to the best of their information, knowledge and belief and are made subject to the penalties of 18 PA. C.S.A. §4904 relating to unsworn falsification to authorities.

 8-30-12
Linda Ficken

 8-30-12
William Ficken